KONRAD ADENAUER STIFTUNG

The Namibian Constitution

A comprehensive guide

2nd Edition, 2023

Compiled and authored by Manfred Hinz and Anne Schmidt

The Namibian Constitution. A comprehensive guide

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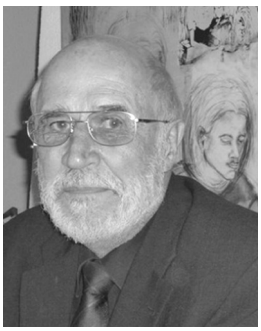
Dedicated to
Walter Joseph Kamba
1931-2007
and
Petrus Shimwefeleni Kauluma
1926-2019

The Authors



Manfred Hinz studied law and philosophy at the University of Mainz (Germany) where he graduated in 1960. He did his legal practitioner examination in 1964, the year in which he also obtained his doctor degree in law from the University of Mainz. After studying sociology, anthropology, and African and Oriental languages at the same university, he was appointed full professor at the University of Bremen (Germany) in 1971.

In 1975, he founded the Centre for African Studies and Migration Studies (CAMS) at the University of Bremen, Germany, from which he started cooperating first with SWAPO and later with the United Nations Institute for Namibia, in Lusaka, Zambia. In 1989, he went to Namibia where he, after independence, assisted the Ministry of Justice. He was then seconded to the office of the Vice Chancellor of the University of Namibia to help build up the UNAM's Faculty of Law. He joined the faculty as professor with its inception and was Deputy Dean and Dean of the Faculty for several years. Prof. Hinz held the UNESCO Chair: Human Rights and Democracy in the Faculty of Law of the University of Namibia from 1 April 2001 to the end of 2009.

Professor Hinz returned to Germany in 2010. At the University of Bremen, he works as the director of the Centre for African and Migration Studies. In 2014, he was appointed adjunct professor in Law and African Studies at the Jacobs University in Bremen.

Manfred Hinz has published in his areas of specialization, in particular in the field of legal and political anthropology, constitutional and international law. Although this work on the Constitution is work in cooperation of researchers standing on their own and working independently from each other, it was Manfred Hinz who acted as a guiding author.

The Authors

Anne Schmidt holds the degree of doctor in law from the University of Bremen, Germany. She currently works as an attorney at law in a law firm in Verden, Germany. She holds an LLB in European and Comparative Law from the Hanse Law School, which is conducted by the University of Bremen in cooperation with the Carl von Ossietzky University of Oldenburg and the University of Groningen in the Netherlands. Within the scope of her studies, Anne Schmidt spent one year at the University of Namibia. She further studied at Birkbeck College, University of London, where she obtained an LLM in Law and Political Justice.

Anne Schmidt gained extensive knowledge about Namibian public law not only while studying in Namibia in 2008 but also in the course of her reading for her PhD studies. Her book with the title *Public Procurement Law and Reform in Developing Countries: International Best Practices and Lessons Learned – Namibia as a Case Study* was published in 2017.

Anne Schmidt published twice in the *Namibia Law Journal* on "The Need to Reform the Namibian Public Procurement System: A Comment on the Neckartal Dam Saga" and on "Public Procurement – A Constitutional Perspective". She further wrote a conference paper on "Essential Aspects of Public Procurement Reform Processes – Lessons learned from Namibia" for the sixth International Public Procurement Conference in Dublin, Ireland, in August 2014 and published several book reviews as well as an editorial for Newsletter of the Working Group of Young Scholars in Public International Law (*Arbeitskreis junger Völkerrechtswissenschaftler*innen*) on "Syria – A Responsibility to Protect? International Law, Morality and Political Will" in July 2012.

Clever Mapaure was co-author of the first edition of this work. Clever Mapaure obtained the degrees of Master of Laws, Bachelor of Laws, Baccalaureus Juris and the Specialized Certificate in Customary Law at the University of Namibia. As a Candidate Legal Practitioner, he articled at Sisa Namandje and Co in Windhoek. Apart from engaging in legal practice, Clever Mapaure was a legal advisor to various institutions within Namibia and also worked part time as a lecturer and tutor at the Universities of Namibia and London. For several years, he was a research associate in *The Future Okavango Project*, an interdisciplinary and international project funded by the German government. The work in the Kavango project allowed him working on his doctorate in law, which he completed in 2021. His thesis focused on OKACOM (the Permanent Okavango River Basin Water Commission). Clever Mapaure was not available when work for this second edition started some two years ago; his contributions to the first edition were substantially revised by the authors of the second edition.

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List of Abbreviations

ABS	Access and Benefit Sharing
ACC	Anti-Corruption Commission
ACP	African, Caribbean and Pacific Group of States
AfCFTA	African Continental Free Trade Area
AGOA	African Growth and Opportunity Act
AHRCR	African Human Rights Law Reports
AR	Affirmative Repositioning (Movement)
ARIPO	African Regional Intellectual Property Organization
ARTP	/Ai-/Ais Richtersveld Transfrontier Park
AU	African Union
BA	Bachelor of Arts
BCLR	Butterworths Constitutional Law Reports
BIPA	Business and Intellectual Property Authority
BTI	Bertelsmann Transformation Index
BwHC	High Court of Botswana
CAMS	Centre for African and Migration Studies
CASS	Centre for Applied Social Sciences
CBNRM	Community-Based Natural Resource Management Network
CC	Constitutional Court
CCLC	Cabinet Committee on Legislation
CDV	Christian Democratic Voice Party
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CLF	Caprivi Liberation Front
CoD	Congress of Democrats
CPA	Criminal Procedure Act
DLR	Dominion Law Reports (Canada)
DPN	Democratic Party of Namibia
DTA	Demokratische Turnhallenallianz (Democratic Turnhalle Alliance)

List of Abbreviations

EFN	Editor's Forum of Namibia
EFTA	European Free Trade Association
EHRR	European Human Rights Reports
ELCIN	Evangelican Lutheran Church in Namibia
EPRA	Economic Policy Research Association
FAO	Food and Agriculture Organization of the United Nations
GIZ	German Agency for International Cooperation
GTZ	German Agency for Technical Cooperation
HC	High Court
HCA	High Court of Australia
HRC	Human Rights Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICJ and I.C.J.	International Court of Justice
ICRPD	International Convention on the Rights of Persons with Disabilities
ILM	International Legal Materials
ILO	International Labour Organization
IMC	National Inter-ministerial Committee on Juvenile Justice
IMF	International Monetary Fund
IPPR	Institute for Public Policy Research
JSC	Judicial Service Commission
JTC	Justice Training Centre
KAZA	Kavango-Zambezi Transfrontier Conservation Area
LAC	Legal Assistance Centre
LC	Labour Court
LGBTI	Lesbian, Gay, Bisexual, Transsexual/Transgender and Intersexual
MA	Master of Arts
MAG	Monitor Action Group
MISA	Media Institute of Southern Africa
MPLA	Movimento Popular de Libertação de Angola (People's Movement for the Liberation of Angola)
NACSO	Namibian Association of CBNRM Support Organisation
NAD	Namibia Dollar
NDP	National Democratic Party of Namibia
NDP	National Development Plan
NEEEF	National Equitable Economic Empowerment Framework

NEFF	Namibia Economic Freedom Fighters
NEPRU	Namibia Economic Policy Research Unit
NLJ	Namibia Law Journal
NP	National Party
NPC	National Planning Commission
NR	Namibian Law Reports
NSA	National Statistics Agency
NUDO	National Unity Democratic Organisation of Namibia
NUST	Namibia University of Science and Technology
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OKACOM	Okavango River Basin Water Commission
PDM	Popular Democratic Movement
PPLAAF	Plateforme Française de Protection des Lanceurs d'Alerte en Afrique (the platform to protect whistle-blowers in Africa)
RDP	Rally for Democracy and Progress
Res.	Resolution
RP	Republican Party of Namibia
SA	South Africa
SALR	South African Law Reports
SACU	Southern African Customs Union
SACR	
SADC	Southern African Development Community
SAFLII	Southern African Legal Information Institute
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SARFU	South African Football Union
SC	Supreme Court
SCIONA	Iona – Skeleton Coast Transfrontier Park
SCR	Supreme Court Reports (Canada)
SSA	Sub-Saharan African countries
SWA	South West Africa
SWANU	South West African National Union
SWAPO	South West Africa People's Organization
TESEF	Transformation Economic and Social Empowerment Framework
TFCA	Transfrontier Conservation Area
TK	Traditional Knowledge

List of Abbreviations

TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDF	United Democratic Front of Namibia
UN	United Nations
UN GA	United Nations General Assembly
UNIN	United Nations Institute for Namibia
UN SC	United Nations Security Council
UNAM	University of Namibia
UNAMLR	University of Namibia Law Review
UNCAC	United Nations Convention against Corruption
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	General Assembly of the United Nations
UNITA	União Nacional para a Independência Total de Angola (National Union for the Total Independence of Angola)
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIL	United Nations Mission in Liberia
UNPO	Unrepresented Nations and Peoples Organization
UNSC	Security Council of the United Nations
UNTAG	United Nations Transition Assistance Group
UPM	United People's Movement
US/USA	United States of America
USAID	United States Agency for International Development
VRÜ	Verfassung und Recht in Übersee
WHO	World Health Organisation
WIMSA	Working Group of Indigenous Minorities in Southern Africa
WIPO	World Intellectual Property Organization
WRP	Workers Revolutionary Party
WTO	World Trade Organization
ZACC	Constitutional Court of South Africa
ZWSC	Supreme Court of Zimbabwe Judgements

Preface to the Second Edition

This second edition of this publication was meant to appear in 2020: thirty years after 1990, the year in which Namibia gained its independence. The restrictions to prevent the spread of the Coronavirus stood against this planning, prevented visits to Namibia and forced the authors to time-consuming research at their respective home offices. The authors hope that the original planned but abandoned oral consultations with legal stakeholders affect the result of the now submitted work only minimally.

The title of the publication is taken from Article 1 of the Constitution of Namibia: "This Constitution shall be the Supreme Law of Namibia" are the words of Sub-Article 6 to Article 1. "Supreme" this means that the Constitution is the highest authority which sets the tone for all other expressions of law in the country. The Constitution sets the tone for politics and political implementations. The Constitution has the last word in disputes between individuals and between individuals and the state. In this sense, we found it necessary not to merely focus on the Constitution and the rules contained in it, but to reach out to a wide range of fields to which the Constitution is of particular relevance.

With respect to the approach to this publication taken by the directing co-author, Manfred Hinz, it must be noted that this publication is certainly influenced by his long-standing work on and in Namibia. He started working on Namibia in 1975 assisting the fight for independence and, after independence, he spent twenty years in Namibia. During these years, he was mainly involved in teaching and researching at the University of Namibia. According to the need of the Faculty of Law, then taking its first steps, he taught in many areas of law including areas being deeply rooted in the inherited Roman-Dutch common law, such as the law of family and inheritance. The very special background of the co-author in social and legal anthropology supported the interest in traditional governance and customary law.

This work on the Constitution of Namibia is addressed to people in Namibia, researchers, students, members of the general public, but also to all outside the country with an interest in Namibian politics and the legal order of the country. Meeting the expectations of readers from Namibia but also from the interested public at large is difficult. For Namibians matters may be of interest which people in other countries will not find important at all. For people in Europe or elsewhere, explanations may be called for, which the Namibian reader may find more than redundant. The authors, who have experienced this methodological dilemma living on both sides of the fence, tried to find a compromising way through the dilemma.

Preface to the Second Edition

This publication is dedicated to two persons who contributed to the post-independence foundation of constitutionally oriented justice in Namibia in extraordinary manner. Prof. Walter Joseph Kamba (1931–2007) is the first person to whom this publication is dedicated. Walter Kamba has a history of standing against colonialism and for academic freedom in his home country Zimbabwe. Walter Kamba was part of the Lancaster House negotiations that opened the way to the independence of Zimbabwe; he resigned from his position as Vice Chancellor of the University of Zimbabwe, as he was not in agreement with interventions by the then Mugabe-government. Walter Kamba was the founding dean of the Namibian Faculty of Law and led the faculty in its becoming a full-fledged institution of legal education. Walter Kamba was a man who showed respect to all with whom he was in contact, he was able to listen, to accept arguments and decided matters fairly and with convincing words. Manfred Hinz served as his deputy in the UNAM Faculty of Law and succeeded him after his returning to Zimbabwe. Manfred Hinz could already express his thankfulness for the honour to work with his colleague and friend Walter Kamba for several years when he spoke at the occasion of the *First Walter Kamba Memorial Lecture* of UNAM's Faculty of Law in 2012 and wishes to repeat what he then said with this dedication.

Petrus (Peter) Shimwefeleni Kauluma (1926–2019), the second addressee of the dedication, was Senior Traditional Councillor in the Ondonga Traditional Authority and main advisor to the King of Ondonga, Omukwaniilwa Immanuel Elifas, for many years until he was dismissed by the King under unfortunate and disputed circumstances shortly before his death. Peter Kauluma was instrumental when the position of customary law was debated after independence and when, more specifically, rules of customary law discriminating against women were abolished and replaced with rules in conformity with the Constitution of Namibia. The working of Manfred Hinz with Peter Kauluma in editing the *Laws of Ondonga* and writing with Peter the introduction to the *Laws* was an unforgettable experience. For all the years of working on customary law in Namibia, Peter Kauluma was open for advice. For the many consultations with King Elifas and also for meetings with other traditional leaders in the Oshiwambo-speaking part of Namibia, Peter was welcome as interpreter. The dedication of this publication underscores the fruitful challenge of searching answers to the challenging questions posed by customary law.

The authors are thankful that this work on the Constitution of Namibia, in addition to the usual way of including it into the world-covering series on constitutions of the publishing house Wolters Kluwer, is published as a monograph for the use in Namibia. Thanks are due to Wolters Kluwer for granting the licence for this and the office of the Konrad Adenauer Foundation in Windhoek for accepting and funding the Namibian publication.

This monograph reflects significant legal changes after its first edition until the end of 2022.

The authors
Bremen, January 2023

Part I. Namibia: Political-Legal History and the Legal Order of Today

1. Understanding the Constitution of Namibia requires to look at the history of the country. Chapter 1 outlines the formation of pre-independence governance in the area which is now the Republic of Namibia. Basic information about the country, its state territory and its current population can be found in Chapters 2 and 3. The economic history and the economic situation of the country as it stands today are not subjects on its own, but they are referred to where relevant for the legal considerations.[1]

1. On the economic development *see*, *e. g*., World Bank (2009); World Bank (2020); the 14 vols Grundlagenstudie Namibia (1989) and the recently published study focusing on the (non-)industrial development of the country: Hope (2020).

2–3

Chapter 1. The Formation of Traditional Governance and the Pre-independence Constitutional History of Namibia

§1. Introduction

2. Namibia, or in the pre-independence terminology: South West Africa, did not exist as a political entity when the first explorers, missionaries and traders entered lands which are now integral parts of Namibia.[2] Namibia emerged out of an African space in response to political movements from within and influences from outside. It would be wrong to hold that the land was *terra nullius*, no man's land, when this part of the world became the focus of explorers, missionaries, traders and, later, of the agents of colonialism.[3] The land was inhabited by various groups of people: *tribes* as it was the language of earlier historiography and anthropology, traditional communities, as one prefers to say today in accordance with the Traditional Authorities Act.[4]

3. All the traditional communities had their own governmental structures; they all had their own laws; they all had their political developments which had a bearing on the political development of and to Namibia as a country of today. In this sense, the view on the constitutional history of Namibia will start with a chapter on the pre-colonial development of traditional governance. Following this, the next chapter will highlight the most important constitutional developments in the time from the Berlin conference that portioned Africa to the end of the German colonial rule. Chapter three will continue with the constitutional development of Namibia under the rule of South Africa until the adoption of Resolution 435 of 1978 of the Security Council of the United Nations, which paved way to the independence of the country. The last chapter on the constitutional history of Namibia will highlight the developments until the adoption of the Constitution of 1990.

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2. In the following, Namibia will primarily be used as the name of the territory although the name as such only emerged in the more recent history of the country. *See* on this: Kerina (1981): 238ff., but also: Resolution 2372 (XXII) of the UN GA of 1968, which states in its first paragraph that "in accordance with the desire of its people, South West Africa shall henceforth be known as 'Namibia'".
3. The interested reader will find general information on Namibia, its history and persons involved in its socio-political life in: Dierks (2003–2004), *see* further: Pütz; von Egedy; Caplan (1987) and (1990); Eriksen (1985); Tonchi; Lindeke; Grotpeter (2012); Sherbourne (2014); also Nujoma (2001) and Legal Assistance Centre (2020c) under "A brief legal history of Namibia." Gwen Lister's personal, biographical account and, at the same time, account of the work of a journalist in service of liberation and freedom (Lister 2021) – Lister founded the newspaper The Namibian as in 1985 – deserves special attention of all interested in the difficult years that led to the independence in 1990, the difficulties voices had to struggle against racist discrimination and apartheid.
4. Act No. 25 of 2000.

§2. The Pre-colonial Development of Traditional Governance

4. The traditional landscape of the country[5] that complements the order of the state can, indeed, be traced back to the early times of which sources exist although it must be understood that what we find today is not just a reproduction of historical pictures. There were movements of people within the territory and movements from outside that changed what was there and gave rise to new developments. There were inroads from different sides that coined the political features of the communities. It can, however, not be the task of this introduction to the constitutional development of Namibia, to give an account of all the traditional communities historically and presently involved in the socio-economic fabric of the country. What the look into the history of traditional governance in Namibia is intended to do, is to highlight some of the constitutionally relevant features in the history of Namibia and by doing so to pay special attention to some of the traditional communities and their role in the constitutionalization of the country.

5. Namibia inherited a politically divided governmental structure at independence that consisted, apart from the central white-dominated government, of eleven so-called second-tier governments in line with the ethnically separated population introduced by the colonial apartheid South African government:[6] Therefore, there was a government for the whites, the coloureds, the Oshiwambo -speaking communities,[7] the communities in the Kavango Region; the communities in the Caprivi Region, the Damara communities; the Nama communities, the Setswana-speaking communities, the Otjiherero-speaking communities and the Rehoboth community. With independence, the second-tier governments were dissolved.[8] The regions of the country were re-delimited in line with the obligation of the Constitution.[9] Thirteen regions replaced the inherited structure.[10] It was only recently that the Kavango Region was divided into two regions, and the Caprivi Region was renamed Zambezi

5. General ethnographic information on Namibia provide: Hahn, Vedder, Fourie (1928); Vedder (1966) and Malan (1995). On traditional governance and its relation to the state, *see*: Hinz (2006) and (2010) with references to other literature.
6. *See*: Schedule 8 to the Constitution of Namibia.
7. Like the Otjiherero, the Setswana-speaking communities and the communities of the Kavango, the Oshiwambo-speaking communities belong to the group of people referred to as Bantu-languages speaking. The words of these receive their specific meaning by adding prefixes to the stem: Omuherero is one member of an Otjiherero-speaking community, while Ovaherero denote several members. The difficulty is that the prefixes differ from language to language. The speakers of the Bantu languages do not favour the omission of the prefixes as omitting prefixes means for a native speaker losing the meaning of the word. Therefore, this study will, to the extent possible, use the prefixes in referring to Bantu words without any additional linguistic explanation.
8. Article 147 of the Constitution.
9. *See*: Article 103(2) of the Constitution.
10. *See*: Establishment of the boundaries of regions and local authorities in Namibia, Proclamation No. 6 of 1992.

Region.[11] The traditional authorities received a new dispensation in accordance with the already mentioned *Traditional Authorities Act* and the *Council of Traditional Leaders Act*.[12]

6. It is generally accepted that the first inhabitants of Namibia were hunters and gatherers, San,[13] as they are usually referred to in Namibia.[14] The Bantu-speaking groups, cattle breeders and agriculturalists, as we find them today in most northern and central parts of the country, moved into Namibia at a later stage, mixed with the then residents and became the dominant communities. They became not only dominant in the areas they occupied during their early migration, but also dominant in the political history of the country as such because of their numbers.

7. The San of Namibia and of other parts of Southern Africa have enjoyed great interest by travellers and anthropological researchers.[15] Reports from travellers to the northern part of the country in the nineteenth century inform us about the San, or Bushmen as they were called at the time. Reverend Hugo Hahn, one of the missionaries of the Germany-based Rhinish-Mission,[16] wrote in 1857 about activities of the San that he never "expected [them] from Bushmen".[17] Hahn noted the mining of copper by San in the area of Otavi, the transport of copper to Owamboland[18] for smelting in exchange for corn, tobacco and calabashes. Gordon informs us about comparable trade of salt from the now national park, the Etosha Pan.[19] The socio-political competence of San is illustrated by reports on leading positions San could obtain in Owambo communities. Owambo Kings obviously recognized the skills of

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11. *See*: Creation of new regions and division and re-division of certain regions into constituencies: Regional Councils Act, 1992, Proclamation No. 25 of 2013. The list with the names of the now fourteen regions of Namibia is annexed at the end of the book.
12. *See* apart from the already quoted Act: the repealed version of the Traditional Authorities Act, 1995 (Act No. 17 of 1995), and the Council of Traditional Leaders Act, 1997 (Act No. 8 of 1997).
13. Kinahan (2011): 15ff.
14. The naming of traditional communities is a special and politically sensitive problem. This work on the Constitution of Namibia follows general anthropological recommendations and the recommendations by the people collected in work by the Centre for Applied Social Sciences (CASS) of the Faculty of Law of UNAM with traditional communities in Namibia since 1990. In general terms, anthropology distinguishes the communities by linguistic categories, which, at least to some extent, also reflect their socio-economic conditions. Accordingly, the majority of the Namibian communities belongs to the Bantu-speakers; other communities, mainly living in the southern and central parts of the country are put together as Khoisan. There linguistic commonality is that their languages employ otherwise not used click sounds. Following Barnard (1992: 11) the Khoisan include the Nama, the San, and the Damara although the latter are different from the first in many respects. The language of the Nama / Damara, is called Khoekhoegowab.
15. Cf. here: Shapera (1930): 3ff.; Barnard (1992): 3ff; (2007): 11ff.; Gordon (1992): 1ff.
16. Cf. to the Rhenish Missionary Society: Buys; Nambala (2003): 17ff.
17. Hahn (1985): 1034.
18. Owambo: The spelling differs between Owambo and Ovambo. This text uses Owambo, unless in quotations. Owamboland is the name of the area between the Etosha National park in northern Namibia and the Angolan border. While in colonial times, Owamboland meant a territory under one administration, Owamboland was divided into four regions after independence. When talking of Owamboland or short Owambo today, the reference is to a socio-economically and culturally closely related area. In a summary reference, the area is sometimes also referred to as the 4-O-region, meaning the Ohangwena, Omusati, Oshana, and Oshikoto Regions.
19. Gordon (1992): 26.

San as "body-guards, executioners, spies, special messengers and professional hunters".[20] The dealing with the settlers of the Republic of Upingtonia – an attempt by white farmers, the so-called thirstland trekkers, who had left South Africa in search of new domiciles, to establish their homes in the area of Grootfontein – by the San living in this area is proof of their organizational and military capacity. The thirstland trekkers were forced to leave after they were unable to suppress the resistance of the San against them.[21]

8. Other early inhabitants of southern Namibia are the Nama. The Nama, hunters and herders of sheep and goats, originate in the Cape Province of South Africa and moved from there to the northern part of the Cape Province and the southern part of Namibia.[22] Parts of the South African Nama left South Africa to settle in Namibia in the nineteenth century. They have become known as Oorlam Nama.[23]

9. The Kai//khaun Nama located in Hoachanas today,[24] is said to be the community from which all the other Nama groups of Namibia split away and formed their own political entities. It is also said that the Kai//khaun were in charge of the whole of the southern part of Namibia. Their oral tradition reports seventeen rulers, "kings" in the language of the report.[25] Assuming that each of them reigned for fifteen years, Budack found that the first ruler should have come to power in 1695.[26]

10. It is now an accepted understanding that the Damara belong to the very early inhabitants of Namibia.[27] The traditional homes of the Damara are the northwestern and central parts of Namibia. The anthropologist Lebzelter collected information on Damara chiefs and reported a genealogy that contains twenty-one rulers.[28] Vedder calculated that the first of them was born in 1390.[29] To what extent this genealogy, in particular in view of the socio-political formation of the Damara, is reliable is debated;[30] however, it is nevertheless an indication of the long-established settlement of the Damara.

11. Oral traditions and the writing of early travellers suggest that it was in the sixteenth and seventeenth centuries that Bantu-speakers moved into Namibia from

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20. *Ibid.*: 27.
21. *Ibid.*: 40ff.
22. *See*: Barnard (1992):176f., but also: Vedder (1928): 112ff., who holds that the Nama migrated to Southern Africa from the lakes in central Africa.
23. Cf.: Vedder (1928): 112 ff.; Malan (1995): 114.
24. Budack (1972): 19.
25. *See* the Profile of the Kai//khaun in the Laws of the Kai//khaun in: Hinz (2016a).
26. Budack (1972): 19. The community profile of the Kai//khaun quoted above comes to the same result although having different years of government for the listed seventeen rulers.
27. To this and the following *see*: Barnard (1992): 199ff. and the more recent political history of the Damara by MacConnell (2017).
28. Lebzelter (1934): 109.
29. Vedder (1966): 115.
30. *See* already: Vedder (1966): 115f., but also: Barnard (1992): 209f.

other parts of Africa.[31] The genealogies of the Owambo kingdoms collected by Williams has dates of kings of the different Owambo communities.[32] Taking the case of the Oukwanyama kingdom,[33] the first dated king in Williams' genealogy came to power in the later years of the eighteenth or earlier years of the nineteenth century. Williams' record has seven undated kings before the first king is noted with details. Giving each of them an average of fifteen years of reign, one can assume that the first remembered king of Oukwanyama came to power around 1730.[34] There were most probably other non-remembered kings, leaving aside the times of migration and the establishment of the kingdom. This may take us back to the seventeenth century[35] or even to the sixteenth century as Vedder suggests by reporting of an Oukwanyama king, who gained power in 1550.[36] The history of the Ovaherero offers genealogies that also go back to 1530, the year reported to be the year of birth of the first-known ancestor to the famous Ovaherero Chief Maharero, who was born in 1820.[37]

12. The areas known today as the Kavango and Zambezi Regions faced a process of settlement only partly comparable to what has been said about the settlement of the central North of the country. The dominant groups in both regions are Bantu-speaking communities, peasants like the people in Owambo. The dominant communities living today in the Kavango Regions, better in the Kavango basin, i.e., on both sides of the river, reached the area around the same time as the people who migrated into the central North of the country although they occupied the southern, i.e., now Namibian side of the river only late.[38]

13. The history of the communities living in the Zambezi Region is very much related to the history of the communities living in the adjacent parts of Zambia and Zimbabwe. It is commonly understood that what later became the Caprivi Region was, with a short interval, under the authority of the Barotse Kingdom with its centre in Zambia since the middle of the eighteenth century.[39]

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31. Cf. here: Wallace (2011): 75ff. and Vedder (1966): 93ff.
32. There is no agreed language in titling the supreme leader of communities. The commonly accepted language for the supreme leaders of Oshiwambo-speaking communities and communities in the Kavango regions is 'king'. This study follows this use and speaks of 'king' where 'king' is the use in the communities.
33. Oukwanyama lost its status as kingdom during the South African colonial time and regained it after independence.
34. Williams (1991): 190, *see also*: Namuhuja (2002: 7) who reports about Nembulongo lyaNgewdha, having ruled Ondonga from 1650 to 1690 and this, most probably at the same time, os King Kapuleko kaVadja of Oukwanyama.
35. *Ibid.*: 68ff.
36. *See*: Vedder (1966): 165.
37. *Ibid.*: 152 – Maharero, also referred to as Kamaherero, was the father of Samuel Maharero, the leader of the Ovaherero in their fight against German colonial forces.
38. Gibson (1981): 22f.
39. Fisch (1999): 51f.; Otto; Goldbeck (2014).

14. Vedder starts the substantial part of his history of Namibia with the year of 1800.[40] For the historian Wallace, the years between 1730 and 1870 mark a "time of rapid transformation".[41] Those years were years of socio-political challenge for the Namibian communities.[42] As Wallace put it:[43] By the end of those years

> the region's political, social, and economic dynamics had been radically reshaped, not least by the rise and fall of a form of centralised control over the entire region, as Jonker Afrikaner won and then lost effective dominance. In the same period, economic relations were fundamentally reoriented as central and southern Namibia became incorporated into the Cape economic nexus, and indigenous societies seized the opportunities offered by the advent of merchant capital. By 1870, too, Christian missions had put down firm roots, white traders had begun to play important economic and political roles, and the question of formal colonisation loomed on the horizon.

15. It was in the nineteenth century that the clairvoyant Sisaama announced his prophecy about "big men" who would bring evil to the land.[44] Who were the "big men", who would come to settle in "our land"? Jonker Afrikaner and his Afrikaners were certainly part of these big men.[45] Big men were also the missionaries, traders and the colonial settlers that came after them. Jonker Afrikaner was the second son of Jager Afrikaner, the leader of a group of South African Nama, called Afrikaner. Jager's Afrikaner fled to the northern side of the Orange River after an incident with a Dutch employer in the Cape during which this employer was killed. After the death of Jager Afrikaner, the community split into two, one under the leadership of Jonker Afrikaner, who, with his followers, left their place of settlement and moved to Namibia. This happened in 1823.

16. The Nama, who left South Africa for Namibia in those years were in many aspects different from the Nama of Namibia. Many of them were the offspring of relationships between Nama and whites of the Cape. Apart from Nama, they spoke Dutch. They had horses and firearms with which they were well versed. Under Jonker Afrikaner, they helped the Nama of Namibia who were at war with the Ovaherero. The defeat of the Ovaherero was the first step in a process of steps to establishing one government over a big part of the territory that is today Namibia!

17. Loth calls the region ruled by Jonker Afrikaner "empire" (*Reich*).[46] Indeed, the area under Jonker Afrikaner stretched from the South of Namibia to where the Owambo communities lived. Jonker had an army with some 2,000 riffles. In his

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40. Vedder (1966): 169ff.
41. Wallace (2011): 45.
42. It is noteworthy that this part of the history of Namibia is still under anti-colonial review; *see* here the collection of articles in: Silvester (2015). On the two anti-colonial heroes, Witbooi and Maharero (to whom the following will also refer): Hillebrecht (2015).
43. *Ibid.*
44. Vedder (1966): 163f.
45. To this and the following: Vedder (1966):176ff. Loth (1963); and also Hinz (1988).
46. To this and the following: Loth (1963): 22.

military activities, he confiscated herds of cattle. Many communities of Namibia paid tribute to Jonker Afrikaner. Traders and travellers who used the road from the harbour town of Walvis Bay to Windhoek in central Namibia, the so-called *Baiweg*, had to pay for the use of the road.

18. What happened under Jonker Afrikaner can be qualified as a process towards far-reaching state formation. The already mentioned missionary Carl Hugo Hahn expressed the view that Jonker Afrikaner "would have become the greatest man whom South Africa would have seen",[47] if he had had other means in his support. Therefore, his *Reich* did not survive. Today, the Afrikaner community still exists as one of the smaller Nama communities.

19. Although the years before Jonker Afrikaner's reign, during his reign and after his death in 1861, were characterized by numerous conflicts between the various communities, there were also attempts to achieve peace. The peace achieved in May 1870 was of particular importance as most of the actors at the time, including the missionaries working with the different communities, participated in the making of the treaty.[48] The treaty intended peace between the Otjiherero-speaking and Nama communities. One critical point in the negotiations was whether the Afrikaner would have a right to stay in Windhoek. The missionary Hahn achieved a compromise: The Ovaherero under Chief Maharero accepted that the Afrikaner would have Windhoek "on feudal tenure" from the Ovaherero.[49]

20. The treaty of 1870 brought ten years of peace. The years after 1880 were again years of new conflicts between the Nama and the Ovaherero.[50] Apart from the fact that the Ovaherero were of the opinion that Windhoek was only on "loan" to the Afrikaner, the treaty did not contain anything about who would have grazing rights and where.[51] The blood night of 23 August 1880 in Okahandja,[52] during which more than 200 Nama were killed, marks the beginning of new conflicts between the Nama and the Ovaherero. The conflicts between the two population groups characterise the years between 1880 und 1890. Years, which led into the period of German colonialism over Namibia! The mentioned years, however, see also the emergence of a new Namibian leader: Hendrik Witbooi. Witbooi represents a new type of leader, a "tribal chief", but with a national vision[53] and who, guided by this, became one of the prominent figures in the fight against German colonialism.

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47. Berichte (1861, 1862): 36. – Translation from the German original by the authors.
48. Cf.: Vedder (1966): 391ff.
49. *Ibid.*: 393.
50. *Ibid.*: 448ff.
51. *Ibid.*: 393. Vedder says that the Ovaherero did not understand the meaning of *feudal tenure* and took the term as *temporary loan*.
52. Town, some 70 km north of Windhoek and a centre of the Ovaherero.
53. It is reported that Witbooi claimed in 1890 (Vedder 1991: 645) to be the leader of all Nama communities. His famous letters express political vision that look beyond the Nama. Cf.: Witbooi (1995), and also: Helbig; Hillebrecht (1992).

21. Treaties as the treaty of 1870 inform us about important events in the constitutional history of Namibia, and they also allow for a political anthropological assessment of the political formation in Namibia at the time and up to today. The text of the treaty[54] refers to the already mentioned Maharero as paramount chief, twenty-seven chiefs of the Ovaherero, and one Nama chief as the parties on the one hand to the chief of the Afrikaner on the other hand. The treaty further notes twenty other Herero chiefs, who were "prevented" from being present, three Nama chiefs who had not opted for peace and three other Nama chiefs who were said to have been there as impartial participants and to confirm the peace agreement. This list of parties (and non-parties) reflects the political complexity present in Namibia of those days and is also an indication that the various communities were politically differently shaped.

22. Since Meyer Fortes and Evans-Pritchard,[55] one distinguishes between three types of political structure in African political anthropology: first, there are "very small societies" the members of which are kinship-related and in which the political organization and the organization of kinship are – so Fortes and Evans-Pritchard – "completely fused".[56] Second, we find societies in which "the lineage structure is the framework of the political system". However, although the two structures are well coordinated, "each remains distinct and autonomous in its own sphere".[57] In the third type of political system, "an administrative organization is the framework of the political structure".[58] In simpler terms, the first and second type of political organizations reflect *stateless* organizations ("tribes without rulers" in the terminology of Middleton and Tait),[59] while the third type summarizes organizations with centralized authority in structures usually associated with state-societies. The typology of political organization introduced by Fortes and Evans-Pritchard has remained influential in the analyses of political formations in Africa and other parts of the world up to today although the socio-political developments under colonialism and the post-colonial orders resulted in structural changes in all the societies classified by the quoted typology.[60]

23. All the societies named traditional were made part of so-called modern political organizations, states that claim sovereignty over traditional political formations, be them with centralized or non-centralized structures. The orders of colonialism as well the post-colonial legal orders did not abolish the traditional political formations.[61] Countries such as Namibia are democracies with political institutions that are expected to exist in democracies, but, nevertheless, accommodate the traditional political formations. In terms of the *Traditional Authorities Act*,[62] they all,

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54. The text of the treaty is contained in: Vedder (1991): 477ff.
55. Fortes; Evans-Pritchard (1940). *See also*: Sigrist (1967); Balandier (2013): 149ff.
56. *Ibid.*: 8f.
57. *Ibid.*: 9.
58. *Ibid.*
59. Middleton; Tait (1967).
60. Cf. the reflections on "Classics and classics revisited" in: Vincent (2002): 27ff.
61. Cf. here: Hinz (2009a).
62. Cf. Section 1 of the Act (Act No. 25 of 2000): defining 'chief'.

by law, have a "supreme leader". Shape and format of traditional governments differ depending on the political history of the respective community and not all traditional communities can, taking note of their history, be classified as communities with centralized authority.[63]

24. The majority of the traditional communities in the northern part of the country have well-established centralized political authorities. Most communities are constituted as kingdoms. This applies to the communities of the Zambezi and the Kavango Regions with the exception of the San found in these regions.[64] The situation in the regions in which the Oshiwambo-speaking communities live is different. Out of the eight communities recognized in terms of the *Traditional Authorities Act*, five are kingdoms; two used to be kingdoms in the past and are now under a council of senior traditional leaders and one which was reported in old descriptions to have a republican structure, again under a council of senior traditional leaders.[65]

25. Although the concepts of kingship differ in particular when comparing the concepts applying to the communities in the North where the tradition of kingship can be traced over many years, the societal position of kings requires legal and political identification. Kings come usually from royal families and their authority is sacred. They represent the ancestors. They maintain close relationships with the ancestors, thus, securing the well-being of their communities.[66]

26. As far as the political structure of the Otjiherero-speaking communities is concerned, Malan holds that these communities are historically "segmentary or stateless societies".[67] The fact that these communities possess a double decent structure is submitted in support of their segmentary nature. Every member of the Ovaherero is linked to two distinct groups of relatives, the patrilineal[68] and the matrilineal group.[69] Residence, religious activities and authority in the family follow the patrilineal, economic functions and inheritance of the matrilineal line.[70]

27. Although the position of paramount chief has been maintained in the tradition of the Ovaherero, this position does not enjoy acceptance under the *Traditional*

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63. The list of recognized traditional authorities can be found in the annexure.
64. The Khwe San in the Kavango East Region failed in their plea for recognition. The king (*Fumu*) of the neighbouring Hambukushu community claims that the Khwe San fall under his authority. Cf.: The Namibian of 8 Dec. 2020, 14 Mar. 2022 and 21 Mar. 2022. Apart from authority over the San, the Traditional Authority of the Hambukushu is also not in agreement with the proclamation of land in the area inhabited by the San as a national park.
65. Uukwambi and Ombalantu were ruled by kings in the past. Uukwambi lost its king. The last king was exiled by the South African colonial administration. The last Ombalantu king was dethroned by his people who resisted to his cruel rule. Uukolonkadhi is the community said to have had a republican structure. Cf.: Williams (1991).
66. Cf.: Williams (1991): 90ff. and also Salokoski (2006): 75ff.
67. Malan (1995): 78.
68. *Oruzo (pl. otuzo)* in Otjiherero.
69. *Eanda (pl. omaanda)* in Otjiherero.
70. *Ibid.*: 71f.

Authorities Act[71] and is also not appreciated by all Ovaherero. After many discussions, first, six royal houses of the Ovaherero received recognition under the *Traditional Authorities Act*, the recognition of others followed later.[72] The attempts of the now late Paramount Chief Kuaima Riruako to be recognized failed for many years.[73] Eventually, Riruako was accepted as chief of the Ovaherero Traditional Authority. Despite this authority being named Ovaherero Traditional Authority, the Ovaherero Traditional Authority is one of several traditional authorities of the Ovaherero, which are not under the Ovaherero Traditional Authority.[74]

28. For the social anthropologist Budack, the political organization of the Nama belongs to the centralized forms of government in terms of the typology of Fortes and Evans-Pritchard.[75] Although this may be an issue for debate, the various Nama communities developed, indeed, permanent centres of authority with an organized structure of officials with special functions for governing the communities. However, there are differences if one compares the governments of the Nama communities, e.g., with the governments of the Oshiwambo-speaking groups. The Nama communities are smaller in size and were under much more pressure in colonial times with the consequence that this did not allow their traditional structures to function, as it was possible in the northern parts of the country.[76]

29. It was under the German colonial administration that Kornelius //Goreseb was made chief of the Damara, a position later claimed to be the position of paramount chief of all Damara. A descendant of Kornelius, David //Goreseb was recognized as paramount chief of the Damara by the South African Administration in 1954.[77]

30. The position of paramount chief was changed to king in 1976. Justus //Garoëb acted as king from that date to 1993 when he was appointed as king.[78] The Damara were recognized under the *Traditional Authorities Act* as one community led by King //Garoëb and a number of Damara chiefs as senior councillors in

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71. The Traditional Authorities Act knows only the position of chief and councillors. *See* section 2 of the Act (Act No. 25 of 2000).
72. It has to be noted that the Otjiherero-speaking Ovambanderu play a distinct role, as they see themselves to be distinguished from the Ovaherero.
73. The application for recognition was even subject to a (unsuccessful) court case, cf.: *Kuaima Riruako v. Minister of Regional*, *Local Government and Housing*, High Court judgment, Case No. (P) A 336/2001 – unreported.
74. Paramount Chief Riruako passed away on 2 Jun. 2014. Adv. Vekuii Rukoro, the first Deputy Minister of Justice in post-independence Namibia and later Attorney-General succeeded Rukoro. *See*: Proclamations No. 10 of 2016; No. 1 of 2017 and No. 15 of 2018. Rukoro passed away in June 2021. His succession is under dispute. Cf.: *Katjua v. Kapuuo*, judgment of the High Court, Case No.: HC-MD-CIV-MOT-GEN-2022/00126 – unreported and The Namibian of 7 Mar. 2022 and 13 Apr. 2022.
75. Budack (1972): 13f.
76. Cf. here: Malan (1995): 118ff. The work by Kössler (2005) informs about the difficulties of two Nama communities to maintain identity during colonialism.
77. Malan (1995): 132f.
78. *Ibid.*

1998.[79] However, this recognition was withdrawn and replaced with the recognition of seven Damara communities under their supreme traditional leaders of the respective communities.[80] King //Garoëb remained in his position as king although this position is not recognized by all Damara.

31. The San used to live in small groups without a centralized authority.[81] There were people who led the group because they were respected as skilled hunters or because of other personal qualities from which the community profited. Under the *Traditional Authorities Act*, five San groups received recognition. They all have now one "supreme traditional leader" whose authority in practice is more the authority of a *primus inter pares*.[82]

32. The Batswana ba Namibia and the Bakgalagadi moved to Namibia only towards the end of the nineteenth century. They settled in the Gobabis area and established their centralized political structure, as they had it before their move to Namibia. Both groups are recognized under the *Traditional Authorities Act*.[83]

33. The Rehoboth Basters came to Namibia from South Africa in the second half of the nineteenth century.[84] They settled in Rehoboth, an area they received from the Swartbooi Nama. They are mainly descendants of whites and Nama.

34. When South Africa introduced its system of self-governing territories, Rehoboth was accepted as one of the self-governing entities.[85] In consequence of this, the Basters transferred their communal land to its government. With the Constitution of 1990, all property registered for the self-governing entities, including the land of the Basters, was transferred to the central government of Namibia.[86] The Basters took this to court. The cases before the High Court and, on appeal, the Supreme Court were not successful, leaving the Basters without ancestral land.[87]

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79. Recognition of Designation of Traditional Leaders, GN No. 65 of 1998.
80. Announcement of Appointment of Traditional Leaders of Certain Traditional Communities, GN No. 64 of 2002. *See* here also: Hinz (2013b): 15f.
81. Cf. here: Lee (1979).
82. It is interesting to note that some of the San communities refer in their laws on succession to belonging to "bloodline" or "royal houses" as criteria for leadership. *See* the San laws in: Hinz (2016a), but also the collection of articles on "San and the State" in: Hohmann (2003).
83. *See* the community profile of both communities in: Hinz (2013a).
84. On Rehoboth and the Rehoboth Basters: Limpricht (2012); Budack (2015).
85. Cf.: Rehoboth Self-Government Act, 1976 (Act No. 56 of 1976) and Government of Rehoboth Powers Transfer Proclamation, AG 32 of 1989. – The Baster community even opted for its independence from the rest of Namibia by declaring independence on the day before the independence of Namibia, which prompted a military intervention. (Cf.: http://rehobothbasters.org/who.php – accessed 1 Apr. 2021). Rehoboth maintained its own laws, the *vaderlike wette* (the laws of the fathers). The English version of the *wette* can be found in Hinz (1995b): 163ff.
86. *See*: Schedule 5 to the Constitution of Namibia.
87. *Rehoboth Bastergemeente v. Government of Namibia* 1995 (9) BCLR 1158 (NmH)*; Rehoboth Bastergemeente v. The Government of Namibia* 1996 NR 238 (SC).

The Basters have applied for recognition as traditional authority under the *Traditional Authorities Act*.[88] This application did not lead to the recognition of the Baster community. One argument of the responsible ministry was that the Basters did not have communal land, which was said to be a precondition for recognition under the Act.[89]

35. Traditional authorities have their own societal dynamics. They were not only changed, but also changed from within. This has not stopped with independence. Traditional authorities and communities have remained a challenge to societies with constitutions based on the concept of democracy.[90] Some of the matters raised in this sub-chapter will be taken up below when dealing with traditional authorities as part of the political order of Namibia, the law of the traditional communities: customary law, the traditional courts, now called Community Courts, and the land rights under customary law.

§3. The Berlin Conference of 1884/1885 and the German Colonial Rule

36. Fourteen states, the European states interested in colonial possession, the USA and the Ottoman Empire, met in Berlin in the famous Conference of Berlin (Congo Conference) of 1884 and 1885 to decide on the spheres of interest in Africa and, thus, to set the colonial map of Africa, as it is basically valid up to today.[91] South West Africa was part of the deal and was given to Germany.[92] The colonial rule of Germany was relatively short: it started in 1884 and ended in 1915 when the German troops surrendered to the South Africans in Khorab, a place close to the mining town of Otavi, on 9 July 1915.[93]

37. The thirty-one years of German colonialism can be divided into two phases, a first phase of continued conquest lasting to the end of the decisive war of Germany against the Ovaherero, Nama, Damara and others in 1904. The second phase is the phase of consolidation of German colonialism and ended with the surrender to South Africa.

38. Despite its short time, German colonialism had certainly influence on the country and its further development. It was Germany that separated central and southern Namibia from the North, establishing the so-called police zone in central and southern Namibia and leaving the northern part more or less to some kind of

88. Cf.: http://rehobothbasters.org/casedetails.php?id=189 (accessed 1 Apr. 2021); *see* further: Rehoboth Baster Gemeente (2018); UNPO (2020).
89. *Ibid.*
90. Cf.: Tötemeyer (1978); Keulder (2000); Hinz (2002) and (2008).
91. *See*: Gatter (1984).
92. Cf. here: Pakenham (1991): 239ff.; Schildknecht (1999).
93. The treaty of surrender can be found in: Silagi (1977): 142ff.

self-administration.[94] It was Germany that forced the bigger part of the country into the mainstream of so-called western civilization with all what belonged to this: Christianity, formal education, modern medicine but also oppression, exploitation, racial segregation. It was Germany that led the foundation for the occupation of the land in central and southern Namibia by white settlers. It was Germany that destroyed traditional structures and governance, in particular with the genocidal war of 1904 and the policies implemented thereafter, which cost the lives of thousands and thousands.

39. Today, the use of the German language in the general public and in schools, a German daily newspaper and the German service of the Namibian Broadcasting Corporation may remind of German colonialism, but is more than this: German culture is part of the culture of Namibia; for most German-speaking people of Namibia the country is their country of home.[95] From the legal order established under the rule of Germany basically nothing survived the much longer period of South African colonialism.[96]

40. As has been indicated, German traders, missionaries and travellers were present in Namibia before Germany declared Namibia its colony. However, there were also other agents present, so agents from the United Kingdom. Subsequent to this, a diplomatic struggle arose as to who would eventually settle as colonial power. In addition to this, it also took time for the imperial government of Germany to decide on whether or not South West Africa should become a German colony.[97] It was only on 24 April 1884 that the German Chancellor Otto von Bismarck telegrammed the German consul in Cape Town and expressed the clear view of Germany by stating:[98]

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94. The *Police Zone* received its name as police stations only existed within the police zone. The South African administration maintained the zone. Up to today, the division between the two parts of the country exists for veterinary reasons as the red line. The red line prohibits the free movement of animals and animal products. On the red line, *see*: Miescher (2012). According to The Namibian of 22 Jul. 2021, the High Court was requested to decide whether the fact of the dividing red line is constitutional.
95. German colonialism is still debated in many aspects: up to now, we find, e.g., letters in the Allgemeine Zeitung, in which the writers of the letters defend the role of Germany in the war of 1904. Most Namibians refer to the war of 1904 as war of genocide committed by Germany. This subchapter will come back to this below. For the following *see* generally: Leutwein (1906); Lüderitz (1945); Zimmermann (1914); Bley (1968); Goldblatt (1971); Hubrich; Melber (1977); Helbig, H. & L. (1983); Hinz; Patemann; Meier (1984); Patemann (1985); Drechsler (1996); Wood (1988); Zimmerer (2001); Hess; Becker (2002); Förster; Henrichsen; Böllig (2004); Gustafsson (2004); Wallace (2011): 103ff.
96. Whether nothing related to law survived from the time of German colonialism, is part of an ongoing project conducted by Jürgen Trabert under the working title: *Das BGB in Afrika. Interpersonelle Zivilrechtstspaltung* (The German Civil Code in Africa. The interpersonal splitting in private law) – oral information to Manfred Hinz in March 2021. *See also*: Fischer (2001).
97. Cf.: Goldblatt (1971): 79ff.
98. Quoted from: Goldblatt (1971): 88.

> According to statements of Mr. Lüderitz, the Colonial Authorities doubt as to his acquisitions north of the Orange River being entitled to German protection. You will declare officially that he and his establishments are under the protection of the Reich.

41. Adolf Lüderitz was a merchant from Bremen.[99] When he learned about deposits of minerals, in particular copper, he became interested in Namibia. Apart from economic interest, Lüderitz also developed the political vision of a German colony. Hans Vogelsang travelled to Namibia for Lüderitz in 1883 to explore the possibilities for the acquisition of land in Namibia. Vogelsang's destination was the South of the country, the bay of Angra Pequena.[100] The only other place to land on the coast of Namibia was the British held Walvis Bay. With the assistance of a German missionary, Vogelsang was able to enter into relationship with Kaptein[101] Joseph Fredericks, the leader of the Nama of Angra Pequena area, and to conclude two agreements for the acquisition of land. In the first agreement, the harbour of Angra Pequena and land surrounding it was acquired.[102] The second agreement with Joseph Fredericks followed on 25 August 1983. This agreement covered the[103]

> whole of the coastline from Angra Pequena to the Orange River, including all the harbours and bays together with the interior, to a width of 20 geographical miles measured from every point along the coast.

42. An agreement with the Chief of the Topnaar Nama concluded on 19 August 1884 added large parts of the coast to the possession. Here again, the *geographical mile* was used to determine the size of the land under the agreement. It was agreed that the land of "twenty geographical miles" into the interior was subject to the agreement. Agreements were also concluded with the Rehoboth Basters, the Afrikaner community and others.[104] By October 1885, a large portion of South West Africa was acquired by Lüderitz.[105]

43. The agreements request attention from different perspectives. The perspective of contractual law prompts to question of validity: the parties had different understanding of what one mile would be. While the leaders who signed the contract believed that one mile was equivalent to 1.6 km, the German buyers interpreted in a fraudulent manner the mile to be a geographical mile equivalent to 7.4 km.[106]

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99. Cf. on the following the literature quoted at the beginning of this chapter and in particular: Goldblatt (1971): 100ff.
100. Now: Lüderitzbucht.
101. Afrikaans for chief.
102. Cf.: Goldblatt (1971): 81.
103. English text of the agreement quoted from: Goldblatt (1971): 82.
104. Cf.: Goldblatt (1971): 100ff.
105. *Ibid.*: 102.
106. *See*: Goldblatt (1971): 100ff. (102); Hubrich; Melber (1977) :37ff.; Patemann (1985): 87ff. – The assessment of treaties concluded between representatives of European governments / companies

44. From the perspective of customary law, i.e., the law of the various communities who entered into agreements with Lüderitz, the question is what – in terms of rights – this contract granted to the German partner. Was the intention of the agreement really meant to sell land or rather to allocate the right to use the land for certain purposes, as it is usually the case when land under customary law is subject of negotiations?[107]

45. In general political terms, the agreements certainly manifested the German interest in Namibia and allowed the German government to claim sovereignty over Namibia against other colonial powers.

46. When Lüderitz was unable to finance the further exploitation of the acquired possession, he sold them to the German Colonial Association.[108] The association was funded for the purpose of acquiring the possessions of Lüderitz and to extend possession to other areas of Namibia. The members of the association were German businessmen and industrialists. The German government left it to the association to consolidate the acquisition of land and mineral rights. In line with this, it was the colonial policy of Germany to limit the direct involvement in the running of the colony to the absolute minimum. In the first years after the proclamation of the German protectorate, the German government promoted the conclusion of what was called protection treaties with various communities of Namibia. A protection treaty with the Ovaherero under Chief Maharero was also achieved. This treaty has its own history: an earlier protection treaty was cancelled by Maharero but reconfirmed in 1890. Maharero repudiated the earlier protection treaty after a British representative was able to convince Maharero to opt for British instead of German protection.[109]

47. It was only in June 1989 that the German government decided to establish a territorial force, the *Schutztruppe,* with twenty-one men under the leadership of *Hauptmann*[110] Curt von François, the first Governor of South West Africa. There was a *Schutztruppe* of seven men before, paid by the German Colonial Association. The re-enforced *Schutztruppe* and the administration of the colony as a whole were from now on to be paid by the German government.[111] Von François' mandate remained, nevertheless, limited. He was instructed to refrain from any military action.

48. In 1890, many traditional communities had entered into protection agreements with Germany. The Nama under the leadership of Chief Witbooi refused to sign a protection agreement. It was Witbooi who also raised his concern about the

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with chiefs / representatives of communities / entities with political authority in areas of colonial interest has occupied political science and legal scholars, but cannot be explored in this study. Reference is just to: Anghie (2004): 52ff., 65ff.

107. Till today, communal land, i.e., land under customary law is not sold. What people can only acquire are rights to use the land, which will not include the right to sell it. Cf.: Hinz (1998a).
108. Cf. to the following: Goldblatt (1971): 111ff.
109. Cf.: *Ibid.* 111ff. (113).
110. Captain.
111. *Ibid.*: 111.

decision of the Ovaherero to re-enter into the protection arrangement with Germany. On 30 May 1890, Witbooi wrote his famous letter to Maharero to warn him against the protection treaty:[112]

> You call yourself Supreme Chief of Damaraland[113] … but my dear Kaptein you have now accepted another earthly Government, the German Government, in order to protect yourself from the terrors of our war power, and through this mighty nation to destroy me …. But it seems to me that you have not sufficiently thought of the consequences to yourself, your country and those who will come after you.
>
> …
>
> I doubt whether you understand the meaning of the German protection which you have accepted. Do you understand the nature of the customs, the laws and the conduct of their government? Do you think you will be able peacefully to put up with it for any length of time?
>
> No, … . You call yourself Supreme Chief, but when you are under another's control you are merely a subordinate Chief.

49. The call of Witbooi failed. It was only in 1892 that Witbooi succeeded in entering in a peace agreement with Samuel Maharero, the successor to Maharero.[114] Alerted by this development, von François reacted by attacking the Nama under Witbooi, however with no result. The Witbooi had left the place where they expected to be by von François and defeated the Germans on their way back. In order to remedy the situation, Major Theodor Leutwein was sent to the territory. Leutwein took over the office of governor from von François in 1894.

50. The Ovaherero and the Nama were affected most by German colonialism. Both communities held vast lands in the centre of the country with large herds of cattle when imperial Germany established its colony.[115] The difficult relationship between the German administration and the Ovaherero culminated in the German Herero war of 1904 and the decisive battle of Ohamakari[116] in August 1904. Leutwein directed the first events of the war but was replaced as military commander with General Lothar von Trotha in June 1904. Von Trotha followed a policy of

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112. Quoted from: Goldblatt (1971): 112f.
113. In old maps, the area inhabited by the Ovaherero carries the name Damaraland.
114. To this and the following: Goldblatt (1971): 113f.
115. The development of the relationship between the Ovaherero, Nama, and the German colonial power has been a subject of research for many years. The publications by Drechsler (1966) and Bley (1968) mark the beginning of critical reflections of the materials in archives. These attempts to reflect colonial history from a new perspective, however, were still far from being acknowledged by scholars in general and politicians in particular. (Cf. here, e.g.: Hinz (1982)) The 100th anniversary of the battle of Ohamakari led to many new publications focusing on what happened in the years before 1904, in the battle of Ohamakari and afterwards. The publication by Hinz (Hinz 2015c) takes note of the discussions in Namibia and Germany. *See also*: Kössler (2015).
116. As the Waterberg is called in Otjiherero. The Waterberg plateau – located some 300 km north of Windhoek – is a table mountain with a length of 48 km and a width of 15 km. It covers an area of almost 50,000 ha.

"crushing defeat",[117] exemplarily documented by his infamous extermination order of 2 October 1904. Issued after the defeat of the Herero, the order expresses von Trotha's intention:

> Within the German borders every Herero, with or without a gun, with or without cattle, will be shot dead. I will no longer accept women and children, I will drive them back to their people or I will let them be shot at.[118]

51. Many participating in the battle of Ohamakari died in the battle, the remaining fled, many of them through the Omaheke, the sandy and rough area east of Ohamakari where water was scarce. Of those who tried to cross the Omaheke – with them also Samuel Maharero – only some reached what is today Botswana.[119] The Nama under Witbooi declared war on Germany in October 1904. Witbooi died in 1905, but the war in the southern part of the country continued until 1909.[120]

52. The war against the Ovaherero, Nama and Damara ended the first phase of German colonialism in Namibia. The war and the legal response to the sociopolitical situation after the war provided for a new phase in the colonization of the country. The interest was not only to control the black majority in general terms, but also to make use of the black labour force for colonial purposes. Particular laws were enacted to meet these interests:[121] one, signed in 1907, contained the obligation for every black person to carry a pass.

53. Apart from these laws which laid the foundation for the oppression of the black majority of the population, the administrative structure of the colony underwent changes. At the beginning, German South West Africa had at its administrative top only a *Kaiserlicher Kommissar* (Imperial Commissioner). This position was changed in 1889 first into *Landeshauptmannschaft* (office of the chief of country) and then, in the same year, to *governor*. The change to governor marked the change

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117. Gewald (1999): 171.
118. Quoted from Gewald (1999): 127f. *See also* von Trotha's proclamation to the "uprising Hottentotts" of 22 Apr. 1905 (Großer Generalstab 1907: 186): " … the few who will not surrender will experience what the Herero people experienced … " (Translation by the authors).
119. Some of the Ovaherero returned to Namibia, others remained in Botswana up to today. Samuel Maharero died in Botswana on 23 Aug. 1923. He was buried in Namibia on 26 Aug. 1923. From then, this day is the annually conducted as the Herero Day where Ovaherero gather to pay tribute to their fallen heroes.
120. Cf.: SWAPO of Namibia (1981): 158ff. The war of 1904 is the "war of national liberation", thus preceding what happened after the SWAPO-led liberation struggle which started in 1966. The war that continued after the death of Witbooi was led by Jacob Morenga, who became known as a master of guerrilla warfare. (*Ibid*.: 160, but also the novel by Timm (2021))
121. Cf.: du Pisani (1986): 37 and Verordnung des Gouverneurs von Deutsch-Südwestafrika, betreffend die Passpflicht der Eingeborenen (Ordinance of the Governor of German South West Africa Concerning the Obligation of Indigenous People to Carry Passes), Kolonialblatt (Colonial Gazette) 1907: 1182; Verordnung der Gouverneurs von Deutsch-Südwestafrika, betreffend Dienst- und Arbeitsverträge mit Eingeborenen des südwestafrikanischen Schutzgebietes (Ordinance of the Governor of German South West Africa Concerning Contracts of Service and Labour with Indigenous People of the South West African Protectorate), Kolonialblatt (Colonial Gazette) 1907: 1179.

to a growing bureaucracy, and, with this, to an increase in governmental functions. The governor was the extended arm of the colonial administration in Germany. As subordinate entities, *Bezirkshauptschaften* (administrative districts) were established; the tasks of which were the administrations at certain localities, such as Windhoek, Gobabis or Okahandja being settlements of importance. The decree of 28 January 1909[122] provided for a three-level administration with participatory rights for the settlers. The new system created *Kommunalverbände* (municipal councils) which were made responsible for the basic needs of local government.[123] At the second level, *Bezirksverbände* (district councils) were introduced.[124] The district councils drew their members from the municipal councils, but also from members living within the districts and not under the jurisdiction of a municipal council. The mandate of the district councils was to look at the administrative requirements at the level of the district. At the third level, there was the *Landesrat* (country council), elected by the district councils.[125] The responsibilities of the *Landesrat,* although extended in scope under the pressure of the settlers, were only of an advisory nature.

54. As far as the administration of justice is concerned, the first German court was put in place in 1890. A court of second instance followed in the same year. Until 1909, four more courts of first instance were installed after the area of jurisdiction was divided accordingly. As no court of appeal existed in the colony, the decisions of the court of second instance were final.

55. The administration of justice of the black inhabitants of the territory was basically not a matter of the so-far introduced courts.[126] Matters between indigenous people were administered by officers or the chiefs of the traditional communities. As in all other German colonies, the colonial administration had jurisdiction in criminal matters the main objective of this was to serve the policy of occupation.[127]

56. What Germany left to its successor, South Africa as the mandatory of the League of Nations, is comprehensively summarized by du Pisani:[128]

> [The] German colonial policy had a relatively permanent impact on the settlement pattern of the different population groups, except in the case of the

122. Verordnung des Reichskanzlers betreffend die Selbstverwaltung Deutsch-Südwestafrika (Ordinance of Chancellor of the Reich Concerning the Administration of German South West Africa), Kolonialblatt (Colonial Gazette) 1909: 141. *See* to this and the following: Huber (2000); Reichelt (2002).
123. *Ibid*.: sections 2–85 of the Ordinance.
124. Sections 86–104.
125. Sections 105–115.
126. *See* to this: Huber (2000): 83f.
127. *See* here: Fischer (2001) and Steinkröger (2019).
128. Du Pisani (1986): 37.

> Ovambo and people residing in the Caprivi area. In the sphere of labour relations it laid the foundations for a rigid system of labour differentiation as embodied in the migrant labour system. In both the economic and political fields whites were put into effective control. … . In the sphere of social relations the indigenous people's status was lowered to 'servants' of the dominant whites.

57. In the assessment of the war of 1904 and what happened in the years that followed, one can distinguish between three positions: the first position is of the view that genocide is the only term to characterize the events of 1904 and thereafter. This view is supported by many historians, other social scientists and also lawyers.[129] For the second and opposite view, the application of the term genocide is not acceptable,[130] even a "lie".[131] The third view accepts that cruelties have been committed against the Ovaherero but finds the discussion about the application of the term "genocide" not helpful in view of the much-needed societal task to achieve national reconciliation.[132]

58. The historian Drechsler, the author of the first comprehensive account of the German Herero war, holds that from the 80,000 Herero, only some 15,000 survived the war and what followed to it.[133] Those who survived in the colony faced a policy of cleaning. The missionary and anthropologist Vedder had this to say:[134]

> After the battle of Ohamakari, there were only ruins of the Herero people. But the roaming bands were dangerous and prevented the reconstruction. Farmers, who wanted to return to their farms, needed military protection. Ambushes were a daily threat. The bush had to be cleaned. This was a dangerous and laborious work.

59. Many of the *roaming* Ovaherero were collected in camps. The high death rates in the camps tell enough about the suffering of the people.[135] The eventual withdrawal of the extermination order per imperial instruction of 9 December 1904 did not save the Ovaherero from losing the land they had occupied. Movable

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129. *See* here, e.g.: publications that appeared in the context of the centenary of 1904 and after: Zimmerer; Zeller (2003); Böhlke-Itzen (2004); Sarkin (2009); (2011); Melber (2005); Olusoga; Erichsen (2010); the re-edition of the 'Blue Book' by: Silvester; Gewald (2003); Förster (2010); Kössler (2015), but also: Mamzer; Schöck-Quinteros; Witkowski (2016); Informationsausschuss (2018/2019); Grill (2019: 153ff.), the collection of articles in: Hartmann (2019), but also Heyl (2021); Melber; Platt (2022) and the play by Leskien (2022).
130. The work of the farmer and historian Schneider-Waterberg has to be mentioned here, *see*: Schneider-Waterberg (2012).
131. Nordbruch (2002); (2004).
132. Staby (2003): 8f.
133. Drechsler (1966): 214.
134. Vedder (1956): 79.
135. Erichsen (2005).

property (cattle) and immovable property (land) was, by way of legal enactment, expropriated,[136] and the Herero were not allowed to raise livestock.[137]

60. There may be reasons to debate the number of people who lost their lives.[138] What counts in legal and political terms is what the report of the *Große Generalstab* concludes after giving participants in the war the opportunity to report their experience:[139]

> The Herero ceased to exist as an independent nation.

§4. The Genocide Case Against Germany

61. The already mentioned Paramount Chief Riruako and his followers were in the forefront of those who launched claims for reparation for what happened in and after war. They used the opportunity of visits of German politicians to Namibia and presented them with their demands. That only one part of the Ovaherero opted for legal actions should not deviate from the fact that the majority of the Ovaherero and the other concerned communities share the opinion that what happened in 1904 and thereafter was *genocide*.[140] The views differ on what redress would be. They range from expecting assistance for specific development projects to establishing a foundation, which would operate nationwide. Reparation is for many the only correct response to compensate for the crimes committed during colonial times. However, many members of the concerned communities have repeatedly expressed that their

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136. Bekanntmachung des Gouverneurs von Deutsch-Südwestafrika, betreffend Einziehung des Stammesvermögens der Herero, Zwartbooi und Topnaar-Hottentotten (Announcement of the Governor of German South West Africa Concerning Confiscation of Tribal Property of the Herero, Swartbooi and Topnaar Hottentotts), 1906, Die Deutsche Kolonial-Gesetzgebung (The German Colonial Legislation), vol. 10: 142; Bekanntmachung des Gouverneurs von Deutsch-Südwestafrika, betreffend Einziehung des Stammesvermögens der Witbooi- usw. Hottentotten, sowie der Roten Nation und der Bondelzwarts- einschließlich der Swartmodder-Hottentotten (Announcement of the Governor of German South West Africa Concerning Confiscation of Tribal Property of the Witbooi etc Hottentotts as well as the Red Nation and the Bondelzwarts- and Swartmodder Hottentotts), 1907, Die Deutsche Kolonial-Gesetzgebung (The German Colonial Legislation), vol. 11: 233. The 'etc' after Witbooi is explained in the text of the ordinance by listing some other Nama groups to which the Ordinance applied.
137. Krüger (1999): 136f.; Bley (1968): 208ff.
138. Lau (1995): 39ff. – Drechsler suggests that 80% of the Ovaherero lost their lives; Grofe speaks of 35%–80% (Grofe 2004: 3). *See also*: Hilpisch (2019).
139. Großer Generalstab (1906): 214 ("*Die Hereros hatten aufgehört, ein selbständiger Volksstamm zu sein*.").
140. This was one clear result of the project *Remembering for the Future Project* conducted in 2003. *Remembering for the Future* was a project of CASS of the University of Namibia and the Centre for African Studies and Migration of the University of Bremen, executed by Manfred Hinz and Thomas Gatter of the Bremen Africa Archive. Its purpose was, in preparation of the centenary of 1904, to investigate to what extent the events of the German Herero war were still in the minds of the people. The interviews are on file with Manfred Hinz.

first concern in their desire to reach settlement of the unsettled case has been about *dignity*: *Dignity* was lost in and after the German Herero war and not regained up to today.[141]

62. Given the delay in achieving any result to come to turn about what happened in Namibia during German colonialism, members of the Ovaherero and of other affected communities eventually decided to take their complaints to court in the USA in 2001.[142]

63. The genocide case has occupied several courts of the USA. So far none of the cases were successful.[143] In the last decision of a first round of claims, supported by Paramount Chief Kuaima Riruako, the Herero People's Reparations Corporation and many individuals and directed against *Deutsche Bank* and *Woermann Line* as companies involved in Namibia during German colonial times, the court held in its conclusion:[144]

> [W]hile we recognize the gravity of the offense described by the appellants, [the Ovaherero who started the law suit] adjudication of such a claim would at least theoretically open the door to claims by countless aggrieved groups for human rights violations occurring anywhere in the world at any point in the vast expanse of recorded human history.

64. The second round of claims was initiated by the successor to Riruako, Paramount Chief Rukoro, Chief David Frederick, Chief of the !Aman Nama and chairman of the Nama Traditional Authorities Association, the Association of the Ovaherero Genocide in the USA and Barnabas Katuuo as an individual and officer of the last-mentioned organization. The claim was directed against the state of Germany. Therefore, the main matter the court had to look at was whether the case was admissible under the *Foreign Sovereign Immunities Act* of the USA.[145] In arguing the admissibility, the claimants referred to the abuse of human bodies for alleged medical purposes and the taking of estimated 300 Namibian skulls to Germany of which parts ended in the American Museum of Natural History.[146] Although the

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141. *Loss of dignity* in the 1904 war and afterwards was a repeated statement in interviews conducted for the *Remembering for the future* project in 2003.
142. The text of the claim is accessible in English in: Befunde und Berichte zur Deutschen Kolonialgeschichte 2,4 (2002): 4ff. This publication also contains comments on the claim by the Ovaherero, among them first reflections by: Hinz (2002b).
143. *See* the decisions *Herero People's Reparation Corporation v. Deutsche Bank*, USA Court of Appeal, District of Columbia Circuit of 11 Jun. 2004, Case No. 370 F.3d 1192 (D.C. Cir. 2004); *Hereros v. Deutsche Afrika-Linien*, USA Court of Appeals for the Third Circuit of 12 Dec. 2007, Case No. 06-1684 and *Rukoro v. Federal Republic of Germany*, United States of America District Court, Southern District of New York of 6 Mar. 2019, Case No. 17 CV 62-LTS.
144. *Hereros v. Deutsche Afrika-Linien, ibid.*: 11.
145. §§ 1330ff. and 1602ff. 28 U.S. Code Chapter 97.
146. Summary of the complaint, submitted by the attorneys of the complainants to the United States District Court, Southern District of New York of 5 Jan. 2019: 13f. (Document No. Civ. No. 17-0062) is electronically retrievable (accessed 15 Feb. 2021) and *Rukoro v. Federal Republic of Germany*:

judge of the court had obviously sympathy for the case before it – the judge introduced one part of the decision by saying "… strong moral claims are not easily converted into successful legal action" – the claim was dismissed as not allowed under the *Immunities Act*.[147]

65. The appeal of the decision did not alter the result of the court of the first instance. Although the court of appeal did not follow the court a quo in all its arguments, the court dismissed the appeal as not permitted under the *Foreign Sovereign Immunities Act*.[148] The court concluded that the[149]

> terrible wrongs elucidated in Plaintiffs' complaint must be addressed through a vehicle other than the U.S. court system.

66. The lawsuit prompted legal discussions beyond the specific concerns the courts were focusing on.[150] One of the questions was to what extent the genocide law, the *Genocide Convention* or principles thereof could be applied to occurrences that took place long before the coming into force of the Convention, since the Convention on genocide sets norms of punishment with which individual perpetrators can be prosecuted under criminal law. In answering this question, the principle of *nulla poena sine lege* (no punishment without law) was referred to[151] and it was explored whether the *Genocide Convention* did not do more than to make acts explicitly liable to prosecution, which had been internationally recognized wrongs before the Convention. And: would the rule that the crime of genocide is not subject to the statute of limitation also influence the claim for compensation, which is based on an unlimited crime but is a claim of private law? How would a court of law decide about who would be entitled to receive what: individual Ovaherero descendants of victims, the Herero nation, and if so, who would be the legitimate representative of the Herero nation: the Namibian government as successor of the independent communities at the time of the war?

67. The second round of the lawsuit added further topics to the list of problems. The claim noted the ongoing negotiations between Germany and Namibia and, by doing this, the concern of the claimants of not being officially included in the negotiations. In this respect, the submission of the claimants counted on the *Declaration on the Rights of Indigenous Peoples* of the United Nations.[152] Article 18 of the

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10f. – According to §1605(a)(2) of the act, a foreign state does not enjoy immunity when the claim is based on a commercial activity with direct effect in the United States.

147. At 2 and 23 of the last judgement quoted in the previous footnote.

148. *Rukoro v. Federal Republic of Germany*, judgement of the United States Court of Appeals for the Second Circuit of 24 Sep. 2020, Case No. 19-609-cv – unreported.

149. *Ibid.:* 23.

150. *See* here literature referred to in: Hinz (2021) and from it in particular: Kämmerer; Föh (2004); and Anderson (2005).

151. The possible retroactive application of the law on crimes against humanity has been raised already with respect to the genocide against the Armenians in Turkey. Cf.: Dana (2008–2009).

152. Cf.: UN GA A/Res/61/295 and Summary of the complaint, submitted by the attorneys of the complainants to the United States District Court, Southern District of New York of 5 Jan. 2019: 5.

Declaration is of particular interest, as it gives indigenous peoples the right "to participate in decision-making in matters which affect their rights". As the court concluded the case on procedural reasons, it did not consider whether the claiming Ovaherero and Nama communities were indigenous in the sense of the Declaration[153] and, thus, entitled to rights under the *Declaration* and, if yes, to whom those rights were addressed to, to Germany as the summary of the complaint argues or to Namibia, the state to which the communities belong.[154]

68. So far and noting the judgements handed down by the courts in the USA, it is rather unlikely that a court would see legal grounds to positively consider a lawsuit on the genocide during German colonialism.[155] However, the fact that the case of genocide was taken to court has certainly contributed to the general awareness that there is still an unresolved matter for which the colonial occupier: Germany has responsibility and, therefore, political attention is required.

69. The centenary of the battle of Ohamakari marked the peak of many efforts to commemorate what happened in colonial times in Namibia in the run-up to the battle, during the battle itself and in its aftermath. In June 2004, the German Parliament adopted a resolution titled "Remembering the victims of the colonial war in the then German South West Africa".[156] This resolution refrained from any reference to genocide as well as to any apology, thus following the then accepted policy according to which any "compensation-relevant statement" had to be avoided.[157]

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153. *See* here on indigenous peoples in Namibia: Human Rights Council (2013): 4f.; Ombudsman of Namibia (2014): 8f.
154. Jaspert (2019) comments on the issue of participation in the negotiation between Germany and Namibia by calling on the *Resolution of the European Parliament on Fundamental Rights of People of African Decent* (P8_TA (2019)0239), which encourages the European Union and its members to "officially acknowledge and mark the histories of people of African descent in Europe, including of past and ongoing injustices and crimes against humanity, such as … those committed under European colonialism". (Point 5 of the Resolutions) In view of this, Jaspert holds that Germany "might at least consider to open the reconciliation negotiations with Namibia". As much as the quoted resolution of the European Parliament is a challenge to European politics, the negotiation between Germany and Namibia are a result of a bilateral agreements between sovereign states, which prevents the parties from making unilateral decisions. The only option Germany has is to submit to Namibia that societally accepted reconciliation should include the broadest possible societal participation. Cf. to this the background note for a meeting between representatives of SWAPO of Namibia and the German Social Democrats: Hinz (2015b): at 23.
155. *See* here also: Eicker (2009): 478ff., who, after analysing the case of the Ovaherero under the law of the USA, considers the chances of a case of the Ovaherero under German law and finds that such a case would, in all probability, not produce substantially different results. Paech (2004) refers to the cases about compensation for atrocities committed by Germany in Greece during World War II, which did not lead to decisions that responded positively to the plea of victims. Paech ends his note (*Ibid.*: 24f.) by stating – and with this, appealing to politics – that cases, such as the Greek cases, the case of the Ovaherero and others are primarily not being pursued because of money but to get recognition for the injustice committed against the victims. According to The Namibian of 19 Nov. 2021, the Ovaherero Traditional Authority and the Nama Traditional Leaders Association submitted a complaint in the genocide case to the Human Rights Council against Germany.
156. Resolution of 17 Jun. 2004, Deutscher Bundestag, 15. Wahlperiode, 114. Sitzung.
157. The phrase "*entschädigungsrelevante Stellungnahme*" was coined by the then German Foreign Minister Joschka Fischer. Cf.: Die Zeit – German weekly newspaper – of 5 Aug. 2004).

70. When the information was circulated that the German Government would be represented at the centenary commemoration of 1904 to be held in Okakarara on 14 August 2004 by the German Minister of Economic Cooperation and Development, Heidemarie Wieczorek-Zeul, many people anxiously awaited what the minister would say. Would she just repeat what the German Parliament had stated in its 2004 resolution, or would she go beyond the limits set by the German Foreign Ministry? The minister did the latter: she said that what had happened then would qualify as genocide if it happened today. Referring to the words in the Lord's Prayer, she asked for forgiveness.[158] When participants in the gathering called out to the minister, asking whether this was meant to be an apology, the minister added to her plea for forgiveness:[159]

> Everything I said was an apology for the crimes committed by German troops.

71. The apology by Germany certainly closed one chapter of the history that Namibia and Germany share, but others remained unresolved. Theo-Ben Gurirab, then Prime Minister of Namibia, spoke to the Namibian parliament on 17 August 2004.[160] He noted that Germany had taken 100 years to say words for which Namibians had been waiting for and which were of importance for the recognition of the dignity. Gurirab called on all Namibians to accept the German apology. At the same time, he also expressed concern that the confession of guilt did not solve a number of "unanswered questions", which would require "constructive exchange".

72. One promising attempt of constructive exchange was realized with the international conference "The German Herero War – One Hundred Years After 1904–2004: Realities, Traumas Perspectives", which was held in the city hall of Bremen in November 2004.[161] The conference was jointly organized by the law faculties of the Universities of Namibia and Bremen. The President of the senate of Bremen, Mayor *Henning Scherf*, acted as the patron of the conference.

73. The conference was attended by high-ranking officials of the Namibian and German governments, Namibian traditional leaders, representatives of the Namibian genocide commemoration committees, bishops of churches, a representative of the German-speaking community in Namibia and delegates of civil society organizations.

74. The conference took note of suggestions and proposals submitted so far to consider for healing the wounds of the past. The main result of the conference was

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158. Wieczorek-Zeul (2007): 47.
159. *Ibid.*: 49.
160. Allgemeine Zeitung of 18 Aug. 2004.
161. Cf. here and to the following: Document (2004) as well as Hinz (2004) and (2021b). – In 2004 and the years after, a range of meetings and international conferences focusing on the genocide committed during German colonialism were held. The Bremen conference is mentioned in some detail, as it was in particular with respect to its relationship to Bremen, from which colonialism in Namibia started, but also in view of its politically broad participation.

to express its trust that the dialogue for which the conference stood would result in a formal follow-up structure in Germany and in Namibia.[162] Part of the conclusion of the conference was also the announcement by the Government of Bremen to erect a site to honour the victims of the 1904–1907 wars in Namibia.[163] It took until 2009 to translate this announcement into practice: on 11 August 2009, the memorial for the victims of the genocide was inaugurated.[164] The monument is unique: it is the only of this kind in Germany. It stands close to the famous brick elephant, which was originally meant to symbolize the nationalist call to regain the colonies lost by Germany after World War I and which was rededicated to mark anti-colonialism.[165]

75. What has become known as the German Namibian Special Initiative was another attempt to contribute to constructive exchange. The Special Initiative has offered an amount of EUR 31 million for projects in areas of communities that were particularly affected by acts of the German colonial government.[166] The Special Initiative was initiated by Wieczorek-Zeul in 2005. Wieczorek-Zeul called the initiative "initiative for reconciliation" (*Versöhnungsinitiative);* the fund to be established by her ministry was named "fund for reconciliation" *(Versöhnungsfonds*). Wieczorek-Zeul also suggested that a panel on reconciliation would be in the centre of the reconciliation initiative with members of the Namibian civil society – Wieczorek-Zeul referred explicitly to members of the Ovaherero, Damara, and Nama, but also to the Namibian churches, other non-governmental organizations including the German-speaking part of the Namibian population should be represented.[167] The language of *Versöhnungsfonds* used by Wieczoek-Zeul, however, disappeared when the initiative was put into practice.

76. In Namibia, the Special Initiative met with controversial reactions. While additional development aid by Germany was appreciated, it was, nevertheless, also emphasized that this offer was not what was demanded by the Ovaherero and others who had suffered under colonialism. The then deputy-prime minister Libertine Amathila was assigned the task of collecting suggestions from the various communities to be addressed by the special initiative. She reports on her experience with this task in her autobiography. Concluding her experience, Amathila writes:[168]

> The affected groups felt that this allocation of money did not come out of genuine concern, but was meant to avoid Namibian demands that the German Government pay reparations like those they have paid to Israelis after the Second World War. The Hereros in particular were furious with the Special Initiative and saw it as a ploy by the German Government to avoid talks about reparations.

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162. Document (2004): 3f.
163. *Ibid.*
164. Gatter (2011): 53ff. and Baum (2022).
165. The elephant was turned into an anti-colonial monument in 1990 and received, in presence of the first President of Namibia Sam Nujoma, an additional plate to commemorate the victims of German colonialism in Namibia in 1996. *See* here: Hilliges, Hinz (2013):12ff., 28f. and Baum (2022).
166. Cf.: Katjavivi (2014): 160.
167. Wieczorek-Zeul (2005): 3f.
168. Libertine Amathila (2012): 189.

77. In 2006, the National Assembly of Namibia debated and adopted a motion on the genocide on the Namibian people put forward by the late Paramount Chief Riruako.[169] The intention of the motion was to provide the background for the demand for reparations. Riruako:[170]

> Forgiveness we can give, but how are they going to go about endorsing the forgiveness? That is the query. Without a conscious process of remaining without sorrow, there can be no true reconciliation.

For Riruako, Germany's Special Initiative is "one-sided". As he put it,[171]

> the Namibians have accepted Germany's apology and they are now calling upon Germany to sit around the table with them and work out the future together. This is our demand.

The demand to sit around the table would include all the descendants of those who suffered under colonial colonialism – not only the Ovaherero.

78. Traditional leaders of the concerned communities submitted their wish to participate in a "discussion forum" – one that comprised members of parliament from each of the political parties in Germany and Namibia but would also include representatives of the affected communities in Namibia. The genocide would be the main issue of the discussion group, including the claim for reparation, "which is inseparable from genocide".[172]

79. It was eventually only in 2015 that a German governmental press conference confirmed that it was now the understanding of the Ministry of Foreign Affairs that what happened in Namibia in 1904 and the years after was, indeed, genocide.[173] The statement explicitly refers to discussions of the German Minister for Foreign Affairs who had talks with his Namibian counterpart on the matter more than one year ago resulting in the agreement to start a political process.[174]

80. Zed Ngavirue, a former diplomat appointed for the Namibian side, and Ruprecht Polenz, a former member of the German parliament were mandated to

169. *See*: Debates of the National Assembly of the Republic of Namibia, 18 and 26 Oct. 2006. The motion and its justification can be found in the debates of 19 Sep. 2006: 32–42.
170. *Ibid.*: 40.
171. *Ibid.*: 41.
172. So reported in: New Era of 18 Jun. 2012.
173. Bundespressekonferenz (Federal government press conference) of 10 Jul. 2015, https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/regierungspressekonferenz-vom-10-juli-847582 (accessed 20 Jun. 2022).
174. Cf. here: Allgemeine Zeitung of 5 Nov. 2015.

negotiate an agreement to settle the genocide case. Several rounds of discussion were conducted and a *Joint Declaration* was finally achieved and confirmed by the government of Namibia in June 2021.[175]

81. In this agreement, the German government, after summarizing of what happened in and after the war of 1904[176]

> acknowledges that the abominable atrocities committed during periods of the colonial war culminated in events that, from today's perspective would be called genocide.

And[177]

> [o]n the basis of this acknowledgment, the German Government recognizes Germany's moral responsibility for the colonization of Namibia and for the historic developments that led to the genocidal conditions between 1904 and 1908, … . On the same basis, Germany accepts a moral, historical and political obligation to tender an apology for this genocide and subsequently provide the necessary means for reconciliation and reconstruction.

82. Therefore, the two governments have agreed to set up a "separate and unique reconstruction and development support programme" in which the representatives of the communities concerned are expected to participate.[178] For this, Germany will pay an amount of EUR 1.1 million over a period of thirty years.[179] A bi-national commission will be established as a "forward looking and lasting political framework for the consolidation of this special relationship between Germany and Namibia".[180]

83. The manner in which the negotiations were conducted has been criticized in Namibia. The main claim is that certain concerned communities were not represented in the negotiations. While some communities, the communities cooperating in the Ovaherero / Ovambanderu and Nama Council for Dialogue on the 1904–1908 Genocide formed a consultative body to the Cabinet Technical Committee of the Cabinet Political Committee on Genocide, Apology and Reparations (which was to

175. The Joint Declaration by the Federal Republic of Germany and the Republic of Namibia is published in Namibia Magazin 2021 (2): 10f. For the confirmation of the Namibian government *see*: The Presidency, Media release of 4 Jun. 2021, Windhoek.
176. At 10 of the Joint Declaration.
177. *Ibid.:* at 11.
178. At 16.
179. At 18.
180. At 21.

advise the Namibian representative in the negotiation team) other concerned communities belonging to the Nama Traditional Leaders Association[181] and the Ovaherero Traditional Authority were not part of the set up of the negotiation process.[182]

84. The critical comments that have accompanied the years of negotiations between Germany and Namibia were repeated after information about the completed negotiations between Germany and Namibia were published.[183] What is interesting to note is that some traditional communities which were part of the communication structure initiated by the government of Namibia have joined the side of the critics.[184]

85. The media report released from the office of the president of Namibia after the agreement was completed[185] joins the critical voices by recognizing that the amount to be paid to Namibia is "not enough".[186] In so far, the office of the presidency appreciates the fact that Germany has agreed to revisit and renegotiate the amount, as the implementation of reparations ensues.[187] At the time of closing the manuscript of this text, the *Joint Declaration* is not in force.[188]

86. Apart from the negotiations about the German genocide in Namibia, the dialogue to achieve reconciliation was accompanied by the return of cultural artefacts and by the repatriation of remains of Namibians taken to Germany.[189] Some letters by Hendrik Witbooi, sold to the Overseas Museum of Bremen in 1934, were given back to Namibia in 1996. The Bible of Witbooi and a whip of him, kept at the Lindenmuseum of Stuttgart was returned to Namibia in 2019.[190] In the case of the Bible and the whip, the Nama Traditional Leaders Association tried to prevent the return to the Namibian government expecting the family of Witbooi to receive the items. The competent regional Constitutional Court in Germany declined the claim for procedural reason.[191] Remains of Namibians were returned to Namibia on three

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181. For which some of the Nama-speaking chiefs stand, *see* open letter by: S. Luipert, Deputy Chairperson of Nama Genocide Technical Committee to President of Namibia from December 2018, on file with the authors.
182. *See* on this: The Namibian of 27 Mar. 2017, 2 Feb. 2018, and 30 Apr. 2019, further various contributions in: Hackmack; Keller (2019) and also Melber (2020).
183. Cf. e.g.: The Namibian of 27, 28, 31 May 2021, but also the critical remarks by Grünhagen (Namibia Magazin 2021(2): 15f.).
184. *See*: The Namibian of 31 May 2021.
185. Quoted above.
186. Mind the use of "reparation"! The presidential statement refers to the agreed payment as "Reparation Package".
187. Presidency, Media release of 4 Jun. 2021, Windhoek: 8f.
188. The Joint Declaration is still before the National Assembly. Recently (*see*: The Namibian of 8 Apr. 2022), the legal opinion was stated that the matters of the Joint Declaration should not be left to "political fiat or policy alone", but "be implemented through legislation".
189. However, it must be noted that returns are not only due from Germany, *see* here on the return of sacred stones from Finland: Silvester; Shiweda (2020).
190. Gustafsson (2003): 520ff.; *see also* report at: https.://www.baden-wuerttemberg.de/de/service/presse/pressemitteilung (accessed 28 Jul. 2020).
191. *Nama Traditional Leaders Association v. Baden-Württemberg*, Constitutional Court of Baden-Württemberg (*Verfassungsgerichtshof für das Land Baden-Württemberg*), 1 VB 14/19.

occasions, in 2011, 2014, and 2018.[192] The last event was of special political importance with the German state-minister for Foreign Affairs accompanying the remains from Germany to Namibia after ceremonial acts in Berlin. It is expected that more remains will be identified as Namibian and returned to Namibia.[193]

§5. Namibia under South African Rule, the United Nations Resuming Responsibility for the Territory, United Nations Security Council Resolution 435 of 1978 and "Internal Solutions"

87. After the *Treaty of Khorab*, Namibia was placed under South African military rule for some years. Law enacted by Germany remained in place unless repealed. The *Treaty of Versailles* formally ended the German rule over its colonies. *The Covenant of the League of Nations* introduced a mandate system for the colonies. Article 22 of the *Covenant* stipulated:

> 1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
> 2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.
> 3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.
>
> …
>
> 6. There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

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192. Dritte Rückgabe von Gebeinen aus der Kolonialzeit – eine bedeutungsvolle Tagesreise nach Namibia. https://www.auswaertiges-amt.de/de/aussenpolitik/laender/namibia-node/muentefering-windhuk/2134368 (accessed 18 Jul. 2022); *see also*: Kössler (2015): 273ff.; Garsha (2020) and Ziegenfuß; Rücker (2018).

193. *See*, *e.g.* the decision of the government of Bremen to return two skulls to Namibia: https://www.senatspressestelle.bremen.de/pressemitteilungen/rueckgabe-menschlicher-ueberreste-an-namibia-aus-der-sammlung-des-uebersee-museums-bremen-300211 (accessed 10 Jun. 2022).

7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

…

9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

88. Article 23 specified the obligations under the systems of mandates by stating:

> Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:
>
> (a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;
> (b) undertake to secure just treatment of the native inhabitants of territories under their control;
>
> …

89. Namibia became a C-mandate in accordance with Sub-Article 6 of Article 22 of the *Covenant of the League of Nations* and was entrusted as such to the Union of South Africa. The United Kingdom accepted the mandate on behalf of the Union of South Africa as confirmed by the League of Nation in its Resolution of 17 December 1920.[194] The parliament of South Africa passed the *Treaty of Peace and South West Africa Mandate Act* in 1919,[195] by which the international agreement on the mandate was transformed into the law of South Africa. South Africa's military rule over Namibia ended in 1921 with the *Indemnity and Withdrawal of Martial Law Proclamation* of 1920.[196]

90. German officials, police, members of the army and their families were deported to Germany. However, almost 8,000 Germans remained in Namibia.[197] The *Landesrat* and the district councils were dissolved.[198] Roman-Dutch law, as it was applied in South Africa, was made the law of Namibia with effect from

194. *See* the text of the Resolution in: Silagi (1977): 148ff.
195. Act No. 49 of 1919. The concept of the mandate in general and the mandate over Namibia led to many publications, cf. here: Abendroth (1936); Freiherr von Freytagh-Loringhoven (1938); Dugard (1973); Cockram (1976); Silagi (1977); Gill (1984); Dore (1985) and was also discussed in court cases.
196. No. 76 of 1920.
197. *See*: du Pisani (1986): 52.
198. By the Protectorate and District Councils Abolition Proclamation, 1920 (Proclamation No. 74 of 1920).

1 January 1920.[199] Magistrates' Courts and a High Court were introduced.[200] South Africa appointed an administrator for the territory. The administrator was accountable only to the government of South Africa. An advisory council was established in which first seven and later nine representatives of the white population in Namibia served. In 1925, the *South West Africa Constitution Act*[201] provided for some self-administration of the white population. The Act introduced a legislative assembly with competencies for education, health and public works.

91. The land policy of South Africa and the policy towards the black majority of the territory followed what was begun under German colonialism. This meant, in particular, that the northern parts of the territory were left to indirect rule. The *Ovamboland Affairs Proclamation* of 1929 made this part of Namibia a "native reserve";[202] the *Okavango Native Territory Proclamation* of 1937 did the same for the Kavango area.[203] Native Commissioners represented the South African Government in these reserves. In central and southern Namibia, the *Native Trust Funds Proclamation* of 1939 regulated matters concerning the Ovaherero, Damara and Nama.[204] New reserves were set up. By 1939, seventeen reserves were established. Municipalities had locations (suburbs) in which blacks, mainly the labourers needed in towns, were concentrated under the control of the municipalities.[205]

92. The obligation under the mandate did not prevent South Africa to pursue its intention to incorporate the territory into the territory of South Africa. South West Africa was understood to become the fifth province of the country.[206] Nevertheless, the government of South Africa was reluctant to translate the annexation into law during the existence of the League of Nations. It was only after World War II that South Africa approached the successor to the League, the United Nations, to accept the making of South West Africa fully part of the country. The General Assembly of the United Nations rejected the application of South Africa in 1947.[207] In consequence of this, South Africa informed the United Nations that it would cease submitting reports on the situation of the territory, as it was required under the rules of the United Nations.[208] The South African Prime Minister announced to the parliament of South Africa that he saw the mandate of South Africa over South West Africa terminated.[209]

93. In 1948 the National Party became the ruling party of South Africa and, with this, the driving force to reshape the political landscape in accordance with its policy

199. Administration of Justice Proclamation, 1919 (Proclamation No. 21 of 1919).
200. *See* on this: Amoo (2008): 175ff.
201. Act No. 42 of 1925.
202. Proclamation No. 27 of 1929.
203. Proclamation No. 32 of 1937.
204. Proclamation No. 23 of 1939.
205. du Pisani (1986): 62. *See also*: Native Administration Proclamation, 1928 (Proclamation No. 15 of 1928).
206. Cf.: du Pisani (1986): 52ff.
207. UN GA Res. 65 (I) of December 1946.
208. Article 73 (e) of the Charta of the United Nations.
209. Cf.: Moleah (1983): 33.

of apartheid.[210] The *South West Africa Affairs Amendment Act* of 1949[211] extended the status of South African citizens to all whites of Namibia. The white part of the Namibian population was given the right to elect six members to the South African House of Assembly and four to the Senate of South Africa. The National Party campaigned in Namibia opposing the position of the United Nations with respect to Namibia: *Ons sal nie buk nie* (we will not bend down) was its political slogan.[212] The National Party won all the six Namibian seats. In the still existing legislative assembly of the territory, the National Party gained fifteen of eighteen seats.[213]

94. The victory of the National Party opened the gate for the South African policy of what was called the policy of separate development.[214] A Commission of Enquiry into South West Africa Affairs, generally referred to as Odendaal Commission – F. H. Odendaal presided over the Commission – was appointed to suggest proposals on the "developments" of the non-whites and the areas of the various population groups. The Odendaal Commission submitted its report in 1964.[215] The Commission grouped the non-white population into ethnical clusters and recommended the establishment of "homelands". The coloured population was treated in a special way. It was to be given residential rights townships in Windhoek, Walvis Bay and Lüderitzbucht, but also a settlement area at the Orange River. The Odendaal Plan was only implemented as from 1968. The *Development of Self-Government for Native Nations in South West Africa Act* of 1968 allowed the creation of "autonomous homelands".[216] The concentration of the non-white population in the recommended homelands led to a far-reaching process of resettlement. The people in central and southern Namibia suffered most from this.[217] Owamboland, Damaraland, Hereroland, Kaokoveld, Kavangoland, and Eastern Caprivi received the status of "native nations". An amendment act to the mentioned act of 1968 enacted in 1973 gave the possibility to declare homelands to "self-governing homelands".[218] The white only Legislative Assembly of South West Africa was turned into a provincial council by the *South West Africa Affairs Act* of 1969.[219]

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210. Cf.: *ibid.*: 33f. About Namibia under South African rule, the emergence of resistance against the rule of South Africa and the role and function of the United Nations, *see*: SWAPO of Namibia (1981): 57ff.; Moleah (1983): 27ff.; Rocha (1984); du Pisani (1986); Katjavivi (1988); Weiland; Braham (1994); Hayes; Silvester; Hartmann (1998); Leys; Saul (1995); Ngavirue (1997); Dobell (1998); O'Linn (2009); Wallace (2011): 205ff.
211. Act No. 23 of 1949.
212. Moleah (1983):34.
213. *Ibid.*
214. To this and the following: Moleah (1983): 35ff.
215. Republic of South Africa (1964).
216. Act No. 54 of 1968; *see also*: South West Africa Native Affairs Administration Act, 1054 (Act No. 56 of 1954).
217. Cf.: Hubrich; Melber (1977): 90f.
218. Amendment to the Development of Self-Government for Native Nations in South West Africa Act, 1973 (Act No. 20 of 1973).
219. Act No. 25 of 1969. *See also*: South West Africa Constitution Act, 1968 (Act No. 39 of 1968).

95. The new structure implemented in pursuance of the Odendaal Plan remained basically in place until 1990. What began in 1948 under the political cover of separate development was noted internationally with concern and eventually led to changes that affected the constitutional order of the country. In 1966 the General Assembly of the United Nations declared the "continued presence of South Africa in South West Africa … a clear violation of the territorial integrity of the international status" of the country.[220] The international reaction was also a response to the growing resistance against the rule of South Africa, which culminated in the refusal of blacks to move from what is known as the Old Location of Windhoek to the new township Katutura[221] in December 1959. Katutura, today integral part of Windhoek and subdivided in several administrative areas, was meant to be a settlement outside of Windhoek. The only road that linked Katutura with Windhoek could also easily be closed to protect the white settlement against feared attacks of the blacks.

96. SWAPO – the South West Africa People's Organization: the liberation movement and after independence the ruling party – was created in March 1960.[222] SWAPO, emerged out of earlier political movements with Sam Shafiishuna Nujoma as its President. Nujoma left Namibia in 1960 for New York to petition the United Nations. On 26 August 1966, SWAPO started its armed struggle against the rule of South Africa in Namibia.[223]

97. The concept of mandate occupied international politics as well as international and national courts: the International Court of Justice (ICJ) rendered several decisions on Namibia.[224] In 1960, Ethiopia and Liberia approached the ICJ for a judgement to confirm the obligation of South Africa under international law as the mandatory power over the country. The ICJ decided in 1962 that it had jurisdiction to consider the matter brought before it,[225] but, in its final judgement of 1966, avoided to deal with the merits of the case by denying the legal standing of the applicants.[226]

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220. UN GA Res. 2424 (XXI).
221. Katutura is Otjiherero and means: where we don't want to stay.
222. SWAPO (1981): 174ff., 176ff.
223. The first military encounter with the South African forces happened on 26 Aug. 1966 at OmulgulugOmabashe in Owamboland. Cf. about this: Dierks (2003): 271 and also: Nujoma (2001): 162ff. – The complex historical process that finally led to SWAPO as the main force of resistance against the occupation by South Africa and also the SWAPO-internal decision to take up arms against the occupier of the country is beyond the scope of this publication.
224. The first decision of the ICJ came out in 1950 (*International Status of South-West Africa*, Advisory Opinion, I.C.J. Reports 1950: 128) and was followed by advisory opinions in 1955 and 1956 (*South-West Africa – Voting Procedure*, Advisory Opinion, I.C.J. Reports 1955: 67 and *Admissibility of hearings of petitioners by the Committee on South-West Africa*, Advisory Opinion, I.C.J. Reports 1956: 23).
225. *Ethiopia; Liberia v. South Africa*, I.C.J. Reports, 1962: 319.
226. *South-West Africa, Second Phase*, I.C.J. Reports, 1966: 6 – This judgement received many critical comments, *see* on this: Hidayatullah (1967); Bernhardt (1973): 13ff. but also: Nujoma (2001): 143ff. - Dugard called the decision of the ICJ of 1966 the "most controversial judgment" in the history of the ICJ (Dugard 1973: 239ff. (292)).

98. The most important decision of the ICJ – its advisory opinion of June 1971 requested by the Security Council of the United Nations[227] – was given after the General Assembly of the United Nations terminated the mandate of South Africa over South West Africa, and, as a consequence, took over the direct responsibility for the territory.[228] In 1971, the ICJ submitted its advisory opinion confirming the position of the United Nations that the mandate over Namibia was correctly repealed by the United Nations, thus rendering the continued presence of South Africa illegal.[229]

99. The courts of South Africa and Namibia dealt with the legal nature of the mandate three times.[230] The three decisions supported the policy of South Africa to act in the mandated territory, as if it was part of South Africa. The first case, a case against the chief of the Bondelswart Nama of South Namibia and others, was decided in 1924, the second, decided in 1969, was the case of treason trial of SWAPO activists and the third, decided in 1984, the case of a Namibian who resisted military service in the South African forces.

100. Chief Christian and other participants of a rebellion against the South Africans were charged for high treason (*crimen laesae majestatis* in terms of the applicable Roman-Dutch common law). The question arose whether South Africa as the mandatory authority had *majestas* over South West Africa and its inhabitants. The court recognized, on the one side, that Article 22 of the *Covenant of the League of Nations* meant a limitation of the authority, but, nevertheless, held, on the other, that the law of the mandate failed to draw a clear line between the competencies of the recipient of the mandate and the League of Nations, leading the court to say that the delegated authority was sufficient for *majestas* and the application of the crime of high treason.[231]

101. After SWAPO had launched the armed struggle against South Africa's rule over Namibia, some SWAPO activists were arrested by South Africa.[232] South Africa enacted its *Terrorism Act* in 1967,[233] which permitted unlimited detention without access to a lawyer and also contained a definition of a terrorist act that allowed subsuming under this all sorts of undesired political activities. Above all, the *Terrorism Act* was retroactively applied. The court to which the case of arrest was submitted followed basically the Christian case and confirmed that the law transferring the mandate into the law of South Africa did not contain any hint on

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227. UN SC Res. 284 (1970).
228. UN GA Res. 2145 (XXI) of 1966. On this and the following: Hinz (1988b); (1988c); (1991/92) and (1992).
229. *Legal consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports, 1971: 16.
230. *See* to this and the following: Hinz (1988a): 174ff.
231. *Rex v. Christian* 1924 SA 101 (AD): 112f.
232. Among them Andimba Toivo ya Toivo, the grand old man of SWAPO who served after his release from Robben Island as SWAPO Secretary-General and was also minister after independence. He died in 2017.
233. Act No. 83 of 1967.

the limitation in executing authority under the mandate. The fact that the United Nations had by then withdrawn the mandate was not considered by the court.[234]

102. The court of the *Binga* case, – Binga had refused military service in the South African army – again followed the decisions of the two previous cases. With respect to the withdrawal of the mandate, the court was of the opinion that the mandate was still in force, as South Africa had not consented to the withdrawal.[235]

103. The three mentioned decisions were certainly politically motivated and are, therefore, questionable with respect to their interpretation of the authority under the mandate.

104. The termination of the South African mandate over Namibia by the United Nations marked the beginning of a new era in the political and constitutional history of Namibia. The terminating resolution reflected the spirit of change in the international political climate discernible since the early sixties. Numerous African countries had gained independence by 1960. They became the advocates of decolonization and, in particular, the abolition of apartheid in Southern Africa. The bloody Sharpeville clashes in 1960 in South Africa resulted in the Security Council passing a resolution,[236] which determined that the situation in South Africa had led to international tensions, which could jeopardize international peace and security. This resolution heralded a policy characterized by the growing conviction that South Africa could only be induced to depart from its apartheid policy by exercising pressure on the country.[237]

105. In 1967, the General Assembly of the United Nations established the United Nations Council for Namibia with the United Nations Commissioner for Namibia as its executive authority.[238] The council was meant to be responsible for the administration of the territory, the introduction of measures to facilitate the establishment of a Constituent Assembly, and the maintenance of law and order.

106. The Resolutions 2403 (XXIII) of December 1968 and 2871 (XXVI) of December 1971 of the General Assembly of the United Nations emphasized the right to self-determination of the people of Namibia and explicitly included the legitimacy of the struggle for this right by "all means". The General Assembly of the United Nations took this position a step further in 1976 by declaring SWAPO of Namibia to be the "sole and authentic representative of the Namibian people".[239]

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234. *S v. Tuhadeleni and Others* 1969 (1) SA 153: 171f. (AD).
235. *Binga v. Administrator-General* 1984 (3) SA 949: 961ff. (SWA).
236. UN SC Res. 34 (1960).
237. UN SC Res. 34 (1960) already emphasizes prerequisites required for the imposition of binding coercive measures in terms of Chapter VIII of the Charter of the United Nations.
238. UN GA Res. 2248 (S-V) (1967).
239. Cf.: UN GA Res. 3111 (XXVIII) of 12 Dec. 1976 and 31/146 of 20 Dec. 1976.

107. The Security Council of the United Nations in Resolution 264 (1969) recognized the repeal of the mandate by the General Assembly and declared the continued presence of South Africa in Namibia illegal. At the same time, the Security Council confirmed the legitimacy of the struggle of the Namibian people against the occupation of the territory by South Africa. The Security Council requested all states in its Resolution 276 (1970), especially those who maintained economic and other links with South Africa, to break all ties with the country if these had any bearing on the illegal occupation of Namibia. Resolution 283 (1970) of the Security Council extended the scope of the previously mentioned resolution by calling upon all states to induce public organizations to act accordingly. The council set out guidelines on how to implement this call in its Resolution 301 (1971). In doing so, the council could draw on the findings of the already mentioned decision of the ICJ of 1971.[240] Both, the ICJ and the Security Council of the United Nations concluded that all Member States of the United Nations were obliged to recognize the illegality of the presence of South Africa in Namibia. All states were compelled to accept the invalidity of measures of South Africa regarding Namibia. The Member States of the United Nations were also expected to abolish everything that would support the occupation of Namibia by South Africa. The Security Council of the United Nations emphasized the direct responsibility of the United Nations for Namibia and the right to self-determination of the people of Namibia. The Security Council instructed the Secretary-General of the United Nations to negotiate the conditions for the realization of the right to self-determination with all parties concerned.[241]

108. From the very beginning, South Africa refused to cooperate with the Council for Namibia and, in particular, to cede any function for which it used to be responsible in the territory, to the council. As a result, the activities of the council were mainly restricted to the following fields: representing Namibia in various international organizations (ILO, FAO, UNESCO), issuing travel documents and coordinating a multifaceted programme aimed at preparing Namibia for its independence: the Nationhood Programme.[242] The Council for Namibia exercised its administrative, or better: legislative power, namely by issuing its *Decree No. 1 for the Protection of the Natural Resources of Namibia*.[243] This decree made it illegal to exploit the natural resources of Namibia. The decree provoked a far-reaching discussion about its applicability in international and national law.[244] Several lawsuits against states importing natural resources from Namibia were launched after the respective domestic laws were analysed in order to test the feasibility of intended lawsuits.[245]

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240. *Legal consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports, 1971: 16.
241. Cf.: UN SC Res. 309 (1972); 319 (1972); 323 (1972); 342 (1973); and 366 (1974).
242. With regard to the juridical problems surrounding the representation of Namibia by the Council for Namibia, *see*: Osieke (1980); on the Nationhood Programme: Ben Amadhila (1988).
243. Passed by the Council of Namibia on 27 Sep. 1974 and confirmed in UN GA Res. 3295 (XXIX) of 13 Dec. 1974.
244. Cf.: Booysen; Stefan (1975); Hinz; Docke; Sommerfeld; Wegener-Brandt (1984); von Lucius (1987); Hinz (1989a).
245. *See* on this: UN GA Res. 39/50 of 12 Dec. 1984.

109. In 1976, the United Nations Institute for Namibia (UNIN) was founded in Lusaka, Zambia.[246] Seán MacBride was the United Nations Commissioner for Namibia at the time und very instrumental in creating this institution.[247] The General Assembly of the United Nations endorsed the recommendation of the Council of Namibia to establish UNIN[248]

> to enable Namibians to undertake research, training, planning and related activities, with special reference to the struggle for the freedom of Namibia and the establishment of an independent State of Namibia … .

The establishment of UNIN was a unique manifestation of the international acceptance of the right to self-determination and the obligation to support its realization. UNIN was active until 1990. Its director was until 1989, Hage Geingob.[249]

110. While the United Nations influenced the situation by exerting increasing pressure with a view to achieve ultimately self-determination under its supervision, SWAPO did not only use the diplomatic channels opened for it by the United Nations, but also engaged South Africa in actions of war. South Africa strived for an "internal solution" that would at least be partially internationally recognized. After declaring Owamboland a self-governing region in 1973, elections were to be held there.[250] The boycott of the elections, called for by SWAPO, resulted in persecutions, arrests and public whipping of supporters of SWAPO.[251] Members of the movement were charged with sabotage and convicted. Many Namibians fled the country.[252] Those who remained boycotted the elections and it was announced that another election was to be held in Owamboland in 1975. SWAPO again called for a boycott since participation would have been tantamount to an acceptance of the homeland policy. According to the official results, some 70% of the registered voters cast their vote. As observers reported, the poll was decisively influenced by threats and extortion.[253]

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246. *See* on UNIN: UNIN (1990).
247. *Ibid.:* 6ff. but also United Nations Council for Namibia (1976): at 251ff.
248. UN GA Res. 3296 (XXIX): at 5. – The Charter of UNIN can be found in: UNIN (1990): 39ff.
249. The activities of UNIN and its contributions in the preparation of Namibians and for Namibia as an independent state deserved recognition and assessment which is not possible in this work on the Constitution of Namibia. Reference may just be made to a publication which appeared in 1986 (UNIN 1988) *Namibia: Perspectives for national reconstruction and development*, which is the comprehensive summary of the societal state of affairs of the then colony of Namibia and its political evaluation in view of post-independence interventions to lead the country into democracy and freedom. – The Namibia Project of the CAMS at the University of Bremen worked in close cooperation with UNIN since its inception.
250. *See*: Moleah (1983): 168ff.
251. The flogging ordered by traditional authorities was challenged in court, cf.: *Wood and Others v. Ondonga Tribal Authority and Another* 1975 (2) SA (AD) 294.
252. *Ibid.*
253. *See*: Tötemeyer (1978): 96f.

111. However, changes in Angola brought new political considerations into play. The end of the Portuguese rule in Angola in 1974 deprived South Africa of the cordon sanitaire that had – thanks to Portugal, the colonial ally to South Africa – separated it from the African states north of the Portuguese colony. South Africa was consequently compelled to determine whether Namibia as a whole or even only its northern territories could take over the role of buffer zone.[254] The new policy of the National Party in South Africa and Namibia was, therefore, to enter into discussions with the various population groups in the country.[255] These discussions eventually led to the Turnhalle Conference (the name is derived from the venue, namely the old German sports hall in Windhoek), which convened for the first time in September 1975.[256] The representatives of the eleven populations groups (the ten non-whites identified by the Odendaal Commission and the whites) met in the Turnhalle. SWAPO did not participate. The conference drafted a constitution for the territory.[257] Based on ethnic separation, this constitution provided for three tiers of government. The first tier, the central government, was to be headed by a president, assisted by a Council of Ministers, representing the various ethnic groups. The National Assembly would consist of sixty delegates: each of the population groups having four representatives, and the remaining sixteen seats were to be allocated proportionally according to the size of the various population groups. The second tier consisted, again in line with recommendations of the Odendaal Commission, of the ethnic authorities. The third tier was reserved for the representatives of towns and local authorities. The envisaged date for independence was 31 December 1979.

112. The Security Council of the United Nations reacted to the Turnhalle suggestions with Resolution 385 (1976). With this, the Security Council condemned measures aimed at sidestepping United Nations-supervised elections. Sanctions against South Africa were not imposed, as the Western powers wished the resolution to be a warning at South Africa, and, thus, would still keep the gate open for negotiations. In this sense, the matter was taken up by what has become known as the Contact Group, which consisted of three permanent members of the Security Council: the USA, Great Britain and France, and Canada and the Federal Republic of Germany, both being non-permanent members of the council at the time.[258]

113. South Africa declared in June 1977 that an Administrator-General would be appointed to take over the administration of Namibia that – in line with the previous South African policy of integration as the fifth province – was directly administered from Pretoria to govern the territory until such time as a legislative assembly had been elected. The first Administrator-General was appointed two months later. This new constitutional dispensation resulted in the whites of Namibia losing their

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254. It was even considered to opt for a special solution for Owamboland, taking into account that many Oshiwambo-speaking people live on the Angolan side. Cf.: Moleah (1983): 176f.
255. *See* here: Moleah (1983): 177ff.; Hinz (1987).
256. *See*: du Pisani (1986): 283ff.; 330ff.
257. The Turnhalle draft is available as GN No. 131 of 1977.
258. du Pisani (1986): 329f.

right to vote in the elections of the South African parliament. This ended the Turnhalle Conference and its efforts of drafting a new constitution for Namibia. However, in political terms, the Turnhalle approach survived. The Republican Party of Namibia that split away from the National Party in 1977 formed an alliance with political representatives of the ten non-white population groups of the Turnhalle Conference: the Democratic Turnhalle Alliance (DTA). DTA, now renamed Popular Democratic Movement, has remained politically involved in Namibia up to today.[259]

114. In implementing its new approach to Namibia, South Africa, on the one hand, repealed several apartheid laws, but extended, on the other hand, the security laws applicable to Namibia. The act prohibiting sexual contact across the colour bars, the act prohibiting mixed marriages, the act requiring permission for the purchase of land in black townships and other laws based on racial grounds were repealed.[260] These repeals, however, did not affect apartheid, as such; the repeals removed, what has been termed "pitty apartheid". The structure of apartheid as the policy of so-called separate development remained intact. The ethnical classification according to which a person was assigned to a specific homeland and, with this, prevented from free movement, remained as it was in place before. The revised security legislation allowed the Administrator-General to declare a state of emergency, which granted the administration virtually unlimited powers that could not be judicially checked.[261]

115. The Contact Group eventually submitted its proposal about how to achieve independence of Namibia in the form of a letter to the United Nations.[262] With reference to this proposal, the Secretary-General of the United Nations was instructed by Resolution 431 (1978) of the council to compile a report that would contain recommendations as to how the independence plan set out in the proposal of the Contact Group could be implemented. Upon receipt of this report, the Security Council passed its Resolution 435 (1978). This resolution provided for the establishment of a special force of the United Nations to supervise the transition to independence: the United Nations Transition Assistance Group (UNTAG). For a period of twelve months, this group was meant to assist the representatives of the United Nations, who would be furnished with a special mandate by the Security Council, in ensuring the speedy independence of the country through free elections. These elections were to be held under the supervision and control of the United Nations, as already set out in Resolution 385 (1976). In variance with the latter resolution, a compromise reached during the negotiations of the Contact Group was incorporated in Resolution 435. In terms of this compromise, South Africa was also permitted to

259. Cf.: du Pisani (1986): 376f. – After gaining a good number of the seats in the first parliament of Namibia, the DTA lost in the following elections and is now one of the less important opposition parties.
260. Cf. on this: du Pisani (1986): 363.
261. *See*: Hartmut Ruppel (Ruppel, H. 1987); Hinz; Gevers Leuven-Lachinski (1989); Soggot (1986); Streitberger; Hinz (1989).
262. This letter and other supplementary documents to UN SC Res. 435 (1978) are contained in Hinz (1988c).

maintain a limited and minutely defined presence in Namibia. Taking note of announced elections, the Security Council declared measures to reach an "internal solution" unilaterally taken by South Africa "null and void".

116. South Africa stated that it was prepared to assist in bringing about the independence of Namibia on 31 December 1978 as agreed upon in the negotiations. However, it was immediately after the adoption of Resolution 435 that South Africa announced that it would hold elections for a Constituent Assembly in Namibia in December 1978. South Africa assured that this would not preclude a solution for Namibia by the United Nations. The elections took place as announced.[263] The DTA won forty-one of the fifty-four seats. The newly elected assembly, assigned with the task of drafting a constitution for Namibia, declared in a first resolution that it did not intend exercising these powers, but instead would rather work towards the implementation of Resolution 435 (1978).[264] In May 1979, the Constituent Assembly was transformed into the National Assembly of Namibia.[265]

117. The Administrator-General promulgated the *Representative Authorities Proclamation*[266] in 1980. This proclamation provided for a unified legal basis of governments of the different population groups in the country which partly had received self-administration in line with the proposal of the Odendaal Commission. The *Representative Authorities Proclamation* was followed by ten additional proclamations that provided for the establishment of the second-tier governments for eleven ethnic groups, including the whites and the coloured. One ethnic group, the San or Bushmen, as they were then called, did not receive its own second-tier structure.

118. In July 1980, a Council of Ministers, consisting of twelve members and belonging to the DTA took office.[267] This new government, still under the authority of the South African Administrator-General, was only in power for a short period of time. Acts passed by the new governments needed assent by the Administrator-General. When he refused to sign an act abolishing South African public holidays in Namibia, the Council of Ministers resigned. Upon the resignation, the National Assembly was dissolved and the Administrator-General again took full authority over the affairs of the territory.[268] What appears to be a reason of minor political relevance reflects the fragile position of the DTA as a movement that tried to find its way between the South African hard-line policy of apartheid and attempts to liberalize apartheid to some extent. When the elections for the legislative assemblies of the second-tier governments were held in 1980, the fragile support of the DTA by the non-white population became apparent: the DTA was only successful where it did not face an opposition. Where the seats were contested, it lost.[269] The failure

263. *See*: du Pisani (1986): 414ff.
264. *Ibid.*: 426.
265. Section 4(1) of the National Assembly Proclamation, AG 21 of 1979.
266. AG 8 of 1980.
267. *See*: Council of Ministers Proclamation, AG 19 of 1980.
268. *See*: National Assembly and Council of Ministers Repeal Proclamation, AG R 3 of 1980.
269. Hinz (1992): 22.

of DTA can be, in particular, be illustrated by what happened in Owamboland. The chairman of the Owamboland DTA party, who was also at the same time the chairperson of the DTA as a whole, Peter Kalangula, accused the DTA of being a neo-apartheid party and left the DTA with his party in 1981.[270]

119. Towards the end of 1983, a new political initiative to achieve a solution for Namibia arose: the Multi-Party Conference. The DTA was one of the initiators, while the National Party followed later. The initiative acknowledged, on the one hand, that Resolution 435 was the only concrete plan for the independence of Namibia, but also stressed, on the other, that there were difficulties in implementing the independence plan according to this resolution. One of these difficulties was the so-called Cuban linkage, which was increasingly insisted upon during the discussions on the implementation of Resolution 435. The Cuban army was heavily involved in the civil war of Angola supporting MPLA[271] against UNITA.[272] For South Africa, the closeness of armed forces of socialist countries, such as Cuba, was seen as a threat to its existence. Therefore, the possible consent to implementing the independence plan under Resolution 435 was linked to the simultaneous withdrawal of the Cuban troops.[273] The Multi-Party Conference also invited SWAPO to participate. SWAPO was met in Lusaka by politicians in support of the conference in 1984. The negotiations did not result in SWAPO joining the initiative. SWAPO was not prepared to become part of this revised version of an "internal solution" for the country.

120. On 17 June 1985, South Africa promulgated a new constitutional framework for Namibia with the *South West Africa Legislative and Executive Authority Establishment Proclamation*.[274] This proclamation provided for a National Assembly and a Cabinet, and, at the same time, allocated the envisaged sixty-two seats in the National Assembly to the parties represented in the Multi-Party Conference. The expected eight ministers were also allocated to the representing parties, with three to the DTA.[275] The position of chairman of the Cabinet was to be occupied on a rotational basis by the members of the Cabinet according to a procedure to be decided upon by the Cabinet.[276] Foreign affairs and defence remained the responsibility of South Africa. The South African Administrator-General also kept its place. His task was to approve all acts passed by the National Assembly.

121. The new government was installed as the Transitional Government of National Unity on the day on which the creating Proclamation was promulgated.

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270. Cf.: du Pisani (1986); 481.
271. The *Movimento Populat de Libertação de Angola*, the Angolan liberation movement, which formed the post-independence government of Angola.
272. The *União Nacional para a Independência Total de Angola*, the liberation movement which opposed the MPLA was led by Jonas Savimbi and supported by South Africa.
273. The Security Council of the United Nations rejected the Cuban linkage, *see*: UN SC Res. 539 of 1983. – Cf. here also: Bremer (2021).
274. R101 of 1985.
275. *See*: sections 2ff.; 22ff.; and the schedule to the proclamation.
276. *See*: Section 26.

The Security Council of the United Nations declared the Transitional Government of National Unity null and void in its Resolution 566 of 1985.

122. Schedule 1 to the *Proclamation to establish the Transitional Government of National Unity* contained a *Bill of Fundamental Rights*, which soon became the object of remarkable proceedings.[277] While the Supreme Court of Namibia attempted to make use of the *Bill of Rights* against restrictive law, the Court of Appeal in South Africa was reluctant to accept the rather liberal ruling from Windhoek.[278] In response to the approach by the court in Namibia, the Court of Appeal ruled that the bill of fundamental rights was not intended to annul legislation already in force prior to the promulgation of the bill.[279] Subsequently, *Proclamation R157* of 1986 stipulated in general terms that no act of the South African parliament could be reviewed on the basis of the fundamental rights contained in the bill scheduled to the proclamation establishing the Transitional Government of National Unity. A very particular decision of the Supreme Court was its rejection of the constitutional arrangement of Namibia on the basis of ethnic affiliation. In an advisory opinion to the then government, the Supreme Court expressed its view that this arrangement of second tiers was not in line with the *Bill of Rights*.[280]

123. The establishment of a Constitutional Council was another important constitutional consequence under *Proclamation R101*.[281] The task of the Constitutional Council was to draft a constitution which was to come into force prior to the envisaged elections. By mid-July 1987, the work of the Constitutional Council ended with the completion of two drafts: a majority draft – called the Hiemstra-draft after the chairperson of the Constitutional Council – and a minority draft. The majority draft was supported by twelve votes in the Constitutional Council; the minority draft originated from the supporters of the National Party. It was clear that the minority submission still very close to the South African policy of apartheid would not enjoy international support, but also the majority proposal led to many critical observations.[282] At the end, the two drafts shared the destiny of the earlier Turnhalle draft:

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277. *See* here: Smuts (1987); Hinz; Gevers Leuven-Lachinski (1989): 20ff.; Horn (2008a); and also Horn (2013a): 58ff.
278. The decision of the Supreme Court in Windhoek against a restrictive rule in the Residence of Certain Persons in South West Africa Regulation Act of 1985, Act No. 33 of 1985, was set aside by the Court of Appeal. *See*: *The National Assembly for the Territory of South West Africa v. Eins* 1988 (3) SA 369 (A): 387. Another interesting case is the so-called curfew case in which the dusk-to-dawn prohibition to leave the houses in northern Namibia was challenged. Three Namibian bishops launched this case on the basis of the Bill of Rights, but did not succeed. (The case is not reported, but *see*: Hinz; Gevers Leuven-Lachinski (1989): 20ff.).
279. *See* here: *Kabinet van die Tussentdydse Regering v. Katofa* 1985 (1) SA 695 (A).
280. *Ex Parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of section 19 (2) of Proclamation R101 of 1985*, 1988 (2) SA 832 (SWA). Cf. on the socio-economic situation of the "homelands": Vesper (1983).
281. The Constitutional Council was established in terms of the Constitutional Councils Act, AG 8 of 1985. Just as in the other bodies of the transitional government, the members of the council were appointed in accordance with the proportional representation of the parties; *see*: Section 6 and the schedule to the Act.
282. Regarding the discussion about the Hiemstra-draft, *see* contributions in: Ress (1986); Landis (1987); Hinz (1988d).

none of them became constitutional reality. The year following the drafts of the Constitutional Council saw the beginning of a new round of international negotiations on the independence of Namibia.

§6. The Pending Implementation of the United Nations Security Resolution 435, Its Implementation and the Constitution of 1990

124. The initial failure to implement Resolution 435 (1978) of the Security Council of the United Nations did not end the efforts to have the resolution eventually implemented. The independence of Namibia remained on the international agenda.[283] The Cuban linkage, the alleged partiality of the United Nations – so South Africa – the type of elections by which independence should be attained, and the freedom in the drafting of the constitution were important topics in the international negotiations following the failure to implement Resolution 435. Of the documents negotiated between 1980 and 1985, three were particularly relevant in terms of international and constitutional law: The first is titled *Principles Concerning the Constituent Assembly and for the Constitution for an Independent Namibia of 1982* (in brief referred to as *Constitutional Principles*); the second *Namibia: Informal Check List* also of 1982; the third is a letter from the Secretary-General of the United Nations to the South African Minister of Foreign Affairs from 1985.

125. The first document, the *Constitutional Principles*, was submitted to the Security Council of the United Nations as an annexure to a letter by the representatives of the Contact Group on 12 July 1982.[284] The letter contains the explicit expectation that the *Constitutional Principles* had to be accepted by all parties involved in the negotiations on the independence of Namibia. Chapter A of the *Constitutional Principles* deals with the Constituent Assembly, especially its election. All Namibian were to be entitled to vote for a constituent assembly by secret ballot. The date of the beginning of the election campaign, the date of the election, the electoral system and all other relevant procedures were expected to be drawn up in a manner that would guarantee full and fair participation. The freedom of speech, association, movement and the press were to be guaranteed, and the electoral system should guarantee fair representation of the various political parties according to the results gained on the elections. It was furthermore stipulated that it would be the task of the Constituent Assembly to draft and adopt a constitution that complied with the principles set out in Chapter B of the document, and that the constitution could only be adopted with a two-thirds majority. Chapter B contains eight prerequisites that a proposed constitution for Namibia should conform with: Namibia shall

283. The international negotiations that eventually produced the framework for the implementation of Resolution 435 were supported not only by very efficient international civic movements, such as the Anti-Apartheid Movement, active in many countries; the Association of West European Parliamentarians for Actions against Apartheid – AWEPA; the Eminent Persons Group, established in 1985; but also a growing civic movement in Namibia in support of the implementation of the peace plan of the resolution. *See* here: NPP 435 (1987); Torreguitar (2009) and Tötemeyer (2015): 261ff.

284. The Constitutional Principles and Guidelines, Security Council Document S/15287 – cf. also: Wiechers (1989–1990).

be a unified, sovereign and democratic state; the constitution shall be the supreme law of the state; the separation of power into three main organs shall be respected; an independent judiciary shall be responsible for the interpretation and enforcement of the constitution; elections, by secret ballot, shall be held regularly; the electoral system shall comply with the provisions set out in Chapter A of the Constitutional Principles; a bill of fundamental rights, enforceable by the courts, shall be enshrined in the constitution.

126. The fundamental rights as envisaged in Chapter B of the document shall be based on the *Universal Declaration of Human Rights* of the United Nations: expropriation of private property without compensation shall not be permitted; retroactive punishment shall not be permissible; fair access to and a balanced structure of the public service, the police and the defence force shall be guaranteed by the establishment of independent institutions. Elected councils for the local and/or regional government would be provided for. The electoral system to be adopted: proportional representation or majority vote, or a combination of the two gave rise to considerable discussion during the negotiations on the *Constitutional Principles*. In order to maintain the consensus on the other parts of the *Principles*, the question of the electoral system remained undecided.

127. The second document, *Namibia: Informal Check List*, was mentioned officially in the report of the Secretary-General of the United Nations in 1989.[285] The *Check List*, which had until then not been made public, also contains the remark that it had been submitted to the Secretary-General of the United Nations in September 1982 and this with the approval of South Africa, the Contact Group, SWAPO, the front-line states and Nigeria. The following points of the *Check List* are of particular importance:[286] In the debate on the expected implementation of Resolution 435 in the Security Council of the United Nations, all speakers were to limit their contributions to a minimum; no debate on the issue of Namibia would take place in the General Assembly of the United Nations during the period of transition; SWAPO would not receive assistance from the United Nations during the period of transition; the United Nations Council for Namibia and the Commissioner for Namibia would refrain from all public activities, as soon as the Security Council had resolved the implementation of Resolution 435; SWAPO would abstain from exercising its privileges granted to it by the General Assembly of the United Nations, including its right to attend as official observer. Once the implementation of Resolution 435 had started, SWAPO would no longer be considered the sole representative of the people of Namibia.

128. The third document, the *Letter from the Secretary-General of the United Nations to the Minister of Foreign Affairs of South Africa* from November 1985,[287] acknowledges the result in negotiating the issue of the electoral system to be applied

285. Available in: Namibia Communication Centre (1989): 24ff. – cf. also: Hinz (1991).
286. *See*: at 9–14 of the Check List.
287. *See*: UN SC Document S/17658.

to the independence process for Namibia, which had been left open in the *Constitutional Principles*. The letter confirms that the electoral process was to be based on proportional representation, while it was up to the Special Representative of the United Nations for Namibia and the South African Administrator-General in Namibia to decide on details.

129. In order to understand the political and diplomatic movement that eventually prompted the new approach to the problem of Namibia, one has to consider certain international and regional developments that eventually forced South Africa to open itself for internationally accepted solutions for Namibia:[288] The end of the Cold War was followed by a phase of détente, opening for new policies and subsequent new negotiations. South Africa found itself increasingly in economic difficulties. The depreciation of its currency, the high expenses incurred through the military operations in northern Namibia and Angola made a change in policy essential. The turning point came when an air attack by Cuban troops in Angola forced the military forces of South Africa onto the defensive. By mid-1988, the Cuban-Angolan forces asserted air superiority over southern Angola. The strategically important town of Cuito Cuanavale in southern Angola was lost by South Africa, and South Africa was unable to recapture it. Losing in particular white lives in the war in northern Namibia and Angola became increasingly unacceptable for South Africa.

130. It was after the loss of Cuito Cuanvale that negotiations mainly between South Africa, Angola and Cuba brought the situation closer to the implementation of Resolution 435. Departing from their previous positions, Angola and Cuba accepted a linkage between the presence of Cuban troops in Angola and the implementation of Resolution 435 for the first time. This was recorded in the *Principles for a Peaceful Settlement in South-Western Africa* agreed between the parties in New York on 13 July 1988. The states concerned assured each other to respect their sovereignty, and that they would not interfere in the domestic affairs of the other party.[289]

131. After further rounds of negotiations, the parties to the New York principles, South Africa, Angola and Cuba, agreed on the *Protocol of Brazzaville* in December 1988.[290] This protocol was brokered by the USA. It was agreed to recommend to the Secretary-General of the United Nations to commence the implementation of Resolution 435 of 1 April 1989. An agreement between South Africa and Cuba also reached in December 1988 contained a timetable for the withdrawal of the Cuban troops from Angola to be completed by 1991. A tripartite agreement

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288. Cf. here: Kühne (1990).
289. *See*: Principles for a peaceful settlement in South-Western Africa, available in: Namibia Communication Centre (1989): 308.
290. *See*: The Joint statement by the Governments of Angola, Cuba, South Africa and the United States of America, available in: Namibia Communication Centre (1989): 313. and the Protocol of Brazzaville and its Annex on the Joint Commission in: *ibid.*: 319ff.

between South Africa, Angola and Cuba confirmed the implementation of Resolution 435 as set out in the New York principles.[291]

132. All the agreements were welcomed by the Security Council of the United Nations in its Resolution 628 of 1989. In this resolution, the Security Council resolved that the implementation of Resolution 435 would commence on 1 April 1989. It requested the Secretary-General of the United Nations to negotiate a formal ceasefire between SWAPO and South Africa.[292] SWAPO was not formally involved in the mentioned negotiations but declared in a letter of 12 August 1988 that it would do everything in its power to ensure peace in South-Western Africa. For this reason, SWAPO announced that it would unilaterally cease all hostilities as from 10 August 1988. In separate letters to the Secretary-General of the United Nations, South Africa and SWAPO confirmed that a formal ceasefire would be effective as from 4:00 am on 1 April 1989.[293]

133. The modalities of the implementation of Resolution 435 are mainly contained in three documents: the *Western Proposal for Settlement* of 1978, the *Report of the Secretary-General of the United Nations of 1978*, and his *Explanatory Statement* of 1978. All three documents have become part of the independence plan for Namibia. Resolution 431 (1978) of the Security Council of the United Nations, which in turn was incorporated in Resolution 435, refers specifically to the *Western Proposal*; the *Report of the Secretary-General* and the *Explanatory Statement* are expressively approved in paragraph 1 of the Resolution 435.

134. The *Western Proposal*[294] contains a detailed timetable for the operation of the envisaged United Nations mission which was to supervise the implementation of Resolution 435. The operation was to last twelve months. The initial confinement of South African troops to their bases would be followed by their phased withdrawal to South Africa. Dates were set for the release of political prisoners and the repatriation of Namibians in exile. The four-month election campaign would start thirteen weeks after D-day (commencement of the implementation of the independence plan). One week after the elections had been certified free and fair, the remaining South African troops would leave the territory, their bases closed, and the Constituent Assembly commence its task.

135. UNTAG should comprise of a military and a civilian component.[295] The task of the military component was to monitor the cessation of hostilities between the South African and the SWAPO forces, their confinement to base and the withdrawal of the South African military forces in accordance with the agreements

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291. This agreement is also contained in: Namibia Communication Centre (1989): 331ff. *See also*: UN SC Res. 628 (1989).
292. Cf.: UN SC Res. 629 (1989).
293. *See*: Namibia Communication Centre (1989): 315ff.
294. *See*: UN SC Document S/12636.
295. *See*: UN SC Document S/12827.

reached and the demobilization of other forces. The civilian component of UNTAG should consist of 360 police officers and 1,500 public servants from various professional fields.

136. The maintenance of law and order during the transitional period would be the responsibility of the South African Administrator-General and his police force. All measures taken would, however, need to be "to the satisfaction of the United Nations Special Representative". Furthermore, it was the task of the Special Representative to introduce measures to prevent intimidation or interference in the election process. The election was to be conducted under the supervision and control of the United Nations.

137. All legislation of a discriminatory nature and legislation impending the free and fair election were to be repealed prior to the beginning of the election campaign. The Administrator-General was expected to release all political detainees and to facilitate the repatriation of Namibians in exile.

138. This plan for the independence of Namibia, originally developed in 1978, was adopted virtually unaltered for implementation in 1989. The timetable was adapted and the strength of the military component of UNTAG was changed: the figure agreed upon in 1978 was reduced to 4.650.[296]

139. The obligation to confine the military forces to bases, as envisaged for the implementation of Resolution 435, led to a bloody clash between the military of SWAPO (PLAN – People's Liberation Army of Namibia) and the forces under South Africa. During the night preceding 1 April 1989, set as the day for the beginning of the implementation of the peace plan of Resolution 435, SWAPO claimed bases for their forces, which were according to SWAPO operating inside Namibia. South Africa held against this saying that these troops had entered Namibia from Angola during the night before 1 April and this was in violation of the ceasefire agreement. Some 300 PLAN fighters died in fights with the military forces under South Africa. It was only an emergency meeting of the Joint Committee of the Protocol of Brazzaville that prevented the end of the implementation of Resolution 435.[297]

140. The legislation enacted for the establishment of the Transitional Government of National Unity for Namibia was repealed with effect from 1 March 1989. The powers vested in the erstwhile National Assembly and the Cabinet reverted to the Administrator-General as did the powers vested in the ethnic authorities (second-tier authorities).[298]

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296. Cf. here: UN SC Secretary General Report S/20412; UN SC Secretary-General Explanatory.
297. The result is known as the Mount Etjo Declaration, agreed upon after the meeting at Mount Etjo on 8 and 9 Apr. 1989. The declaration is contained in: Namibia Communication Centre (1989): 408.
298. *See*: South African Proclamations R11 of 1989 and R13 of 1989, the Cabinet and Constitutional Council Proclamation, AG 16 of 1989; the Representative Authorities Powers Transfer Proclamation, AG 32 of 1989; and the Rehoboth Powers Transfer Proclamation, AG 32 of 1989.

141. The United Nations and South Africa concluded an agreement on the status of UNTAG.[299] According to this, South Africa, through the Administrator-General was obliged to support UNTAG in the execution of its task. To facilitate the implementation of the status of UNTAG, South Africa extended the applicability of its *Diplomatic Privileges Act* to Namibia.[300]

142. The laws promulgated by the South African Administrator-General in the transitional phase to independence refer to different fields: laws directly related to creating social and political conditions to allow for free and fair election and the law related to the expected constituent assembly. Some of these laws gave rise to controversy.

143. One group of laws comprises the proclamation by which a commission for the prevention of intimidation and similar practices was established;[301] the proclamation in terms of which amnesty was granted (especially to those returning from exile);[302] and most importantly the two proclamations dealing with discriminatory laws and all other laws that could affect the freeness and fairness of the election.[303] Another field of laws was concerned with the registration of voters, the registration of political organizations and the election as such.[304] The *Constituent Assembly*

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299. *See*: Agreement between the United Nations and the Republic of South Africa concerning the status of the United Nations Transition Assistance Group in Namibia (South West Africa) and the Status of the United Nations Transition Assistance Group in South West Africa Proclamation, 1989 (Proclamation No. 49 of 1989). The text of the first-mentioned agreement is contained in the annexure to the proclamation.
300. *See*: Diplomatic Privileges Proclamation, AG 13 of 1989.
301. Cf.: Intimidation Proclamation, AG 24 of 1989 and the Commission for the Prevention and Combating of Intimidation and Election Malpractices Proclamation, AG 11 of 1989.
302. Amnesty Proclamation, AG 13 of 1989. Cf. here also: Aliens and Immigration Laws Amendment Proclamation, AG 15 of 1989.
303. First and Second Law Amendment (Abolishment of Discriminatory or Restrictive Laws for the Purposes of Free and Fair Elections) Proclamations, AG 14 and 25 of 1989. These proclamations raised concern. *See* here: Gatter; Hinz; Winter (1989):27. It was also so that prior to the repeals of discriminatory and restrictive laws, efforts were undertaken to identify the laws expected to be repealed. In particular, the Namlaw Project (directed by the late Adv. A. T. E. A Lubowski – a political activist who was assassinated shortly before Namibia gained independence, cf. here: G. Lubowski 2011, and M. O. Hinz) compiled a list of laws for repeal. Cf. Hubbard (1989), *see* further: Landis (1975). The process of repealing discriminatory, respectively obsolete acts from the time before independence has not been completed with the repeal at independence, *see*: Repeal of Obsolete Laws Act, Act No. 21 of 2018, and Law Reform and Development Commission (2021). Enacting new laws is the other side of the coin dealing with repealing. *See* on this: Legal Assistance Centre (2019).
304. Registration of Voters (Constituent Assembly) Proclamation, AG 19 of 1989; Registration of Political Organizations (Constituent Assembly) Proclamation, AG 43 of 1989; and Election (Constituent Assembly) Proclamation, AG 49 of 1989. In order to achieve consent on the acts, the proclamations were first published by the Administrator-General as drafts (*see* the draft of AG 19 published as GN No. 58 of 1989 and the draft of AG 19 as GN No. 90 of 1989) and comments by the public were invited. The agreements reached between the Administrator-General and the Special Representative of the United Nations by means of correspondence were made part of the finally agreed versions of the proclamations. *See*: Agreement on Procedures in Connection with the Registration of Voters, GN No. 83 of 1989; Agreement on Procedures in Connection with the Registration of

Proclamation belongs to this field.[305] The difference of opinion on this law clearly shows the juridical background against which the confrontation between the United Nations and South Africa took place. In this act, South Africa attempted to determine the frame of the work of the Constituent Assembly from the beginning. The process of getting to the eventual enactment of the *Constituent Assembly Proclamation* lasted from July 1989 to early November. The United Nations rejected the South African view that independence for Namibia was to be granted by the mandatory authority which South Africa did not hold anymore. For the United Nations, the drafting of the expected constitution and independence was based on a combination of international responsibility and the right to self-determination.[306]

144. The elections for the Constituent Assembly were held from 4 to 11 November 1989. 95.9% of the registered voters cast their votes. The results were announced on 14 November: The Special Representative of the United Nations stated his satisfaction with the election and declared it to have been free and fair.[307] The elections were monitored by more than 800 observers from 25 countries. SWAPO gained forty-one of the seventy-two seats of the Constituent Assembly; the DTA 21.[308]

145. The deliberations of the Constituent Assembly progressed at a rate that surpassed all expectations. It was, in particular, the announcement by SWAPO that the mentioned *Constitutional Principles* having been made part of the 435-independence plan for Namibia would be accepted to be the foundation of the political process towards the constitution for Namibia that assisted the speedy completion of the drafting of the *Constitution*.[309] The first draft of the *Constitution* was already adopted on 20 December 1989; the final version on 9 February 1990. The rapid result was possible on account of each party being afforded a limited time to present its constitutional proposals to the assembly, after which the proposal was referred to

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Political Organizations, GN No. of 1989; Agreement on Procedures in Connection with the Election for a Constituent Assembly, GN No. 142 of 1989.

305. This proclamation, too, was first published as a draft inviting comments and afterwards promulgated together with an agreement between the Administrator-General and the Special Representative of the United Nations. *See*: Draft Constituent Assembly Proclamation, GN No. 91 of 1989; Constituent Assembly Proclamation, AG 62 of 1989 and Agreement on Certain Aspects of the Implementation of Provisions of the Constituent Assembly Proclamation, GN No. 184 of 1989.
306. *See* here, e.g., the comments on the draft Constituent Assemble Proclamation in: Hinz (1989b).
307. Reports by observers of the election confirm the opinion of the Special Representative of the United Nations. *See*, *e.g.*: Commonwealth Secretariat (1989); International Association of Democratic Lawyers (1989); Weiland (1990); but also: Harneit-Sievers (1990); Ansprenger (1991); M'passou (1990). The parties involved in the election campaign had agreed on a Code of Conduct in September 1989; the text of the code is contained in: National Democratic Institute for International Affairs (1990). The independence process in broader terms is comprehensively summarized by Harlech-Jones (1997). Mudge (2015: 373ff., 405ff., 436ff.) adds to this his view from the perspective of the DTA.
308. Four seats went to the United Democratic Front – a party mainly operational among the Damara – the Aksie Christelike Nasionaal (a conservative party of whites) received three seats, and the three remaining seats were taken by three small parties with one seat each.
309. Namibia. Constituent Assembly, Vol. 1. Debates. Windhoek: 15.

a committee for further debate.[310] The fact that SWAPO, although it held the majority and would thus be the future governing party, did not obtain the two-thirds majority to pass the constitution, led to a politically important process of consensus building. The SWAPO proposal for the constitution was used as the basis for the discussion.[311]

146. The main issues at stake were the status of the president, the structure of the legislative body and the procedure for the parliamentary elections.[312] The proposal of SWAPO was to have an executive president; a unicameral parliament and an electoral system in terms of which each constituency would be represented in parliament by one delegate who would achieve his or her seat by majority vote.[313] The view of the opposition was to have a ceremonial head of state, a bicameral parliament, and a representative electoral system. The kind of parliament to be formed was also controversial. The voices for a bicameral parliament and a representative electoral system for voting for the National Assembly won. With respect to the position of the president a compromise was reached, according to which an executive president was complemented by the position of Prime Minister as the head of Cabinet.[314]

147. The drafting of the Constitution was a give and take process.[315] However, the common concerns of the members of the Constituent Assembly were to bring about accountability of all the three organs of state under the banner of constitutional principle of checks and balances.

148. The proposed constitution was unanimously adopted on 9 February 1990.[316] In terms of Article 133 of the *Constitution*, the Constituent Assembly continued its work as National Assembly. Sam Shafiishuna Nujoma was elected President of the Republic of Namibia on 16 February. Namibia became independent on 21 March 1990. Its first president was sworn in by the Secretary-General of the United Nations. The Security Council of the United Nations recommended with Resolution 652 of 1990 to the General Assembly of the United Nations to admit

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310. The juridical editing of the Constitution was done by a team of three legal experts from South Africa, appointed by the Constituent Assembly. The Standing Committee on Standing Rules and Orders and Internal Arrangements was tasked to sort out controversies. This committee consisted of twenty-one members and was chaired by Hage Geingob, also chairman of the Constituent Assembly.
311. The equally detailed proposal submitted by the DTA could also have served as an alternative to the proposal by SWAPO. The former, however, was essentially based on the Hiemstra-draft (*see* above: at 114) The SWAPO proposal accepted by the Constituent Assembly as basis was a revised version of the draft prepared in exile. The various drafts are on file with the authors. *See* in general: Bomani; Ushewokunze (1979); United Nations Institute for Namibia (1988): 960ff.; Sichilongo (1981).
312. *See* on this: Namibia. Constituent Assembly. Debates. Vol. I. Windhoek. *See also*: Geingob (2004).
313. Katjavivi (2011): 26.
314. *See* on both below: Part III, Chapters 3 and 5.
315. *See*: Angula (2011): 6.
316. The Namibian Constitution was published as Constitution of the Republic of Namibia in GN No. 1 of 1990. According to Article 148 of the Constitution, the Constitution shall be called the Namibian Constitution. Cf. here also: Shangala (2012).

Namibia as member of the United Nations. This happened in April 1990. The United Nations Council for Namibia was dissolved.

149. The unanimous adoption of the *Constitution* by the Constituent Assembly is already an indication of its broad acceptance. The making of the *Constitution* and the subsequent translation of the political event of independence into societal reality signify the dimension of the intended new beginning after a long and difficult history of colonialism.[317] The preamble to the *Constitution* reflects this in a very clear language. Taking as its point of departure, the inherent dignity and fundamental rights of all people must be effectively maintained and protected in a democratic society where these rights have been denied by colonialism, racism, and apartheid. With the view to the future, the preamble determines as societal aim the protection of the dignity of the individual, as well as the unity and integrity of Namibia. National reconciliation is an extremely significant keyword in this context although the Constitution does not provide for mechanisms on the promotion of this important political goal.[318]

150. Proof of the quality of the *Constitution*, its capacity to meet the reality of Namibia and its acceptance by the political leaders of the country and the population at large is certainly that in the thirty years of existence, the *Constitution* was amended only three times. For the first time, the *Constitution* was amended to allow the first president of the country to have a third term of office by declaring the first term to which the president was called by the then Constituent Assembly not to count as one of the two terms provided for in the Constitution.[319] The Constitution was amended for the second time, in 2010 and for the third time in 2014.[320]

151. The third amendment was met with some opposition in the Namibian public. The main criticism was that not much opportunity was given to discuss the amendment. It was also alleged that several of the changes would lead to a centralization of power and undermine democracy.[321] Details of the third amendment will be dealt with in the following chapters.

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317. *See* here: Kießwetter (1993); Müller (1993); Lush (1993); Diescho (1994); Hinz; Amoo; van Wyk (2002); Melber (2003); Thornberry (2004); Bösle; Horn; du Pisani (2010); Hishoono; Hopwood; Hunter; Links; Sherazi (2011), but also von Wietersheim (2020).
318. The call for reconciliation is still very much on the societal agenda – the call refers to many matters, not only to matters such as the genocide of 1904, but also to matters that happened during the years of the liberation struggle. *See* here: Groth (1996); Hunter (2008); du Pisani; Kössler; Lindeke (2010); Tötemeyer (2010a) and (2013); and Ndeikwila (2014).
319. Namibian Constitution First Amendment Act, 1998 (Act No. 34 of 1998).
320. Namibian Constitution Second Amendment Act, 2010 (Act No. 7 of 2010) and Namibian Constitution Third Amendment Act, 2014 (Act No. 8 of 2014).
321. *See* here: Kawana (2014); Zaire (2017): 76ff.; and from the many contributions in the newspapers of Namibia: Diescho (2014a); Diescho (2014b), Hubbard (2014).

§7. Namibia 2020: Thirty Years of Independence

152. Namibia reached thirty years of independence in 2020. It was the year in which the first term of the government under President Geingob ended and with which, after the national elections in 2019, the second term of office started. The president took note of this in his address on the state of the nation which he delivered on 4 June 2020,[322] looking back to what was achieved, to what was not achieved and the challenges ahead. The president referred to the comprehensive plans and visions developed for the country, the National Development Plans, Vision 2030, and the Harambee Prosperity Plan.[323]

153. The Fifth National Development Plan covers the periods from 2017/18 to 2021/22.[324] It is s built on four pillars: economic progression; social transformation; environmental sustainability; and good governance.

154. Vision 2030 was initiated by President Nujoma in 1998 to be a "[v]ision that will guide us to make deliberate efforts to improve the quality of life of our people to the level of their counterparts in the developed world."[325]

155. The Harambee Prosperity Plan was launched by President Geingob in 2016 as a plan to accelerate development.[326] The Kiswahili word *harambee* means to pull together in the same direction. Constructing an inclusive Namibian house is mentioned to be the main goal in constructing Harambee. The five pillars Harambee is built on are: effective governance; economic advancement; social progression; infrastructure development and international relations and cooperation.

156. Going into the details of the expected achievements of the three development perspectives is beyond the scope of work on the Constitution of Namibia. However and despite of developmental failures and shortcomings, President Geingob could note in the mentioned address on the state of the nation:[327]

> A testament to our commitment to improving accountability and transparency, Namibia increased in ranking on the Ibrahim Index, making us one of the five best-governed countries in Africa. Namibia is 4th on the continent preceded by

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322. Geingob (2020a) - *see also*: Geingob (2020b) and further Democracy 2030 (2016).
323. Geingob (2020a): 6.
324. Republic of Namibia (2017/18).
325. Office of the President (2004): 7.
326. Republic of Namibia (2016/2017) – *see also*: Republic of Namibia (2019) and Harambee Prosperity Plan II: Republic of Namibia (2021).
327. Geingob (2020a): 8. – As to the ranking of Namibia, *see*: Mo Ibrahim Foundation (2020) and the critical comments reported in New Era of 24 Jan. 2020: Hopwood from the Institute for Public Policy Research (Windhoek) is quoted to have said: "We haven't really improved since 2015 and have now slipped down the ranking by four places. I think this is because we talk a lot about corruption but do very little." One concern is the recent scandal about fishing licences. Cf. here: Corruptionwatch (2020). The fish case was internationally noted, *see* Strittmatter; Wischmeyer (2021). *See* on this also below: Part II, Chapter 8, §14.2.

> Mauritius, Seychelles and Cabo Verde in the top three positions, and followed by Botswana, Ghana, Rwanda and South Africa respectively.

157. It is also worthwhile to see the assessment of the International Monetary Fund which underlined the positive developments of the country, but also points at challenges:[328]

> Among Southern Africa economies, Namibia stands out for its considerable economic and social progress, notwithstanding high unemployment and inequality. … over the last two decades annual per capita GDP growth averaged 2.6 percent, resulting in better living standards and lower poverty, and in one of most gender-equal countries in the world. The country's strong institutional and governance framework, among the best-rated in Africa, underpinned these developments. … However, growth has not benefited all Namibians. Unemployment remains high (about 33 percent), particularly for the youth (46 percent), and inequality, although declining, is one of the highest in the world. Moreover, the economy remains highly dependent on volatile SACU receipts and vulnerable to fluctuations in commodity exports.

328. IMF (2019): 4.

Chapter 2. State Territory

§1. Introduction

158. The *Constitution* defines the state territory in Article 1(4):

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

159. Namibia, thus, identifies the whole territory of former South West Africa, including Walvis Bay and the Penguin Islands as its territory. What this means in geographic data is explained in § 2 of this chapter. § 3 of this chapter then deals with the consolidation of territory in colonial times which can be attributed to the Conference of Berlin where the Europeans divided the African continent into different interest zones as well as agreements made during the following German colonization.[329]

160. The territorial integrity of Namibia was affected by ongoing South African control over Walvis Bay and the Penguin Islands at the time of independence. This is discussed in § 4 of this chapter. In addition, the exact run of the borders has led to several conflicts with neighbouring countries: a border dispute with South Africa concerning the Orange River has not yet been solved (see on this § 5 of this chapter). Other border disputes have been settled peacefully, such as the exact course of the maritime boundary line between Namibia and Angola (see § 6 of this chapter) and the Kasikili / Sedudu Island dispute with Botswana which was referred to the ICJ in 1996 (see § 7 of this chapter). A dispute over the belonging of another small island in the Caprivi (Situngu island) has been officially settled between Namibia and Botswana in 2018 but has triggered great resentment in the public (see § 8 of this chapter). § 9 of this chapter is about the threat of the territorial integrity and state sovereignty of Namibia by an internal secessionist movement from the Caprivi region (now Zambezi region).

161. Some regional arrangements, which translated political and economic transborder concerns into law, have to be noted: The Okavango River Basin Water Commission (OKACOM) was established in 1994 to promote coordinated and environmentally sustainable water resources development.[330] Namibia, Botswana and

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329. This was discussed in more detail in the previous chapter in § 3.
330. Agreement between the Government of the Republic of Angola, the Republic of Botswana, and the Republic of Namibia on the Establishment of a Permanent River Basin Water Commission, *see*: www.okacom.org (accessed 1 Apr. 2021). Cf. here also: Mapaure (2015).

South Africa established the Transkalahari Corridor Secretariat in 2000, the aim of which is to harmonize cross-border procedures for traffic on the road between the Gauteng province of South Africa and Walvis Bay.[331] The protection of the environment and natural resources – affected by the division of natural landscapes and animal territories through national borders – has been addressed by creating transborder conservation areas: Namibia and South Africa signed a treaty to create the Ai-/Ais-Richtersveld Transfrontier Park in 2003;[332] Namibia, Zambia, Zimbabwe, Angola and Botswana established the Kavango-Zambezi Transfrontier Conservation Area (KAZA) in 2011.[333] More details on OKACOM and transborder conservation areas can be found in § 10 of this chapter.

§2. Geographic Data

162. The territory of Namibia amounts to 824.292 km^2 and is situated between 17.87° and 29.9808° southern latitude and 12° and 25° eastern longitude. Namibia has common borders with Angola, Zambia, Botswana and South Africa. In the North, the Kunene and the Kavango River constitute national borders with Angola. The eastern boundary with Botswana runs through the Kalahari Desert. In the South, South Africa borders Namibia at the Orange River, whereas it is still disputed whether the actual frontier runs in the middle of the river or at the northern bank of the river, as South Africa claims.[334] The Atlantic Ocean constitutes the western border of the country. Additionally, in the northeast, a 450 km long and 50 km wide strip of land, formerly called the Caprivi Strip, located between the bordering countries Angola and Zambia to the north and Botswana to the South, is part of the Namibian territory. The bordering territory of Zambia is divided from Namibia by the Zambezi River.

163. Apart from the bordering rivers, there are several other rivers, but except of the Kwando and Kavango, none of these rivers carry water all season. A large part of the country is covered by dry savannah and desert, the Namib in eastern and the Kalahari in western Namibia. The Namib Desert is an 80 km to 120 km wide strip along the Atlantic Ocean. A vast inland plateau around the capital Windhoek stretches in between both deserts covering nearly half of the Namibian territory. The Kalahari Desert is a large semi-arid sandy savannah extending from Botswana to Namibia and South Africa.[335]

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331. Cf.: http://www.tkcmc.com/index.php (accessed 1 Apr. 2021).
332. *See*: https://www.peaceparks.org/tfcas/ai-ais-richtersveld/ (accessed 1 Apr. 2021).
333. Treaty between the Government of the Republic of Angola, the Government of the Republic of Botswana, the Government of the Republic of Namibia, the Government of the Republic of Zambia, and the Government of the Republic of Zimbabwe on the Establishment of the Kavango-Zambezi Transfrontier Conservation Area, *see*: https://www.kavangozambezi.org/en/ (accessed 1 Apr. 2021).
334. This will be discussed in detail in § 5 of this Chapter.
335. Cf.: Schneider; Schneider (1989): 40f.

164. According to the United Nations' *Convention on the Law of the Sea* (UNCLOS),[336] the sovereignty of a costal state extends beyond its land territory to an adjacent belt of sea.[337] Namibia's territorial sea is defined in section 2(1) of the *Territorial Sea and Exclusive Economic Zone of Namibia Act*.[338] It establishes, in consistence with the provisions of UNCLOS, that the sea within a distance of 12 nautical miles measured from the low water line belongs to the Namibian territory. Beyond the territorial sea, UNCLOS confirms that a coastal state has sovereign rights such as for exploring and exploiting, conserving and managing natural resources in a certain area called exclusive economic zone.[339] UNCLOS determines that the outer limit of such zone shall not exceed 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. This has been implemented in section 4(1) of the *Namibian Territorial Sea and Exclusive Economic Zone of Namibia Act*.[340]

§3. The Consolidation of the Territory in Colonial Times

165. As has been mentioned above, it was the German merchant Lüderitz who played a decisive role in the establishment of German South West Africa as a colony of the German Empire. Since 1983, he systematically purchased land in the area, and after his death, the German Colonial Society for South West Africa continued with the purchase of land.[341]

166. The availability of land for white settlers was prominent in the policies of Governor Leutwein.[342] An order (*Verordnung)* of 10 April 1898 allowed for the demarcation of reserves, i.e., areas of land that was left to the indigenous people.[343] Agreements with the colonial governments of the neighbouring countries settled the borders: an agreement in 1886 with Portugal, which had occupied Angola, and, in 1890, with Great Britain having occupied Betchuanaland, now Botswana.[344] Caprivi, now the Zambezi Region, was added to the German colony in accordance with an agreement with the United Kingdom of 1890.[345]

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336. Namibia has ratified UNCLOS on 18 Apr. 1983.
337. Article 2(1) read together with Article 3 of UNCLOS.
338. Act No. 3 of 1990.
339. Articles 55–57 of UNCLOS.
340. Section 4(1) of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 1990 (Act No. 3 of 1990).
341. Leser (1982): 22; Demhardt (1989): 111ff.
342. du Pisani (1986): 21ff.; 27ff.
343. Allerhöchste Verordnung, betr. die Schaffung von Eingeborenenreservaten in den südafrikanischen Schutzgebiete (Highest Order Concerning the Establishment of Reserves for Indigenous People in the Protectorate of South West Africa), Kolonial Blatt (Colonial Gazette) 1898: 199ff.
344. *See*: Leser (1982): 22.
345. Cf.: the Heligoland-Zanzibar Treaty of 1890, which returned Heligoland to Germany and ceded Zanzibar to the United Kingdom. An English version of the treaty is available at: German History in Documents and Images, Vol. 5, Wilhelmine Germany and the First World War, 1890-1918 – Anglo-German Treaty [Heligoland-Zanzibar Treaty] (1 Jul. 1980): http://germanhistorydocs.ghi-dc.org/pdf/eng/606_Anglo-German%20Treaty_110.pdf (accessed 17 Jun. 2022).

167. The Orange River was considered as natural borderline in the south, delimiting the Cape Province. The agreement of 1890 with Great Britain determines the northern bank of the river as borderline. As this agreement has never been revised, the course of the border is still disputed.[346]

§4. Divided Territory under Traditional Governance

168. When the colonial powers divided Africa, the habitats of the different communities living in Africa were of no interest. The artificial allocation of colonial regions and demarcation of borderlines caused problems to the people of Africa, as the colonial borders divided many communities and, with this, their traditionally established socio-economic and political structures. This colonial policy also affected Namibia. The ruler-drawn borders in the northern part of the country indicate that these borders just followed the political decision taken somewhere in office and not noting the living conditions of the people.

169. The traditional kingdom of Oukwanyama in the Owambo area is just one example to illustrate the effects of the artificial colonial borders. The border between Angola and Namibia has divided this kingdom into two parts. The office of the Oukwanyama kingdom and the seat of the currently reigning queen are in Namibia. Although there are traditional structures also in place in Angola, there is obviously no supreme traditional leader on the Angolan side: people pay respect to the queen in Namibia.[347] The warning words of President Pohamba at the inauguration of Queen Martha Klisiana stating that the queen was only the queen of the Namibian Oukwanyama[348] did not prevent the people from respecting the queen.

170. Although the Kavango River is for the Kavango Regions the official border between Namibia and Angola, people of the same ethnic origin and language live on both sides of the river. Looking at the river, one may see that people cross the river by boat or even by foot in both directions every morning and every afternoon. They go for work to their fields on the other side and ship crops to their homes after harvest. The border has no meaning to them. When asked traditional leaders on where they would see the border of their authority, they responded that for them the border was about 60 km inside Angola.[349] It is worthwhile to mention that the traditional authorities of the Kavango Regions have started discussing this issue in

346. This will be discussed in detail in §5 of this chapter.
347. Oral information collected by Manfred Hinz.
348. *See*: New Era of 15 Nov. 2005.
349. Information collected during fieldwork in the then Kavango Region by Manfred Hinz in May 1993.

view of the need to protect the river and its natural resources from which they have benefitted all the time and which they want to maintain. For them, the Kavango River is a "Namibian" river.[350]

§5. Walvis Bay

171. Walvis Bay is the only deep-water port in Namibia and location of one of the most important manufacturing sectors, the fish processing industry. It had been seized by the British in the second half of the nineteenth century for different reasons including the importance of the harbour as trading point, for administrative convenience and safe passage of ships.[351] Great Britain officially annexed the harbour and the surrounding settlement area on 12 March 1878 to forestall the German occupation of Walvis Bay.[352] After South West Africa was colonized by Germany, a boundary dispute arose between the Germans and the British, and the British Government decided to place Walvis Bay under the direct administration of the Cape Colony in 1884.[353] Thus, during the whole time of German occupation, Walvis Bay was administered by the Cape Colony. In 1910, it was incorporated into the newly established Union of South Africa.[354]

172. Following the German defeat, South Africa kept control of the territory according to marital law.[355] In 1915, South Africa placed Walvis Bay under South West African administration.[356] However, in 1977, this decision was withdrawn, and South Africa proclaimed to regain control over Walvis Bay.[357] The United Nations condemned this move and called for the reintegration of Walvis Bay into South West Africa.[358]

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350. Cf.: Interviews on file with the Centre for African Studies and Migration, University of Bremen. The interviews were conducted in 2014 and 2015 within the framework of The Future of the Okavango (TFO) project. On the TFO project and its sub-project on customary water law, *see*: Hinz (2013c).
351. History of Walvis Bay, http://www.walvisbaycc.org.na/?page_id=50 (accessed 1 Apr. 2021), *see also*: Moorsom (1984) and (1988); Berat (1990); Hangula (1993): 122ff. and Akweenda (1997): 295ff.
352. Moorsom (1988): 228, Hangula (1993): 124f.; *see also*: Akweenda (1997): 301ff. and History of Walvis Bay, http://www.walvisbaycc.org.na/?page_id=50 (accessed 1 Apr. 2021).
353. Walfish Bay and St. John's River Territories Annexation Act, 1884 (Act No. 35 of 1884).
354. *See*: Walvis Bay Administration Proclamation, 1977 (Proclamation No. R 202). *See also*: History of Walvis Bay, http://www.walvisbaycc.org.na/?page_id=50 (accessed 1 Apr. 2021).
355. *See*: Proclamation of Martial Law, 1915 (Proclamation No. 5 of 1915) and Proclamation Walvis Bay, 1915 (Proclamation No. 12 of 1915), which extended the martial law regulations to Walvis Bay.
356. *See*: Akweenda (1997): 335f. The decision taken in 1915 was reinforced in the South West Africa Affairs Act, 1922 (Act No. 24 of 1922) which prescribed that the port and settlement of Walvis Bay should be administered as if it were part of the mandated territory.
357. Walvis Bay Administration Proclamation, 1977 (Proclamation No. R 202 of 1977), repealing Act No. 24 of 1922. *See also*: Moorsom (1988): 232f.; Hangula (1993): 127.
358. Three different resolutions were adopted by the UN with respect to the issue of Walvis Bay, *see* General Assembly Resolutions 32/9 (1977) and 35/227 (1981) and Security Council Resolution 432 (1978).

173. South Africa refused to cede control even when Namibia gained its independence, the status of Walvis Bay was hence still unclear in the first years after independence. It was only in 1994 that Walvis Bay was incorporated into Namibia's territory.[359] The territorial dispute about Walvis Bay also concerned the Penguin Islands.[360]

§6. The Border Dispute with South Africa

174. The dispute about the Orange River as the border between Namibia and South Africa can be attributed to an agreement made between Great Britain and Germany dating back to 1890, in which the border of the Orange River was declared to run along the north bank of the river.[361] During the whole time of German occupation, this implied a *de jure* denial of access to the waters of the river on the German side. After the end of the colonial rule of Germany, the question of access to water from the Orange River was of no importance as the river was *de facto* transformed from an international into an administrative border by South Africa.[362]

175. The South African apartheid regime seemed to be willing to agree to the *ad medium filum aquae* presumption of property which is a legal principle extending territorial rights to an imaginary mid-point of waters adjacent to granted lands,[363] but no formal agreement was made.[364] In 1994, Nelson Mandela and Sam Nujoma reached a gentlemen's agreement that people living on both sides of the border would have access to the waters of the river.[365] A formal clarification has though never been agreed upon, because the new government of South Africa wanted to keep the northern bank of the river as borderline.[366] Only in 2014, a working group between the two countries was created to address the ongoing dispute.[367] A revised Orange-Senqu River Basin Commission agreement making regulations for the equitable access to waters of the perennial river was signed in April 2018 and ratified in September 2020.[368] The border dispute has, though, not yet been resolved.[369]

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359. Treaty between the Government of the Republic of South Africa and the Government of the Republic of Namibia with respect to Walvis Bay and the off-shore Islands of 28 Feb. 1994, available at the Website of the UN, Delimitation Treaties Infobase: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/ZAF-NAM1994OI.PDF (accessed 27 Jun. 2022). *See also*: Transfer of Walvis Bay to Namibia Act, 1993 (Act No. 203 of 1993); Walvis Bay and Off-shore Islands Act, 1994 (Act No. 1 of 1994).
360. *See* for the history of the legal status of the Penguin Islands: Akweenda (1997): 263ff.
361. Article III(1) of the English-German Boundary Treaty (the so-called Helgoland-Zanzibar Treaty) of 1 Jul. 1890 provided that, " … a line commencing at the mouth of the Orange River and ascending the north bank of that river to the point of its intersection by 20th degree of east longitude."
362. Hangula (2010): 193.
363. *See*, *e.g.*: Blair (2001): 517.
364. Cf.: Informanté of 30 Oct. 2014.
365. Hangula (2010): 194.
366. *See*: Informanté of 30 Oct. 2014.
367. *Ibid.*
368. The Namibian Sun of 21 Sep. 2020; New Era of 18 Sep. 2020; The Namibian of 22 Sep. 2020.
369. The Namibian of 22 Sep. 2020.

§7. Redrawing the Border with Angola

176. On 30 December 1886, Germany and Portugal signed a contract establishing the rough course of the boundary line in the north of South West Africa, having in mind the accurate determination of the boundary line in a later bilaterally concerted agreement.[370] As very few Europeans had visited the area, an exact stipulation of the borderline with reference to geometrical positions was not possible. For this reason the agreement refers only to physical features and latitudes as borderline. While the Kunene and the Kavango rivers formed part of the border, two straight lines between defined starting points constituted the remaining part of the boundary line.[371] These starting points agreed upon had not only not been precisely defined but also cut through numerous African dominions, and in particular cut the settlement areas of Oshiwambo-speaking people in two.[372] In the following years several colonial disputes arose over the course of the border. While any negotiations about the exact course failed, in 1912, Portugal and Germany came to an agreement to declare the area within the disputed border area a "neutral zone".[373] Nevertheless, not only all efforts to come to an agreement failed but also both colonial powers started several continuous military campaigns with the objective to ensure control over parts of the Owambo and Kavango areas.[374]

177. In 1915, a practical agreement regarding the neutral zone and establishing a provisional boundary line was concluded between two military officers from both sides[375] which was never legalized, as the governments did not give their approval.[376] The South African government though recognized the neutral zone as provisional arrangement until the final conclusion of an agreement over the boundary issue when it took control over South West Africa.[377]

178. In 1919, a joint boundary commission was established to resolve the boundary dispute. However, since Britain made any boundary agreement dependent on unimpeded access to Kunene water for the people of South West Africa, the League of Nations urged Portugal and South Africa to discuss and settle the boundary issue finally.[378] An agreement establishing the boundary line between Namibia

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370. Cf.: Hangula (1993): 22.
371. The agreement defined, *inter alia*, that the border would follow the Cunene Rier "from its mouth to the cataracts which are formed by that river to the south of Humbe when crossing the range of Canná Hills". *See* for the definition of the border in the agreement: Hangula (1993): 19 and also: Moser (2008).
372. Zollmann (2016): 38f.
373. *See*: Akweenda (1997): 215; Zollmann (2016): 40f.
374. Hangula (1993): 32f.
375. *See*: Akweenda (1997): 222 and also: Zollmann (2016): 228.
376. Hangula (1993): 34f. This is, however, disputed by Akweenda (1997): 224 who asserts that the "subject-matters of such a nature that it [the *modus vivendi*] was intended to have legal significance".
377. Hangula (1993): 37.
378. *See*: Akweenda (1997): 227f.

and Angola was signed on 22 June 1926 in Cape Town.[379] It determined that the boundary run through the middle of the Kunene River up to a certain point at the Ruacana Falls, from where

> the boundary follows the parallel of latitude passing through the said beacon to a point where it cuts the middle line of the Okavango (Cubango) River … .[380]

South Africa thus accepted Angola's claims to the "neutral zone". In turn Portugal accepted South Africa's water rights and ratified the first treaty with the Union without involving the British Foreign.[381] Demarcation started in 1931.[382] This led to the infringement of the territorial integrity of different kingdoms, which includes in particular the partitioning of the Oukwanyama, the Ombadja and the Ombalantu territories.[383] In consequence to the demarcation of the border according to the provision of the agreement, people were deprived of their parishes, fields and grazing areas and families were separated. The demarcation was thus met with hostility.[384]

179. Despite that there was the agreement that the Kunene River demarked the international boundary[385] and Article 2 of the boundary convention of 22 June 1926, the exact course of the maritime boundary line between Namibia and Angola had never been determined and remained unclear until 2004. A bilateral agreement between Namibia and Angola to "establish, determine and fix the course of the maritime boundary line between their territories and the limits of their territorial waters as well as their specific economic coastal zones" in accordance with UNCLOS, was signed on 4 June 2002.[386] A Joint Commission was established to determine and demarcate the maritime boundary line and, in particular, to triangulate the Kunene River mouth, to determine the baseline and the parallel of latitude 17°15'S, to extend the baseline westwards of a distance of 200 nautical miles, to establish marker beacons on the land, and to define the corresponding points of, and laying, the buoys on the sea water. Most of the work was completed in 2004, leading to clarification of the maritime boundary line between Namibia and Angola.[387]

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379. Agreement between the Government of the Union of South Africa and the Government of the Republic of Portugal in relation to the boundary between the Mandated Territory of South West Africa and Angola, 22 Jun. 1926.
380. Article 3 of the Agreement.
381. Zollmann (2016): 348.
382. *Ibid.*
383. Cf.: Hangula (1993): 41.
384. *Ibid.*: 45.
385. *See*, *e.g.*: Article 2 of the Agreement between the Government of the Union of South Africa and the Government of the Republic of Portugal in relation to the boundary between the Mandated Territory of South West Africa and Angola, 22 Jun. 1926.
386. Accord on the delimitation of the maritime border between Angola and Namibia, 4 Jun. 2002, http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/NAM.htm (accessed 19 Jul. 2022).
387. Hangula (2010): 192f.

§8. The Kasikili/Sedudu Island Dispute[388]

180. The Kasikili Island which is called Sedudu in Botswana is a fluvial island in the Chobe River which forms the border between Namibia and Botswana. Both, Namibia and Botswana, claimed that the island belonged to their territory. The dispute was only resolved by a decision of the ICJ ruling in favour of Botswana in 1999. The island is approximately 5 km^2 and has no permanent residents. For several months each year, beginning around March, the island is submerged by floods.

181. In order to settle the dispute concerning the boundary around Kasikili/Sedudu Island peacefully on the basis of the applicable rules and principles of international law, Namibia and Botswana signed a special agreement to confer the determination of the boundary and the legal status of the island to the ICJ in 1995.[389] A Joint Team of Technical Experts, which was appointed to determine the boundary in 1992, had not been able to reach a conclusion and recommended a submittal of the dispute to the ICJ.[390]

182. The treaty between Great Britain and Germany from 1890[391] located the dividing line between the spheres of influence of Great Britain and Germany in the 'main channel' of the Chobe River. The location of the main channel is however disputed with Botswana contending that it runs north of the island and Namibia that it runs south of the island.[392]

183. The ICJ found that the northern channel of the river around Kasikili/Sedudu Island must be regarded as its main channel and, thus, the island formed part of the territory of Botswana.[393] Namibia and Botswana have though agreed that there shall be unimpeded navigation for craft of their nationals and flags in the channels around the island.[394]

184. In 1999, a Joint Commission[395] was established to delimit and demarcate the boundary between Botswana and Namibia in terms of the Anglo-German Agreement of 1890.[396]

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388. Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999: 1045.
389. Special Agreement between the Government of the Republic of Botswana and the Government of the Republic of Namibia to submit to the International Court of Justice the dispute existing between the two states concerning the boundary around Kasikili/Sedudu island and the legal status of the island, 1996, available at: https://www.icj-cij.org/public/files/case-related/98/7185.pdf (accessed 19 Jul. 2022).
390. *Ibid*.: Preamble. *See also*: Akweenda (1997): 161f.
391. The treaty was called *Heligoland-Zanzibar Treaty* of 1890. *See* above in § 3 of this Chapter.
392. Kasikili / Sedudu Island (Botswana / Namibia), Judgment, I.C.J. Reports 1999: 1045, 1061ff. (at: 21 ff).
393. *Ibid*.: 1072 (at: 4), 1106 (at: 101).
394. *Ibid*.: 1107 (at: 103).
395. Joint Commission of Technical Experts on the Delimitation and Demarcation of the boundary between Botswana and Namibia along the Kwando, Linyanti and Chobe rivers.
396. The Namibian of 4 Jun. 2021.

§9. The Dispute over Situngu Island

185. In 2018, the governments of Namibia and Botswana concluded a boundary treaty.[397] It places the boundary along the left upper channel of the Linyanti River. In consequence, Situngu Island and all islands along the Linyanti River belong to the territory of Botswana. As a result, six islands which formerly belonged to Namibia were lost to Botswana.[398] Families living in the area are thus artificially separated from their communal land or farms, grazing land and livestock water.[399] Subsequently, accusations were made that the nation and the people affected by the treaty were not consulted by the government. It was alleged that there were neither public consultations nor parliamentary discussions on the matter.[400]

§10. The Caprivi Liberation Front and the Secessionist Movement

186. The Caprivi Liberation Front (CLF) was founded by members of a secessionist movement in the Caprivi Strip in February 1994. In October 1998, troops of the Namibian government discovered a training camp run by the military wing of the CLF in the Muduma National Park. Following this, around 2 400 individuals fled into neighbouring Botswana and most of them were granted political asylum. The head of the CLF, Mishake Muyongo, fled to Denmark where he received political asylum in May 1999.

187. In August 1999, rebels of the CLF allegedly carried out an armed attack on a military base and police station in Katima Mulilo. Three policemen, three soldiers, five rebels and three civilians died during the attack. As a consequence of the attack, President Sam Nujoma declared a state of emergency in the region which lasted till 25 August 1999.[401] More than 300 individuals were arrested with several of them being charged with high treason leading to the largest trial in the Namibian history.[402]

§11. Okacom and Transborder Conservation Areas

188. The Cubango-Okavango River Basin comprises of a network of river systems traversing through Angola, Botswana and Namibia with a total surface of approximately 700 000 km^2.[403] The basin is characterized by a significantly high biological productivity and iconic biodiversity.[404] In 1994, Angola, Botswana and

397. *Ibid.*
398. *Ibid.*
399. *Ibid.*
400. *Ibid.*
401. Declaration of State of Emergency: Caprivi, Proclamation No. 23 of 1999.
402. This will be dealt with in Part V, Chapter 2, § 1.
403. OKACOM Website, Cubango Okavango River Basin (CORB), available at: https://www.okacom.org/cubango-okavango-river-basin-corb (accessed 1 Apr. 2021).
404. *Ibid.*

Namibia agreed to promote coordinated and environmentally sustainable regional water resources development with respect to the river basin by signing an agreement in Windhoek.[405] The agreement established the Permanent Okavango River Basin Water Commission (OKACOM) whose objective is

> to act as technical advisor to the Contracting Parties on matters relating to the conservation, development and utilisation of the resources of common interest to the Contracting Parties and shall perform such other functions pertaining to the development and utilisation of such resources as the Contracting Parties may from time to time agree to assign to the Commission.[406]

This not only follows the notion that developments upstream of the river can have implications on the resources downstream but also that the legitimate social and economic needs of each of the riparian states must be balanced with the conservation of one of the few near pristine rivers in the world.[407]

189. There are several international, regional and national organizations involved in achieving a sustainable management of resources. OKACOM, through support from various international partners, including the Global Environmental Facility, UNDP and the EU, has been implementing the Cubango-Okavango River Basin Strategic Action Plan 2018–2022 through various ongoing activities and projects.[408] A key project is the revision of the 1994 *OKACOM Agreement*. The provisions of the agreement have been found not to be sufficient and suitable for the achievement of the objectives of OKACOM anymore and also to require adaption with view to regional and international trends and developments in transboundary water resources management and governance.[409]

190. Angola, Botswana, Namibia, Zambia and Zimbabwe established a 519 912 km^2 large transborder conservation area, the Kavango-Zambezi Transfrontier Conservation Area (KAZA) in 2011. KAZA has been inaugurated on 15 March 2012 and is administered by all five states concertedly. It constitutes the largest transborder conservation area in the world and is supported by several international donors, including the World Wildlife Foundation. KAZA aims at developing the area which is characterized by an immense and faunal biodiversity through sustainable tourism

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405. Agreement between the Governments of the Republic of Angola, the Republic of Botswana, and the Republic of Namibia on the Establishment of a Permanent Okavango River Basin Water Commission (1994).
406. Article 1.3 of the OKACOM Agreement.
407. *See* for a detailed discussion of this issue: Mapaure (2015).
408. OKACOM website, Current Projects, available at https://www.okacom.org/current-projects#:~:text=The%20European%20Union%20%28EU%29%20in%20support%20to%20the,in%20October%2C%202021%20at%20cost%20of%20EURO%206million (accessed 1 Apr. 2021).
409. OKACOM Website, Review of OKACOM Agreement Nears Finalisation (15 Oct. 2020), available at https://www.okacom.org/review-okacom-agreement-nears-finalisation#:~:text=The%20OKACOM%20Agreement%20was%20signed%20on%2015%20September,and%20the%20Republic%20of%20Namibia%20to%20establish%20OKACOM (accessed 1 Apr. 2020).

and nature conservation through consolidated efforts by its Member States.[410] The objectives include the opening up of migration routes for animals by removing fences and combating international wildlife trade and poaching by joining forces.[411]

191. On 1 August 2003 Namibia and South Africa signed a treaty to merge the /Ai-/Ais Hot Springs Game Park and the Richtersveld National Park in South Africa, creating the /Ai-/Ais Richtersveld Transfrontier Park (ARTP). It provides for the joint management of the parks. The ARTP measures 5,920 km^2 and encompasses some of the most spectacular arid and desert mountain scenery in southern Africa.[412] The area is well known as a biodiversity hotspot and boasts some of the richest succulent flora in the world.[413]

192. The governments of Namibia and Angola declared the Skeleton Coast and Iona National Parks in Namibia and Angola respectively a transborder conservation area by signing a Memorandum of Agreement in Windhoek on 3 May 2018.[414] The Iona-Skeleton Coast Transfrontier Conservation Area stretches along the desert coast of Angola and Namibia and comprises several national parks, reserves, conservancies and tourism concession areas on both sides of the border encompassing a total area of 47,698 km^2.[415] On 1 February 2018, the three-year project SCIONA[416] funded by the EU and led by the Namibia University of Science and Technology (NUST) in cooperation with the Instituto Superior de Ciências de Educação da Huíla, Angola (the Higher Institute of Education Sciences of Huíla, Angola) started with the objective to strengthen cross-border ecosystem management and wildlife protection within the Transfrontier Conservation Area through co-designing and implementing conservation monitoring technology with the park authorities and surrounding communities.[417]

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410. *See*: KAZA Treaty (above) and information on the KAZA website: https://www.kavangozambezi.org/en/ (accessed 1 Apr. 2021).
411. *See*, *e.g.*: Website of the Peace Parks Foundation, About Kavango-Zambezi, available at: https://www.peaceparks.org/tfcas/kavango-zambezi/ (accessed 1 Apr. 2021). *See also*: World Wide Fund For Nature, Kavango-Zambesi (Kaza), available at: https://www.wwf.de/themen-projekte/projektregionen/kavango-zambesi-kaza/ (accessed 1 Apr. 2021).
412. SADC TFCA Fact Sheet, available at: https://www.sadc.int/files/2514/2122/3333/SADC_TFCA_Fact_Sheetsv_final.pdf (accessed 1 Apr. 2021).
413. Ministry of Environment, Forestry and Tourism in Namibia, at: Ministry of Environment and Tourism Namibia, /Ai-/Ais-Richtersveld Transfrontier Park, available at: https://www.met.gov.na/national-parks/-ai-ais-richtersveld-transfrontier-park/296/ (accessed 1 Apr. 2021).
414. SADC TFCA Portal, Angola and Namibia sign MoA for Iona-Skeleton Transfrontier Park, available at: https://tfcaportal.org/angola-and-namibia-sign-moa-iona-skeleton-transfrontier-park (accessed 27 Jun. 2022).
415. SADC TFCA Portal, Iona-Skeleton Coast TFCA, available at: https://tfcaportal.org/node/404 (accessed 1 Apr. 2021).
416. SCIONA stands for: Iona - Skeleton Coast Transfrontier Park.
417. SCIONA website, available at: http://sciona.nust.na/about (accessed 1 Apr. 2021).

Chapter 3. Population

193. Censuses to establish the population of Namibia have taken place in a ten-year interval starting in 1991. The piloting phase of the 2021 Population and Housing Census was conducted in early 2021.[418] Census mapping started in 2020 but had been challenged and temporarily interrupted due to the COVID-19 pandemic. In July 2021, the Namibia Statistics Agency (NSA) then announced that the 2021 Population and Housing Census had been postponed and now planned for August 2022 due to competing priorities such as the COVID-19 budget prioritization.[419] The legal basis for the census can be found in section 7(2)(d) of the *Statistics Act*.[420] According to this provision, the Namibia Statistics Agency is obliged to cause a population and housing census to be taken every ten years. Apart from the population and housing censuses, there have been intercensal demographic surveys with the main objective of providing updated information on demographic, socio-economic, and housing characteristics of the population in 1996, 2006, and 2016. The intercensal survey is a sample survey collecting information from persons in households and their housing units.[421] Moreover, the United Nations regularly generate population estimates for the world population including the population in each country. The latest 2019 Revision of World Population Prospects is the twenty-sixth round of official United Nations population estimates and projections that have been prepared by the Population Division of the Department of Economic and Social Affairs.[422]

194. The national census of 2011 established a total population of 2 113 077.[423] The intercensal survey of 2016 yielded a population of 2 324 388.[424] The United Nations estimate the population to be 2 587 344 on 1 July 2021.[425] This equates to a population density of about 2.6 people per km^2 in 2011 and 2.8 people per km^2 in 2016.

195. In 2011, a total of 1 209 643 people lived in rural areas, while 903 434 lived in urban areas, from which alone 322 500 resided in the capital city, Windhoek.[426] In 2016, it was estimated that 1 112 868 people lived in rural and 1 211 520 people in urban areas.[427] Namibians at working age migrate to urban areas, consequently more young and elderly live in rural than in urban areas.[428] With close to 37% being

418. NSA to start piloting phase of 2021 Census next month, NBC website, available at: https://www.nbc.na/news/nsa-start-piloting-phase-2021-census-next-month.40072 (accessed 1 Apr. 2021).
419. The Economist of 14 Jul. 2021.
420. Act No. 9 of 2011.
421. Namibia Statistics Agency (2017): 10.
422. *See*: Department of Economic and Social Affairs, Population Dynamics, World Population Prospects, available at: https://population.un.org/wpp/ (accessed 1 Apr. 2021).
423. Namibia Statistics Agency (2011): 25.
424. Namibia Statistics Agency (2017): 13.
425. *See*: Department of Economic and Social Affairs, Population Dynamics, World Population Prospects, available at: https://population.un.org/wpp/ (accessed 1 Apr. 2021).
426. *Ibid.* Namibia Statistics Agency (2017): 14.
427. Namibia Statistics Agency (2017): 13.
428. Namibia Statistics Agency (2011): 27.

less than fifteen years old in 2011 and 2016, Namibia has a very young population.[429] In 2016 an average of 95 men for every 100 women lived in Namibia.[430]

196. A total 96.8% of the people living in Namibia had Namibian citizenship in 2011. Non-Namibians living in the country came from Angola (28.9%), Botswana (0.7%), South Africa (8.6%), Zambia (11.2%), Zimbabwe (8.0%), other SADC countries (13.7%), other African countries (13.7%), European countries (9.1%), Asian and Oceanic countries (4.6%), and American countries (1.4%).[431]

429. Namibia Statistics Agency (2011): 27. Namibia Statistics Agency (2017): 14.
430. Namibia Statistics Agency (2017): 14.
431. Namibia Statistics Agency (2011): 34.

Part II. The Sources of Law

197. The reception clause of Article 140 provides that

> all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.

This means that South West African and South African legislation, the South African and English common law and the customary law as it was applicable at independence remain valid sources of law in Namibia. Moreover, according to the law of precedence, pre-independence decisions of the South West African and South African higher courts are also binding in Namibia. Furthermore, international law is explicitly made part of the law of Namibia by Article 144. In the following chapters, the different sources of law are presented in more detail: the Constitution (Chapter 1), international law (Chapter 2), legislation (Chapter 3), customary law (Chapter 4), and jurisprudence (Chapter 5). Chapter 6 then outlines some basic information on the codification and publication of law in Namibia.

198–201

Chapter 1. The Constitution

§1. The Supremacy of the Constitution

198. Namibia moved away from the concept of parliamentary sovereignty which developed in Britain and existed in South Africa and South West Africa before Namibia became independent.[432] Unrestricted parliamentary sovereignty allows parliament to pass any law, provided it follows the correct procedure.[433] The *Constitution* of Namibia instead opted for constitutional supremacy. To this end, the *Constitution* states:[434]

> This Constitution shall be the Supreme Law of Namibia.

199. The implication of the supremacy clause is that any law enacted by the legislature or any action taken by the executive part of the government must comply with the requirements of the *Constitution.* Article 25 of the *Constitution* gives courts the power and authority to remedy situations of violations of fundamental rights and freedoms by acts of the executive and the legislature by declaring law that violates the *Constitution* unconstitutional and – so it is said in Sub-Article 3 of Article 25 – make "all such orders as shall be necessary and appropriate to secure such applicants [i.e. aggrieved persons claiming remedy] the enjoyment of the rights and freedoms conferred on them under the provisions" of the *Constitution*.

§2. Separation of Powers

200. The main objective of the doctrine of separation of powers is to preclude the arbitrary exercise of power or, in other words, to restrain and control power.[435] This doctrine entails that the freedom of citizens can only be ensured if the concentration of power is prevented by its division into executive, legislative, and judicial authority.

201. Article 1(3) of the *Constitution* determines that the legislature, the judiciary, and the executive are the three organs of the state, thus, making the doctrine of the separation of powers part of the constitutional law of the country. The importance of the principle of separation of powers under the *Constitution* was highlighted by the High Court in *S v. Heita*:[436]

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432. Okpaluba (2000): 112; and also: Bangamwabo (2010): 251.
433. As Dicey (1915: 3f.) says: "Parliament … has … the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of parliament."
434. Article 1(6) of the Constitution.
435. *S v. Heita* 1992 NR 403 (HC); *Ex Parte Attorney-General in Re: the Constitutional Relationship between the Attorney-General and the Prosecutor* 1998 NR 282 (SC).
436. 1992 NR 403 (HC): 407F-G.

> The existence of the separation of powers between three separate departments of government is certainly one of the main pillars of the Namibian constitution and State.

202. Other articles of the *Constitution* specify the way how the separation of powers is expected to work: Article 44 vests the legislative functions in the National Assembly and the National Council; Article 27(2) provides that the executive power shall vest in the President and the Cabinet; Article 78 vests the judicial powers in the courts.

203. There are, in particular, two constitutional arrangements that affect the separation of powers. The members of the Cabinet are members of the National Assembly.[437] In the latter capacity they are controlling themselves. The judges of the Supreme and the High Courts are appointed and may be removed by the president, albeit on the recommendation of the Judicial Service Commission.[438]

204. The concept of separation of powers has been discussed in *Ex Parte: Attorney-General In Re: Constitutional Relationship between Attorney-General and the Prosecutor-General*.[439] The court had to determine whether the Attorney-General, in the exercise of the final responsibility for the Office of the Prosecutor-General under Article 87 of the *Constitution*, has the authority to interfere with the Prosecutor-General's powers. The Supreme Court emphasized that "Namibia is a Rechtsstaat just as South Africa under the apartheid regime was not".[440] Section 3(5) of the *Criminal Procedure Act,*[441] which basically put the Attorney-General under the control of the minister, was found not to be compatible with the principle of separation of powers. The court declared the respective provision unconstitutional and decided that the office of the Prosecutor-General was only subject to the duty to keep the Attorney-General properly informed so that the latter may be able to exercise ultimate responsibility for the office.

205. The independence of the judiciary[442] has been stressed as indispensable and any influence on judges regarding decisions made in their function to hear and decide cases has been found to be unconstitutional.[443] In the Supreme Court judgement *Mostert v. The Minister of Justice*,[444] it was emphasized that the independence of the judiciary[445]

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437. Article 35(1) of the Constitution.
438. Article 32(4) and (6) of the Constitution. – On the Judicial Service Commission *see*: below.
439. 1998 NR 282 (SC).
440. *Ibid*.: 299F.
441. Act. No. 51 of 1977.
442. The independence of the judiciary is discussed in more detail below.
443. *See*, *e.g.*: *Mostert v. The Minister of Justice* 2003 NR 11 (SC), *Alexander v. Minister of Justice and Others* 2010(1) NR 328 (SC).
444. 2003 NR11 (SC).
445. *Mostert v. The Minister of Justice* 2003 NR 11 (SC): 33A. The court referred to the Public Service Act, Act No. 13 of 1995.

> cannot be reconciled with section 2 of the Public Service Act which requires from staff members to execute government policy and directives or to be described as staff members, which by itself, carries the clear implication of being subject to control in some or other form.

The court emphasized the importance to adhere to the principle of separation of powers:[446]

> For as long as magistrates remain subject to the provisions of the Public Service Act, which virtually designates them as employees of the Government and which requires of them prompt execution of Government policy and directives, their independence will be under threat and, what is just as important, is that magistrates would not be perceived by the public as independent and as a separate arm of Government. I therefore agree with the order of the Court a quo that s 23(2) did not apply to magistrates.

206. The independence requirements for lower courts were found to be different from those for higher courts. Reference was made to the South African case *van Rooyen and Others v. The State and Others*[447] leading to the following conclusions:[448]

> From the extracts out of the Van Rooyen case it seems clear that all courts are entitled, in terms of the particular Constitution, to the protection of their institutional independence but, depending on the nature of their jurisdiction and the hierarchical differences between higher courts and lower courts, this protection need not be in the same form. Coming to the situation in Namibia it seems to me that we have the same hierarchical differences between our higher courts and lower courts which is dealt with much the same by our Constitution, as is the case in South Africa. It follows therefore that I am of the opinion that also in Namibia the protection of the institutional independence of the lower courts need not be in the same form as that necessary for the High and Supreme Courts … .

207. In *Alexander v. Minister of Justice*[449] the High Court had to decide whether the chief: lower courts can lawfully hold extradition enquiry proceedings in terms of the *Extradition Act*[450] and discussed the question whether this would be contrary to the principle of separation of powers. The court argued as follows:[451]

> It follows that, in my judgment, the Chief: Lower Courts is a member of the public service within the meaning of the Public Service Act, and so the Chief:

446. *Ibid.* at: 34E–F.
447. 2002 (8) BCLR 810 (CC).
448. *Mostert v. The Minister of Justice* 2003 NR 11 (SC) at: 31J–32B.
449. 2009 (2) NR 712 (HC).
450. Act No. 11 of 1996.
451. *Alexander v. Minister of Justice* 2009 (2) NR 712 (HC): 728D–G.

> Lower Courts cannot at the same time be a part of the magistracy without offending the Namibian Constitution. … In this regard, it must be remembered that the concept of independence of the judiciary stands on two inseparable pillars, namely individual independence and institutional independence. Individual independence means the complete liberty of individual judges and magistrates to hear and decide the cases that come before them. … Institutional independence of the judiciary, on the other hand, reflects a deeper commitment to the separation of powers between and among the legislative, executive and judicial organs of state.

208. While the principle of separation of powers requires the courts to operate independently from the executive and legislative, it also includes the duty not to encroach on the powers of the other branches of government. The High Court found in this respect in *Matengu v. Minister of Safety and Security*[452] that a court can only intervene if the responsible member of the executive had, in the exercise of his powers, acted unlawfully. The applicant had applied for an order compelling the Minister of Safety and Security to transfer him to a different correctional facility close to his family's home. As he had not first applied to the Commissioner-General, as required by section 74 of the *Correctional Service Act*,[453] the High Court found it not to be appropriate "to intervene at this stage because to do so would be to usurp the powers vested by the Constitution on the executive branch of government."[454]

§3. Rule of Law

209. The rule of law demands that law should be certain; that it is ascertainable and predictable. This is essential for citizens in order to know what legal consequences their conduct may have. In view of this, Article 1(1) of the *Constitution* established Namibia as a sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all. Placing the adherence to the rule of law in context with democracy and justice shows that the understanding of the rule of law in the *Constitution* is different from the South African understanding during the time of apartheid and the South African administration in Namibia.[455]

210. Applying the rule of law means more than following the letter of the law as the positivist approach to law suggests. Rule of law refers to the material understanding of law that conceptualizes law as the comprehensive expression of the democratically intended legal order. With this, the *Constitution* follows the development of the concept of the rule of law as it has manifested itself in most modern constitutional orders.[456]

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452. 2017 (2) NR 569 (HC).
453. Act No. 9 of 2012.
454. *Matengu v. Minister of Safety and Security* 2017 (2) NR 569 (HC): 573I – J.
455. Amoo; Skeffers (2008): 17.
456. *See*: Okapaluba (2000): 120.

211. In *Sikunda v. Government of the Republic of Namibia (2)*,[457] where the Minister of Home Affairs was found to be guilty of contempt of court for refusing to follow a court rule for the immediate release of a detainee, the importance of the rule of law and the role of the courts in this respect have been stressed:[458]

> Judgments, orders are what the courts are all about. The effectiveness of a court lies in execution of its judgments and orders. You frustrate or disobey a court order, you strike at one of the foundations that established and founded the State of Namibia. The collapse of rule of law in any country is the birth of anarchy. The rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded and protected.

§4. Limits on Acts of Government Affecting Fundamental Rights and Freedoms and for Amending the Constitution

212. The principle of constitutional supremacy in the *Constitution* is further strengthened by Article 24(3) which declares several human rights and freedoms non-derogable. This non-derogable character of fundamental human rights and freedoms guarantees a high degree of protection.

213. The fundamental rights and freedoms are further entrenched by exempting them from amendment and repeal. Article 131 of the *Constitution* stipulates:

> No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

And according to Article 132(5)(a), it is prohibited to

> detract in any way from the entrenchment provided for in article 131 hereof of the fundamental rights and freedoms contained and defined in Chapter 3 hereof.

Carpenter has referred to Article 131 as the most important provision in the Constitution as it renders any diminution impossible, "except in the extreme case that the entire Constitution is irrevocably abandoned".[459] Other provisions of the

457. 2001 NR 86 (HC).
458. *Sikunda v. Government of the Republic of Namibia* (2) 2001 NR 86 (HC): 92D–E.
459. Carpenter (1991): 59.

Constitution can only be amended and repealed with a two-thirds majority of all members of the National Assembly and the National Council[460] or with a two-thirds majority of votes cast in a national referendum.[461]

460. Article 132(2) of the Constitution.
461. Article 132(3).

214–218

Chapter 2. International Law

§1. Introduction

214. The participation of the international community in Namibia's struggle to independence has influenced Namibia's legal system. This particular relationship of Namibia with international law and the international community has been recognized by politicians and scientists alike. Namibia was termed a "child of international solidarity",[462] a "child of the UN",[463] a "child of pan-Africanism and internationalism"[464] and a "child of international law".[465]

215. These quotations not only illustrate the influence of international law and the international community on Namibia and its constitutional orientation but also explain that international law has received a prominent place as source of law in *constitution*. The key provision is Article 144, which reads:

> Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

216. So far, the courts did not have an opportunity to explore the meaning of Article 144. What is worthwhile to consider are the opinions by legal scholars who have discussed the role of international law in the Namibian legal system and have made suggestions for the interpretation and application of Article 144.[466]

217. In order to understand the discussion about the scope and meaning of Article 144 it is necessary to know some basics about the sources and principles of international law. These will be briefly outlined in § 2 of this chapter. Then, the constitutional provisions governing the application of international law shall be discussed in detail (§ 3). In § 4 an overview of the jurisprudence by Namibian courts with view to international law shall be given.

§2. The Sources of International Law; International Law within the Domestic Legal System

218. Article 38 of the *Statute of the International Court of Justice* reflects on the sources of international law, as follows:

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462. Geingob at the seventieth session of the UN General Assembly on 29th September 2015. *See* https://gadebate.un.org/en/70/namibia (accessed 1 Apr. 2021).
463. Egge (2014): 293.
464. Diescho (2014): 413.
465. Zongwe (2019a): 7.
466. Erasmus (1991), Szasz (1991), Tshosha (2001), Bangamwabo (2009), Tshosha (2010), Dausab (2010), Zongwe (2019a), Ndeunyema (2020).

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

219. The most important sources of international law are international conventions and customary law, followed by rules of international customary law. Customary law refers to obligations arising from established international practices. Customary international law presupposes a general and consistent practice of states and the will of states to follow this practice.[467]

220. General principles of law in terms of Article 38(1)(c) of the statute of the ICJ refer to a coherent body of rules which have been developed by tribunals by employing "modes of general legal reasoning as well as comparative law analogies."[468] Thus, accepted principles of domestic law are the principles of consent, equality of states, and good faith.[469]

221. The way states deal with international law in relationship to their municipal legislation differs. Some states make international law directly applicable and consider international law as part of national law. In doctrinal terms this approach is referred to as monism. Other states require that international norms are implemented into national legislation, viewing international and national laws as two distinct legal systems. This has been referred to as the dualistic approach.[470] While there might exist constitutional or legislative provisions suggesting whether a country pursues a monist or dualist approach, the interaction between international and domestic laws is, in practice, usually more complex.[471] With view to customary international law, e, g., a dualistic approach is simply not suitable as the rules emerge gradually in the world community and their content is not immediately definable.[472] Moreover, on the one hand some international rules such as non-self-executing treaties need further specification or definition by legislature and, hence, must be incorporated into national law in order to be effective, even if international

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467. Crawford (2019): 21ff; Dugard; du Plessis; Maluwa; Tladi (2018): 31ff.
468. Crawford (2019): 32.
469. Crawford (2019): 32.
470. The practical effects of the classification in monistic or dualistic states are minimal and the respective theories do not offer an adequate account of state practice. Cf.: Crawford (2019): 45ff.; Gaeta; Viñales; Zappalá (2020): 218ff.; Dugard; du Plessis; Maluwa; Tladi (2018): 57f.; and with view to the Namibian context: Bangamwabo (2009): 166ff.; Dausab (2010): 265f.; Tshosha (2010): 4ff.; Ndeunyema (2020): 273ff.
471. Gaeta Viñales; Zappalá (2020): 220.
472. *Ibid*.: 226.

law is made directly applicable.[473] On the other hand, there is a rising number of international rules addressing themselves directly to individuals by granting rights and imposing obligations. Those rights may be exercised, and obligations must be fulfilled, irrespective of what national legal order may provide.[474]

222. If international law is considered as part of national law, the national court "will go about establishing the content of international law as a matter of legal argument".[475] In practice, it is often difficult for the courts to find reliable information on international law, especially customary law and the courts are thus required to make a full investigation of the legal sources in order to be able to interpret and apply international law.[476] It also falls to the courts to determine how international law fits within the internal hierarchy of a national system and to adjudicate possible conflicts between a rule of international on the one hand and domestic law on the other hand. This question arises to international treaties and customary law alike.[477] While some states tend to accord international rules a higher rank than that of national legislation, other states regard international law as having the same rank as national legislation of domestic origin.[478] In the latter case, the courts must apply the general principles governing the relationship between rules having the same rank, if international law-based norms are in conflict with national legislation.[479]

§3. International Law under the Constitution

223. With the introduction of the *Constitution*, Namibia chose a more friendly or proactive approach to international law than before independence.[480] According to Tshosha, this is, *inter alia*, due to "the experience of a long period of apartheid colonial rule in total disregard of international law and defiance of the international community" which "reminded the architects of the Constitution that they had to ensure that the legal system of Namibia was anchored on firm principles of international law".[481]

224. Apart from the constitutional expectation to "foster respect for international law and treaty obligations",[482] Article 144 of the *Constitution* provides for the direct application of international law:

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473. Cf. *ibid.*: 8f., 221, 227; Crawford (2019): 54.
474. Cf.: Gaeta Viñales; Zappalá (2020): 221, 232; Dugard; du Plessis; Maluwa; Tladi (2018): 1f.
475. *Ibid.:* 52.
476. *Ibid.:* 52f.
477. *Ibid.:* 53.
478. Gaeta Viñales; Zappalá (2020): 224.
479. Cf.: *ibid.*
480. *See*: Erasmus (1991): 93. The application of international law before independence is discussed by Ndeunyema (2020): 276ff.
481. Tshosha (2010): 10.
482. Article 96(d) of the Constitution of Namibia.

> Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

225. In terms of Article 144, international agreements comprise all form of written agreements concluded between Namibia and other states (or international organisations), including bilateral as well as multilateral agreements.[483] According to Article 32(3)(e) of the *Constitution*, the power to negotiate and sign international agreements is vested in the president. Nevertheless, he or she can also delegate such power. The president can be assisted by the Cabinet in determining what international agreements are to be concluded, acceded, or succeeded to.[484] The ratification or accession to international agreements which have been negotiated and signed is subject to approval by the National Assembly.[485] Only when treaties are duly signed and ratified, they are binding upon Namibia and form part of its national law. According to Ndeunyema, the constitutionally required process of treaty accession and ratification "augments democratic benefits of legislative scrutiny and executive accountability, as well as arguably, ameliorating the democratic deficits in international law-making".[486]

226. The 1978 *Vienna Convention on the Succession of States in Respect of Treaties*, which entered into force in 1996, deals with the inheritable treaty rights and obligations of new actors on the international stage.[487] Generally and subject to certain conditions, it provides that newly independent states can choose whether or not to be bound by any or all of the bilateral and multilateral treaties that had applied in respect of their territory on the date of independence.[488] Although Namibia has not acceded to this convention, it can be seen as a reference for the succession of newly independent states such as Namibia in respect of treaties.[489] In Namibia, succession or the continuing validity of international agreements that have been entered into before independence is provided for in Article 143 of the *Constitution*. Nevertheless, this only applies if the National Assembly, which has the power to consider and decide whether or not to succeed to such pre-independence international agreements, has not decided otherwise.[490] The question of the validity of international treaties that have been concluded before independence is of particular importance in Namibia and concerns treaties concluded on behalf of Namibia during the

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483. *See*: Erasmus (1991): 101; Ndeunyema (2020): 279.
484. Article 40(i) of the Constitution.
485. Article 63(2)(e).
486. Ndeunyema (2020): 280.
487. Vienna Convention on Succession of States in respect of Treaties of 1978, done at Vienna on 23 Aug. 1978, entered into force on 6 Nov. 1996. United Nations, *Treaty Series*, Vol. 1946: 3.
488. *Ibid.*: Arts 16ff. *See also*: Szasz (1991): 65. With the exception of a particular kind of treaties such as boundary treaties: *see*, *e.g.*, Article 6 of the Vienna Convention on the Law of Treaties of 1969 and Article 11 of the Vienna Convention on Succession of States in Respect of Treaties.
489. Namibia as well as South Africa was actively represented at the conference leading to the conclusion of the agreement, and the conference adopted a resolution concerning Namibia which implicates that Namibia's coverage by the convention was clearly envisaged. *See:* Final Act of the Conference (A/CONF. 80/SR. 3), and also: Szasz (1991): 66f.
490. Article 63(2)(d) of the Constitution.

time of the South African administration,[491] in times where South Africa illegally occupied Namibia after the termination of the mandate in 1966, but also treaties entered into by the United Nations Council for Namibia[492] on behalf of Namibia.[493] Since not all treaties entered into are necessarily detrimental for Namibia, the decision was taken to accept generally the validity of all treaties but give the National Assembly the power to decide otherwise.[494] It has to be remarked that there are no time limits for the National Assembly to conduct the review of treaties under Articles 143 and 63(2)(d) of the *Constitution*, neither the United Nations convention nor customary law provides a time limit for review.[495] Treaties can, hence, be revoked at any time at the discretion of the National Assembly. However, as Szasz notes, if Namibia exercises its rights and fulfils its obligation under a given treaty over a period of time, the National Assembly might be precluded from deciding that there had been no valid succession.[496] Parties to treaties where succession of Namibia is unclear might provoke a submission to and a decision by the National Assembly through a diplomatic inquiry.[497] The status of all other treaties remains unresolved which is not incompatible with international customs until the National Assembly exercises its function under Article 63(2)(d).[498]

227. What is meant by "general rules of public international law" has not been discussed by Namibian courts. Legal scholars dealing with international law in Namibia disagree with view to the interpretation of the term. Erasmus[499] and Tshosha[500] use the phrase as synonymous with customary international law. Ndeunyema suggests that "general rules of public international law" include both customary international law and general principles of law.[501] The wording in Article 144 of the *Constitution*, though, differs as it refers to "general rules" rather than "general principles". The term "general principles" is thus wider than "general rules". The wording "general rules of international law" would, hence, only include established standards or principles with binding character.

228. As the *Constitution* is supreme, international law is only valid as long as it is in conformity with the *Constitution*.[502] The test of conformity must though be

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491. That is, before the mandate was withdrawn.
492. *See* above in Chapter 1. The council entered several treaties such as the International Convention on the Elimination of All Form of Racial Discrimination, 1966; the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973; and the United Nations Convention on the Law of the Sea, 1982.
493. For a detailed discussion about the binding character of these different types of treaties upon Namibia *see*: Szasz (1991): 70ff.
494. A study conducted by UNIN makes recommendations in respect of the over 300 treaties that might be considered to have related to pre-independence Namibia. *See*: Szasz (1991): 66.
495. Szasz (1991): 68.
496. *Ibid*.: 78.
497. *Ibid.*
498. *Ibid.*
499. Erasmus (1991): 98.
500. Tshosha (2010): 11.
501. Ndeunyema (2020): 280f.
502. Cf.: Erasmus (1991): 94 and Tshosha (2010): 24ff.

applied with caution. The High Court remarked in this respect, that only constitutional provisions, that are specific and unequivocal, override provisions of international agreements.[503] Additionally, international law is only applicable if it has not been excluded from application by legislation. With regard to international treaties, states, though, have an obligation to respect a treaty it has entered into and not to undermine the object and purpose of the treaty it has signed and ratified.[504] This reduces the scope of application of excluding the application of international treaties by legislation significantly. The exclusion of international law using an act of parliament is "of course, not recommended".[505]

229. What rank international law has in the national legal order and how potential conflicts of norms are to be dissolved has not yet been decided by the Namibian courts. According to the Supreme Courts' interpretation in *JT v. AE*,[506] legislation and international agreements can be regarded has having the same rank in the national legal order:[507]

> [I]n Namibia, international agreements such as the Convention, appear to have similar force of law as accorded to legislation, in the absence of any constitutional provision or Act of Parliament contradicting the law or agreement in question.

230. Ndeunyema suggests the doctrine of consistent interpretation requiring legislation to be interpreted in harmony with international obligations wherever possible.[508] This doctrine is part of the pre-constitutional common-law position on international law's application which remained in force by virtue of Article 66(1) of the *Constitution*.[509]

231. Article 144, in combination with Articles 79 and 80 of the *Constitution*, implicates that the judiciary is competent and responsible to determine, interpret, and apply international customary law as well as treaties Namibia is a party to.[510] In general, no legislative action is required for incorporation or transformation.

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503. *Kauesa v. Minister of Home Affairs and Others* 1994 NR 102 (HC): 141A–B ; *see also*: Ndeunyema (2020): 288
504. This derives from the principle of *pacta sunt servanda* requiring states to perform every treaty binding on them in good faith as well as from customary international law obliging states to ensure that their own national legislation, policies or practices meet the requirements of the treaty. Cf.: Article 27 read together with Article 46 of the Vienna Convention on the Law of Treaties of 1969 which is binding on Namibia as customary law although Namibia has not acceded to the Convention. *See*: Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Report. 1999: 1045, 1059, and also: Dausab (2010): 268; Ndeunyema (2020): 291f.
505. Dausab (2010): 284.
506. *JT v. AE* 2013 (1) NR 1 (SC).
507. *Ibid.:* 7B.
508. Ndeunyema (2020): 284.
509. *Ibid.:* 276.
510. Cf.: Erasmus (1991): 95; Tshosha (2001): 79/80.

However, as many treaties provide general objectives and principles rather than specific obligations or provisions that can be enforced before national courts, the necessity to incorporate or implement these principles or obligations arising from such treaties persists, despite Article 144.[511] As Horn puts it, the *Constitution* indeed does not demand "a legal framework for the treaties to be implemented in Namibian domestic law", but "it is not always possible to obtain the results aimed at by the treaties without any domestic intervention".[512] While the constitutional approach to international law makes international law directly applicable without implementation, the effectiveness of international treaties in the domestic legal process depends on the jurisprudence of Namibian courts.[513] Horn remarked in 2009 with view to international human rights law:

> Despite the liberal approach of the Namibian Constitution, the UN human rights instruments are not receiving the prominence one would have expected. The courts still expect the legislator to provide a legal framework for the implementation of treaty principles.[514]

232. There have been some cases where the courts referred to international treaties and international public law when interpreting certain provisions of the *Constitution*.[515] Courts have, though, not clearly defined and classified the type of source of international public law they referred to;[516] they rarely "positively identified a rule as one specifically of customary international law".[517] Moreover, there are also cases where specific provisions of international law were directly applied

511. Cf.: Tshosha (2010): 21; *see also*: Erasmus (1991): 106 where he notes that, "[w]hen a party seeks to invoke an agreement as self-executing it will be for the courts to decide whether the terms of the treaty are adequate or whether new legislation is needed." The understanding that not all provisions of international treaties are able to create directly rights and duties has also been recognized by the Namibian Parliament and led it, for example, to enact the Geneva Conventions Act No. 15 of 2003 to implement the following Geneva Conventions into municipal law: Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in Field, 12 Aug. 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949; Geneva Convention relative to the Treatment of Prisoners of War, 12 Aug. 1949; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 10 Jun. 1977; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 10 Jun. 1977.
512. Horn (2009): 142.
513. *Ibid.:* 110.
514. *Ibid*.: 144.
515. *See*, e.g.,: *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State* 1991 NR 178 (SC); *Minister of Defence v. Mwandinghi* 1993 NR 63 (SC); *Government v. Cultura* 1993 NR 328 (SC); *Kauesa v. Minister of Home Affairs and Others* 1994 NR 102 (HC); *Namunjepo and Others v. Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC).
516. In *S v. Mushwena* 2004 NR 276 (SC), the court though cited the recognized sources of international law.
517. Ndeunyema (2020): 289.

by the courts.[518] According to Zongwe, the role of Article 144 in jurisprudence and the decision whether international law is applied as a source of international law or as a source of meaning to interpret constitutional provisions has not been clarified yet.[519] However, this assertion seems not to take account of the complexity of international law and its different sources. The application of international law might indeed differ with respect to the source of law. Nevertheless, it can be concluded with the words of Ndeunyema that the application of international law by the Namibian courts has so far been inconsistent, inaccurate, and divergent.[520]

§4. International Law in Namibian Case Law

233. The first case before a Namibian court where the necessity to consider international norms when interpreting the *Constitution* was *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State*.[521] In this case, the court had to decide whether corporal punishment by or on the authority of any organ of state contemplated in legislation was violating the right to dignity as provided by Article 8 of the *Constitution*. The question as to whether a particular form of punishment authorized by the law can properly be said to be inhuman or degrading was found to require[522]

> a value judgment which requires objectively to be articulated and identified … and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.

234. The court found that the provisions of Article 8(2) articulated "a temper throughout the civilised world which has manifested itself consciously since the Second World War".[523] The court referred to foreign constitutional provisions and jurisprudence that consistently rejected corporal punishment as inhuman and degrading and came to the result that there is "beginning to emerge an accelerating consensus against corporal punishment for adults throughout the civilized world".[524] The court thus analysed and accepted global values when interpreting the

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518. These include: *S v. Mushwena* 2004 NR 35 (HC); *S v. Mushwena* 2004 NR 276 (SC); *Government of the Republic of Namibia v. Mwilima and all other accused in the Caprivi treason trial* 2002 NR 235 (SC). *See also: Müller v. President of the Republic of Namibia and Another* 1999 NR 190 (SC).
519. *See*: Zongwe (2019a): 89ff.
520. Ndeunyema (2020): 290.
521. 1991 NR 178 (SC). *See* on this decision: Obadina (1996) and Indongo (2008).
522. *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State* 1991 NR 178 (SC): 188E–F.
523. *Ibid*.: 188G.
524. *Ibid*.: 189F.

Constitution. The Supreme Court confirmed the approach to consider the situation in the international community when interpreting the *Constitution* again in *Namunjepo v. Commanding Officer, Windhoek Prison.*[525] This would not only include cases in other jurisdictions but also "conventions and protocols drafted and accepted by various institutions and countries".[526]

235. In *Minister of Defence v. Mwandinghi*,[527] the court stressed that the fundamental human rights and freedoms in the *Constitution* are "in a broad and ample style and are international in character".[528] In their interpretation, they would call for the application of international human rights norms.[529] The influence of universal human rights on jurisprudence in Namibia was also emphasized in *Government v. Cultura*:[530]

> It is manifest from these and other provisions that the Constitutional jurisprudence of a free arid independent Namibia is premised on the values of the broad and universalist human rights culture which has begun to emerge in substantial areas of the world in recent times and that it is based on a total repudiation of the policies of apartheid which had for so long dominated lawmaking and practice during the administration of Namibia by the Republic of South Africa.

Article 144 was interpreted as giving[531]

> expression to the intention of the Constitution to make Namibia part of the international community … .

236. In *Kauesa v. Minister of Home Affairs,*[532] the High Court found that the *African Charter of Human and People's Rights* has become binding on Namibia in accordance with Article 143 and would, hence, form part of the Namibian law under Article 144.[533] The court clarified the principle of constitutional supremacy with respect to international law by stating that the provisions of the *Constitution* override provisions of international law when they specifically and unequivocally contradict international law:[534]

> However, in all situations where such law is not in conflict with the provisions of the Namibian Constitution, such law will have to be given effect to in Namibia. In cases where the provisions of the Namibian Constitution are

525. *Namunjepo and Others v. Commanding Officer*, Windhoek Prison and Another 1999 NR 271 (SC).
526. *Ibid*.: 283I.
527. *Minister of Defence v. Mwandinghi* 1993 NR 63 (SC).
528. *Ibid.*: 70B.
529. *Ibid.*
530. 1993 NR 328 (SC): 333H – I.
531. *Ibid.*: 333I–J.
532. *Kauesa v. Minister of Home Affairs* 1994 NR 102 (HC).
533. *Ibid*.: 140H–I.
534. *Ibid.*: 141A–C. *See also*: Ndeunyema (2020): 284.

> equivocal or uncertain as to the scope of their application, such provisions of the international agreements must at least be given considerable weight in interpreting and defining the scope of the provisions contained in the Namibian Constitution.

237. Apart from the specification that constitutional provisions must be "specific and unequivocal" to override international agreements, the *Kauesa* case "also affirms the value of international law beyond their direct application domestically: in the interpretation and scoping of *Constitution* provisions"[535] by establishing that agreements and declarations not binding on Namibia should be considered when interpreting provision of the *Constitution*, too.[536]

238. In the case of *Müller v. Government of the Republic of Namibia*[537] the Supreme Court found that a provision of the *Aliens Act*[538] was not discriminatory under the *Constitution*. Müller had claimed that the refusal of the government to let him adopt his wife's surname was discriminatory on the ground of sex and contrary to the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). The court stressed that applicable conventions would be subject to the *Constitution* and would hence not influence the decision.[539] Ndeunyema criticized that the court dismissed "the reliance on CEDAW without any attempt at reconciling the Constitution with CEDAW provisions as required by Article 144".[540] The couple brought its case to the Human Rights Committee (HRC) which is the UN human rights treaty body responsible for overseeing implementation of the *International Covenant on Civil and Political Rights* (ICCPR). The HRC concluded that the Supreme Court had erred in finding that there was no discrimination, and that this constituted a violation of CEDAW. The applicants were found to have been victims of discrimination and violation of Article 26 of the *Covenant*.[541] The Committee advised the Namibian state to take the necessary measures to give effect to the Committee's views.[542] This, however, remained ineffective as the government did not initiate any change.[543]

239. There are also cases in which the court explicitly dealt with Article 144. That the United Nations *Convention and Protocol on the Status of Refugees* as well as the ICCPR are, by virtue of Article 144, read with Articles 63(e) and 32(3)(e) of

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535. Ndeunyema (2020): 288.
536. *Kauesa v. Minister of Home Affairs* 1994 NR 102 (HC): 140J–141A.
537. *Müller v. President of the Republic of Namibia* 1999 NR 190 (SC).
538. Act No. 1 of 1937.
539. *Müller v. President of the Republic of Namibia* 1999 NR 190 (SC): 205E–F.
540. Ndeunyema (2020): 289.
541. *Müller and Engelhard v. Namibia,* 2002, Report of the Human Rights Committee, U.N. General Assembly Official Records, 57th Session, Supp. No. 40, UN Doc. A/57/40, Vol. II, Annex IX, sect. CC, at 243 (30 Oct. 2002); Office of the UN High Commissioner for Human Rights, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. VII, at 142, UN Doc. CCPR/C/OP/7, UN Sales No. E.06.XIV.1 (2006) . Available also at: http://www.worldcourts.com/hrc/eng/decisions/2002.03.26_Muller_v_Namibia.htm (accessed 27 Jun. 2022).
542. *Ibid.*
543. Cf.: Horn (2014): 39.

the *Constitution*, directly applicable in Namibia was stressed in *S v. Mushwena.*[544] The Supreme Court had to decide about the legality of the extradition of thirteen accused from Zambia after they were apprehended and abducted by Namibian agents in the course of the Caprivi secessionist movement. The following was held:[545]

> As a matter of fact … the International Covenant of Civil and Political Rights and the U.N. Covenant and Protocol Relating to Refugees, have become part of public international law and by virtue of article 144, has become part of the law of Namibia. The whole process of taking the accused prisoner, and handing them over to Namibian officials, was also in conflict with the aforesaid principles and rules of public international law. An appropriate label for such illegal action is 'official abduction'.

This can be regarded as an affirmation of the direct and automatic application of international agreements by Namibian courts.[546]

240. In *Government of the Republic of Namibia v. Mwilima and all other accused in the Caprivi treason trial*,[547] section 14(3) of the ICCPR was found to bind the state to grant legal aid to an accused if a trial without legal representation would be grossly unfair. In this case, the government was claimed to have violated the right of the accused to a fair trial by denying them legal representation. The following was held in respect to the applicability of international law and the obligations deriving therefrom:[548]

> According to article 63(2)(e) read with article 144, 'international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'. From this it does not follow that the said article is now part of the Constitution of Namibia but being part of the law of Namibia, it must be given effect.

It was emphasized that the[549]

> State not only has an obligation to foster respect for international law and treaties as laid down by article 96(d) of the Constitution but it is also clear that the International Covenant on Civil and Political Rights is binding upon the State and forms part of the law of Namibia by virtue of article 144 of the Constitution.
>
> It is furthermore clear from article 2, sub-article 2 of the Covenant, that State parties who have acceded thereto are under an obligation to take the necessary

544. *S v. Mushwena* 2004 NR 276 (SC).
545. *Ibid.*: 390A.
546. Cf.: Ndeunyema (2020): 287.
547. *Government of the Republic of Namibia v. Mwilima and all other accused in the Caprivi treason trial* 2002 NR 235 (SC).
548. *Ibid.*: 259G–H.
549. *Ibid.*: 260A–F.

> steps to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant. In my opinion the Legal Aid Act, as amended, does no longer give full effect to the rights of an indigent accused as provided for in article 14(3)(d) of the Covenant, if that was the only source whereby assistance could be given to such accused.

The court stated that, although international treaties are part of the law of Namibia, treaties including obligations to take necessary steps to ensure that effect is given to the rights provided therein require the state to implement national legislation incorporating the rights into national law.[550] The court then indicated that, in order to be compatible with international law, progress is required with respect to applicable legislation:[551]

> Because the instant case is an exceptional one where the absence of legal representation clearly constitutes unfairness, it can hardly serve as an example of when it can be said that a trial is fair or not fair. Whether, on the other hand, one applies the qualification of the Covenant in determining if a trial is unfair or uses some other formula such as substantial injustice, it seems to me that our law in this regard is still in a developing phase and that it will not be appropriate to lay down hard and fast rules at this stage.

241. It was also stressed that the *Legal Aid Act* would be in conflict with Article 14(3) (d) of the *ICCPR* if that was the only source whereby legal representation could be ensured.[552] The reason is that it makes legal aid for an indigent accused dependent on the availability of funding rather than granting legal aid unconditionally.[553] The court then deduced the obligation to provide legal representation directly from Article 14 (3) (d) of the *Covenant*.[554] The court thus applied the Convention directly while disregarding the provisions of the *Legal Aid Act*.

242. According to Ndeunyema, the court's non-application of the *Legal Aid Act* "amounted to a superiorization of the international agreement provisions over those of legislation, implying that the validity of the latter is to be tested against the former."[555] This would be contrary to the principles of constitutional and legislative supremacy provided by Article 144 of the *Constitution*. Ndeunyema holds that the "Mwilima majority ought to have grappled with interpretatively reconciling the conflicting legislative and treaty provisions per the consistent interpretation principle under common law".[556]

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550. *See* for a deeper analysis of the shortcoming in applying international law: Zongwe (2019a): 92ff.
551. *Government of the Republic of Namibia v. Mwilima and all other accused in the Caprivi treason trial* 2002 NR 235 (SC): 264H–I.
552. *Ibid.*: 260C.
553. *Ibid.*
554. *Ibid.:* 260E–F.
555. Ndeunyema (2020): 288.
556. *Ibid.*

243. In *S v. Munuma*[557] the Supreme Court had to decide upon a special plea of lack of jurisdiction on the part of the Namibian courts in terms of section 106 of the *Criminal Procedure Act*[558] of 1977. The accused was handed over by Botswana authorities to the Namibian police on the territory of Botswana, who arrested the accused while still being on foreign territory. The Supreme Court held that the arrest of the applicant in Botswana constituted a sovereign act by the Namibian authorities on the territory of another state that violated international law, even if the arrest had been allowed by Botswana authorities.[559] That jurisdiction is territorial and cannot be exercised by a state outside its territory was basically drawn from the Lotus case of the Permanent Court of International Justice.[560]

244. The court solely draw its legal position from the aforementioned case and did not make any reference to Article 144. The court did not clarify on what source of international law the prohibition stemmed from. Ndeunyema states in this regard that the court should have taken note of the potential customary international law rule of state consent, which precludes the wrongfulness of an internationally delinquent act.[561] The ignorance of this rule would reveal "that Namibian courts rarely explicitly identify and apply customary international law rules as part of Namibian law".[562]

245. In *South African Poultry Association and Others v. Minister of Trade and Industry and Others,*[563] the Supreme Court acknowledged the necessity for further clarification with respect to the interpretation of Article 144, but refrained from expressing itself on this topic and remitted the matter back to the High Court:

> Clearly the issue raised in the review is of considerable public importance. […] It also concerns the interpretation to be given to Art 144 of the Constitution and the extent, if any, to which international trade treaties form part of the domestic law of Namibia and can be enforced in the national courts of Namibia. The review also concerns the principle of legality and whether international treaties in conflict with national legislation would prevail and whether and the extent to which the content of those treaties must inform the exercise of statutory powers conferred to the Minister under the Act.

557. 2016 (4) NR 954 (SC).
558. Act No. 51 of 1977.
559. *S v. Munuma* 2016 (4) NR 954 (SC): 961D.
560. *Ibid.*: 961E–F.
561. *S.S. Lotus (France v. Turkey),* Judgement No. 9 of the Permanent Court of International Justice, 7 Sep. 1927, Publications of the Permanent Court of International Justice, Series A - No. 10; Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 1927. Available also at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm (accessed 27 Jun. 2022). *See also*: Ndeunyema (2020): 289.
562. Ndeunyema (2020): 290.
563. 2018 (1) NR 1 (SC).

… the public interest would be served by the ventilation and determination of the application of Art 144 of the Constitution and the extent, if any, to which international treaties can be enforced in domestic courts.

… we deliberately refrain from expressing ourselves on the merits at all. That would need to be determined by the High Court.

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Chapter 3. Common Law and Legislation

§1. Introduction

246. Common law and parliamentary legislation are the most important sources of national law. Subordinate legislation by the executive arm of government and by local governments follow parliamentary enactments in importance. Presidential decrees are exceptionally possible.

§2. Common Law

247. As mentioned above, the common law in force on the date of independence remained valid.[564] In order to understand the development of common law in Namibia, one has to look to its history in South Africa. South African common law can be traced back to representatives of the Dutch East India Company which had taken possession of the area in the middle of the seventeenth century.[565] From 1806 on, when South Africa was finally integrated into the British Empire, English common law strongly influenced South African law.[566] In particular, civil and criminal procedural law, mercantile and company law as well as the law of evidence were introduced from the United Kingdom.[567] The *Proclamation 21* of 1919[568] formally made the Roman-Dutch law applicable in South Africa as the common law of South West Africa.[569] The incorporation of the judiciary of South West Africa into that of South Africa by way of the *Supreme Court Act*[570] then made decisions of the Supreme Court of South Africa binding on South West African courts.

248. Common law that violates the *Constitution* is unconstitutional without any declaration to this effect by a court. This follows from the words of Article 66(1) of the *Constitution* which, in so far, is special to Article 140(1) according to which laws in force at the date of independence remain in force "until they are repealed or amended by act of parliament or until they are declared unconstitutional by a competent court." "Laws" in this provision are meant to be enacted law and not common law. This was clarified by the Supreme Court in the case of *Myburgh v. Commercial Bank of Namibia*.[571] The concept of marital power of the husband over his wife was disputed in this case; the facts of which happened before the repeal of the concept by the *Married Persons Equality Act*.[572]

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564. Article 66 of the Constitution.
565. *See*: Hahlo; Kahn (1968): 567–575.
566. *Ibid*.: 576ff.
567. *Ibid*.: 576.
568. Administration of Justice Proclamation, 1919 (Proclamation No. 21 of 1919).
569. Cf.: Amoo (2008): 60.
570. Act No. 59 of 1959.
571. 2000 NR 255 (SC): 263E–F.
572. Act No. 1 of 1996.

249. The *Constitution* is not only of relevance when it comes to the question whether common law is unconstitutional but influences the application and the development of common law in general.[573] In *S v. Hangue*, the Supreme Court stressed that the common law in force on the date of independence cannot be applied without scrutiny and consideration of constitutional values and ideals:[574]

> Under the constitutional dispensation brought about on independence, this court now bears the heavy and ultimate responsibility to determine what our common law is to the extent that it is not validly repealed or amended by an Act of Parliament. In doing so, this court will carefully consider pre-independence declarations of the common law made by other courts, in particular decisions of the Appellate Division of South Africa. It would, however, fall short of the obligation entrusted to it under the Constitution if it were to accept those declarations without close and independent scrutiny: this court is the final authority to decide upon principle what our common law is and is bound to do so with due regard to the values entrenched and ideals articulated in our Constitution.

§3. The Legislative Authority of Parliament

250. Article 44 of the *Constitution* vests the legislative functions in the National Assembly, subject to "the powers and functions" of the National Council as determined by the *Constitution*.[575] Statutes enjoy priority over the applicable common law: Article 66 provides for the continued validity of common law only as long as it is not in conflict with the *Constitution* or statutory law.[576]

§4. Law of Regional and Local Government

251. Namibia is divided into regional and local units, which are governed by regional and local authorities.[577] The regional councils and the local authorities are competent to develop regional structure plans and urban structure plans accordingly. The *Urban and Regional Planning Act* of 2018 consolidated the planning law of Namibia.[578] The *Local Authorities Act* contains a long list of areas in regard of which councils of local authorities may – after consultation with the responsible

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573. Cf.: Hubbard (2017): 211, who discusses the indirect influence of the Constitution in detail.
574. 2016 (1) NR 258 (SC): 274C–E.
575. *See* more on the National Assembly and the National Council below in the chapter on the legislature.
576. Cf.: *ibid.*
577. *See*: Article 102(1) of the Constitution.
578. Urban and Regional Planning Act, 2018 (Act No. 5 of 2018). *See*: sections 25ff., 31ff. and 132 of the Act.

minister – make regulations.[579] Local government authorities can make laws that deal with public health, sanitation, water or anything regarding security and civility in their local jurisdiction.

252. A further important regulatory competence of local authorities follows from section 43C of the *Police Act*.[580] This section enables municipalities of certain categories to establish municipal police institutions by making regulations. Regulation 2 to the *Police Act* states:

> The municipal council of a municipality referred to in Part I of Schedule I to the Local Authorities Act 1992, (Act 23 of 1992) may make regulations for the establishment of a municipal police service for that municipality to carry out the functions specified in regulation 4 within its municipal area.

253. Compared with the law-making rights of local authorities is the respective right of regional councils rather limited. Apart from the mentioned competence to plan, regional councils may – again after *consultation* with the relevant minister – regulate trade, businesses, and occupations in areas outside local authorities.[581]

§5. Subordinate Legislation by the Executive

254. The delegation of legislative power to an executive functionary is permissible under the *Constitution*, albeit in a limited way.[582] In many parliamentary acts, there is a provision that the ministry or any functionary in charge of administering that piece of legislation is empowered to pass regulations under such acts. The empowering act usually indicates a list of what the mandated authority can regulate.

§6. Presidential Proclamations

255. In terms of Article 26(5)(a) of the *Constitution*, during a state of emergency or when a state of national defence prevails, the president has the power to make such regulations as in his or her opinion are necessary for the protection of national security, public safety, and the maintenance of law and order by proclamation.[583]

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579. *See*: Section 94 of the Local Authorities Act, 1992 (Act No. 23 of 1992), as amended.
580. Act No. 9 of 1990.
581. *See*: section 44A of the Regional Councils Act, 1992 (Act No. 22 of 1992), as amended.
582. *See* on this below: Part III, Chapter 4, §6.
583. This will be discussed in detail in Part III, Chapter 7.

§7. Making Rules by Banks and the Courts

256. There are other official institutions, which are empowered to issue rules with legal quality. Examples are the High and the Supreme Courts. The Judge-President of the High Court and the Chief Justice in the Supreme Court have the authority, with the approval of the state president, to determine the rules regulating the proceedings of the respective courts.[584] Another example are banks. The Bank of Namibia may not only recommend to the relevant minister to enact regulations but is also permitted to issue by-laws.[585]

584. *See*: section 39 of the High Court Act, 1990 (Act 16 of 19990), as amended, and the Supreme Court Act, 1990 (Act 15 of 1990), as amended.

585. *See*: sections 3 and 71 of the Banking Institutions Act, 1998 (Act 2 of 1998); as amended, and also sections 84 and 85 of the Bank of Namibia Act, 2020 (Act 1 of 2020).

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Chapter 4. Customary Law

257. Customary law is part of the law of Namibia. Article 66(1) of the *Constitution* says:

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

The important message of Article 66(1) is that customary law and common law are at the same level of application. Customary law is not subject to common law, it is valid as common law is. Article 66(1) of the *Constitution* ended the long chapter of jurisprudence which held customary law inferior if law at all.[586] With Article 66, an important part of African culture received back its dignity.[587]

258. What is customary law? The *Traditional Authorities Act* and the *Community Courts Act* offer a definition which reads:[588]

> "customary law" means the customary law, norms, rules of procedures, traditions and usages of a traditional community in so far as they do not conflict with the Namibian Constitution or with any other written law applicable to Namibia; … .

This definition is not very helpful, as it defines customary law by referring to customary law and adds to customary law norms which are usually not necessarily norms of law but only of societal value without being legally binding.[589]

259. The *van Breda* case, decided by the South African Supreme Court in 1921, is an often quoted reference to answer the question about what is customary law.[590] *van Breda* was a case about a practice of "first come, first pull" that was claimed by

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586. When referring to "indigenous customary law", Hosten; Edwards; Nathan; Bosmann et al. (1983: 271) held "that there is only one legal system operative in South Africa which, in turn, is a hybrid system of law composed of Roman-Dutch law and English law elements". Having stated this, the quoted authors state that "native customs … may be regarded as a body of law which, in certain cases, is applied instead of either common law or statute law." In the second edition of the publication (Hosten; Edwards; Bosman; Church 1995) the statements quoted from the first edition did not appear any more.
587. This was expressed by Namibian traditional leaders in many discussions, so already in field research that led to Hinz (1995a).
588. Section 1 of the Traditional Authorities Act, 2000 (Act No. 25 of 2000) and s 1 of the Community Courts, 2003 (Act No. 10 of 2003).
589. The discussion on customary law, indeed, notes that customary law does not necessarily follow the otherwise promoted jurisprudential border between legal and ethical rules. *See* here, e.g.: Gluckman (1967): 163ff.
590. *Van Breda v. Jacobs* SA 1921 AD 330. – *See* here the critical remarks on the relevance of the *van Breda* case for the determination of the law of traditional communities: Hinz (1995a): 41ff.

one party of a fishing community to be a rule of customary law with the consequence that the later coming party lost access to fish. The court held that the law on customary was clear by stating that for a custom to be law[591]

> [t]he custom must be reasonable, must be properly proved and must have existed for some time.

260. As much as this definition may be helpful in determining customary law as part of general law, it is not with respect to African customary law. In particular, the requirement of having existed for some time will certainly not be met when a traditional authority, which, as confirmed by the *Traditional Authorities Act,* has the power to make customary law,[592] in other words, enacts rules and expects these rules to be immediately legally binding.

261. In view of this, some authors debate the peculiarity of the law of traditional communities, by arguing against calling this law customary law.[593] Practice and law, however, maintained the dominant language for which the law of traditional communities is called *customary law*. This practice is followed: wherever there is reference to customary law, customary law is meant to be African customary law unless another meaning is indicated.

262. Legal anthropological research led to the question how to deal with customary law changed through governmental interventions.[594] South African courts raised concern about what is named *official customary law* and decided *living law* (the law practised and not necessarily respecting official customary law as stated by researchers or also noted in earlier decisions by the courts) to be the customary law which the constitution had in mind when giving this part of the law its protected place in the new post-apartheid democratic constitutional order.[595]

263. Does Article 66 recognize or confirm customary law? The answer to this question differs depending on the legal-philosophical position taken. For those who follow a state-centralist position, the *Constitution* is the basic norm that provides the space for all norms of the sub-constitutional order(s). Parliamentary acts are law because the *Constitution* recognizes the power of parliament to make law; customary law is law because the *Constitution* recognizes it as part of sub-constitutional law. The view is different for the legal pluralist. Customary law pre-exists not only

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591. *Van Breda v. Jacobs:* 321.
592. *See*: section 3(3)(c) of the Act.
593. *See* to this: Hinz (1995a): 45.
594. *See*: Chapter 12 of the Constitution of the Republic of South Africa of 1996 which contains rules giving customary law a status in the legal order of South Africa comparable to Article 66 of the Namibian Constitution.
595. *See*: Himonga; Bosch (2000); Rautenbach (2018) and there the references to cases decided by South African courts. – The concept of "living law" was introduced to legal anthropology by the Austrian legal sociologist Ehrlich after discovering that the "tribes" of the Bucovina (Ehrlich was professor of law in Chernivsti, which is part of Ukraine today) followed their own laws and not the law of the Austrian empire. (Ehrlich 1967: 303ff.).

in the *Constitution* but also in the statutory and common law inherited from the time before independence. Legal pluralism accepts empirical findings that the making of law is not necessarily bound to official, i.e., legally confirmed and thus formalized delegation, but the result of societal processes accepted by the members of the relevant community: the history, the historic development, and the ongoing inherent dynamic of customary law as law that changes from within and is changed by the societal structures that are responsible for the application of customary law favour the pluralistic approach.[596]

264. The subjection of customary law to the *Constitution* means that customary law can be tested against the fundamental rights and freedoms of the *Constitution*. The subjection of customary law to statutory law means that statutory enactments prevail over customary law, and that statutory enactments may invalidate customary law. The latter is explicitly clarified in Article 66(2) of the *Constitution*:

> Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.

265. Assessing Namibian customary law against the Constitution is still a process under consideration. There are rules of customary law, in particular in the field of family, inheritance and land law, which can be argued as violating human and fundamental rights of the *Constitution*. When exploring human and fundamental rights below, reference will be made to identified problems and some case law.[597]

266. The scope of repeals of customary law by legislative acts is limited: "Subject to the terms of the Constitution" are the words of the *Constitution* that express the limits of legislative inroads into customary law. What are possible limiting constitutional terms? The most important follows from Article 19 of the *Constitution*, which guarantees the right to culture. Although this Article addresses the right to culture to "every person" and not to communities, the view is held that Article 19 protects implicitly culture as a societal formation, as it would otherwise not make sense to give the individual the right to his or her culture. In other words, as culture is constitutionally protected, the law that is related to a specific culture is also constitutionally protected.[598] This means that when the government envisages a statutory change of customary law, it must place this change into a constitutional context and investigate to what extent the part of customary law earmarked for change is constitutionally protected by the right to culture.

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596. *See* the summary of approaches to legal pluralism and its application to Namibia in: Hinz (2006b) and (2006c) and generally: Menski (2006): 82ff.
597. The Faculty of law of the UNAM hosted an expert meeting, organized by UNAM and the Office of the High Commissioner for Human Rights of the United Nations on traditional and informal justice in 2007. *See* the publication of the presentations in: Hinz (2010a), but also Office of the High Commissioner (2016).
598. *See* on this: Bennett (1996): 21ff.

267. There are examples where statutory law changed customary law. Important inroads into customary law were, e.g., enacted through the *Traditional Authorities Act*,[599] the *Communal Land Reform Act*,[600] but also in the field of procedural customary law through the *Community Courts Act*.[601]

268. What is the consequence for law that is not in line with the *Constitution* or a statutory enactment? For law in force before the date of independence, Article 140(1) of the *Constitution* is very clear. Such law will also remain in force "until repealed or amended by Act of Parliament or until […] declared unconstitutional by a competent Court." The words of Article 66(1) of the *Constitution* point into a different direction. Article 66 suggests that law in "conflict with this Constitution or any other statutory law" shall not remain valid, meaning it will be invalid without any official declaration of invalidity. This appears also to be accepted by the *Traditional Authorities Act*, which says in its section 14(a):

> In the exercise of the powers or the performance of the duties and functions referred to in section 3 by a traditional authority or a member thereof:
>
> (a) any custom, tradition, practice or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Namibian Constitution or any other statutory law or which prejudices the national interest, shall cease to apply; … .

269. Where and to what extent customary law is invalid is therefore unfortunately left to all appliers of customary law. This is unfortunate, in particular as this practice burdens the task of identifying the applicability of customary law to the main appliers of customary law, the judges in traditional courts who are normally not experts in constitutional law.

270. The constitutional guarantee of customary law that follows from reading Articles 66 and 19 of the *Constitution* together may also have consequences for the interpretation of law, the law in statutes and the inherited common law. The customary law may reflect values and expectations that the applier of the law must take note of in the same way as general societal values have to be reflected.[602]

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599. Act No. 25 of 2000 and its predecessor Act No. 17 of 1995, as amended.
600. Act No. 5 of 2002.
601. Act No. 10 of 2003. – When dealing with the three acts mentioned further information will be provided.
602. The need to reflect societal values was an important argument in one of the first far-reaching decisions of the Supreme Court on corporal punishment case (Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State 1991 NR 178 (SC)). – In so far and although the Constitution of Namibia does not refer to *ubuntu*, as the 1993 Constitution of South Africa did (Act No. 200 of 1993), the orientation on specific values expressed in the concept of *ubuntu* may also be applied to in Namibia. Cf. here: Bennett (2018): 8ff.; Netshitomboni (1998) and Ndeunyema (2021). On Ubuntu in general terms cf.: Patemann and Fikentscher in: Hinz; Patemann (2006) and Bennett (2018).f

271. At this point, a general word be added on the accessibility of customary law in Namibia. Under the authority of the Council of Traditional Leaders,[603] the Namibian Customary Law Ascertainment project was conducted by the Human Rights and Documentation Centre in the Faculty of Law of the University of Namibia. The philosophy behind the project accepted the criticism against the codification but also the restatement of customary law and developed instead an approach called "self-statement" of customary law. There was basically consensus that codification negates the dynamic and flexible nature of customary laws.[604]

272. In employing the approach to self-statement, the traditional communities were requested to write up their customary law to the extent, as they found it important to put the law into writing. The great majority of the traditional communities followed the call for self-statement and produced documents that are helpful for all who want to get some understanding of the customary law of a community. Three volumes of Customary Law Ascertained have been published.[605]

273. The process of self-stating customary law is a process of ascertaining customary law by the owners of the law: the people, the respective community, and the traditional leaders as the custodians of customary law are the authors of the law ascertained by self-stating.[606] How self-stating is done, differs from community to community. The most important fact in self-stating remains that the end result is a product created in the community in which the law is to be applied. Instead of suggesting to the communities what the law would possibly be, it was left to the community (knowing best what their law was) to decide what part of their law was to be consolidated in writing and how.

274. That the self-statement of customary law ascertains certain rules in writing will keep the so far practised application of the now ascertained rules untouched. The binding quality of the self-stated laws is neither an implicit repeal of the orally transmitted customary law or even only parts of it, nor does it imply a change in the nature of customary law as a set of rather flexible principles and rules, nor will it prevent the community to amend their law as need arises. The applying authorities will still handle the ascertained rules in the manner that appears appropriate to them in view of the interest to achieve the restoration of societal peace.[607]

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603. Established under Article 102 of the *Constitution. See also:* Council of Traditional Leaders Act, 1997 (Act No. 13 of 1997).
604. *See* here the direction-giving report of a conference of the Law Reform and Development Commission on ascertainment of customary law: Bennett; Rünger (1995) and in this publication in particular the contributions by: Allott; Molokomme; Becker and Hinz.
605. *See*: Hinz (2010c) – Vol. 1; Hinz (2013a) – Vol. 2; Hinz (2016a) – Vol. 3.
606. To this and the following: Hinz (2016b), (2019).
607. This is, at least, the methodologically informed understanding of the approach to self-state customary law. Empirical research on practice with the self-stated laws would be of interest.

275. The legal political expectation is that the published self-stated laws will assist the public discourse on customary law in general and more so on those parts that may require constitutional reconsideration. The self-stated laws will also assist in identifying needs for change to meet demands for societal development.[608]

608. Cf. here the foreword to the second volume of *Customary law ascertained* by Gawanas (2013): The Namibian customary law ascertainment project was also noted internationally. Manfred Hinz was requested to assist in the preparation of the ascertainment of customary law in the Republic of South Sudan. *See* on this: Hinz (2009b) and further: Ubink (2011). – It may be added here that the question how courts have to ascertain customary law possibly relevant for a case in front of them has occupied the South African Constitutional Court in *Shilubana v. Nwamitwa* (Case CCT 03/07 [2008] ZACC). In *Mayelane v. Ngwenyama* (Case CCT 57/12 [2013] ZACC: at 61) the Constitutional Court of South Africa decided that "it is the function of a court to decide what the content of customary law is, as matter of law and not fact".

Chapter 5. Jurisprudence

§1. The Doctrines of *Stare Decisis* and *Res Judicata* and Its Application to Namibia

276. As in all common-law countries, the decisions of the higher courts contribute to the understanding and development of the law, and court decisions are an important source of law. The doctrine of *stare decisis*[609] applies to the decisions of the higher courts in Namibia rendering them binding. *Stare decisis* has been an integral part of South African law and has been applicable to South West Africa as well. Article 81 of the *Constitution* reaffirms the applicability of this doctrine by rendering all decisions of the Supreme Court binding on all other courts, if not reversed by an act of parliament or the Supreme Court itself. In *Schroeder v. Salomon*,[610] the Supreme Court held in respect to Article 81:[611]

> It reaffirms the locality of this court at the apex of the judicial authority, and the binding nature of its decisions on all the other courts and all persons, right or wrong; its decisions are absolutely binding unless reversed, abandoned or departed from by this court itself or contradicted by Act of Parliament.

277. The decisions of the High Court bind all lower courts. The High Court is only bound by its earlier decisions unless this decision is considered to be manifestly wrong or injurious to justice.[612] The judgements by higher courts issued before independence including the courts of South Africa are legally binding, unless they have been overturned or are unconstitutional.[613] According to Horn, non-constitutional pre-independence judgements of the South African Appeal Court though only bind the High Courts. The Supreme Court would – as final authority in all legal questions in Namibia – not be accountable to any other court.[614]

278. The Supreme Court clarified in *Likanyi v. S*[615] that Article 81 does not only incorporate the *stare decisis* but also the *res judicata* principle. *Res judicata* generally means that a cause of action may not be re-litigated once it has been judged on the merits. The court outlined the different meaning of both principles. While *res judicata* would mean that[616]

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609. "The rule *stare decisis et non quieta movere* (stand by the decisions and do not disturb settled law) was adopted from the English Law with the establishment of the Supreme Court at the Cape in 1828." *See*: *Schroeder v. Solomon* 2011 (1) NR 20 (SC): 30B, and *also*: Amoo (2008): 281.
610. *Schroeder v. Salomon* 2011 (1) NR 20 (SC).
611. *Ibid.*: 29H–30A.
612. Cf.: Parker (2019): 5.
613. Sippel (2003): 86; Horn (2014): 40f.
614. Horn (2014): 40f.
615. *S v. Likanyi* 2017 (3) NR 771 (SC).
616. *Ibid.*: 782A–B.

> once this court has taken a decision in a case it is final, binds the parties to the dispute and the court becomes functus officio. In other words, a party to the dispute in which the court has rendered a decision cannot come back to reopen the case …

stare decisis would require the court to[617]

> follow a legal principle established by it after due deliberation, if similar facts occur in the future. It can only depart from such principle if later facts are distinguishable; it was arrived at per incuriam or is found to be clearly wrong.

279. The Supreme Court accepted that in exceptional circumstances it is justified to deviate from the *res judicata* rule if it is necessary to put right a manifest infringement of a person's constitutional rights. For this reason, the Supreme Court reversed and declared an earlier judgement and order by the Supreme Court of no effect. Likanyi, the claimant of this case had been part of a group of fugitives who were removed from Botswana by the Namibian authorities to stand trial on different charges, including charges of high treason because of his alleged involvement in the Caprivi secessionist movement. At the High Court in *S v. Mushwena*,[618] he and the other accused had raised a plea of lack of jurisdiction of the Namibian courts in terms of section 106 of the *Criminal Procedure Act*.[619] While the High Court had upheld their plea, the Supreme Court had reversed this decision.[620]

280. In 2016, a differently composed Supreme Court had to decide in *S v. Munuma*[621] upon a special plea of jurisdiction based on very similar facts. Despite the similarity of facts with *S v. Mushwena*, the Supreme Court, in this case, affirmed a lack of jurisdiction and ordered a permanent stay of prosecution.[622] This decision of the Supreme Court was the reason, why Likanyi decided to bring his case back to court. He argued that he was in no different position than the applicant in *S v. Munuma* and premised his relief on Articles 10 and 81 of the *Constitution*. The Supreme Court pointed out that the principle of *res judicata* generally precludes the reversal of a final decision by the Supreme Court. However, it would be against the principle of legality for the Supreme Court to be powerless to put right a manifest injustice caused to an individual and render ineffective the justiciability of the bill of rights guaranteed by the *Constitution*. The Supreme Court held:[623]

> There is, undoubtedly, a legitimate governmental purpose in the finality of decisions. Finality of litigation is an important value, but it is not the only value at play. In my view, the importance of finality of decisions does not justify a

617. *Ibid.*: 782B–C.
618. *S v. Mushwena* 2004 NR 35 (HC).
619. Act No. 51 of 1977.
620. *S v. Mushwena* 2004 NR 276 (SC).
621. 2016 (4) NR 954 (SC).
622. *Ibid.*
623. *Ibid.*: 787G–J.

> conclusion that the apex court is powerless to correct an injustice caused to an accused through no fault of his or her own. … There is no justification in a constitutional state for a rigid rule which admits of no exception at all to the principle of criminal *res judicata* in relation to decisions of the Supreme Court.

281. The relaxation of the *res judicata* rule would apply in matters involving the liberty of subjects, primarily in criminal matters, where the Supreme Court is satisfied that its earlier decision was demonstrably a wrong application of the law to the facts which resulted in an indefensible and manifest injustice.[624] The Supreme Court, however, stressed that the reopening of a case previously adjudicated and determined will be a rare exception and that "no litigant may as of right come to this court to reopen its prior decision in terms of Art. 81".[625] The Chief Justice would,[626]

> upon a representation made, consider the matter and only if satisfied that exceptional circumstances exist having regard to all circumstances – including the imperative to safeguard finality to litigation – afford leave for the matter to be argued and give directions as to how it will be heard. It is unnecessary to set out what would constitute exceptional circumstances as the jurisprudence in that respect should be developed over time. Each case will be considered on its own facts and circumstances and the power will be invoked only exceptionally.

§2. The Contribution of Namibian Courts to the Development of Law

282. During the apartheid era, the South African legal order was characterized by oppressive laws and the strict positivistic application of such laws. Judges saw their duty as "… giving effect to the true intention of the legislature as expressed in statutes".[627] Only when a question arose outside the scope of a written law passed by parliament, were judges allowed to interpret existing laws and rely on English common law in forming their decisions.

283. Since independence Namibian courts have made a great contribution to the development of law under the *Constitution* by adopting a generous and purposive approach to interpretation and thereby departing from the limited positivist application of the *Constitution* and the narrow procedural review function of the courts before independence.[628] The ultimate goal of striving for justice has found its way into the Namibian judicial system, mirroring the paradigm shift from unbound parliamentary sovereignty to constitutional supremacy.[629]

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624. *Ibid*.: 788D.
625. *Ibid*.: 789C–D.
626. *Ibid.*: 789D–E.
627. International Commission of Jurists (1988): 5.
628. Cf.: Coleman; Schimming-Chase (2010): 211; Schulz (2000): 193.
629. Schulz (2000): 193; *see also*: Horn (2013).

284. Several statutory provisions enacted before independence and applicable by means of the reception clause in Article 140 were found to violate the bill of rights and have been declared unconstitutional.[630] Some provisions were repealed or parliament was required to amend the provisions. The courts have, hence, played a major role in advancing the law in light of the *Constitution*. Moreover, the courts have referred to, but also refined common-law principles by aligning them to the *Constitution* and, therefore, extending their scope of protection, including, e.g., the rules of natural justice.[631] Furthermore, by applying a value-based interpretation, the ethos of the *Constitution* and the norms and values of the Namibian people have been translated well into judicial interpretation. The development of law by such reasoning is essential in order to achieve justice for all.[632]

§3. Interpretation to Secure the Values of the Constitution

285. Namibian courts have stressed that the *Constitution* must be interpreted broadly, liberally, and purposively[633] with view to the past and to the norms and values of the Namibian people.[634] Rather than being a mechanical instrument, the *Constitution* has been referred to as a mirror reflecting the national soul, the identification of the ideals, and the aspirations of a nation as well as the articulation of the values bonding its people and disciplining its government. Judicial interpretation has, thus, be strongly informed by the spirit and the tenor of the *Constitution.*[635]

286. Judicial interpretation is furthermore influenced by the ethos of the *Constitution* against apartheid and racism, as the High Court held in *S v. Van Wyk*:[636]

> Throughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread – an abiding 'revulsion' of racism and apartheid. It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people 'for so long'

630. *See*, *e.g.*: *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State* 1991 NR 178 (SC); *Government of the Republic of Namibia v. Cultura 2000* 1993 NR 328 (SC); *Kauesa v. Minister of Home Affairs* 1995 NR 175 (SC); *Fantasy Enterprises CC t/a Hustler the Shop v. Minister of Home Affairs* and *Nasilowski v. Minister of Justice* 1998 NR 96 (HC); *Africa Personnel Services v. Government of Namibia* 2009 (2) NR 596 (SC).
631. *See*, *e.g.*: *Kersten t/a Witvlei Transport v. National Transport Commission* 1991 NR 234 (HC); *Minister of Health and Social Services v. Lisse* 2006 (2) NR 739 (SC); *S v. Luboya* 2007 (1) NR 96 (SC); *Kessl v. Ministry of Land Resettlement* 2008 (1) NR 167 (HC).
632. *See*, *e.g.*: *S v. Acheson* 1991 NR 1 (HC); *Minister of Defence v. Mwandinghi* 1993 NR 63 (SC); *Government of the Republic of Namibia v. Cultura* 2000 1993 NR 328 (SC); *Namunjepo v. Commanding Officer, Windhoek Prison* 1999 NR 271 (SC).
633. *Government v. Cultura* 1993 NR 328 (SC): 340B, *see also Minister of Defence v. Mwandinghi* 1993 NR 63 (SC).
634. *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State* 1991 NR 178 (SC):188E and 198G–H; *S v. Van Wyk* 1993 NR 426 (HC): 456A–C.
635. *S v. Acheson* 1991 NR 1 (HC): 10A–B.
636. 1993 NR 426 (HC) at: 456 G - I (Additional observations by Mahomed, AJA).

> and a commitment to build a new nation 'to cherish and to protect the gains of our long struggle' against the pathology of apartheid. …

That ethos must 'preside and permeate the processes of judicial interpretation and discretion' as much in the area of criminal sentencing as in other areas of law.

287. The Supreme Court further pointed out that judicial interpretation had to be carried out in the context of "a fundamental humanistic constitutional philosophy introduced in the preamble to and woven into the manifold structures of the Constitution".[637] In *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State*, the Supreme Court confirmed that the answer to the question whether corporal punishment was inhuman and, thus, unconstitutional required[638]

> a value judgement which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community … which Namibians share. This is not a static exercise. It is a continually evolving dynamic.

Berker (CJ) added in a separate vote that[639]

> the making of a value judgement is only possible by taking into consideration the historical background, with regard to social conditions and evolutions, of the political impact on the perceptions of the people and a host of other factors, as well as the ultimate crystallisation of the basic beliefs and aspirations of the people of Namibia in the provisions in the Bill of Fundamental Human Rights and Freedoms.

288. The fundamental rights and freedoms of the Constitution must be interpreted by a broad and generous approach to achieve a construction that is "most beneficial to the widest amplitude".[640] This was also stressed by the Supreme Court in *Namunjepo v. Commanding Officer, Windhoek Prison*:[641]

> A court interpreting a constitution will give such words, especially the words expressing fundamental rights and freedoms, the widest possible meaning so as to protect the greatest number of rights.

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637. *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State* 1991 NR 178 (SC): 179G.
638. 1991 NR 178 (SC): 188E.
639. *Ibid.:* 198G–H.
640. *James v. Commonwealth of Australia*, (1936) AC 578 at 614; and cited in several Namibian cases, *see: Government of the Republic of Namibia v. Cultura 2000* 1993 NR 328 (SC): 340D. *Namibian Employers' Federation v. President of the Republic of Namibia*, High Court judgement, Case No. HC-MD-CIV-MOT-GEN-2020/00136 – unreported, by referring to *Kauesa v. Minister of Home Affairs* 1995 NR 175 (SC): 184H and *Sibeya v. Minister of Home Affairs* 2000 NR 224 (HC).
641. 1999 NR 271 (SC): 283C–D.

Derogations from such rights and freedoms must in contrast be narrowly or strictly construed, where rights and freedoms are conferred on persons by the *Constitution*.[642] In *Chairperson of the Immigration Selection Board v. Frank,*[643] the Supreme Court though emphasized that a broad, liberal, and purposive interpretation does not provide an unlimited degree of discretion but has to be[644]

> anchored in the provisions of the Namibian Constitution, the language of its provisions, the reality of its legal history, and the traditions, usages, norms, values and ideals of the Namibian people … .

289. The courts have also emphasized that the fundamental rights and freedoms "are framed in a broad and ample style and are international in character".[645] When interpreting the rights and freedoms, international human rights norms should be applied.[646] The courts are thus obliged to consider the scope of protection of international human rights law beyond the national framework.

290. Jurisprudence of other countries is often used by the courts. In particular, Australian, Canadian, Indian, German, and South African case law as well as scholarly contributions are points of reference for the courts.[647] The consultation of foreign legislation as well as case law has been a common instrument and the analysis thereof in the Namibian context has often influenced decision-making.[648]

291. Although the courts approach to the interpretation of the *Constitution* constitutes a shift away from a pure literal interpretation, conservative views persistent in society, as for instance with respect to homosexuality or abortion, which can also be hindering to the courts to make a progressive judgement and transform society.[649] This has happened in the just mentioned *Frank* case. The Supreme Court referred to statements by the then President of Namibia and its Minister of Home Affairs to the effect that homosexual relationships were against Namibian traditions and values. Hubbard suggested instead that[650]

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642. *Namibian Employers' Federation v. President of the Republic of Namibia*, High Court judgement, Case No. HC-MD-CIV-MOT-GEN-2020/00136 – unreported, by referring to *Kauesa v. Minister of Home Affairs* 1995 NR 175 (SC): 184H and *Sibeya v. Minister of Home Affairs* 2000 NR 224 (HC).
643. 2001 NR 107 (SC): 135G.
644. *Chairperson of the Immigration Selection Board v. Frank* 2001 NR 107 (SC): 174C.
645. *Minister of Defence v. Mwandinghi* 1993 NR 63 (SC): 70B.
646. *Ibid.*
647. *See*, *e.g.*: *Corporal Punishment Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State* 1991 NR 178 (SC); *Kauesa v. Minister of Home Affairs* 1995 NR 175 (SC); *S v. Scholtz* 1998 NR 207 (SC); *Mostert v. Minister of Justice* 2003 NR 11 (SC); *Chairperson of the Immigration Selection Board v. Frank* 2001 NR 107 (SC).
648. The relevance of comparative jurisprudence is discussed in detail in: Amoo (2017).
649. In *Chairperson of the Immigration Selection Board v. Frank*, 2001 NR 107 (SC): 135H, the court indicated that "[t]he Namibian reality is that these traditions/usages, norms, values, and ideals are not always 'liberal' and may be 'conservative' or a mixture of the two. But whether or not they are 'liberal', 'conservative' or a 'mixture of the two', does not detract from the need to bring this reality into the equation when interpreting and applying the Namibian Constitution."
650. Hubbard (2010): 241.

> the values which should guide constitutional interpretation are the core values which inform the new constitutional order, rather than the political views of the majority of the moment.

292. It can be concluded that the *Constitution* and its underlying values have a strong impact on judicial interpretation. However, the full implementation of constitutionally oriented interpretation and its contextual reflection that take note of the aspiration and expectation of the country on its way to democracy has only started and apartheid will remain on the agenda of the judiciary. The decisive role of the interpretation and enforcement of the *Constitution* in transforming the country from apartheid and colonial structures into a democratic society, where the inherent dignity and the equal and inalienable rights of all its members are recognized, is obvious and has been stressed by the courts as well as academics.

293. The courts have generally emphasized the need to a broad interpretation of the *Constitution* with the past injustices and contemporary conditions in mind, rather than following a literal or textual way of interpretation.[651] However, the analysis of the constitutional jurisprudence since independence up to the recent years shows that value orientation of the judgements was more prevailing in the first years after the independence of the country. Indeed, the first years after 1990 were years where transitional justice was a requirement to mark the transition from the time of apartheid and racism to the new democratic order where all were to enjoy equal rights.[652]

294. Melber emphasizes that the *Constitution* is "a marker for the post-colonial democratic society to promote and protect human dignity through the implementation of the law as conceptualized and codified during the initial preparations for anchoring a sovereign pluralist state".[653] Horn criticizes the approach taken by the courts with view to constitutional interpretation. In many cases courts would choose a narrow interpretation and hesitate to regard and apply the Constitution as a "transformative" element and rather stuck to the formalism and conservatism of the pre-independence era:[654]

> As a rule, the Namibian superior courts still approach the law as sacrosanct principles. The idea that a Constitutional problem may have more than one 'correct' answer, is seldom, if ever, mentioned by the Courts. Every judgment appears to be the only possible interpretation, … . The Courts prefer formalistic arguments. Even the acclaimed value judgments such as the Corporal Punishment and the Frank cases are not based on substantive arguments. Consequently, the value judgments did not help much to develop guidelines for constitutional interpretation.

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651. Cf. Naldi (1997): 11.
652. *See* here the comprehensive analysis of the constitutional jurisprudence in Namibia by: Horn (2013a).
653. Melber (2017): 19.
654. Horn (2013a): 283.

295. In South Africa, the change of society induced by constitutional enactment, interpretation, and enforcement is discussed under the broad term 'transformative constitutionalism'[655] and has been made a compulsory element of legal education.[656] The question whether the theory of "transformative constitutionalism" is suitable for Namibia has not yet been answered.[657] However, constitutional and legal theories behind the interpretation and enforcement of the Constitution have been part of the discussion on the *Constitution*.[658]

655. An important initiative for the classification of the South African Constitution in the theoretical concept of transformative constitutionalism has been made by Klare (1998). This is discussed in detail in: Horn (2017).
656. *See* on this: Zongwe (2019b): 89.
657. While Zonge (2019b): 89 views an adaption of transformative constitutionalism to Namibia critically, according to Horn (2017): 253, "transformative constitutionalism can make a useful contribution to constitutional jurisprudence in Namibia".
658. The authors include: Diescho (2010); du Pisani (2010c); Wiechers (2010); Horn (2013a); Amoo (2017); Melber (2017), Horn (2017); Ndeunyema (2021); *see also* the special edition of the Namibia Law Journal: Vol. 11, Issue 1, 2019, which deals primarily with discourses centered on the issue of transformative constitutionalism in Namibia.

296–298

Chapter 6. Codification and Publication

§1. Codification and Statutory Consolidation of Common Law

296. Although there is a growing number of comprehensive statutes, the law of Namibia is only partly codified. As codification of laws is seen to ensure legal certainty,[659] there have been efforts to codify particular areas of the law. In this respect, a special role is adhered to the Law Reform and Development Commission (LRDC) which has been established by section 2 of the *Law Reform and Development Commission Act*.[660] Apart from the reassessment of pre-independence laws, the Law Reform and Development Commission is also responsible for "the consolidation or the codification of any branch of the law or the introduction of other measures aimed at making the law more readily accessible".[661]

297. There were attempts to codify the criminal law of Namibia. The first Round-Table Consultation on the Codification of the Criminal Law was held in 1998. This was followed up by an Expert Hearing on Codifying the General Principles of the Criminal Law.[662] Both occasions were organized by the Ministry of Justice and sponsored by the German Agency for Technical Cooperation (GTZ).[663] At the expert hearing, knowledgeable persons from Namibia as well as other countries delivered their opinions. At the end thereof it was agreed in principle that criminal law should be codified.[664]

298. It was, however, soon realized that such a codification project would indeed be very unique and would require extraordinary means.[665] A working group for the project was established.[666] Codes and draft codes of other countries were considered. After intensive discussion, it was agreed that expertise and resources for the mammoth task to develop a Namibian criminal code was not available and the project was stopped.

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659. Glinz (2013): 101.
660. Act No. 20 of 1991.
661. Section 6 of the Law Reform and Development Commission Act, 1991 (Act No. 20 of 1991), as amended. – It is interesting to note that the publication to celebrate twenty-five years of work of the LRDC (Zongwe; Dausab (2017)) refers to the quoted section from the act but does not pay any attention to codification (*See* in particular: Dausab (2017): 19ff.).
662. LRDC (2006): 1.
663. Now: German Agency for International Cooperation (GIZ). The GTZ has been merged with two other institutions to form GIZ in 2011.
664. *See*: Law Reform and Development Commission (2006): 1.
665. *Ibid.*
666. *Ibid*.: 2.

299. There was also a project to consolidate administrative law or at least achieve statutory rules similar to what we have in the *South African Promotion of Administrative Justice Act*.[667] But also this project was not pursued beyond initial research.[668]

§2. No Codification of Customary Law

300. Although the codification of customary law was never on the agenda of government,[669] parts of customary law were consolidated in already mentioned statutes: the law related to the scope and structure of traditional governance in the *Traditional Authorities Act*, the granting and holding of rights on communal land law in the *Communal Land Reform Act* and the operation of traditional courts in the *Community Courts Act*.[670] Other parts of customary law are still waiting for statutory conceptualization, so the law concerning customary marriage and the customary inheritance law.[671]

301. The accessibility of customary law was, as mentioned in the above chapter on customary law facilitated by the ascertainment of customary law project and its publications. However, the first volume of Customary Law Ascertained was published more than ten and the last volume five years ago. The publications show pictures of traditional leaders who are not with us anymore, some communities have received recognition after the publication and did, therefore, not get a place in the ascertainment, and some of the laws collected have most properly been amended.

§3. Publications

302. The statutory laws are published in the Government Gazette.[672] According to Article 65(1) of the *Constitution*, two copies of an act have to be submitted to the office of the registrar of the Supreme Court serving as evidence of the act. The parliamentary debates of the laws are compiled in the *Hansard*.[673]

303. The Government Gazette of Namibia is accessible online from several websites: the Namibia Legal Database of the parliament of Namibia implemented

667. Act No. 3 of 2000.
668. Glinz (2013), a PhD-thesis under the supervision of Manfred Hinz, resulted from research for the project. In the paragraphs on administrative law below information on the background of the project will be provided (Part V, Chapter 3, § 12.1).
669. *See* above in the chapter on customary law (Chapter 4 of this part).
670. Act No. 25 of 2000; Act No. 5 of 2002 and Act No. 10 of 2003.
671. *See* on this: Hinz (2008b), but also: Hinz (2005) and the ground-breaking decision of the South African Constitutional Court *Bhe v. Magistrate Khayelitsha* 2005 (1) BCLR 1 (CC).
672. Cf.: Articles 32(5), 56(1), 65(1) of the Constitution.
673. Amoo; Skeffers (2008): 26.

by the Konrad Adenauer Stiftung, Windhoek; NamibLII, the Namibia Legal Information Institute, a project of the Namibian Law Reform and Development Commission.[674] NAMLEX, an index to the laws of Namibia, has been established by the Legal Assistance Centre in cooperation with the Namibian government and is electronically accessible. Most of the statutes on offer by NAMLEX are in an annotated version.[675] The bills before parliament are accessible through the website of the parliament.[676]

304. Selected decisions of the Namibian Supreme and High Court are recorded in the Namibian Law Reports. Most decisions can also be accessed electronically.[677] Magistrate's Courts and traditional courts, now community courts, do not have a reporting system.

§4. Law Journals

305. The Namibian Law Journal is published since 2009 by the Namibia Law Journal Trust. Both a printed and an electronic version are available. It is a biannual publication[678]

> for lawyers, scholars and students to examine, discuss, comment on and disseminate information about legal issues that are nationally and regionally relevant; to maintain, develop and promote the principles of the rule of law, democracy and justice for all … ; to maintain and encourage transparency in legal discourse; to contribute to the development of Namibian Law and to maintain and enhance the standard of legal practice and the adjudication by Courts of Law in Namibia.

306. The University of Namibia Law Review (UNAMLR) was an electronic journal published by UNAM law students. The first issue of UNAMLR was launched in February 2013, the so far last edition was published in 2017.

307. The South African journal De Rebus, published by the Law Society of South Africa, contains information on the law of Namibia.

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674. Reference be also made to SAFLII, the Southern African Information Institute, which reports cases from Africa as a whole.
675. Legal Assistance Centre (2020). Law enacted under German colonialism is electronically accessible at https://brema.suub.uni-bremen.de.
676. www.parliament.na.
677. The website of the Namibia Legal Information Institute (https://nambilii.org) is a widely used database for decisions of Namibian courts.
678. The Namibian Law Journal can be accessed on the website of the Konrad Adenauer Foundation: https://www.kas.de/de/web/namibia/publikationen/einzeltitel/-/content/namibia-law-journal3 (accessed 1 Apr. 2021).

§5. Legal Profession and Education

308. The legal profession includes legal practitioners, legal advisors, conveyancers, and notaries. The professional division of attorneys and advocates as applicable before independence was repealed,[679] and both attorneys and advocates were registered as legal practitioners under section 6 of the *Legal Practitioners Act*.[680] This act established the Law Society of Namibia, the first objective of which is to "maintain and enhance the standards of conduct and integrity of all members of the legal profession".[681]

309. The Society of Advocates, as it developed from the Bar Council of South West Africa, still exists and represents those practising lawyers who expect briefing from legal practitioners on behalf of their clients for legal action.[682]

310. Legal education is provided by the University of Namibia (UNAM), which was established in 1992.[683] Based on the *Turner Report* of 1991,[684] a special committee in the office of the designated Vice Chancellor of the University proposed to the Cabinet the establishment of a Faculty of Law. This proposal was approved in November 1991.[685] The years of 1992 and 1993 were years of planning. The first law students were admitted in January 1994.[686]

311. Making the entity on legal education a department in a faculty covering also other social sciences was considered, but not followed. The main argument behind establishing an institution for legal education standing on its own was that legal education and the framework in which this part of tertiary education had to operate was seen different from the frameworks of other fields of education.[687] However, the Faculty of Law was transformed to School of Law in the Faculty of Commerce, Management and Law in 2021.[688]

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679. The advocates' profession in South Africa is a referral profession. This means that a client approaches an attorney who, in turn, instructs an advocate. *See*: Attorneys Act, 1979 (Act No. 53 of 1979) and Admission of Advocates Act, 1964 (Act No. 74 of 1964) which were repealed by the Legal Practitioners Act, 1995 (Act No. 15 of 1995).
680. Act No. 15 of 1995. *See* here also: Kavendjii; Horn (2008a): 292f.
681. *See*: sections 40 and 41 of the Legal Practitioners Act and the Rules of the Law Society of Namibia, 2002, GN No. 340 of 2002, as amended. – The Law Society also offers legal advice free of charge holding counselling days in different parts of the country. Since 2014, the advisory project of the Society is supported by the office of the Ombudsman. (Cf.: Allgemeine Zeitung of 4 Sep. 2018).
682. Cf.: https://www.namibianbar.org/about.html (accessed 1 Apr. 2021) in general and *ibid.:* Rules of the Society of Advocates of Namibia, 2017.
683. University of Namibia Act, 1992 (Act No. 18 of 1992).
684. Government of Namibia (1991b).
685. Cf.: Faculty of Law (2020): 1.
686. *Ibid. See* further: Hinz (1993a); (1993b); Hinz; Kamba (1993); Hinz (2011a); and also: Zaire; Haibach (2012).
687. Cf.: the literature referred to in the previous fn.
688. Cf.: UNAM (2022) and: https://www.unam.edu.na/faculty-of-economic-management-sciences (accessed 22 Jun. 2022).

312. Originally, the Faculty of Law of the University of Namibia offered a three-year Baccalaureus Juris course, which was the prerequisite for attending the programme to obtain the degree of Bachelor of Laws after two more years of studying. In 2012, the Faculty commenced phasing out this combined programme starting a new four-year undergraduate LLB programme without the degree of *Baccalaureus Juris*.[689]

313. The Faculty of Law / School of Law also offers specializing and post-graduate programmes. To the first ones belong: Specialised Certificate in Customary Law, Certificate in Criminal Justice, Constitutionalism and Human Rights, Certificate in Parliamentarian Practice and Conduct, and Diploma in Alternative Dispute Resolution. As post-graduate qualifications, the degrees of Master of Law and Doctor of Philosophy in Law are offered.[690]

314. Section 16 of the *Legal Practitioners Act* confers the mandate for the training of legal practitioners to UNAM and, thus, requires UNAM to establish a Justice Training Centre (JTC) for this purpose. The Act also established a Board of Legal Education being responsible for determining the curriculum and moderating the Legal Practitioners Qualifying Examination.[691] The JTC offers, in addition to the legal practitioners' programme, special courses for conveyancers and notaries.

315. Apart from the JTC, the Human Rights and Documentation Centre was part of the Faculty, but has been integrated into the librara of UNAM. Its task was to assist in projects and programmes on fundamental rights and freedoms.[692]

316. The University of Science and Technology[693] also contributes to legal education, but only to a limited extent.[694] It offers two bachelor programmes in Criminal Justice, one specializing in Correctional Management and one in Policing.

317. The Namibia Institute of Public Administration and Management (NIPAM) covers aspects of law and the *Constitution* specifically in its programmes to qualify people for the appointment to the public service.[695]

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689. *See*: Faculty of Law (2020): 1ff.
690. *Ibid:* 10ff. and 56ff and now: UNAM (2022): 8ff.
691. Section 8 and 11 of the Legal Practitioners Act.
692. *See* here: Hinz (1995c). – *See also* the recent evaluation of the HRDC by: Hipanga; Yule (2021).
693. Formerly the Polytechnic of Namibia. – Cf.: Namibia University of Science and Technology Act, 2015 (Act 7 of 2015) and Commencement of the Namibia University of Science and Technology Act, 2015 (GN No. 254 of 2015).
694. University of Science and Technology (2020).
695. Namibia Institute of Public Administration and Management Act, 2010 (Act No. 10 of 2020) and the website of the institute (https://www.nipam.na - accessed 12 Jan. 2021).

318. The International University of Management is a private institution but accredited by the Qualification Authority and the National Council for Higher Education.[696] Its programmes include law-related courses, such as business, engineering, labour, and international law.[697]

696. Established under the Namibia Qualification Authority Act, 1996 (Act No. 29 of 1996) respectively the Higher Education Act, 2003 (Act No. 26 of 2003).
697. *See* the website of the International University of Management: https://www.ium.edu.na (accessed 9 Jun. 2021).

Part III. Form of Government

Chapter 1. Introduction

319. Article 1(1) of the *Constitution* constitutes Namibia as a sovereign, secular, democratic, and unitary state, but recognizes decentralized governmental bodies, namely regional and local councils.[698]

320. As has been shown in the part on the constitutional history above,[699] the *Constitution* was inspired by a particular vision of a non-racial and democratic society, in which government is based on the will of the people. This means that public participation in the decision-making process is a must: the sovereign authority of the state belongs to its citizens, who "themselves should participate in government – though their participation may vary in degree".[700] In this sense, liberty is not only the negative freedom from coercion by the government, but also the freedom to participate actively and constantly in collective power. The form of government envisaged by the *Constitution* is to encourage the citizens of the country to be involved actively in public affairs, identify themselves with the institutions of government and become familiar with the laws of the country. It promotes a spirit of accommodating the whole variety of ethnic groups, including minorities, with the objective that laws are likely to be widely accepted and effective in practice thus furthering the policy of reconciliation. Article 1(2) of the *Constitution* reflects the said by vesting "[a]ll power … in the people of Namibia who shall exercise their sovereignty trough the democratic institutions of the State".

321. Exercising through democratic institutions means that provisions must be in place which guarantee the exercise of undisturbed rights and liberties (this will be in a detailed manner the focus of Part IV of this work) and specifically the structures to respect and protect the free expression of votes in the various government-related election processes. As these structures stand behind the branches and institutions of government, the part on the form of government will start with a chapter highlighting the electoral system in place in Namibia (Chapter 2).

322. The different branches at the central level of government will be presented thereafter: the head of state (Chapter 3), the legislature (Chapter 4), the executive

698. Articles 102–111 of the Constitution provide for regional and local government.
699. *See*: Part I, Chapter 1.
700. Breyer (2005): 15.

(Chapter 5) and the judiciary (Chapter 6). Chapter 7 then deals with special government proceedings that are applicable in emergency situations, such as war, emergencies, and terrorism. Apart from the three main branches of government, the *Constitution* establishes several other bodies carrying out important functions for the state which are described in Chapter 8. The constitutional relationship between churches and the state is the focus of Chapter 9. The essence of a democratic state also requires adequate participation of the public. The way people's participation is regulated under the *Constitution* is decisive for the functionality of democracy. This is the topic of the final chapter (Chapter 10) of Part III.

Chapter 2. The Electoral System

§1. Electoral Law and the Electoral Commission

323. An important role in election processes is played by the Electoral Commission which "shall be the exclusive body to direct, supervise manage, control the conduct of elections and referenda … ".[701] According to Article 94B(2) of the *Constitution*, the Electoral Commission shall be an independent, transparent, and impartial body.

324. The five members of the Electoral Commission, of whom at least two must be women, are appointed by the president with the approval of the National Assembly.[702] The Chairperson of the Electoral Commission is required to serve in a full-time capacity for a term of five years; he or she is eligible for reappointment.[703] The qualifications for appointment, conditions and termination of service for the Chairperson, Commissioners and the Chief Electoral Officer are determined by the *Electoral Act*.[704] In terms of Article 94B(6) of the *Constitution* in connection with section 17 of the *Electoral Act*, the commission appoints the Chief Electoral and Referenda Officer who is the executive officer and designated as the permanent secretary of the Commission.

325. For all elections except elections for the National Council, the *Electoral Act* provides for the submission of party lists or nominees in the case of presidential and regional council elections, and it is up to the discretion of each party to determine how the order in the list is compiled.[705] If any person's name appears on more than one list of candidates, it shall be deemed not to be nominated as a candidate for any political party which submitted the list in question.[706] This is a fair provision for it avoids confusion and cheating in the electoral process. Parties, therefore, have to be certain about the standing of their members. Further, this may be a way of avoiding members of parliament from crossing the floor.[707] The party lists have to be published by the Electoral Commission in the Gazette.[708]

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701. Article 94B(1) of the Constitution. *See also*: section 3 of the Electoral Act, 2014 (Act 5 of 2014). The Electoral Commission was established as a constitutional institution in terms of Article 94B of the Constitution in 2014 which was introduced by the Namibian Constitution Third Amendment. *See* for a detailed discussion of the constitutionalization of the Electoral Commission: Ndeunyema (2017).
702. Article 94B(3) of the Constitution in connection with section 6(1) and (2) of the Electoral Act.
703. Article 94B(4) of the Constitution.
704. Article 95B(6) of the Constitution; Chapter 2 of the Electoral Act.
705. Sections 72, 73, 77, 80, 86 of the Electoral Act.
706. Section 86(5) of the Electoral Act.
707. Crossing the floor has come to mean permanently changing political party. The term comes from the fact that – in the Westminster system – members of Parliament from opposing parties sit traditionally on opposite sides of the chamber. Therefore, a member that changes party usually has to cross the floor of the House to sit on the other side of the chamber. The term is used to signify the changing of allegiance.
708. Section 78 of the Electoral Act.

326. In order to increase women's representation in the National Assembly, SWAPO has in 2014 committed to filling half of its seats in parliament with women, but also committed to what they call a "zebra system", whereby if a minister is a woman, the deputy minister will be a man, and vice versa. This has certainly contributed to placing Namibia among the top countries in the world for its impressive rate of women's representation in the National Assembly.[709] Currently, there are more than 40% women in the National Assembly.[710]

327. The presiding officer at a polling station is not allowed to give any assistance to a voter unless the voter is incapacitated by blindness or other physical disability. If any assistance is given, such assistance should be meant to direct a voter to a polling booth for the purposes of recording his or her vote or to inform a voter in respect of the procedure which he or she may follow on entering the polling booth, but without such presiding officer or polling officer interfering with the secrecy of the voter's vote. In the same vein, the polling officer can only assist if the voter is unable to read or to understand any written directions or instructions at a polling station and requests the presiding officer or polling officer explanation.[711]

328. At the end of an election for the National Assembly, a returning officer shall, when the counting of votes in accordance with the Act has been completed, announce the result of the count in the prescribed manner and inform the chief electoral officer accordingly.[712] The chief electoral officer shall determine the number of candidates of each political party to be declared duly elected as members of the National Assembly.[713]

§2. Elections before the Courts

329. There is the possibility to challenge the results of elections before the courts and different political parties and candidates have used their constitutional and statutory rights to redress the shortcomings they identify in the electoral process of Namibia in virtually all periodic elections since independence.[714] Subsequent to the 2004 national elections, two political parties sought an order declaring

709. Shejavali (2020): 1.
710. *Ibid*. A minimum women representation at the Local Authority Level is ensured through legislation (*see* below: Part V, Ch. 3, § 5.1). In contrast, at regional councils and in the National Council, women are represented poorly. Currently, about 26% of the members of the National Council are women. *See* on this: Shejavali (2020).
711. Section 103(1) of the Electoral Act.
712. Section 110(1).
713. Section 110(2).
714. *See* the cases of: *//Garoëb v. President of the Republic of Namibia* 1992 NR 342 (HC); *DTA of Namibia v. SWAPO Party of Namibia* 2005 NR 1 (HC); *Congress of Democrats v. Electoral Commission* 2005 NR 44 (HC); *Rally for Democracy and Progress v. Electoral Commission of Namibia* 2009 (2) NR 793 (HC); *Municipality of Walvis Bay v. Du Preez* 1999 NR 106 (LC); *Republican Party of Namibia v. Electoral Commission of Namibia* 2010 (1) NR 73 (HC); *Rally for Democracy and Progress v. Electoral Commission of Namibia*, High Court judgement, Case No. A 01/2010 - unreported; *Rally for Democracy and Progress v. Electoral Commission of Namibia* 2010 (2) NR

the elections null and void and setting it aside or alternatively that the votes be recounted.[715] The application was based on alleged irregularities observed in the election process, including that the ballot papers lacked serial numbers, the announcement of contradictory results, that accounts and verifications were either not made or not signed or the stuffing of ballot boxes. The court found that the evidence adduced was not sufficient to prove that the results would have been different had the Electoral Commission complied with its obligations under the *Electoral Act*.[716] The High Court concluded that the irregularities did not justify declaring the election null and void but ordered a recount.[717]

330. After the national elections in 2009, the opposition party RDP successfully sought an order from the High Court in terms of section 14 of the *Electoral Act* compelling the Electoral Commission to make available for inspection by the applicants certain documents related to the elections including, e.g., the counted, unused, rejected and spoilt ballot papers, their counterfoils, and voter registration cards.[718] In another case, several political parties challenged the results of the elections but the High Court dismissed the case for procedural reasons arguing the application was not properly and timeously presented as contemplated by the *Electoral Act*.[719] On appeal, the Supreme Court stressed the exceptional circumstances of the case and the importance of election applications,' set aside the High Court's order to strike the application off the roll and remitted the matter to the High Court for further adjudication.[720] The High Court then found that there was not sufficient evidence to prove the various alleged irregularities and despite the fact that certain requirements had not been complied with by the Electoral Commission, this did not affect the outcome of the election.[721] The court thus dismissed the application.[722] The appeal to the Supreme Court was also dismissed.[723]

331. In 2020, the High Court had to decide upon the question whether a political party has the discretion to choose which persons to nominate as members of the National Assembly after the gazetted list of candidates has been published and before persons taking the oath of office.[724] The applicants were on the final candidate list of the Popular Democratic Movement (PDM) in the 2019 elections of the

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487 (SC); *Rally for Democracy and Progress v. Electoral Commission of Namibia* 2013 (2) NR 390 (HC); *Rally for Democracy and Progress v. Electoral Commission for Namibia* 2013 (3) NR 664 (SC).

715. *Republican Party of Namibia v. Electoral Commission of Namibia* 2010 (1) NR 73 (HC).
716. *Ibid.*: 119B–F.
717. *Ibid.*: 119J–120A.
718. *Rally for Democracy and Progress v. Electoral Commission of Namibia*, High Court judgement, Case No. A432/09 - unreported.
719. *Rally for Democracy and Progress v. Electoral Commission of Namibia*, High Court judgement, Case No. A 01/2010 - unreported. *See* on this and for a detailed overview of the elections up to 2014: Weiland (2017); Zaire (2017): 86ff.
720. *Rally for Democracy and Progress v. Electoral Commission of Namibia* 2010 (2) NR 487 (SC). This judgement is discussed in: Horn (2011).
721. *Rally for Democracy and Progress v. Electoral Commission of Namibia* 2013 (2) NR 390 (HC).
722. *Ibid.*: 451G.
723. *Rally for Democracy and Progress v. Electoral Commission for Namibia* 2013 (3) NR 664 (SC).
724. *Tjirare v. Chairperson of the Electoral Commission of Namibia* 2020 (3) NR 637 (HC).

National Assembly. According to their ranking and the result of the vote, they were entitled to become members of the National Assembly. However, the PDM decided to change the list of candidates subsequent to the elections. With the permission of the Electoral Commission, it included six members to the list who had been excluded from the list prior to election because they did not qualify. In consequence, these subsequently added candidates were entitled to become members of the National Assembly instead of the applicants. The High Court made an order with the effect that the members that were included in the list after the elections had to "vacate their positions in the National Assembly in order to allow the first applicant and her colleagues whose names were removed from the gazette list to take their rightful place in the August House."[725] The High Court interpreted Schedule 4 of the *Constitution*, as follows:[726]

> We accordingly prefer the interpretation that for a person to be proposed or formally entered as a candidate for election to the National Assembly that person must be so proposed, or formally entered as a candidate for election to the National Assembly in accordance with the procedures established by the Act. In other words, the person's name must appear on the gazetted list prior to the conduct of the poll. This interpretation is not only sensible or businesslike but actually gives effect to the apparent clear and obvious purpose of the Constitution. The purpose of the Constitution in no uncertain terms being to confer on eligible citizens the right to elect who must represent them in the National Assembly.

It was further clarified that the powers of the Electoral Commission to amend or alter a party list after the elections was limited to circumstances set out in section 110(4) of the *Electoral Act*, including death, incapacity or non-qualification of a candidate as well as the expulsion of a candidate by its party.[727] Moreover, the Supreme Court emphasized the importance of the Electoral Commission performing its functions independently of any direction or interference by any other authority or person.[728]

332. Section 97 of the *Electoral Act* provides for the use of electronic voting machines in elections and establishes requirements and procedures for its use, including the requirement of a verifiable paper trail. Electronic voting was used in the 2014 general elections for the first time in Namibia and for the first time in Africa. The electronic voting machines were also used in the 2015 Namibian local and regional elections and in the 2019 general election. The electronic voting machines that Namibia purchased, though, do not implement a verifiable paper trail as required by Section 97(3) and (4) of the *Electoral Act*. However, when publishing a notice in the Government Gazette putting into operation the *Electoral Act* in October 2014, the Minister of Urban and Rural Development had determined that

725. *Ibid.:* 660E.
726. *Ibid.:* 651A–C.
727. *Ibid.:* 655D–G.
728. *Ibid.:* 658F–G.

the "Act comes into operation on the date of publication of this notice in the Gazette, except for section 97(3) and (4)".[729] These subsections provide that the use of voting machines is subject to the simultaneous utilization of a verifiable paper trail and that where the results of the voting machines and the results of the paper trail did not agree, the paper trail results were to be accepted as the election outcome for the polling station concerned.

333. In consequence, several applicants who were candidates in the elections sought an interim order, on an urgent basis, with a view to setting aside the Namibian Constitution Third Amendment Act 8 of 2014, section 209(2) of the Electoral Act and Government Notice 208 of 2014 as unconstitutional.[730] The High Court had, inter alia, to decide whether it was an unconstitutional violation of separation of powers, if a member of the executive branch decides that only portions of an Act come into force. The minister argued in this regard that section 209 of the *Electoral Act,* which is cited in the following, would empower him to make such a decision:

> (1) This Act is called the Electoral Act, 2014, and comes into operation on a date determined by the Minister responsible for regional and local governments by notice in the Gazette.
> (2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.

334. The High Court dismissed the application and the elections proceeded with the use of electronic voting machines without a verifiable paper trial. After also the 2019 elections took place with electronic voting machines without a verifiable paper, five of the candidates in the election brought an application to the Supreme Court in terms of section 172 of the *Electoral Act* which says, in effect, that any challenge relating to the return or outcome in a presidential election must be decided by the Supreme Court as a court of first and final instance. The Supreme Court rejected a jurisdiction objection by the respondents and ruled that without a paper trail, usage of the electronic voting machines in elections is unconstitutional.[731]

335. Section 172(1) of the *Electoral Act* was found to be construed broadly and purposively, taking into account the primacy of the right to vote in the context of the Namibian constitutional democracy and its history.[732] The jurisdiction objection was held to be without merit:[733]

> The challenge to the outcome of the Presidential election is with reference to the Minister's determination which excluded a paper trail when use is made of EVMs [electronic voting machines]. Properly considered as a whole, it plainly relates to the Presidential election given the direct relationship between the

729. GN No. 208 of 2014.
730. *Maletzky v. Electoral Commission of Namibia* 2015 (2) NR 571 (HC).
731. *Itula v. Minister of Urban and Rural Development* 2020 (1) NR 86 (SC).
732. *Ibid.:* 99G.
733. *Ibid.:* 99G–I.

> declaratory relief and the conduct of voting by EVMs. The election challenge by the applicants thus falls within the gamut of s 172 … .

336. The Supreme Court concluded that the minister had acted in conflict with the Constitution when putting into force section 97(1) and (2) of the *Electoral Act* while excluding the application of sections 97(3) and (4) of the same act. The minister was required, when exercising the power entrusted under section 209, to carry it out lawfully and consistently with the *Constitution*.[734] The use of electronic voting machines under section 97(2) was held to be conditional upon complying with sections 97(3) and (4). The legislative authorisation of the use of electronic voting machines in section 97(2) was thus subordinate to the conditions being met as set out in sections 97(3) and (4). Section 97 was found to be a composite and integrated provision. The Supreme Court held:[735]

> This means that those subsections were required to be put in operation alongside the power to make use of EVMs. It plainly exceeded the Minister's powers under s 209 to selectively put into force the power to use EVMs without the conditions placed by the legislature for their use. It was not open to the Minister to hold those provisions in abeyance as the use of EVMs is dependent upon the safeguards placed in them. By doing so, the Minister effectively deleted (for the time being) the safeguards enacted by Parliament and thus usurped its role and breached the separation of powers provided for in the Constitution.

337. The applicants not only sought a declaratory order with regard to the unconstitutionality of the minister's action but also consequential relief that includes the setting aside of the 2019 presidential election and directing a rerun of the election without undue delay.[736] It was, though, held that the applicants had delayed raising the issue[737] and had not shown that the absence of a verifiable paper trial had adversely affected their right to vote.[738] It would, hence, not be appropriate to declare the election invalid and order a rerun of it.

338. After the local government elections in November 2020, the Electoral Commission applied to court on an urgent basis to declare the ballots cast and the

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734. *Ibid.:* 104D.
735. *Ibid*.: 104G–105B. Section 97(3) and (4) of the Election Act came into operation by determination of the Minister of Urban and Rural Development in March 2020. *See*: GN No. 85 of 2020.
736. *Ibid.:* 91D–E.
737. The Supreme Court, though, found that the steps taken by the applicant "were taken without undue delay *after* becoming aware of the absence of a paper trial on 24 Oct. 2019 for the purpose of a review." (*Ibid*.: 101H–I). Although there was a delay in the circumstances of the matter in raising the issue with the Electoral Commission, this was only relevant in determining appropriate relief and it was "not necessary to determine whether it was unreasonable for the purpose of the delay rule in review proceedings because the applicants should not be non-suited on this ground from raising this issue of profound constitutional importance and where the merits of the challenge are sound as is shown below". It was in the interest of justice to grant condonation. (*Ibid*.: 102F–G).
738. *See* on this: *ibid*.: 105D–110I.

elections in certain local authorities and one constituency null and void.[739] It further seeked a court's order directing the holding of new elections not later than fourteen days from the date of the order. It was the first time the electoral commission itself approached the court to declare the taking of a poll invalid. The application was based on alleged irregularities including the presentation of incorrect ballot papers at certain polling stations, the closing of a polling station four hours earlier than the time when it was supposed to have closed and the use of ballot papers with only three instead of four candidates by uneligible voters at three of the polling stations.

339. The High Court stressed the role and responsibility of the Electoral Commission with respect to free, transparent, credible, and fair elections:[740]

> Elections can be conducted successfully and thus perform their stabilizing role if conducted by an independent, well-functioning Election Commission and an Election Complaints System (where disgruntled persons may be heard and their issues decided upon) which is crucial for the success of an election process. This case is, in our view, about reaffirming the importance of a free, transparent, credible and fair election at the local and regional spheres of government.

The court further said:[741]

> We have made an observation which is worth recording. As much as the Commission can approach the court to rectify material irregularities, it remains the duty of the Commission to ensure that its election officers are properly trained in order to ensure credible, free and fair elections. It is incumbent on the Commission to have mechanisms in place to assess the transfer of election knowledge and skill to the election officers, and be satisfied that the men and women who are ultimately tasked to conduct elections on which our democracy starts and rests are well equipped to serve the election process. We cannot imagine the chaos that may consequentially follow if the voters come to the realization that some election officers are found to be wanting in the process of conducting elections. The Commission will not be approached with kid gloves if it turns out that its election officers are either not properly trained, assessed or examined to the extent that they may compromise the elections.

340. One of the key issues of the case was what jurisdictional facts must be present for a court to declare an election invalid. Section 115 of the Electoral Act prohibits the setting aside of elections by the courts if certain basic principles of the electoral process have been adhered to and the irregularity did not affect the result of the election. The Court interpreted the provision as follows:[742]

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739. *Electoral Commission of Namibia v. SWAPO Party of Namibia* 2021 (1) NR 227 (HC).
740. *Ibid*.: 229I–230A.
741. *Ibid*.: 245A–C.
742. *Ibid*.: 239H.

> Our reading of s 115 of the Electoral Act, 2014 is that the jurisdictional facts that must be present for a court to uphold an election are that the court must be satisfied that the election in question was conducted in accordance with the principles laid down in the Act and that the mistakes or non-compliances with the act do not affect the result of the election. In our view if both those jurisdictional facts are not met then the court will exercise its discretion and invalidate the election.

The High Court found both jurisdictional facts were not met with respect to the elections at issue, declared the elections invalid and set them aside.[743]

341. The High Court finally had to decide upon the question[744]

> whether the power to hear and determine any matter which relates to the interpretation of any law relating to electoral issues referred to it by the commission includes a power to direct a re-run of the taking of the poll on a specific day.

It held in this respect that the power to determine the polling day is restricted to the president who takes such decision based on the recommendation of the Electoral Commission. Consequently, the power to hear and determine any matter which relates to the interpretation of any law relating to electoral issues referred to the court by the Commission would not include the power to direct that a rerun of the taking of the poll must take place by a specific day.[745]

743. *Ibid*.: 239I–242I.
744. *Ibid*.: 243E.
745. *Ibid*.: 244B–H.

Chapter 3. The Head of State

§1. Introduction

342. The President of Namibia is the head of state and head of the government. In addition, the president is also the commander-in-chief of the defence force.[746] The executive power vests in the president and the Cabinet.[747] In the exercise of his or her functions, the president is "obliged to act in consultation with the Cabinet".[748]

343. The presidency consists of the president and the vice-president, the latter being appointed by the president from the elected members of the National Assembly[749] and basically having a deputy, assistant, and advisory function.[750] The office of the vice-president was established in 2014 by the *Namibian Constitution Third Amendment Act*.[751]

§2. The Election of the President

344. The election of the president is by direct, universal, and equal suffrage; and is conducted in accordance with principles and procedures stipulated in the *Electoral Act*.[752] The Act provides for the procedures to be followed for the nomination of candidates for election as president, and for all matters to ensure the free, fair, and effective election of the president.[753]

345. A person qualifies to run for the office of president if he or she is a citizen of Namibia by birth or descent, over the age of 35, and is eligible to be elected to office as a member of the National Assembly.[754] The candidate for the office of president can be a politically independent person or the nominee of a registered political party. An independent candidate must be "supported by a minimum number of registered voters to be determined by act of parliament".[755] The successful candidate must get more than 50% of the votes cast. If there is no winner in the election of presidency, the president is elected in a run-off ballot from the two candidates with the most votes.[756]

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746. To this and the following *see*: Article 27 of the Constitution.
747. Article 27(2) of the Constitution.
748. Article 27(3).
749. Articles 27A and 28(1A).
750. Article 28(2A)(b).
751. Act No. 8 of 2014.
752. Article 28(1) and (2) of the Constitution as amended by the Namibian Constitution Third Amendment Act No. 8 of 2014 and Electoral Act, 2014 (Act 5 of 2014).
753. Article 28(4) of the Constitution.
754. Article 28(3).
755. Article 28(4) of the Constitution. Section 72(c)(ii) of the Electoral Act, 2014 (Act 5 of 2014) requires an independent candidate to be supported by at least 500 registered voters per region.
756. Article 28(2)(b) of the Constitution.

346. Before formally assuming the office, the president-elect shall make an oath (or affirmation) in which the president-elect confirms "to the best of [his or her] ability to uphold, protect and defend … the Constitution of the Republic of Namibia … ". This oath is administered by the Chief Justice, the Deputy-Chief Justice or a judge designated by the Chief Justice.[757]

§3. Term of Office

347. The term of office of the president runs for five years unless he or she dies or resigns before the expiry of the said term or is removed from office.[758] The president can be re-elected once, meaning that he or she is not allowed to hold the office for more than two terms.[759]

348. Should the president dissolve the parliament, his or her term will also end.[760] However, to avoid a constitutional vacuum, Article 29(5) of the *Constitution* stipulates that if the president dissolves the National Assembly, a new election for president shall be held in accordance with the provisions of Article 28 of the *Constitution* within ninety days. Pending such election, the president shall remain in office and can still summon the dissolved parliament to sessions "for the conduct of business during the period following ... [the] dissolution".[761]

349. If a president dies, resigns or is removed from office, the vacant office of president shall be filled for the unexpired period following two constitutional rules: should the vacancy occur not more than one year before the date on which presidential elections are required to be held, the vacancy shall be filled in by the vice-president and in the absence of the vice-president, by the prime minister. In case both, the vice-president and the prime minister are absent, the deputy-prime minister shall act as president and in the absence of all mentioned office holders a person appointed by the Cabinet shall fill in the vacancy.[762] Should the vacancy happen more than one year before the date on which presidential elections are to be held, an election shall be held within a period of ninety days after the vacancy. Until such election, the above-mentioned officials will act as president.[763]

350. In case of temporary absence of the president from the country or a pressure of work and the absence of the vice-president, prime minister or deputy-prime

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757. Article 30.
758. Article 29(1)(a).
759. Article 29(3) of the Constitution. However, the Namibian Constitution First Amendment Act, 1998 (Act No. 34 of 1998) explicitly allowed the first President of the Republic of Namibia to hold office as president for three terms. This is due to the fact that its first election was by the Constituent Assembly and not as provided for by the Constitution.
760. Article 29(5) of the Constitution.
761. Article 58.
762. Article 29(4)(a) read with Article 34.
763. Article 29(4)(b) read with Article 34.

minister and if regarded as necessary or expedient that a person deputizes for the president, he or she can appoint any of the three to act in his or her stead.[764]

§4. Protection of Office of President and Removal from Office

351. The president can only be sued in civil proceedings where the proceedings concern an act done in official presidential capacity.[765] The president is exempted from criminal charges in respect of any act or any omission during his or her tenure of office.[766] After the vacation of the office, the president may be subject to civil or criminal proceedings with respect to acts committed during his or her office in case the parliament has removed the president in accordance with the *Constitution* and adopted a resolution stating that such proceedings were justified in the public interest.[767]

352. Article 29(2) of the *Constitution* allows parliament to remove the president from office by adopting a resolution for the impeachment of the president with a two-thirds majority of all the members of the National Assembly confirmed by a two-thirds majority of all the members of the National Council if

> he or she has been guilty of a violation of the Constitution or guilty of a serious violation of the laws of the land or otherwise guilty of such gross misconduct or ineptitude as to render him or her unfit to hold with dignity and honour the office of President.

§5. Functions, Powers and Duties of the President

353. The president is obliged to perform all acts necessary, expedient, reasonable, and incidental to the discharge of the executive functions of the government with "dignity and leadership". These duties are subject to the *Constitution* and the laws of Namibia, which "he or she is constitutionally bound to protect, to administer and to execute".[768] In terms of Article 32(2), the president, in accordance with the responsibility of the executive branch of government to the legislative branch, is enjoined to attend parliament. During such session, the president is obliged to address parliament on the state of the nation and on the future policies of the government. The president should also report on the policies of the previous year. Members of parliament have the right to pose questions to the president.[769]

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764. Article 34(2).
765. Article 31(1).
766. Articles 31(2).
767. Article 31(3).
768. Article 32(1).
769. Article 32(2).

354. The president presides over meetings of the Cabinet[770] and has special powers concerning foreign affairs of the state, such as receiving ambassadors of foreign countries and appointing ambassadors of Namibia and other diplomatic officers, consuls and consular officers.[771] The president further has the power to negotiate and sign international agreements.[772] According to Article 32(3)(d), he or she can pardon or reprieve offenders.[773]

355. The president has the power to establish and dissolve government departments and ministries as he or she may "consider being necessary or expedient for the good government of Namibia".[774] The president can confer honours, as he or she considers "appropriate on citizens, residents, and friends of Namibia in consultation with interested and relevant persons and institutions".[775]

356. In the exercise of his or her duties, the president has the power to appoint the following persons:[776]

(a) the Vice-President;
(b) the Prime Minister;
(c) the Deputy-Prime Minister;
(d) Ministers and Deputy-Ministers;
(e) the Attorney-General;
(f) the Director-General of Planning;
(g) the Head of the Intelligence Service; and
(h) any other person or persons who are required by any other provision of this Constitution or any other law to be appointed by the President.

357. The appointment of certain persons by the president is on recommendation of special commissions. On the recommendation of the Public Service Commission, the president appoints:[777]

(a) the Auditor-General; and
(b) the Governor and the Deputy-Governors of the Central Bank.

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770. Article 32(3).
771. Article 32(3)(c).
772. Article 32(3)(e).
773. Article 32(3)(d) of the Constitution. While the Prisons Act (Act No. 17 of 1998) was in force, presidential pardons were issued to certain categories of prisoners and offenders including the Announcement of Presidential Pardon to Certain Categories of Prisoners, Proclamation No. 15 of 1993; Announcement of Presidential Pardon to Certain Categories of Offenders, Proclamation No. 11 of 1994 and several others. For the time after the Correctional Service Act (Act No. 9 of 2012) came into force, *see*: Announcement of Granting of Presidential Pardon or Reprieve to Certain Categories of Convicted Inmates: Namibian Constitution, Proclamation No. 8 of 2020, which was withdrawn and replaced by Announcement of Granting of Presidential Pardon or Reprieve to Certain Categories of Offenders: Namibian Constitution, Proclamation No. 19 of 2020.
774. Article 32(3)(g) of the Constitution.
775. Article 32(3)(h).
776. Article 32(3)(i).
777. Article 32(4)(b).

358. On the recommendation of the Judicial Service Commission the president appoints:[778]

(a) the Chief Justice, the Judge-President of the High Court and other Judges of the Supreme Court and the High Court;
(b) the Ombudsman;
(c) the Prosecutor-General.

359. The removal of judges is also within the authority of the president on the recommendation of the Judicial Service Commission.[779] The president is entitled to extend the tenure of judges who have reached retirement age 65 to 70.[780]

360. On the recommendation of the Security Commission the president appoints:[781]

(a) the Chief of the Defence Force;
(b) the Inspector-General of Police; and
(c) the Commissioner-General of Correctional Services.

361. The president may, in consultation with the Cabinet and on the recommendation of the Public Service Commission constitute any office in the public service of Namibia not otherwise provided for. When the president creates such an office, he or she has the power to appoint any person and to determine the terms and conditions of the office.[782]

362. Any person appointed by the president may be removed by the president by the same process through which such person was appointed.[783]

363. The powers of the president have an impact on the functions of the legislature. Bills passed by parliament must have the assent of the president.[784] To what extent the president is obliged to give assent will be dealt with in detail below.[785] The president can initiate, as he or she considers it necessary, laws for submission to and consideration by the National Assembly.[786] The president has also the power to promulgate proclamations which he or she is entitled to proclaim.[787]

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778. Article 32(4)(a).
779. Article 84(1) – The appointment and the removal of judges will be taken up again in the Chapter on the judiciary (Chapter 6 of this part).
780. Article 82(4) of the Constitution.
781. Article 32(4)(c).
782. Article 32(7)(a)–(c).
783. Article 32(6).
784. Article 56.
785. *See* Chapter 3 of this part.
786. Article 32(5)(b) of the Constitution.
787. Article 32(5)(a).

364. The president can appoint not more than eight persons into the National Assembly. These people are appointed by virtue of their special expertise, status, skill, or experience.[788] However, they do not have any vote in the National Assembly. In addition, the president also determines the times for the holding of special sessions of the National Assembly and to prorogue them.[789]

365. The president has the power to dissolve the National Assembly by proclamation on the advice of the Cabinet if the government is unable to govern effectively.[790] From the date of such dissolution on, a national election for a new National Assembly and a new president shall take place within a period of ninety days.[791]

366. The power of the president regarding to martial law, states of national defence, and states of emergency are outlined in Article 26 of the *Constitution* and will be discussed below.[792]

§6. The Remuneration of the President

367. Article 33 of the *Constitution* expects an act of parliament to provide for the remuneration of the president, the payment of allowances, of pensions to former presidents and, in the case of their deaths, of payment to the surviving spouses out of the State Revenue Fund.[793] In implementing this obligation, the *Presidential Remuneration and Other Benefits Act*[794] was put in place.

368. In terms of this Act, the president is entitled to a salary which is fixed at a rate of 15% above the remuneration for the vice-president.[795] The vice-president's remuneration is fixed at a rate of 15% above the remuneration for the prime minister.[796] The remuneration of public office-bearers, including the prime minister, is determined by the president after recommendations of the Public Office-Bearers (Remuneration and Benefits) Commission.[797]

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788. Article 32(5)(c) of the Constitution, as amended by the Third Constitutional Amendment Act, 2014 (Act 8 of 2014).
789. Article 32(3)(b) of the Constitution.
790. Article 32(3)(a) read with Article 51(1).
791. Article 57(2).
792. Chapter 7 of this part.
793. The state revenue fund is administered by the Revenue Agency. *See*: Namibia Revenue Agency Act, 2017 (Act No. 12 of 2017).
794. Act No. 5 of 2016.
795. *See* section 2(a) of the Act.
796. Section 2(b).
797. Section 8 of the Public Office-Bearers (Remuneration and Benefits) Commission Act, 2005 (Act No. 3 of 2005). The remuneration and benefits of public office-bearers, the president, vice-president and former presidents have been determined by Proclamation No. 4 of 2017.

§7. The Vice-President

369. The vice-president is appointed by the president from the elected members of the National Assembly.[798] According to Article 32(3A) of the *Constitution*, the vice-president shall be appointed with "due regard for the need to obtain a balanced reflection of the national character of the people in Namibia". A member of the National Assembly appointed as vice-president is required to resign as a member of parliament[799] and shall not at the same time be the prime minister, deputy-prime minister, a minister or hold any other office in the government.[800] Before formally assuming office, the vice-president shall make and subscribe to an oath or solemn affirmation before the Chief Justice, the Deputy-Chief Justice or another judge designated by the Chief Justice.[801] The vice-president shall assume office on the same day as the president.[802] The vice-president's conditions of service may be provided by an act of parliament.[803]

370. In case the president is unable to assume office due to his or her death, incapacity, disqualification or other reason, the vice-president assumes the office of president in acting capacity until the assumption of office of the new president elected in a subsequent by-election.[804] If the vice-president resigns, is dismissed, dies or is incapable of exercising his or her function, he or she is replaced by a person appointed by the president under the *Constitution*.[805] The presidential immunity provision of Article 31 of the *Constitution* also applies to the vice-president.[806]

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798. Section 28(1A) of the Constitution.
799. Section 28(2A)(c).
800. Section 28(2A)(d).
801. Section 28(2B).
802. Section 28(2D).
803. Section 28(2A)(e).
804. Section 28(2A)(f).
805. Section 28(2A)(g).
806. Section 28(2E).

Chapter 4. The Legislature

§1. Introduction

371. The founders of the *Constitution* have opted for a bicameral legislature with the National Assembly as primary legislative organ and the National Council as second chamber with law introducing and reviewing powers. While the members of the National Assembly are directly elected, the National Council members are representatives elected from and by the regional councils. This chapter will focus on the two chambers of the parliament and their authority to legislate, including their power to delegate the authority to legislate. The "making [of] customary law"[807] will be looked at when dealing with the traditional authorities.[808]

§2. The National Assembly

I. Introduction

372. The National Assembly is established in terms of Article 44 of the *Constitution*. According to Article 46(1), the National Assembly is made up of ninety-six elected members and up to eight members appointed by the president.[809] The elected members are directly elected by the registered voters by general, direct, and secret ballot. They assume their seats based on a proportional representation system.[810] Only those citizens who have attained a minimum of 21 years of age are eligible to stand as members of the National Assembly. Once they assume their office, the members are the representatives of all the people and shall in the performance of their duties be guided by the objectives of the *Constitution*, by public interest, and by their conscience.[811]

II. Election to the National Assembly

373. The procedure through which a person gets into the position of member of the National Assembly is provided for in Article 49 of the *Constitution* and its Schedule 4. For the allocation of seats in the National Assembly the total number of votes cast in the election for these seats shall be divided by the number of seats to be filled. The result then constitutes the quota of votes per seat.[812] Once this is done, the total number of votes cast in favour of a registered political party shall be

807. So the language in section 3(3)(c) of the Traditional Authorities Act, 2000 (Act No. 25 of 2000).
808. *See*: Chapter 4 of Part IV.
809. Article 46(1) of the Constitution.
810. Article 49.
811. Article 45.
812. Clause 1 of Schedule 4 to the Constitution.

divided by the quota of votes per seat and the result shall constitute the number of seats to which that political party shall be entitled in the National Assembly.[813]

374. Clause 3 of Schedule 4 to the *Constitution* stipulates that where a surplus yields a fraction not absorbed by the number of seats allocated to the political party concerned, such surplus shall compete with other similar surpluses accruing to any other political party or parties participating in the election, and any undistributed seat or seats shall be awarded to the party or parties concerned in sequence of the highest surplus.

375. After the mentioned division is done, it is now up to the political party to choose – according to the requirements pertaining to the qualification of members of the National Assembly – which member will occupy the allocated number of seats in the National Assembly.[814]

376. Schedule 4 to the *Constitution* requires that provision shall be made by an act of parliament for all parties participating in an election of members of the National Assembly to be represented at all material stages of the election process and to be afforded a reasonable opportunity for scrutinizing the counting of the votes cast in such election. In this respect, Part IV of the Electoral Act makes provision for the observation of elections and referenda by organizations, institutions, and individuals.

III. Functions and Powers

377. The broad mandate of the National Assembly as the principal legislative authority is stipulated in Article 63(1) of the *Constitution*. According to this, the National Assembly has the power to make and repeal laws for peace, order, and good government of the country in the best interest of the people of Namibia.

378. The National Assembly has fiscal, administrative, advisory, and socio-economic duties for the nation. Regarding fiscal duties, the National Assembly has the mandate to approve the budgets for the administration of the country and to provide for revenue and taxation.[815] With respect to administrative issues, the National Assembly is responsible for upholding and defending the law and advancing the objectives of the independence of Namibia. In this respect, it has the power to take any steps it considers expedient to achieve this goal.[816] The legislative mandate also includes – as already indicated when dealing with the domestic application of international law – the power to decide on the succession of international agreements

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813. Clause 2 of Schedule 4.
814. Clause 4 of Schedule 4. As has been mentioned above, a party is bound to its party list as gazetted prior to the elections (*See*: Chapter 2, § 2 of this part).
815. Article 63(2)(a) and (b) of the Constitution.
816. Article 63(2)(c).

entered into prior to independence and to agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) of the *Constitution*.[817]

379. It is part of the mandate of the National Assembly to receive reports on the activities of the executive, including parastatal enterprises, and, from time to time, to call officials to appear before any of the committees of the National Assembly to account for and explain his or her acts and programmes.[818] With view to referenda, the National Assembly has the power to initiate, approve or decide to hold a referendum on matters of national concern.[819] The National Assembly can debate and advise the president in regard to any matters which, by the *Constitution*, the president is authorized to deal with.[820]

380. Article 59(a) of the *Constitution* grants the National Assembly the power to make such rules for the establishing, functioning, and procedures of committees, as may be necessary. Parliamentary standing committees, established in conformity with Article 59 and Article 74(2) of the *Constitution*, have an advisory and control function.[821] Committees established under Article 59(1) have the authority to subpoena persons to appear before it to give evidence on oath and to produce any documents required by it.[822]

IV. Disqualification of Members and Vacation of National Assembly Seats

381. A person does not qualify to become a member of the National Assembly if he or she was convicted of a serious offence as prescribed in Article 47(1) of the *Constitution*. Further, a person is unqualified if he or she is an unrehabilitated insolvent, of unsound mind, is a remunerated member of the public service of Namibia, and is a member of the National Council, regional councils or the council of a local authority.[823]

382. A member of the National Assembly may vacate his or her seat for different reasons. One is that he or she ceases to have the qualifications which rendered him or her eligible to be a member of the National Assembly, for example because he or she is not re-elected or is no longer a member of the political party which nominated him or her to sit in the National Assembly.[824] A member can also resign from his or her seat. A member can be expelled from the National Assembly in

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817. Article 63(2)(d), (e); *see also* above: Chapter 2 of Part I.
818. Article 63(2)(f).
819. Article 63(2)(g). *See also* below in this part: Chapter 10, §1.
820. Article 63(2)(h).
821. *See* for more detail: Section 64 of the Standing Rules and Orders and Internal Agreement of the Parliament of Namibia, available at: https://www.parliament.na/wp-content/uploads/2021/08/SROs-booklet.pdf (accessed 27 Jun. 2022).
822. Article 59(3) of the Constitution.
823. Article 47(1)(c)–(f).
824. Article 48(1)(a)–(b).

accordance with its standing rules and orders.[825] A member of the National Assembly ceases being a member if he or she is absent during sittings of the National Assembly for ten consecutive sitting days, without having obtained special leave of the National Assembly on grounds specified in its rules and standing orders.[826]

383. If the seat of a member of the National Assembly is vacated, the political party which nominated such member is entitled to fill the vacancy by nominating any person on the party's election list compiled for the previous general election, or if there is no such person, by nominating any member of the party.[827] This rule was given effect in the case of *Federal Convention of Namibia v. Speaker, National Assembly of Namibia*[828] where it was held that if a political party withdraws the membership of a person representing it in parliament, such person ceases to be a member of parliament and the party concerned has free choice to have another representative to occupy the seat.

V. The Speaker, Deputy-Speaker, and Secretary

384. The National Assembly should elect its speaker at its first sitting. The secretary to the National Assembly will act as the chairperson of the meeting in which the speaker is elected. After the election of the speaker, the National Assembly shall elect another member as its deputy speaker. The deputy speaker shall act as speaker whenever the speaker is not available. When neither the speaker nor the deputy speaker is available, the National Assembly, again with the Secretary of the National Assembly acting as chairperson, shall elect a member to act as speaker.[829]

385. The speaker of the National Assembly appoints or designates the Secretary of the National Assembly.[830] The secretary performs the functions and duties assigned to him or her by the *Constitution* or by the speaker.[831]

VI. Parliamentary Sessions

386. The presence of at least forty-nine members of the National Assembly entitled to vote, other than the speaker or the presiding member, shall be necessary to constitute a meeting of the National Assembly when any voting is required.[832]

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825. Article 48(1)(c)–(d).
826. Article 48(1)(e).
827. Article 48(2).
828. 1991 NR 69 (HC).
829. Article 51(4) of the Constitution.
830. Article 52(1).
831. *Ibid*.
832. Article 53(1).

For meetings when no voting is required, the presence of at least twenty-six members of the National Assembly, other than the speaker or presiding member, suffices to constitute a meeting.[833]

387. As a general rule, the public may attend parliamentary sessions.[834] Access can though be denied if the National Assembly adopts a motion excluding public access for specified periods or in respect of specified matters.[835] Such motion must be supported by two-thirds of all its members.[836] A motion shall only be considered if it is supported by at least one-tenth of the members of the National Assembly and the debate on such a motion shall not be open to members of the public. When there is an equality of votes in the National Assembly, "the speaker or the deputy speaker or the presiding member shall have and may exercise a casting vote".[837]

388. The National Assembly sits at its usual place of sitting determined by the National Assembly, unless the speaker directs otherwise on the grounds of public interest, security, or convenience.[838] Since independence in 1990, the seat of the National Assembly has been in the capital, Windhoek.

389. The minimum number of sessions for the year is two of which is the opening and the closing session. The rest may be determined by the members.[839] The day of commencement of any session of the National Assembly may be altered by proclamation by the president, if the president is requested to do so by the speaker on grounds of public interest or convenience.[840] The National Assembly can also sit for such special sessions as directed by proclamation by the president from time to time.

390. The power of the speaker to rule over the proceedings of the National Assembly led recently to a dispute that was brought to the High Court.[841] In April 2021, the speaker suspended two members of parliament from the National Assembly for an indefinite period of time, after they had been removed by security from the chambers during a chaotic incident. The affected persons applied, without success, to the High Court to declare the decisions invalid. The applicants argued that, according to the *Standing Rules and Orders*, the speaker was not allowed to bar members of parliament from the National Assembly for more than one day. The High Court concluded that the case could be competently dealt with through parliamentary processes and that due to the principle of separation of powers, section

833. Article 53(2).
834. Article 61(1).
835. Article 61(2).
836. *Ibid.*
837. Article 54 of the Constitution.
838. Article 62(1)(a).
839. Article 62(1)(b).
840. Article 62(3).
841. *Swartbooi v. Speaker of the National Assembly*, High Court judgement, Case No. HC-MD-CIV-MOT-GEN-2020/00149 [2021] NAHCMD 207 – unreported.

21 of the *Powers, Privileges and Immunities of Parliament Act*[842] would even preclude it from usurping the proceedings pending before the Committee.[843] The Supreme Court though upheld the appeal and set aside the decision of the speaker to suspend the appellants. The Supreme Court argued that the decision taken to suspend indefinitely was not made in accordance with the Standing Rules or the Act.[844] It also stressed that the decision to suspend was not made by parliament, but by the speaker, so that section 21 of the *Powers, Privileges and Immunities of Parliament Act* would not find application in this matter, given the absence of the necessary jurisdictional facts for its invocation to preclude the court's jurisdiction.[845]

§3. The National Council

I. Introduction

391. The National Council is established by Article 68 of the *Constitution*. It is the second house of parliament and is made up of each three elected representatives from the fourteen regions of Namibia.[846] Before the 2014 amendment of the *Constitution*, only two representatives from the regions were elected to the National Council. Since the 2014 amendment and the redrawn regions, the National Council has forty-two members.

392. The members of the National Council are elected from the members of the regional councils and hold office for five years. The rules on qualification for membership to the National Assembly apply to regional councillors. The additional requirement is that no person shall be qualified to be a member of the National Council if he or she is an elected member of a local authority.[847]

II. The Election to the National Council

393. The procedure for the election of National Council members from regional councils is provided for in the *Regional Councils Act*.[848] Section 26(1) of the Act stipulates that for purposes of the provisions of Article 69 of the *Constitution*, a regional council shall elect three persons from among its members as members of the National Council in the manner provided in section 27 of the Act. This election should be held on a date fixed by the president by notice in the Government Gazette,

842. Act No. 17 of 1996.
843. *Swartbooi v. Speaker of the National Assembly*, High Court judgement, Case No. HC-MD-CIV-MOT-GEN-2020/00149 [2021] NAHCMD 207 – unreported. *See also*: *Swartbooi v. Speaker of the National Assembly: Katjavivi* 2021 (3) NR 652 (SC): 656F–G.
844. *Swartbooi v. Speaker of the National Assembly: Katjavivi* 2021 (3) NR 652 (SC): 666D.
845. *Ibid.*: 666E–F.
846. Article 69 of the Constitution.
847. Article 72.
848. Act No. 22 of 1992).

and any member so elected shall become a member of the National Council with effect from the date following the date on which the period of office of the existing members expires.

394. A person designated by the Electoral Commission shall preside at a meeting of a regional council, during which the election of a member of the National Council is held in terms of Article 69 of the *Constitution*. During this session, a member is free to propose any of the members as a representative for the National Council.[849]

395. A member is not allowed to propose or second his or her own candidature.[850] In the case that the number of candidates proposed and seconded is not higher than the number of vacancies, the proposed candidates shall be declared duly elected.[851] If the number of candidates increases the number of vacancies to be filled, there will be a vote by secret ballot with each member having one vote in respect of each vacancy.[852]

396. The presiding officer is bound to declare the candidates with the greater or greatest number of votes duly elected as National Council members. It is required that not less than the majority of all the members of the Regional Council have voted for such candidates.[853] If due to an equality of votes or a lack of majority, the number of candidates declared duly elected is less than the number of vacancies to be filled, the meeting shall be adjourned on one occasion to a time during that day or the next day determined by the presiding officer. At this meeting, the presiding officer will have to call for nominations in respect of any vacancy to be filled. The procedure will be repeated except that two or more candidates have received the same number of votes, then the candidate to be elected shall be determined by lot.[854]

397. By-elections are held in situations where a seat of a member of the National Council becomes vacant through death, resignation, or disqualification.[855] An election will not be held in situations where such vacancy arises less than six months before the expiry of the term of the National Council.

III. The Chairperson and Vice-chairperson

398. As set out in Article 73 of the *Constitution*, the National Council shall, at its first sitting, elect a Chairperson and a Vice-chairperson from its members. The

849. Section 27(1) and (2) of the Act.
850. Section 27(3).
851. Section 27(4).
852. Section 27(5)(a).
853. Section 27(6).
854. Section 27(8)(e).
855. Article 70(2) of the Constitution.

Chairperson, or, in his or her absence, the Vice-chairperson, shall preside over sessions of the National Council. Should neither the Chairperson nor the Vice-chairperson be present, the National Council shall, with the secretary as Chairperson, elect a person to act as chairperson in their absence during that session.

399. The 2014 amendment to the *Constitution* regulates the appointments of the secretary and other offices of the National Council.[856]

IV. The Powers and Functions of the National Council

400. The National Council has the power to consider all bills passed by the National Assembly.[857] It can also "investigate and report to the National Assembly on any subordinate legislation, reports and documents which must be tabled in the National Assembly and which are referred to it by the National Assembly for advice".[858] It may further "recommend legislation on matters of regional concern for submission to and consideration by the National Assembly".[859] Article 74(1)(d) adds that the National Council has the power to "perform any other functions assigned to it by the National Assembly or by an Act of Parliament".

401. According to Article 74(2) of the *Constitution*, the National Council can establish parliamentary committees for the exercise of its powers and its functions. The committees are allowed to conduct hearings and to collect evidence necessary for its work.[860] The committees have the power, just like committees of the National Assembly, to call persons to give evidence before it.[861]

V. Procedural matters

402. Article 77 stipulates that decisions of the National Council require a majority of the votes cast by members present other than the Chairperson or the Vice-chairperson. The presiding officer has a casting vote in the case of an equality of votes.

403. The presence of a majority of members of the National Council is necessary to constitute a meeting of the National Council and to exercise its powers.[862]

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856. Article 73A of the Constitution.
857. Article 74(1)(a).
858. Article 74(1)(b).
859. Article 74(1)(c).
860. Article 74(2) – *see also*: Website of the Namibian Parliament, https://www.parliament.na/standing-committees-national-council/ (accessed 30 Mar. 2022); section 64(3)(f) and (g) of the Standing Rules and Orders and Internal Agreement of the Parliament of Namibia, available at: https://www.parliament.na/wp-content/uploads/2021/08/SROs-booklet.pdf (accessed 27 Jun. 2022).
861. Article 74(2) of the Constitution referring to its Article 59(3).
862. Article 76.

VI. Reforming the National Council?

404. The institution of the National Council has been criticized as being inefficient and not living up to its mandate. Tötemeyer[863] noted that the National Council has, up to 2006, never used its power to introduce legislation on regional matters for discussion in the National Assembly. He further makes the point that the review of legislation by the National Council takes an unduly long time impacting negatively on the efficient running of government affairs.

405. A reform, including the abolition of the National Council was suggested in order to make the legislative process more effective. Thus, the National Council could be changed into an upper house, only empowered to discuss and formally approve legislation without having any law-making powers.[864] In case of abolition, Tötemeyer recommended that regional representatives could be elected to the National Assembly to have a direct impact of the regions and propose their interests on the national level.[865] However, the 2014 amendment of the *Constitution* increased the number of members of the National Council instead of reforming or even abolishing the institution and, with this, clearly opted for the status quo.

§4. Duties, Privileges, and Immunities of Members of Parliament

406. Once elected, the members of the National Assembly and the National Council are required to subscribe to an oath or solemn affirmation before the Chief Justice, Deputy-Chief Justice or a judge designated by the Chief Justice.[866] After the oath of affirmation, special duties and privileges arise for the members of the two houses. They include that each member of parliament is obliged to maintain the dignity and image of the National Assembly and the National Council both during the sittings as well as in their acts and activities outside.[867] Each member also has a duty to regard him- or herself as servant of the people of Namibia, and to avoid any act of improper enrichment.[868] Article 74(3) of the *Constitution* requires that the National Council makes provision for the disclosure of the "financial and business affairs" of its members.

407. Section 22 of the *Powers, Privileges and Immunities of Parliament Act*[869] requires the disclosure of conflict of interests and provides for disciplinary action if a member fails to comply. The Act though remains silent on the frequency at which the members of parliament are expected to declare their interests and assets. Therefore, the applicable provisions have been criticized as ineffective because "compliance is largely left to the interpretation and discretion of the MPs and members of

863. Tötemeyer (2007): 10f.
864. *Ibid*.: 12.
865. *Ibid.*
866. *See*: Articles 55 and 71 of the Constitution.
867. Articles 60(1)(a) and 74(4)a).
868. Articles 60(1)(b) and 74(4)(b).
869. Act No. 17 of 1996.

the executive".[870] Members of parliament and ministers could only be kept under public gaze vis-à-vis potential conflict of interest, if it was public what they actually own and what the nature of their outside interests are; hence, if they declared their assets regularly and comprehensively.[871]

408. The *Code of Conduct*[872] for members of the National Assembly obliges all members of the National Assembly to disclose any conflict-of-interest situation. Specifically, any gift with a value of more than NAD 1,000 is subject to the obligation of disclosure.[873] While some members of parliament indicated that they have nothing to declare or submitted under declarations, others simply have not complied with the law.[874] Calls for the enactment of legislation making the disclosure of interests and assets on a regular basis an obligation for members of the National Assembly have not yet let to the introduction of respective rules.[875] After the 2015 elections, the newly elected president who, although not being required by law, declared his assets.[876] Until 2021, this was the only time the president declared his assets for public scrutiny.

409. According to Articles 60(3) and 74(5) of the *Constitution*, all members of the National Assembly and the National Council are entitled to particular privileges and immunities. The rules for such privileges and immunities are also contained in the *Powers, Privileges and Immunities of Parliament Act*.[877]

In terms of section 2 of this Act, no member

> shall be liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of anything done in the exercise of that member's right to freedom of speech in Parliament.

Members are also not liable for[878]

> any matter or thing which such member -
> (i) brought by report, petition, bill, resolution, motion or otherwise in or before Parliament;
> (ii) said in Parliament, whether as a member or a witness, or otherwise may have communicated while taking part in any proceedings in Parliament.

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870. Tjirera; Links (2011): 4.
871. *Ibid*.
872. Code of Conduct & Disclosure of Members' Interests by the National Assembly, 28 Nov. 2002. Available at: https://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Namibia_MP%20Code%20of%20Conduct%20and%20Interest%20Disclosure%20Law_2002_en.pdf (accessed 27 Jun. 2022).
873. *See*: Part 1(c) of the Code of Conduct (*ibid*.).
874. *See* on this: New Era of 22 Jul. 2020 and also: Bertelsmann Foundation (2020): 26.
875. *See*: Tjirera (2012); Weylandt (2016) and New Era of 22 Jul. 2020.
876. Weylandt (2016): 4.
877. Act No. 17 of 1996.
878. Section 2(b)(i) and (ii) of the Powers, Privileges and Immunities of Parliament Act.

410. If a member of the National Assembly or the National Council is arrested or sentenced to imprisonment, the Speaker of the National Assembly or respectively the Chairperson of the National Council has to be informed.[879]

411. It is also part of the parliamentarian privileges that no member or officer of the parliament is required to appear in any legal proceedings in any court of law while such member or officer is in attendance at parliament.[880] A certificate by the Speaker of the National Assembly or the Chairperson of the National Council stating that a member or an officer is in attendance at parliament shall be sufficient proof of the attendance of such a member or officer for the purposes of protecting the member from attending court proceedings.[881]

412. The *Powers, Privileges and Immunities of Parliament Act* extends the privilege also to persons who are not members of parliament by stipulating that no person shall be liable for damages or otherwise for anything done under the authority of parliament.[882] This means that the parliamentary privilege overrides the administration of justice. This arises from the notion that parliamentary business is the business of the nation. Because members of parliament must fulfil their mandate given by the people, personal liability has to wait until the peoples' mandate has been executed.

§5. The Law-Making Process

I. Law-Making

413. Legislation can be initiated by a minister, a member of parliament, a non-governmental organization or by any ordinary member of the society. A private members' bill may be introduced in the National Assembly if supported by one-third of all the members of the National Assembly.[883]

414. If a minister has a proposal for a new piece of legislation, what is what usually has happened since the National Assembly started working at independence, he or she has to communicate the proposal to the office of the Attorney-General. If the Attorney-General approves it, the line minister has to forward the proposal to the Cabinet which then refers it to the Cabinet Committee on Legislation (CCL). Once the CCL approves the proposal, the Cabinet may approve it in principle. The draft law and the proposal are then sent to the Ministry of Justice for legal drafting. The law drafted is sent back to the line ministry and the Attorney-General for approval. Changes may be suggested during these processes and if the drafting process is complete, the bill will be submitted by the line ministry to the National Assembly

879. Section 3 of the Act.
880. Section 4(1).
881. Section 4(2).
882. Section 5.
883. Article 60(2) of the Constitution.

for public debate.[884] The bill then goes through the first, second, and third reading stages in terms of the *Standing Rules and Orders*[885] of the National Assembly and may be referred to the parliamentary committee responsible for legislation and back to the whole house for further debate.

415. In terms of Article 75(1) of the *Constitution*, all bills passed by the National Assembly shall be referred to the National Council. The National Council has to consider the bills and to submit a report thereon with its recommendations to the Speaker of the National Assembly. If the National Council confirms the bill, the speaker will refer it to the president to deal with it under Articles 56 and 64 of the *Constitution*, i.e., to assent to it or reject it.[886]

416. If the National Council recommends that the bill be passed subject to amendments, the bill has to be referred back to the National Assembly.[887] If the bill is passed by the National Assembly, whether in its original or in an amended form, it will not be resubmitted to the National Council but shall be sent to the president.[888]

417. If a majority of two-thirds of all the members of the National Council objects to the principle of a bill, the National Council has to mention this in its report. Further, the report also has to indicate whether or not the National Council proposes that amendments be made to the bill.[889]

418. If the National Council objects to the principle of the bill, the National Assembly is bound to reconsider it. If upon such reconsideration the National Assembly reaffirms the principle of the bill by a majority of two-thirds of all its members, the principle of the bill will not be further debated. If the two-thirds majority is not obtained in the National Assembly, the bill lapses.[890]

419. In case the National Assembly reaffirms the principle of the bill by a majority of two-thirds of all its members and the report of the National Council proposes that in such event amendments be made to the bill, the National Assembly shall deal with the amendments proposed by the National Council.[891] After deciding, the bill shall not again be referred to the National Council but to the president. Should the

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884. Cf.: the Website of the parliament: www.parliament.na (accessed 27 Jul. 2021).
885. Sections 32ff. of the Standing Rules and Orders and Internal Agreement of the Parliament of Namibia, available at: https://www.parliament.na/wp-content/uploads/2021/08/SROs-booklet.pdf (accessed 27 Jun. 2022).
886. Article 75(2) and (3) of the Constitution.
887. Article 75(4) of the Constitution.
888. *Ibid.*
889. Article 75(5)(a).
890. Article 75(5)(b).
891. Article 75(6)(a).

National Council not propose that amendments be made, the National Council shall be deemed to have confirmed the bill, and the bill will be sent to the president for assent.[892]

420. The National Council is bound to decide on bills within three months of the date of referral. If the National Council fails to do this, the National Council will be deemed to have confirmed the bill and the bill will be submitted to the president.[893]

421. The process regarding bills dealing with levying of taxes or the appropriation of public monies are governed by specific provisions.[894] Sub-Articles (5) and (6) of Article 75 of the *Constitution* do not apply to such bills. Article 75(8) of the *Constitution* obliges the National Council to report on bills on taxes or appropriations of public monies within thirty days of the date on which such bills were referred to it by the speaker. The powers of the National Council in regard to such bills are limited, as it can only propose "corrections" but not amendments by the National Assembly.[895]

II. Assenting and Gazetting

422. The president is obliged to give his or her assent to the passed bill, except he or she assumes that the bill would be in conflict with the *Constitution*.[896] If the president signs a bill, the bill becomes an act of parliament and is published in the official Government Gazette. The promulgation may indicate dates on which the bill as a whole or parts of it will come into force.

423. In regard to a bill that has been passed by the National Assembly with less than two-thirds of its members and has been confirmed by the National Council, but has not received the assent of the president, the bill may be reconsidered by the National Assembly.[897] The National Assembly can pass the bill, can amend it or decline to pass the bill.[898] If at least two-thirds of the National Assembly do not agree with the president's reservations and votes on the bill, the president is obliged to sign the bill.[899] If there is no two-thirds majority, the president may not assent to the bill with the effect that the bill lapses.[900]

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892. *See*: Article 75(6)(b).
893. Article 75(8).
894. Article 75(7).
895. Article 74(4A) – This limitation of the authority is criticized by: Watz (2004): 251.
896. Article 56(2) read in connection with Article 64 of the Constitution.
897. Articles 56(3).
898. Article 56(4).
899. *Ibid.*
900. *Ibid.*

424. If the president is of the opinion that a bill forwarded to him or her would conflict with the *Constitution,* he or she is entitled to withhold his or her assent.[901] In such case the president will inform the speaker who again will inform the National Assembly.[902] Additionally, the president is expected to inform the Attorney-General who may cause the matter to be decided by court.[903] If the court finds the bill violates the *Constitution*, it shall be deemed to have lapsed.[904] Should the court confirm the constitutionality of the bill, the president may only withhold his or her assent if the bill has not been passed by a two-thirds majority of the members of the National Assembly.[905]

§6. Delegation of Legislative Power

425. Before 1990, the courts used to accept acts of parliament, which vested wide powers in the executive.[906] Decisions of this kind were delivered at a time when the *Constitution* was not entrenched and the doctrine of parliamentary sovereignty prevailed. However, not even democratic constitutions recognize that parliament can cover all matters but is obliged to mandate the executive to regulate in particular where details are involved which the executive is closer to than parliament.

426. The *Constitution* of Namibia does not contain rules on the scope and limits of delegated law-making, but notes subordinate legislation when it says in its Article 40(a) that the members of Cabinet have

> to direct, coordinate and supervise the activities of Ministries and local departments including parastatal enterprises, and to review and advise the President and the National Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations and orders pertaining to such parastatal enterprises, regard being had to the public interest.

427. The Supreme Court first had to deal with the problem of delegated law-making in *Communications Regulatory Authority of Namibia (CRAN) v. Telecom Namibia Ltd.*[907] By citing from a South African case,[908] it stressed that delegating

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901. Article 64(1).
902. Article 64(2).
903. *Ibid.*
904. Article 64(4).
905. Article 64(3).
906. *Binga v. Administrator General* 1984 (3) SA 949, 961ff. (SWA) and *R v. Maharaj* 1950 (3) SA 187(A) are examples of such decisions.
907. 2018 (3) NR 663 (SC).
908. *Executive Council, Western Cape Legislature v. President of the Republic of SA* 1995 (4) SA 877 (CC): at 51.

subordinate regulatory authority to other bodies did not offend the separation of powers principle as long as no plenary legislative power is conferred to another body:[909]

> In a modern State detailed provisions are often required for the purpose of implementing and regulating laws. Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution, which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make law for the country and under our Constitution and I have no doubt Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body.

428. This was revived in *Kambazembi Guest Farm CC t/a Waterberg Wilderness v. Minister of Lands and Resettlement*[910] where the Supreme Court found the delegation of the value of agricultural land to determine the land tax not to be an unconstitutional delegation of power:[911]

> The regulations essentially prescribe the means and procedure of determining the unimproved value of agricultural land so that the land tax, established by parliament, can be determined in accordance with the formula set out by parliament in s 76(1). The determination of the value of agricultural land is inherently a matter of administrative action for duly qualified valuers involving a reasonable and fair procedure which can be provided for in subordinate legislation, as has occurred in the regulations. The detailed provisions dealing with valuation, objections, a valuation court, appeals from it and service of notices are likewise administrative matters to be particularised by the Minister in regulations under the Act and do not constitute an unconstitutional delegation of legislative powers.

429. When making of law is delegated, the principle of certainty is of utmost importance in order to avoid arbitrary exercise of the delegated power. This was clearly expressed by the Supreme Court in *Medical Association of Namibia v. Minister of Health and Social Services*:[912]

> [W]here the legislature confers a discretionary power, the delegation must not be so broad or vague that the body or functionary is unable to determine the

909. *Communications Regulatory Authority of Namibia (CRAN) v. Telecom Namibia Ltd.* 2018 (3) NR 663 (SC): 671G–H.
910. 2018 (3) NR 800 (SC): 813I–814B.
911. *Ibid.*
912. 2017 (2) NR 544 at 560 C-E.

nature and scope of the power conferred. That is so because it may lead to arbitrary exercise of the delegated power. Broad discretionary powers must be accompanied by some restraints on the exercise of the power so that people affected by the exercise of the power will know what is relevant to the exercise of the power and the circumstances in which they may seek relief from adverse decisions.

§7. Parliamentary Control of the Spending Power

430. The responsibility to prepare and to implement the budget rests on the executive. Responsible for oversight of the process of budgeting is the National Assembly assisted by a constitutional institution: the Auditor-General.[913]

431. All income accruing to the central government is deposited in the State Revenue Fund.[914] The authority to withdraw money from the state revenue fund vests in in the government.[915] The *State Finance Act* mandates the Auditor-General to oversee the use of state funds. Article 125(4) of the *Constitution* makes the executive subject to parliamentary control as it prohibits the withdrawal of money except in accordance with an act of parliament. In addition, the Minister of Finance is obliged to present estimates of revenue, expenditure and income for the prospective financial year to the National Assembly for consideration at least once a year as the basis for appropriation acts.[916]

913. *See*: Article 127 of the Constitution and further below in §6 of Chapter 8 in Part III.
914. Article 125(2) of the Constitution.
915. Article 125(5).
916. Article 126(1).

Chapter 5. The Executive

§1. Introduction

432. There is no chapter in the *Constitution* which specifically refers to the executive, but there is Article 27(2) in the chapter on the president, which reads:

> The executive power of the Republic of Namibia shall vest in the President and the Cabinet.

The office of the President has already been dealt with above.[917] This chapter will deal with the Cabinet and its members as regulated in chapter 6 of the *Constitution.* The regulation of public service, which comprises the front officers of the executive, will be explored in the paragraph on the public service.[918]

§2. The Cabinet and Its Members

433. Apart from the president and the vice-president, members of the Cabinet are the prime minister, deputy-prime minister, and other ministers.

434. The president appoints the ministers, including the prime minister and the deputy-prime minister, from the National Assembly including from those members who sit in the National Assembly without the right to vote.[919] Members of the National Council are not eligible for the position of a minister, but for the position of deputy-minister.[920]

435. The president or, in his or her absence, the vice-president, prime minister or other minister designated for this purpose by the president, shall preside at meetings of the Cabinet.[921]

§3. The Prime Minister, the Deputy-Prime Minister, the Ministers and Deputy-Ministers

436. The prime minister is the "leader of Government business in Parliament" and coordinates the work of the Cabinet.[922] The deputy-prime minister is appointed

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917. *See*: Chapter 3 of Part III.
918. *See* below: §2 of Chapter 8 in Part III.
919. Article 35(1) and (2) of the Constitution. – There is obviously an error in the wording of Article 35(1) as the words "as the President may appoint" were deleted from the original text of Article 35(1). *See*: the note in the text of the amended version of the Constitution after Article 35(1).
920. Article 37 of the Constitution.
921. Article 35(3).
922. Article 36.

to perform such functions as may be assigned to him or her by the president or the prime minister.[923]

437. The deputy-ministers are also appointed by the president.[924] The president may appoint them from the National Council or the National Assembly. Deputy-ministers perform functions on behalf of the ministers to whom they are related.

438. Once appointed, the prime minister, the deputy-prime minister, the ministers, and deputy-ministers are obliged to take an oath or subscribe to a solemn affirmation before the president or a person designated by the president for this purpose.[925]

§4. Duties and Functions

439. The duties and functions of the members of Cabinet are listed in Article 40 of the *Constitution*. These include the direction, coordination, and supervision of ministries and government departments. Cabinet members have the duty to attend meetings of the National Assembly and to be available to report on any queries and debates pertaining to government policies. With respect to the conclusion, accession, or succession of international agreements, the state of national defence and the maintenance of law and order, the Cabinet has an advisory role to the president and a reporting duty to the National Assembly. The Cabinet is further obliged to issue notices, instructions, and directives to facilitate the implementation and administration of laws administered by the executive. The Cabinet shall[926]

> remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies.

440. All ministers are individually accountable for the administration of their ministries and collectively for the administration of the work of the Cabinet, both to the president and to the parliament.[927]

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923. Article 35(2).
924. Article 37.
925. *See*: Article 38 and Schedule 2 (Parts A and B) to the Constitution.
926. Article 40(l) of the Constitution.
927. Article 41.

441. Article 42 stipulates that during their tenure of office as members of the Cabinet, ministers may not take up any other paid employment or engage in activities inconsistent with their positions as ministers.[928] They are also encouraged not "to expose themselves to any situation which carries with it the risk of a conflict developing between their interests as ministers and their private interests".[929] Since the ministers and deputy-ministers are also parliamentarians, they are required to disclose any conflict of interest according to section 22 of the *Privileges and Immunities Act.*[930] However, as there is no effective mechanism to ensure compliance, accountability is difficult to achieve.[931]

442. Members of the Cabinet are not allowed to benefit from their positions or confidential information entrusted to them as members of the Cabinet to enrich themselves.[932]

443. The president is obliged to terminate the appointment of a Cabinet member, if the National Assembly decides by majority that it has no confidence in that member.[933]

444. Article 43 creates the office of the secretary to the Cabinet. The secretary is appointed by the president and entrusted with functions determined by law and are assigned to the secretary by the president or the prime minister.[934] The secretary serves as a depository of the records, minutes, and related documents of the Cabinet.[935]

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928. Article 42(l).
929. *Ibid.*
930. Act No. 17 of 1996.
931. *See* above: Chapter 4, §4 of this part. The matter of accountability in the Namibian public sector in general is discussed in: Zaire (2014).
932. Article 42(2) of the Constitution.
933. Article 39.
934. Article 43(1).
935. Article 43(2).

Chapter 6. The Judiciary

§1. Introduction

445. Access to courts has been on the political agenda since independence. The judiciary inherited by Namibia at independence had to be improved in terms of legal institutions available to the members of the public, but also be amended in its structure and functioning. There was, in particular, need to extend the system of Magistrates' Courts into the areas previously under the second-tier governments established during the South African occupation and without permanently residing courts.[936] There were also only a limited number of legal professionals on whom the government could count to equip new Magistrates' Courts and on whom people in need of legal advice could rely.[937] Although many things are still to be done,[938] a lot has been achieved since independence, as will be seen in the following.

446. Article 78(1) of the *Constitution* confirms three levels of courts, the level of:

– the Supreme Court;
– the High Court; and
– the Lower Courts.

447. The service of judges[939] of the Supreme and High Court and the service of magistrates are administered by two commissions:

– the Judicial Service Commission;[940] and
– the Magistrates' Commission.[941]

448. The highest court, the Supreme Court, is led by the Chief Justice and a Deputy-Chief Justice.[942] The High Court is under the authority of the Judge-President and a Deputy-Judge-President.[943] The Judge-President of the High Court is at the same time the Deputy-Chief Justice of the Supreme Court and an ex officio judge of the Supreme Court.[944]

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936. Cf.: https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/inline/Evaluation%20of%20the%20Commonwealth%20Secretariat%27s%20Support%20to%20Nambia%20-%20Detaile....pdf (accessed 22 Jun. 2022).
937. The shortage of people appointable as magistrates is still of concern, *see*: The Namibian of 18 .ember 2020.
938. Cf. here: the proposals for improving access to justice by the Legal Assistance Centre: Hinson; Hubbard (2012a); (2012b); (2012c); (2012d) and also: Legal Assistance Center (2012).
939. Or acting judges: *S v. Zemburuka (2)* 2003 NR 200 (HC) confirmed that the rules on appointment of judges also apply to the appointment of acting judges.
940. *See*: Articles 82(1), 84 and 85 of the Constitution.
941. *See*: Article 83(3).
942. *See*: Article 79(1) of the Constitution, as amended by the Namibian Constitution Third Amendment Act, 2014 (Act No. 8 of 2014) and the High Court Act of 1990 (Act 16 No. of 1990), as amended.
943. Article 80(1) of the Constitution.
944. *Ibid.*

449. The seat of the Supreme Court is Windhoek.[945] The court has currently, apart from the Chief Justice and his deputy,[946]two permanent judges.[947] As need arises, acting judges can be added. The High Court has its main division in Windhoek.[948] Its Northern Local Division is situated in Oshakati. Its main division has seventeen permanent judges, the local division in the North three.[949] Again, acting judges can be appointed in addition.

450. The Magistrates' Courts are lower courts, presided over by magistrates or other judicial officers.[950] The magistracy as a whole is headed by the Chief Magistrate.[951] Lower courts are also the community courts that apply the customary laws of the various traditional communities of the country.[952]

451. So far, 34 Magistrates' Courts exist.[953] Community Courts have been established in most of the fifty-one registered traditional authorities.[954] By way of an agreement with the city of Windhoek, special facilities provide for the operation of magistrates to operate as traffic court in Windhoek. These facilities were created to deal with the backlog of traffic cases.[955]

§2. The Office of the Judiciary

452. The amendment to the *Constitution* of 2014 introduced a new governmental entity for the administration of the judiciary,[956] which was, with the *Judiciary Act* translated into an act of parliament.[957]

453. The *Judiciary Act* established the Office of the Judiciary for handling all administrative and financial matters of the judiciary as a quasi-ministerial body operated by an official with the rank of an executive director (formerly termed permanent secretary) under the direction of the Chief Justice.[958] The Chief Justice

945. Section 3 of the Supreme Court Act, 1990 (Act No. 15 of 1990), amended.
946. Article 80(1) of the Constitution.
947. *See*: https://ejustice.moj.na (accessed 19 Aug. 2020).
948. Section 4 of the High Court Act.
949. *See*: https://ejustice.moj.na (accessed 14 Aug. 2020).
950. *See*: Article 83 of the Constitution; the Magistrates' Courts Act of 1944 (Act No. 32 of 1944), as amended, and the Magistrates Act of 2003 (Act No. 3 of 2003), as amended. Cf. further: Kangueehi (2008).
951. *See*: sections 1 and 11(1)(a) Magistrates Act.
952. Community Courts Act, 2003 (Act No. 10 of 2003).
953. *See*: https://www.judiciary.na (accessed 16 Apr. 2021); *see also*: Creation of District Divisions and Establishment of Courts for such Divisions: Magistrates' Court Act, 1944, GN No. 22 of 1994, as amended, and Redefinition of the Local Limits of Districts and Creation of New Districts in Namibia: Magistrates' Court Act, 1944, GN No. 23 of 1994, as amended.
954. Cf. the list of community courts in: Legal Assistance Centre (2019): Courts – 30ff. and the list of registered traditional communities annexed to this publication.
955. Cf.: Allgemeine Zeitung of 12 Jun. 2018.
956. Article 78(5), (6) and (7) of the Constitution.
957. Act No. 11 of 2015.
958. Sections 3, 4 and 6 of the Act. *See* here also: Shivute (2015).

supervises the judiciary and monitors the norms and standards for the exercise of the judicial functions of all courts.[959] The financial and other administrative matters of the High Court and Supreme Court are – so the *Constitution* – to be performed in such a manner "that the independence of the Judiciary can be effectively and practically promoted and guaranteed by means of appropriate legislative and administrative measures".[960]

§3. The Judicial Service Commission

454. The Judicial Service Commission is created by Article 85 of the *Constitution*.[961] The Commission consists of the Chief Justice, the Deputy-Chief Justice, the Attorney-General, and two members of the legal profession nominated in accordance with the provisions of an act of parliament by the professional organization or organizations representing the interests of the legal profession in Namibia.[962]

455. Except the Chief Justice, the Deputy-Chief Justice, and the Attorney-General, each of the other members of the Commission hold office for a period of three years from the date of appointment. They are eligible for reappointment on the expiry of their term of office.[963]

456. The Commission makes recommendations to the president with regard to the appointment of persons to judicial offices and their removal.[964] In recommending the appointments, the Judicial Service Commission considers the qualifications for the positions as stipulated in the High Court Act.[965] Connected to this, the Commission also reviews or makes recommendations on the terms and conditions of service, including retirement benefits.[966]

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959. *See*: Article 78(7) of the Constitution and sections 3 and 6 of the Judiciary Act.
960. Article 78(5) of the Constitution.
961. *See* further: Judicial Service Commission Act, 1995 (Act No. 18 of 1995) and the Judicial Service Commission Regulations: Article 85(3) of the Namibian Constitution, GN No. 60 of 2011.
962. Article 85(1) of the Constitution was amended by the Namibian Constitution Third Amendment Act, 2014. Before the amendment, the Judicial Service Commission was composed of the Chief Justice, a judge appointed by the President of Namibia, the Attorney-General and two members of the legal profession. *See* further on the Judicial Service Commission: the Judicial Service Commission Act, 1995 (Act No. 18 of 1995) and also: the Judicial Service Commission Regulations: Article 85(3) of the Namibian Constitution, GN No. 60 of 2011.
963. *See*: section 3(1) of the Judicial Service Commission Act, 1995 (Act No. 18 of 1995) and Article 79(1) read in connection with 80(1) of the Constitution.
964. Section 4(1)(a) of the Judicial Service Commission Act. – For the Judicial Service Commission Act, "'judicial offices' means the office of the Chief Justice; the Judge-President of the High Court; a judge of the Supreme Court; a judge of the High Court; the Ombudsman and for the purpose of this Act, the Prosecutor-General" (section 1 of the Act). The rules on appointment of judges also apply to the appointment of acting judges, *see*: *S v. Zemburuka (2)* 2003 NR 200 (HC).
965. *See*, e.g.: section 3 of the High Court Act.
966. Section 4(1)(b) Judicial Service Commission Act.

457. The Commission may conduct disciplinary inquiries about the conduct of judicial offices and investigate complaints from the public concerning the administration of justice at the superior courts.[967] The Commission is also empowered to make recommendations to the Minister of Justice concerning any matter which pertains to the administration of justice.[968]

§4. The Magistrates' Commission

458. The Magistrates' Commission was established by section 2 of the *Magistrates Act* of 2003.[969] The *Namibian Constitution Third Amendment Act* of 2014 made the establishment of the Magistrates' Commission a constitutional requirement.[970]

459. The Magistrates' Commission is responsible for the appointment, transfer, removal of, and disciplinary measures against magistrates as well as their conditions of service, including remuneration.[971] It consists of seven members: a judge of the High Court,[972] the chief of the lower courts, one magistrate, one staff member of the Ministry of Justice,[973] one person designated by the Public Service Commission, one designated by the Attorney-General, and a teacher of law.[974] Part of the objectives of the Magistrates' Commission is also the protection of the independence of magistrates, promotion of their judicial education, and to ensure that properly qualified and competent persons are appointed as magistrates.[975]

460. The recognition of the magistracy as part of the judiciary and its constitutional protection occupied the courts several times. The first case – the first *Mostert* case – was about the transfer of a magistrate.[976] The applicable rules were given in the *Magistrates' Courts Amendment Act* of 1999, which authorized the Minister of Justice to decide on appointments of magistrates, including their transfer, in accordance with the provisions of the *Public Service Act* of 1995.[977] The Supreme Court decided that the relevant provision of the *Public Service Act* was not to be applied

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967. Section 4(1)(c) of the Act.
968. Section 4(1)(d).
969. Act No. 3 of 2003, as amended. *See also*: Regulations regarding Magistrates: Magistrates Act, 2003, GN No. 130 of 2003.
970. Article 83(3) of the Constitution.
971. *See*: sections 3, 4 and 17ff. of the Magistrates Act.
972. The judge, who serves as the chairperson, is designated by the Judge-President (section 5(1)(a) Magistrates Act).
973. Designated by the Minister of Justice (section 5(1)(d) Magistrates Act).
974. The teacher of law is appointed by the Minister of Justice from a list of two teachers of law nominated by the Vice Chancellor of the University of Namibia (section 5(1)(g) Magistrates Act).
975. Section 3 of the Act.
976. *Mostert v. The Minister of Justice* 2003 NR 11 SC.
977. *See*: section 9 of the Magistrates' Courts Amendment Act, 1999 (Act No. 1 of 1999) and section 23 of the Public Service Act, 1995 (Act No. 13 of 1995), as amended.

to magistrates and declared the reference in the *Magistrates' Courts Amendment Act* as unconstitutional while violating the constitutionally required independence of the judiciary.[978]

461. The Magistrates' Commission as such was challenged in the second *Mostert* case.[979] The claim was that the composition of the Commission did not guarantee its independence. The High Court held:[980]

> The creation of such a Commission is … a matter of political choice as long as it does not negate the independence of the magistracy.

A matter of choice, as long as the choice remains within the framework set by Article 78(2) and (3) of the *Constitution!* This is the case, as the magistracy is "placed outside the public service".[981]

462. The case of *Alexander v. The Ministry of Justice* assisted in clarifying the position of the Chief: Lower Court,[982] which is now called Chief Magistrate.[983] The judgement of the High Court decided that the so far existing situation according to which the Chief: Lower Court was a civil servant did not allow the Chief: Lower Court to exercise the judicial functions of a magistrate.[984] The judgement led to an amendment rectifying the position of Chief Magistrate in the *Magistrates Act.* The amendment reads:[985]

> Chief Magistrate means a magistrate who is the head of the Magistracy …

And:[986]

> The Chief Magistrate is the head of the Magistracy and may preside over cases in any lower court.

§5. The Appointment, Removal and Remuneration of Judges

463. As already mentioned, the judges of the Supreme and the High Court are appointed or removed by the president on the recommendation of the Judicial Service Commission.[987] The magistrates are appointed by the Minister of Justice on the

978. *Mostert v. The Minister of Justice, ibid.:* 34I–35B, 39E–G.
979. *Mostert v. The Magistrates' Commission* 2005 NR 491 (HC).
980. *Mostert v. The Magistrates' Commission* 2005 NR 491 (HC): 508G–H.
981. *Ibid.:* 508H–509B.
982. 2009 (2) NR 712 HC.
983. Section 3 Magistrates Amendment Act, 2009 (Act No. 5 of 2009).
984. *Alexander v. The Minister of Justice*, *ibid.:* 721ff., 728H–729A.
985. Section 1(b) Magistrates Amendment Act, 2009 (Act No. 5 of 2009).
986. Section 2 of the Act.
987. Articles 82 and 85 of the Constitution and Judicial Service Commission Act.

recommendation of the Magistrates' Commission.[988] The "justices", as the judges of Community Courts are called, are nominated by the traditional authority in whose territory they are to operate and appointed by the minister.[989]

464. The *Constitution* allows the removal of judges of the Supreme and of the High Court only based on mental incapacity or for gross misconduct of the judge.[990] Investigations on possible misconduct of magistrates are to be done under the authority of the Magistrates' Commission.[991]

465. With respect to justices of community courts, the *Community Courts Act* gives the minister the power to appoint and also remove a justice if he or she loses a qualification required for his or her appointment after consultation with the relevant traditional authority.[992]

466. The *Community Courts Act* lists several reasons that exclude persons from appointment. Section 8(2) says that no person

> shall be eligible for appointment as a Justice of a community court unless -
>
> (a) he or she is conversant with the customary law of the area in question;
> (b) by virtue of his or her integrity he or she is a fit and proper person to be entrusted with the responsibility of the office of Justice;
> (c) he or she is not a member of -
> (i) Parliament;
> (ii) a regional council; or
> (iii) a local authority council; or
> (d) he or she is not a leader of a political party, whether or not that political party is registered under section 39 of the Electoral Act, 1992 (Act No. 24 of 1992).

467. The minister decides on the removal of justices from the office should such a judge become subject to disqualification as described in the just quoted section of the Act. Prior to removal, the minister is bound to consult with the traditional authority and to hear the judge concerned.[993]

468. In view of the constitutional debate about the administration of the magistracy and the requirement of its independence, it will certainly also be debatable whether the rule about the appointment and removal of justices of Community Courts stand against the *Constitution*. Article 83(2) of the *Constitution* expects that the lower courts be presided over by "magistrates or other judicial officers appointed

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988. Section 13 of the Magistrates Act.
989. Section 8 of the Community Courts Act.
990. *See*: Article 84(1) and (2) of the Constitution.
991. Sections 24 ff. of the Magistrates Act.
992. Section 8(4) of the Community Courts Act.
993. *See*: section 8(2) of the Act.

in accordance with procedures prescribed by Act of Parliament", and demanded in its Sub-Article 3, the establishment of a Magistrates' Commission by act of parliament. Sub-Article 4 to Article 83 gives space for other commissions to be established by act of parliament "to regulate matters relating to such other Lower Courts". This sub-article could, indeed, become a legislative entry point to have a Traditional Justices Commission in future. This is supported by the fact that community courts qualify as local courts in terms of the *Constitution* although the *Constitution* mainly refers to Magistrates' Courts when referring to local courts.

469. The remuneration of judges of the Supreme and the High Court and also the judicial officers of Magistrates' Courts is subject to special rules. The remuneration of judges is regulated by the *Judges' Remuneration Act* of 1990.[994] Changes or increases of payments and benefits are effected by amendments to the schedule of the original act by the President of Namibia.[995] The remuneration of magistrates is, according to the *Magistrates Act,*[996] a matter of ministerial decision. The *Community Courts Act* provides for allowances to traditional justices to be prescribed by the Minister of Justice.[997] Traditional leaders or secretaries who serve as justices will not receive an allowance above the allowance paid to them for their functions as leaders or secretaries.[998]

§6. The Supreme and the High Court

I. Introduction

470. According to Article 78(4) of the *Constitution*, the Supreme and the High Court have inherent jurisdiction; i.e., they are allowed to hear and adjudicate cases brought before them unless there is a rule that excludes jurisdiction.

II. The Supreme Court

471. The Supreme Court is the highest court of the country and generally serves as a court of appeal. According to Article 79(2) of the *Constitution*, this includes "appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder".[999]

472. In certain cases, the Supreme Court can adjudicate as a court of first instance. This is the case when the Attorney-General refers a matter to it or when

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994. Act No. 18 of 1990.
995. The last amendment was by Proclamation No. 10 of 2018.
996. Section 18(2) Magistrates Act 2003 (Act No. 3 of 2003).
997. Section 10(1) and (2) Community Courts Act. – Allowances are also payable to the clerks and messengers of Community Court.
998. Section 10(3) of the Act.
999. *See* here also: Supreme Court Act, 1990 (Act No. 15 of 1990) and Rules of the Supreme Court of Namibia: Supreme Court Act, 1990, GN No. 249 of 2017.

this may be authorized by an act of parliament.[1000] Disputes about the presidential election also go to the Supreme Court as a court of first instance.[1001]

473. The Attorney-General exercised this constitutional power on several occasions. The first occasion happened soon after independence when the then Attorney-General requested the Supreme Court to rule on the constitutional assessment of corporal punishment.[1002] Another case submitted to the Supreme Court related to the relationship between the Attorney-General and the Prosecutor-General.[1003] In the case of the *Attorney-General v. Minister of Justice,*[1004] the Supreme Court was asked to deal with the constitutionality of the provisions of certain sections of the *Criminal Procedure Act* of 1977.[1005]

474. In terms of section 16(1) of the *Supreme Court Act*, the Supreme Court also has jurisdiction to "review the proceedings of the High Court, any lower court, or any administrative tribunal or authority".

III. The High Court

475. The High Court has jurisdiction to hear and decide "upon all civil and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms" guaranteed by the *Constitution*.[1006] The High Court also has appellate jurisdiction on cases decided by lower courts.[1007]

476. Rules for the management of cases by judges of the High Court were introduced in recent years. They altered the strong formalization of the process before the court, which often prevented the courts from deciding on what was in the centre

1000. *See*: Article 79(2) of the Constitution read with its Article 87(c). *See* further: section 15(1) of the Supreme Court Act, 1990.
1001. Section 172 of the Electoral Act, 2014 (Act No. 5 of 2014), *see also*: Rules of the Supreme Court relating to Presidential Election, GN No. 118 of 2015.
1002. *Ex parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC).
1003. *Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor* 1998 NR 282 (SC).
1004. *Attorney-General of Namibia v. Minister of Justice* 2013 (3) NR 806 (SC).
1005. Namely: sections 245 and 332(5) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
1006. Article 80(2) of the Constitution, *see also*: High Court Act and: Rules of the High Court of Namibia: High Court Act, 1990, GN No. 4 of 2014, High Court Practice Directions: Rules of the High Court of Namibia, 2014, GN No. 67 of 2014 and: Rules for High Court Regulating Proceedings Contemplated in Chapters 5 and 6 of Prevention of Organised Crime Act, 2004, GN No. 79 of 2009.
1007. *See*: section 16 of the High Court Act.

of interest of the people who took it to court. The introduction of the rules on management of cases are certainly an important inroad into the strict adversary approach inherited from common law but opened the way for judges to assist in achieving substantial justice.[1008]

477. Civil cases heard by the High Court as court of first instance can be heard by a single judge unless the Judge-President determines otherwise.[1009] When sitting as a criminal court of first instance, the High Court will be constituted in accordance with the law relating to procedure in criminal matters.[1010] Any appeal from a lower court may be heard by one or more judges, again as the Judge-President may direct.[1011]

478. With the exception noted in the second paragraph on the Supreme Court, electoral matters are handled by the Electoral Court, which is a division of the High Court.[1012] The Electoral Court hears appeals against decisions of the Electoral Tribunals and the Electoral Commission, reviews their decisions and decides on the interpretation of the *Electoral Act*.[1013]

479. The High Court has the power to hear appeals from all lower courts and to review the proceedings of these courts.[1014] Certain decisions of the magistrates in criminal matters are subject to automatic review by the High Court.[1015]

§7. The Labour Court

480. The Labour Court is a division of the High Court.[1016] It consists of a judge of the High Court designated by the Judge-President.[1017] The *Labour Act* of 2007

1008. *See*: Amendment of Rules of High Court of Namibia: High Court Act, 1990, GN No. 57 of 2011 (repealed) and sections 17ff. Rules of the High Court of Namibia: High Court Act, 1990, GN No. 4 of 2014 and also: Damaseb (2020).
1009. Section 10(1)(a) of the Act.
1010. Section 10(4) of the High Court Act. Cf. also: Ministry of Justice (https://ejustice.moj.na –Namibia superior courts – accessed on 17 Aug. 2020) according to which criminal trials of first instance before the High Court are currently presided over by a single judge.
1011. *See*: section 10(2) of the High Court Act.
1012. Sections 167ff. of the Election Act, 2014 (Act No. 5 of 2014); *see also*: Rules of Electoral Court: Electoral Act, 2014, GN No. 118 of 2014.
1013. Section 168 of the Act. On electoral tribunals, *see* below: §10 of this Chapter.
1014. *See*: sections 16(1)(b) and 19(1)(b) of the High Court Act.
1015. Section 302 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004).
1016. Section 115 of the Labour Act, 2007 (Act No. 11 of 2007), as amended. *See also*: Labour General Regulations: Labour Act, 2007, GN No. 261 of 2008; Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner: Labour Act, 2007, GN No. 262 of 2008; Labour Court Rules: Labour Act, 2007, GN No. 279 of 2008 and further to this and the following *see*: Parker (2012).
1017. *See*: section 116 of the Labour Act of 2007.

replaced the *Labour Act* of 1992, which had also provided for District Labour Courts.[1018] The Act of 2007 introduced labour conciliation and arbitration procedures.[1019]

481. The Labour Court has jurisdiction to hear matters concerning labour and employment.[1020] It can also review arbitration awards, ministerial decisions, and decisions of the Labour Commissioner and grant declaratory orders in respect of the provisions of the *Labour Act*, a collective agreement, contracts of employment, and also urgent reliefs to enforce an arbitration agreement.[1021] The Labour Court may refer disputes to the Labour Commissioner for conciliation and to request the Inspector-General of the Police to give a report on any danger to life, health or safety of persons arising from any strike or lockout.[1022]

§8. The Magistrates' Courts

482. Section 2 of the *Magistrates' Courts Act* gives the Minister of Justice authority to establish Magistrates' Courts in a manner that guarantees access to justice in all parts of Namibia.[1023]

483. The *Magistrates' Courts Act* distinguishes between district courts and regional divisions.[1024] Regional divisions have only criminal jurisdiction.

484. The jurisdiction in civil matters is limited to certain values of the matter.[1025] Magistrates' Courts are competent to hear cases the value of which does not exceed NAD 25 000. Actions arising out of a liquid document, a mortgage bond or a credit agreement can be brought before the Magistrates' Court if the claim or the value of the matter in dispute does not exceed NAD 100 000. The dissolution of marriages and matters related to this, and the interpretation of a will do not fall into the jurisdiction of magistrates.

485. The district courts have criminal jurisdiction over all offences with the exception of treason, murder, and rape.[1026] Courts of a regional division have criminal jurisdiction over all offences except treason and murder.[1027]

1018. Section 16 of the Labour Act, 1992 (Act No. 6 of 1992).
1019. Chapter 8 of the Labour Act of 2007.
1020. Section 117 of the Labour Act of 2007.
1021. Section 117(1) of the Act.
1022. Section 117(2).
1023. Act No. 32 of 1944, as amended, *see* further: Magistrates Act, 2003 (Act No. 3 of 2003), as amended; section 25 of the Magistrates' Courts Act and Rules of the Court: Magistrates' Court Act, 1944, RSA GN R. No. 1108 of 1968, as amended, Code of Conduct for Magistrates, GN No. 190 of 2010.
1024. Section 2 of the Magistrates' Courts Act.
1025. *See*: section 29 of the Act.
1026. Section 89(1) of the Act.
1027. Section 89(2) of the Act.

486. If there exist uncertainty in which of several jurisdictions an offence has been committed, it can be tried in any of such jurisdictions.

487. In terms of section 7 read together with section 5 of the *Magistrates' Courts Act*, Magistrates' Courts are courts of record.[1028] Their proceedings shall be carried in open court and recorded. However, the court may in any case, in the interests of good order or public morals, direct that a trial shall be held in camera or that minors or other categories of persons or the public generally shall not be permitted to be present thereat.[1029]

488. According to the *Child Care and Children's Protection Act*, every Magistrate's Court is a Children's Court and, therefore, mandated to take on any matter related to the Act in its area of jurisdiction.[1030] The magistrate, appointed for a district, is a Children's Commissioner and presides as such over every session of the court.[1031] Section 40 of the Act gives the Children's Commissioner the right to request assistance by assessors, i.e., persons who have knowledge and experience for the matter before the commissioner.[1032]

489. The Children's Court is a court of record and has the status of a Magistrate's Court at a district level.[1033] Section 46(1) of the Act allows for appeal to the High Court. The appeal will be dealt with "if it were an appeal against a civil judgment of a magistrate's court".[1034]

490. The Minister of Justice is obliged to provide training to Children's Commissioners and clerks of children's courts on the implementation of the *Child Care and Protection Act*.[1035]

§9. Community Courts

491. Community Courts are the courts of traditional communities and commonly still often referred to as traditional courts. Traditional courts are very much part of the legal history of the country: as much as they have and were changed during colonialism, they are rooted in the traditions of the various communities and became a challenge to the post-independence constitutional order of the country. How to deal with the traditional administration of justice? How to combine it with the administration of justice as envisaged by the *Constitution*? It took more than ten

1028. Section 4 of the Act.
1029. Section 5(2) of the Act.
1030. Section 38 (1) of the Child Care and Protection Act, 2015 (Act No. 3 of 2015) as amended, in force since 30 Jan. 2019, GN No. 4 of 2019; *see also*: section 41 of the Act.
1031. Section 38(4) and (7) of the Act.
1032. Section 40 of the Act.
1033. Section 38(3). *See also*: sections 47ff. of the Act and Regulations Relating to Children's Court Proceedings: Child Care and Protection Act, 2015, GN No. 6 of 2019.
1034. Section 46(2) of the Act.
1035. Sections 38(11)(a) and 39(4).

years to translate answers based on research into legislation. As will be seen in the following, these answers are most probably not the last words on how to deal with Community Courts legally.

492. The *Community Courts Act* was enacted in 2003.[1036] It took further years to implement the Act. The date for applications to recognize Community Courts was eventually extended to March 2013. The first Community Courts were established in 2009.[1037] Today, most traditional communities have Community Courts established.[1038]

493. The colonial powers dealt with the traditional administration of justice differently in the different areas of the country. The traditional courts remained mainly functional for dispute settlements in the northern parts (the Kunene Region, the Owambo regions, the Kavango regions, and the Zambezi Region). In the central and southern parts of the country, the preferred areas of white settlement, the traditional courts became less important. What South Africa left to the independent Namibia was a patchwork situation, in which a number of different rules applied to the traditional administration of justice. In terms of its geographical scope, *Proclamation No. R. 348 of 1967* was the most important statute on traditional courts.[1039]

494. It was immediately after independence that the Ministry of Justice started reviewing the traditional administration of justice with the view of unifying the law of traditional justice and also to bring it in line with the *Constitution*. A Working Group of the Ministry compiled a draft bill and also commissioned research on the situation of the traditional administration of justice.[1040]

1036. *See* apart from the: Community Courts Act, 2003 (Act No. 10 of 2003), Regulations of Community Courts: Community Courts Act, 2003, GN No. 237 of 2003, as amended. Cf. further: Hinz (1995a) and (1995b), but also: Hinz (2008a). Hinz (1995a) and (1995b), result from fieldwork commissioned by the Ministry of Justice during which the traditional authorities of Namibia were visited and consulted about their view on the traditional administration of justice.
1037. *See*: GN Nos. 86ff. of 2009.
1038. *See* above: §1 of Chapter 6 in Part III.
1039. Civil and Criminal Jurisdiction. – Chiefs, Headmen, Chiefs' Deputies and Headmen's Deputies, Territory of South West Africa Proclamation No. R.348 of 1967, as amended by Proclamation No. R.222 of 1969, Proclamation No. R.304 of 1972; and Proclamation No. R.241 of 1973. This proclamation applied to the traditional courts in the Owambo and Kavango regions. For the communities in what is today the Zambezi Region: Jurisdiction of Chiefs, Chief Tribal Councillors (Ngambelas), Tribal Councillors (Kuta Members), Tribal Councils (Kuta), Headmen of Wards (Silalo Indunas) and Representatives of Chiefs – Eastern Caprivi Zipfel Proclamation No. R.320 of 1970, for the Nama communities: Proclamation to provide for the establishment of a Nama Council, Tribal Authorities and Village Management Boards in Namiland, No. 160 of 1975, for the Otjihereo-speaking communities: Jurisdiction of Traditional Authorities in Hereroland in respect of Civil and Criminal Amendment Proclamation, No. AG. 70 of 1985 and for the Damara communities: Damara Community and Regional Authorities and Paramount Chief and Headmen Ordinance, No. 2 of 1986. All these statutes were repealed by the Community Court Act. (section 33).
1040. Hinz (1995a and b).

495. The research produced a picture very similar to the picture on the traditional authorities by the presidential commission of inquiry into traditional matters of 1991:[1041] traditional leaders played an important role in the settlement of conflicts and disputes. In particular in the northern parts of the country, many people expressed that they preferred to bring their cases to traditional courts, as the law applied was closer to them, the language used was their language, the cases were dealt with much faster than in state courts, the proceedings were cheap and, in view of cases where people suffered from damages, traditional courts would grant them compensation. The latter applied in particular to cases of theft, but also major wrongs, such as killing for which the family who lost a member would expect compensation for the lost member from the person responsible for the killing or from his or her family.[1042]

496. Although the mentioned Working Group of the Ministry of Justice produced several versions of the draft bill,[1043] the results had to wait for years before it was forwarded to parliament for enactment.

497. The substantial jurisdiction of community courts was a matter of dispute when the drafting of the bill started. Some people were of the opinion that community courts should only have jurisdiction in civil and not in criminal matter. The exclusion of criminal cases, however, was expected to create serious problems as compensation under customary law for criminal wrongs was found to be a must in the traditional understanding of justice.[1044] As a kind of compromise, the *Community Courts Act* avoided the language of calling something civil or criminal and provides instead in its section 12:[1045]

> A community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognized by the customary law, … .

498. According to this, Community Courts may even award compensation in cases of killing. However, the jurisprudential question remains, whether a case of theft, or even killing can be dealt with by a Community Court and a state court or whether this would be against *ne bis in idem* (not being dealt with twice by court for the same matter) as prohibited by Article 12(2) of the *Constitution*. The answer to this problem will depend on whether the award of compensation is a punishment in terms of criminal law or a payment due to the complainant under civil law. In actual fact, the customary law compensation has elements of both without being the one or the other. The compensation compensates for financial losses, but it also has

1041. Republic of Namibia (1991a).
1042. Cf. here: Hinz (2003a): 175ff. and (2010b).
1043. One version of the draft bill is contained in: Hinz (2003a): 317ff.
1044. *See*: Hinz (2003): 175ff.
1045. As it was basically suggested in section 11 of the draft bill, *see*: Hinz (2003a): 324.

a punitive element. Compensation in case of killing is very often defined under customary law as "wiping the tears",[1046] thus referring to the element of compensation, which is not just an eventually mathematically calculated remedy to make good for the loss. Compensation under customary law is, indeed, a fixed amount to be paid by the wrongdoer and not a sum of money resulting from the evaluation of the loss.[1047] It is unfortunate that the *Community Courts Act* in its positive approach to compensation under customary law did not provide a rule on how to handle conflicts of this nature.[1048]

499. Another disputed area is the personal jurisdiction: Who is subject to the administration of justice by Community Courts? In very general terms, the *Traditional Authorities Act* lists among the duties and functions of traditional authorities "to hear and settle disputes between the members of the traditional community in accordance with the customary law of that community".[1049] However, section 14(b) of the Act specifies this rule by saying that in

> the exercise of the powers or the performance of the duties and functions referred to in section 3 by a traditional authority or a member thereof–
>
> (b) the customary law of a traditional community shall apply to the members of that traditional community and to any person who is not a member of that community, but who by his or her conduct or consent submits himself or herself to the customary law of that traditional community; … .

500. The *Community Courts Act* deals with the personal jurisdiction of community courts in a way, which is not necessarily consistent with the rules in the *Traditional Authorities Act*. The just quoted section 12 of the *Community Courts Act* continues after the quoted part by stating:

> but only if
>
> (a) the cause of action of such matter or any element thereof arose within the area of jurisdiction of that community court; or
> (b) the person or persons to whom the matter relates are in the opinion of that community court closely connected with the customary law.

501. In the case of *Adcook v. Mbambo*,[1050] the High Court had to decide whether the applicant who ran a lodge on Hambukushu communal land for many years was subject to the jurisdiction of the Hambukushu traditional court.[1051] At the time of

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1046. So referred to during fieldwork done for Hinz (195a) and (1995b).
1047. Cf. here: Hinz (2003a): 175ff. and the many rules on compensation in the ascertained customary law: Hinz (2010c), (2013a) and (2016a).
1048. Cf.: Hinz (2008a): 165f.
1049. Section 3(3)(b) of the Act.
1050. *Adcook v. Mbambo,* High Court judgement, Case No.: 87/2010 – unreported.
1051. The Community Court of the Hambukushu was recognized and gazetted (*see*: GN No. 98 of 2009), but not implemented.

the case, there was no Community Court established in the Hambukushu area. Therefore the High Court focused on the *Traditional Authorities Act* for finding an answer whether the Hambukushu authority had jurisdiction over the applicant. In analysing section 14(b) of the Act, the court emphasized the requirement of membership in the traditional community and denied the jurisdiction of the traditional court, as the applicant was not a member of the Hambukushu traditional community.[1052] The question of submission to customary law by "conduct or consent" was not considered by the High Court.

502. After coming into force of the *Community Courts Act*, the traditional courts already in existence before the enactment of the Act had to apply for recognition by the Minister of Justice.[1053] Where traditional courts did not exist but were envisaged, an application for the establishment had to be lodged to the minister.[1054] Both forms of applications have to be accompanied by certain information: the area of jurisdiction and the names of the persons who qualify for appointment as justices, to mention two pieces of the required information.[1055]

503. The parties before the Community Courts have the right to be represented by any person of their choice.[1056] Many traditional leaders have difficulties with this rule, as they fear that legal practitioners may intervene into the customary law proceedings by referring to procedural rules and practices that are applied before state courts, although the *Community Courts Act* confirms customary procedural law as the law applicable in community courts proceedings.[1057]

504. The Community Courts are courts, which can issue summons to persons to appear.[1058] The orders of the Community Courts can be enforced as decisions of Magistrates' Courts.[1059]

505. Decisions of Community Courts can be appealed to the Magistrates' Court.[1060] From there, an appeal may be lodged to the High Court.[1061]

506. So far, not much legal practice is available to assess the working of the *Community Courts Act*.[1062] There is, in particular, no material available that would allow evaluating whether the appeal procedures will do justice to proceedings that follow customary law. It can be doubted that magistrates have the necessary knowledge about customary law.

1052. *Adcook v. Mbambo, ibid*.: at 33ff., 42.
1053. *See*: section 2 of the Community Courts Act.
1054. Section 3 of the Act.
1055. Section 4.
1056. Section 16.
1057. Cf.: section 19.
1058. *See*: section 20.
1059. Section 23.
1060. *See*: sections 26–28.
1061. Section 29.
1062. *See* nevertheless: The Namibian of 7 Dec. 2021.

507. In 2019 and with reference to the twenty-first annual meeting of the Council of Traditional Leaders, the then Minister of Justice announced to replace the *Community Courts Act* with a new Act.[1063] A number of points were raised by the minister which he recommended to discuss before steps are taken to change the law in place: in view of the increasing cases of disputed succession to the position of chief of head of traditional authority, the Community Court should be the court of first instance to hear the case.[1064] Community Courts should nominate an individual from each community of the region for which a Community Court exists and constitute a Regional Community Court to which a magistrate would belong with the task to hear appeals from Community Courts of the region. A National Community Court Tribunal should be responsible to deal with appeals from Regional Community Courts. Such a national institution should be presided over by a judicial officer designated by the Minister of Justice. However, the ministerial announcement has not been pursued further.

§10. Tribunals

I. Introduction

508. In several statutes, the legislator decided to provide for tribunals to deal with special cases of conflict. One of the reasons for the legislator to regulate the solution disputes in such a manner is that there are disputes, which require special expertise in conducting the process of adjudicating. In addition, some of the acts instituting tribunals respond to constitutional demands. Article 18 of the *Constitution* refers to administrative justice by obliging the administration "to act fairly and reasonably and comply with the requirements imposed … by common law and relevant legislation" and gives aggrieved persons the right to "seek redress before a competent Court or Tribunal".

509. Namibia, so far and unlike, e. g., South Africa has no general statute on administrative acts and how to deal with such acts procedurally.[1065] One consequence of this is that tribunals and procedural law to be applied by these tribunals are regulated in various statutes. The following gives some examples.[1066]

1063. Letter of the Minister of Justice to Community Courts and Traditional Authorities of 25 Jun. 2019 (on file with the authors).
1064. When addressing the annual meeting of the Council of Traditional Leaders in 2018, President Geingob urged the traditional leaders to use customary law to resolve disputes of successions and called approaching the courts a "white culture". (The Namibian of 11 Sep. 2018).
1065. Cf. below: §12 of Chapter 3 in Part V.
1066. A systematic elaboration of adjudication outside the principal structures of the judiciary would be of importance, but cannot be delivered in this work. Therefore, what follows needs amendments as research continues. This applies especially to one important area of adjudication: the adjudication of disciplinary matters including the dealing with disciplinary matters in the police and defence force.

II. Labour Arbitration Tribunal

510. The *Labour Act* of 2007[1067] changed – as already mentioned above[1068] – the previously established adjudication system in labour matters[1069] and confirmed the Labour Court as a division of the High Court abolishing the so far existing District Labour Courts.[1070] Instead, section 85 of the Act established Arbitration Tribunals, which operate under the auspices of the Labour Commissioner. The responsible minister appoints arbitrators in accordance with the law governing public service.[1071] As the focus of the new *Labour Act* is on alternative dispute resolution,[1072] the parties to a labour dispute may also enter into an arbitration agreement which may leave it to the parties to agree on the appointment of an arbitrator.[1073] Awards of arbitration will become binding when filed with the court.[1074] Appeals or reviews are heard by the Labour Court.[1075]

III. Tax Tribunal and Tax Court

511. Disputes about income tax or value-added tax can be brought before Tax Tribunals when the amount of disputed tax does not exceed a certain amount, the claimant and the Commissioner of Inland Revenue, who administers income and value-added tax for the Minister of Finance, agree to the use of a Tribunal or no objection to the jurisdiction of the Tribunal is raised.[1076] In case the parties before the Tribunal are not satisfied with the final decision of the Tribunal, they have the right to appeal to a Special Court.[1077] The establishment of such Special Courts is the task of the Minister of Finance.[1078]

512. The Special Court for tax matters is composed of a judge of the High Court as presiding officer – nominated by the Judge-President – an accountant with not

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1067. Act 11 of 2007, as amended.
1068. *See*: §7 of this chapter.
1069. As it was in place under the Labour Act, 1992 (Act No. 6 of 1992).)
1070. Section 115 of the Act of 2007, s. 15f. of the Labour Act of 1992 and Rules relating to the conduct of conciliation before the Labour Commissioner, GN No. 63 of 2016, as well as Labour Court Rules, GN No. 279 of 2008.
1071. Section 85(3) of the Labour Act of 2007.
1072. *See* here: Parker (2012) and Van Rooyen (2011).
1073. Section 91 of the Labour Act of 2007.
1074. Section 87 of the Act.
1075. Section 89.
1076. *See*: section 73A of the Income Tax Act, 1981 (Act No. 24 of 1981), as amended and section 28(2) Value-Added Tax Act, 2000 (Act No. 10 of 2000), as amended. Cf. also: Hamutumwa (2020).
1077. Section 73A Income Tax Act.
1078. *See*, *e.g.*: GN No. 321 of 2017.

less than ten years of professional experience and a representative of the commercial community. In a case relating to mining, the appellant may wish the person representing commerce be a mining engineer.[1079] The judgements of the Special Court can be appealed at the Supreme Court.[1080]

513. In the case of *Kruger v. Minister of Finance of the Republic of Namibia*[1081] some provisions of the *Income Tax Act* related to the power of the Minister of Finance in setting the Special Court in tax matters and in obtaining an attachment were questioned. Section 73 of the *Income Tax Act* gives wide discretion to the minister in constituting the court and in the appointment of its members. Against this, the judge of the case emphasized the constitutional importance of the doctrine of separation of powers and Article 12(1)(a) of the *Constitution* guaranteeing a fair hearing by an independent court of tribunal established by law. Therefore, the so far relevant parts of section 73 of the *Income Tax Act* were declared unconstitutional.[1082] The same applies to section 83 of the Act, which – so the court – cannot justifiably restrict the constitutionally provided right to access to court.[1083]

IV. Valuation Court

514. Owners of agricultural land have to pay land tax. The amount of the tax is assessed by the responsible minister.[1084] Matters of the valuation are to be heard by a Valuation Court.[1085] The Valuation Court is established by the responsible minister in reference to section 77 of the *Land Valuation and Taxation Regulations.* The *Regulations*[1086] contain the rules on the establishment, functions, and powers of the Valuation Court.[1087] The court consists of five members, a magistrate, a valuer, an expert in agriculture or land economy, a person from the private sector and a staff member of the responsible ministry.[1088] The magistrate is the presiding officer of the court.[1089] Up to two assessors with special knowledge and experience may be appointed by the court.[1090] Regulation 15 of the Regulations states that

1079. Section 73(2), (3), (6) of the Act.
1080. Section 76 of the Act.
1081. 2020 (4) NR 913 (HC).
1082. *Ibid.*: 942C–945H and 961C–D.
1083. *Ibid.:* 945I–957G and 961C–D. But *see* now: *Minister of Finance v. Kruger*, Supreme Court judgement, Case No. SA 55 of 2020 – unreported, which was handed down after the completion of this work on the Constitution of Namibia.
1084. Section 76 of the Agricultural (Commercial) Land Reform Act, 1995 (Act No. 6 of 1995), as amended, and Land Valuation and Taxation Regulations: Agricultural (Commercial) Land Reform Act, 1995; GN No. 285 of 2018.
1085. Regulations 8ff. Land Valuation and Taxation Regulations, GN No. 285 of 2018, which replaced the regulations on place before. (GN No. 120 of 2007) The first version of the regulations was enacted in 1996 (GN No. 272 of 1996).
1086. GN No. 285 of 2018, which replaced the regulations on place before. The first version of the regulations was enacted in 1996 (GN No. 272 of 1996).
1087. Sections 10ff. of the Regulations.
1088. Regulation 10(1) Valuation and Taxation Regulations.
1089. Regulation 10(4) of the regulations.
1090. Regulation 12.

the proceedings before the Valuation Court are conducted in such a manner as the presiding officer considers most suitable to resolve the issues before the court and the court is not bound by any law relating to procedure and admissibility of evidence.

515. Persons aggrieved by a decision of the Valuation Court may appeal against the decision to the High Court.[1091] In adjudicating the appeal, the High Court treats the decision of the Valuation Court as a civil judgement of a Magistrate's Court.[1092] The currently valid rule on appeal amended the scope of appeal: while the old rule limited appeal "on a point of law", the new regulation has given up this limitation.

516. The *Agricultural (Commercial) Land Reform Act* and the *Land Valuation and Taxation Regulations* were part of several court cases, initiated by the Kambazembi Guest Farm as applicant. In a case of an interlocutory application decided by the High Court in 2013, the applicant won, the court declaring the sitting of Valuation Court null and void because the Minister of Lands and Resettlement did not follow the rules on the establishment of the court.[1093] Already in this case, the applicant submitted to the court constitutional concerns alleging that the *Land Valuation and Taxation Regulations* violated the right to a fair hearing as set out in Article 12(1)(a) of the *Constitution*.[1094]

517. The constitutional concerns were discussed at length in the subsequent judgement of the High Court of November 2016 and the appeal judgement of the Supreme Court of July 2018.[1095] Both judgements dismissed the constitutional arguments of the applicant and held the *Agricultural (Commercial) Land Reform Act* and the Land *Valuation and Taxation Regulations* constitutionally valid.

518. In arguing against the submission of the claim, the court asked: "Does section 76 of the [Agricultural (Commercial) Land Reform] Act violate the principle of separation of powers … ?"[1096] Is the principle of separation of powers violated because the act gave the executive the power to determine the payable tax? With reference also to the Constitutional Court of South Africa, the High Court held that as there is no universal model of separation of powers,[1097] the constitutionally relevant question was, whether the legislator mandated the executive with plenary

1091. Regulation 16(1).
1092. Regulation 16(2).
1093. *Kambazembi Guest Farm CC t/a Waterberg Wilderness v. The Minister of Lands and Resettlement*, High Court judgement, Cases No. A 295/2013 et al. – unreported, and quoted as *Kambazembi High Court* in the following.
1094. The Regulations in force at the time of the case decided by the High Court and on appeal by the Supreme Court were enacted in 2007 (GN No. 120 of 2007).
1095. *Kambazembi Guest Farm CC t/a Waterberg Wilderness,* High Court judgement and *Kambazembi Guest Farm CC t/a Waterberg Wilderness v. Minster of Lands and Resettlement,* 2018 (3) NR 800 (SC) – quoted as *Kambazembi Supreme Court* in the following.
1096. *Kambazembi High Court*: at 42.
1097. *Ex parte chairperson of the Constitutional Assembly; In re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC): at 108f.

powers what would not be acceptable. For the court, section 76 of the Act set in clear terms "the aspects and circumstance … in respect of which the Minister may make regulations" also subjecting the powers of the minister "to parliamentary oversight".[1098]

519. After the argument against the *Land Valuation and Taxation Regulations* on the basis of the alleged unconstitutionality of the mandating rules in the *Agricultural (Commercial) Land Reform Act*, the applicant argued against individual regulations on which the High Court and the Supreme Court responded in detail but confirmed the regulations at the end. For the purpose of this report, only one point will be taken up from the very lengthy parts of the two judgements: the general reference to the process of dealing by the Valuation Court.

520. What kind of court is the Valuation Court? The High Court answers this question by saying:[1099]

> The valuation court is not part of the State institutions … which form the bureaucratic executive … . The valuation court is a body established by law for the purpose of determining the civil rights and obligations of persons; … .

And:[1100]

> [T]he Valuation Court is not a court of law but a tribunal as envisaged in Article 12(1) of the Constitution.

521. The High Court of the *Kambazembi* judgement repeated what it confirmed in the *Medical Association of Namibia* case:[1101]

> Tribunals are informal investigative or quasi-judicial bodies which deal almost exclusively with administrative law … .

Accordingly, the characteristics of tribunals are:[1102]

> Firstly, they should have the ability to make *final, legally enforceable decisions*. Secondly, they should be independent from any departmental branch of government. Thirdly, the nature of the *hearings conducted in tribunals should be both public and of a judicial nature*, while not necessarily subject to formalities of a court of law. Fourthly, *tribunals should be in possession of specific expertise, in the field of operation of the tribunal* as well as judicial

1098. *Kambazembi High Court*, at: 43, 50, *see also*: *Kambazembi Supreme Court*: 806F–814C.
1099. *Kambazembi High Court*: at 88.
1100. *Ibid.:* at 92.
1101. *Medical Association of Namibia Ltd v. Minister of Health and Social Services* 2015 (1) NR 1 (HC): 23A.
1102. *Ibid:* 23C. – The words in italics mark emphasis of the court.

expertise. Fifthly, there should be a *duty on tribunals to give clear reasons for their decisions*, and lastly that there should be a *right of appeal to a higher court on disputes regarding points of law*.

522. The functions of tribunals and in so far also the Valuation Court must be seen as of having quasi-court functions. There is court-likeness, but this likeness must not comply, as stated in the list of characteristics, with all the formalities found in the operation of courts proper.[1103] The likeness does not necessarily mean that parties concerned with an administrative decision are obliged to proceed with a tribunal. We may have rules saying, as it is the case in section 14(9) of the *Agricultural (Commercial Land) Land Reform Act*[1104] according to which an appeal against the decision of the minister responsible for land to the Lands Tribunal is allowed. Here the High Court holds that the party concerned has "a choice whether to appeal or seek judicial remedy".[1105]

V. Land Tribunals

523. The acts regulating commercial and communal land[1106] require the establishment of tribunals to consider decisions made in the application of the two acts.[1107] The Lands Tribunal of the *Agricultural (Commercial) Land Reform Act* has as members one person who practised law for not less than five years and who shall be the chairperson of the Tribunal, one with experience on economical and financial matters, one with experience in agriculture and one additional person to be the alternate of the chairperson.[1108] The jurisdiction will be on all matters under the *Agricultural (Commercial) Land Reform Act*.[1109] The Lands Tribunal is not bound by the rules of evidence in civil proceedings.[1110] The decisions of the Tribunal can be executed as if they were decisions by the High Court.[1111]

1103. From a legal comparative point, it should be noted that legal orders such as the legal order of Germany provides in its Administrative Courts' Act, 1991 as amended (*Verwaltungsgerichtsordnung*) for quasi-judicial bodies usually established within the respective branches of the administration. Should there be a decision against the claimant, the matter can go to the administrative court.
1104. Act No. 6 of 1995.
1105. *Josia Tjivovi v. Minister for Land and Resettlement*, High Court judgement, Case No.: HC-MD-CIV-MOT-REV-2017/00086 – unreported.
1106. Agricultural (Commercial) Land Reform Act; Communal Land Reform Act, 2002 (Act No. 5 of 2002), as amended.
1107. Sections 63ff. of the Agricultural (Commercial) Land Reform Act; section 39 of the Communal Land Reform Act.
1108. Section 63 of the Agricultural (Commercial) Land Reform Act.
1109. Section 67.
1110. Section 68(8).
1111. Section 67(3).

524. The Tribunal under the *Communal Land Reform Act* is referred to as Appeal Tribunal. The Tribunal may hear appeals against decisions of a chief, a traditional authority or a land board.[1112] The responsible minister appoints the members of the Tribunal. The minister decides how many people should be members; in case of more than one member, the minister designates one member to be the chairperson.[1113]

525. The jurisdiction to deal with appeals against decisions of the tribunals is differently regulated. For appeals against decisions of the tribunal in matters of commercial land, the *Agricultural (Commercial) Reform Act* states in section 74:

> Any party to any proceedings before the Lands Tribunal may appeal against any decision, order or determination, given by the Lands Tribunal as if it were a judgment or an order given in civil proceedings by a single judge of the High Court of Namibia sitting as a court of first instance, and, for the purposes of prosecuting any such appeal the provisions relating to appeals of the High Court Act (Act 16 of 1990) and of the Supreme Court Act, 1990 (Act 15 of 1990), as well as the rules of court made under those Acts, respectively, shall apply mutatis mutandis.

526. The *Communal Land Reform Act* has no provision on appeals against decisions of the tribunal dealing with communal land matters. Therefore, it follows from the concept of inherent jurisdiction that the High Court is competent to hear appeals against decisions of the tribunal.

527. Appeals against decisions of the executive can go directly to the High Court, i.e., without prior involvement of the tribunal.[1114]

VI. Electoral Tribunals

528. The Magistrates' Commission can after consultation with the Electoral Commission designate a magistrate of a regional court to be the Electoral Tribunal for a certain geographical area.[1115] The Electoral Tribunal is primarily competent to decide on all sorts of matters related to elections.[1116] In dealing with such election matters, the tribunal has the obligation to make enquiries, consider the matter and

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1112. Section 39(1) of the Communal Land Reform Act.
1113. Section 39(2) and (3) of the Act.
1114. *See* the case: *N≠a Jaqna Conservancy Committee v. The Minister of Lands and Resettlement*, Case No. A 276/2013 – unreported – in which the High Court accepted competence to adjudicate in a communal land dispute even though the claimant approached the High Court without involving the Tribunal of the Communal Land Reform Act. *See* on the case: Hinz (2018) and further: *Tjirovi v. Minister for Lands and Resettlement*, High Court judgement, Case No.: HC-MD-CIV-MOT-REV-2017/00086 - unreported.
1115. Section 162 of the Electoral Act, 2014 (Act No. 5 of 2014); *see also*: Rules for the Electoral Tribunal, GN No. 191 of 2018.
1116. Section 162(a)–(e) of the Act.

lead it to "fair and just" solution.[1117] As reported in the chapter on the High Court appeals against decisions of Electoral Tribunals go to the Electoral Court, which is a division of the High Court.[1118]

VII. Industrial Property Tribunal

529. The Industrial Property Tribunal, as provided for in the *Industrial Property Act*,[1119] is established by the minister responsible for trade and industry after consultation with the Minister of Justice and consists of three members, one with legal qualification and two with knowledge or experience in intellectual property, economical or financial matters.[1120] The tribunal has jurisdiction in all matters related to industrial property in terms of the *Industrial Property Act.* The High Court hears appeals against decisions of the tribunal.[1121]

VIII. Witness Protection Review Tribunal

530. Comparable provisions are contained in the *Witness Protection Act* of 2017.[1122] Matters relating to the Act may be attended to by the Witness Protection Review Tribunal. This tribunal is composed of three persons, a chairperson who holds or held a higher professional judiciary office and two other persons with qualifications in the administration of justice.[1123] The responsible minister appoints the chairperson of the tribunal in consultation with the Chief Justice and the two other members after consultation with the Chief Justice.[1124] The tribunal exercises its jurisdiction as if it was a Magistrates' Court and has "the same powers, privileges and immunities available to a magistrate"s court in a civil matter".[1125] The appeal against the decisions of the tribunal goes to the High Court and[1126]

> must be prosecuted as if it were an appeal from a judgement or an order given in civil proceedings by a magistrates' court.

1117. Section 163(1)(a).
1118. Section 168(1)(a) and (b).
1119. Sections 215ff. (220(6), 228) of the Industrial Property Act, 2012 (Act No. 1 of 2012); *see also*: Regulations 144ff. of the Industrial Property Regulations, 2018, GN No. 114 of 2018.
1120. Section 215 of the Act.
1121. Section 228(1): " … any party to any proceedings before the Tribunal any appeal against any decision … by the Tribunal as if it were a judgement … in a civil proceedings by a magistrates' court being appealed against to the court." Court is per definition of the Act (section 1 of the Act) the High Court.
1122. Act No. 11 of 2017 – not in force yet.
1123. Section 61 of the Act.
1124. *Ibid.*
1125. Section 63(3) of the Act.
1126. Section 70.

§11. The Attorney-General

531. The office of the Attorney-General,[1127] to be appointed by the president,[1128] is the principal legal adviser to the president and government. It is mandated to take all action necessary for the protection and upholding of the *Constitution* and to perform all such functions and duties as may be assigned to the Attorney-General by act of parliament.[1129] The Attorney-General also exercises the "final responsibility" for the office of the Prosecutor-General.[1130]

§12. The Prosecutor-General

532. The Prosecutor-General is, as already noted above,[1131] appointed by the president and is vested with the power to prosecute in the name of the Republic of Namibia.[1132] Authority over the Prosecutor-General is given to the Judicial Service Commission with regard to his or her personal conduct in so far as the Commission can recommend his or her removal from office to the president.[1133]

533. A person qualifies as Prosecutor-General only if he or she possesses legal qualifications that would entitle him or her to practise in all the courts of Namibia.[1134]

§13. Independence of the Judiciary

534. According to Article 78(2) of the *Constitution*, the courts should be independent and only subject to the law and the *Constitution*. This means that the other organs of state are prohibited to interfere in the work of the courts in Namibia.[1135] For this purpose, Article 78 was amended, resulting in the enactment of the *Judiciary Act.*[1136]

535. The independence of the judiciary has been respected fairly well in Namibia.[1137] However, despite the prohibition of interfering with judges or judicial officers, there have been cases where judicial independence has been threatened. In

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1127. *See*: Articles 86 and 87 of the Constitution.
1128. Article 86 of the Constitution. *See* on this already above: §5 of Chapter 3 in this part. – Article 86 wrongly refers to Article 32(3)(1)(cc). This reference is to the Constitution before the 2014 amendment and should read "Article 32(3)(i)(ee)".
1129. *See*: Article 87.
1130. So the words in Article 87(a). *See* on this already above: §2 of Chapter 1 in Part II and §6 of Chapter 6 in this part.
1131. *See*: §2 of Chapter 1 in Part II and §6 of Chapter 6 in Part III.
1132. Articles 88(1) and 88(2)(a) of the Constitution.
1133. *See*: Articles 32(5) and 32(6).
1134. Cf.: Article 88(1)(a); but also: Article 88(1)(b).
1135. This is reinforced in Article 78(3).
1136. Act No. 11 of 2015, *see* on this above: §2 of Chapter 6 in this part.
1137. *See* for a detailed assessment of judicial independence: Von Doepp (2008).

Ngoma v. Minister of Home Affairs,[1138] the Minister of Home Affairs was interdicted from arresting the accused asylum seekers or removing them from the Osire refugee camp. The Minister of Home Affairs then threatened to withdraw the work permits of some foreign judges but later apologized to the judges.[1139]

536. In the case of *State v. Heita*,[1140] SWAPO supporters demonstrated against a judge who, as they said, gave a lenient sentence against their opponents and called for the resignation of the judge who was of European descent describing him as "anti-black". The court clearly stated that political parties should not interfere with the independence of the judiciary no matter how strong or powerful they are in the executive branch.

537. Several cases of dismissals of magistrates occupied the High Court. The reasons for the dismissals did not affect the independence of judiciary but were based on violations of the professional duties by the dismissed.[1141]

538. The public is not precluded from criticizing the judiciary and its officers. Legitimate, informed, *bona fide*, and fair criticism of the decisions made by judges is not only permissible – it indeed strengthens both the judiciary and the society it serves. This was noted by Ismael Mahomed, then Chief Justice of Namibia:[1142]

> But criticism of the Judiciary is regrettably often not graced by such qualities. It is sometimes quite dangerously uninformed, unfair and unbalanced-impugning without justification the integrity and scholarship of Judges without understanding the deep traditions of rigorous legal discipline and rational thought they seek to give expression to, without understanding or having regard to the precise terms of the language and the content of the legal instruments they are called upon to interpret and at times without any real understanding of the relevance and the nature of the evidence which they are required to assess in particular cases.

539. The judge also noted that criticism is unfair should it improperly impugn the integrity and the reputation of the judiciary. Such criticism[1143]

1138. High Court judgement, Case No. A206/2000 – unreported.
1139. *See*: Tjombe (2008): 233.
1140. 1992 NR 403 (HC).
1141. Cf.: *Le Roux v. Minister of Justice* 2015 (1) NR 131 (HC); *Shaanika v. The Magistrate's Commission*, High Court judgement, Case No. CA 47/2012 - unreported; *Kanime v. The Ministry of Justice*, High Court judgement, Case No. A 166/2011 - unreported.
1142. Address by Chief Justice Mahomed accepting the Honorary Degree of Doctor of Laws at the University of Cape Town on 25 Jun. 1999.
1143. *Ibid.*

> corrodes public confidence in its legitimacy and may ultimately diminish its capacity to enforce its will in the defence of the citizen seeking redress against injustice and would be a menacing consequence for a viable constitutional democracy.[1144]

540. As much as the independence of the judiciary is related to public confidence, public confidence depends on the effectiveness of the judiciary. In *Ndemuweda v. Government of the Republic of Namibia,*[1145] the High Court had to decide about an application for an order for the payment of damages which the minister was obliged to pay according to an order of court but had yet failed to do so. The Court clarified that the judiciary can only give effect to the rights of successful litigants and, furthermore, act as a guardian of the *Constitution* if the courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of the state.[1146] Disobedience towards court orders or decisions would risk rendering the courts impotent and judicial authority a mere mockery.[1147]

541. Article 78(3) of the *Constitution* explicitly requires organs of state not only not to intervene with the judiciary but also to assist and to protect the courts to ensure their independence, impartiality, dignity, accessibility, and effectiveness. According to the High Court a prerequisite for the authority of courts to be effective is, that orders of court are binding on all persons and also the organs of the state. If court orders were not effective, this would lead to a constitutional crisis:[1148]

> Where the orders of a court are disregarded with impunity such a situation will undermine and erode the foundational basis of our Republic and will inevitably, lead to a situation of constitutional crisis. It thus follows that any action or inaction that displays disregard for judicial orders must be swiftly dealt with.

As there was already an order to pay damages, the court, of its own accord, directed the ministry to make payment to the applicant by a certain date but also stressed the following:[1149]

> This is however not the end of the matter. This case is good example of the Constitutional crises we may find ourselves in if Court orders are not heeded and honoured by State organs. It is for that reason that I find it appropriate to strongly urge the Minister of Finance to investigate means on how the State's obligation to pay monetary awards emanating from Court orders can be funded from sources other than operational budgets of the Ministries. I further direct

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1144. *Ibid.*
1145. *Ndemuweda v. Government of the Republic of Namibia (Minister of Health and Social Services)* 2018 (2) NR 475 (HC).
1146. *Ibid*.: 477D.
1147. *Ibid.:* 481C – D.
1148. *Ibid.:* 480C – D.
1149. *Ibid*.: 481C – D.

that the Registrar of this Court brings this judgment to the attention of the Honourable Minister of Finance and the Honourable Attorney General.

§14. Protection of Witnesses

542. The *Witness Protection Act*[1150] allows for procedures for the protection of witnesses "who face potential risk or intimidation due to them being witnesses or related persons".[1151] The protection of witnesses is the responsibility of the Ministry of Justice according to which a Witness Protection Unit has to be established within the ministry.[1152] The unit enjoys independence in performing its tasks.[1153] A Witness Protection Advisory Committee[1154] advises the minister on high level policy matters and the unit on the exercise of its powers.[1155]

543. Witness protection programmes will be administered by the unit.[1156] Persons admitted to the programme may benefit from protection measures as described in the Act.[1157] The controlling instance is the Witness Protection Review Tribunal which has already been mentioned above.[1158]

1150. Act No. 11 of 2017 is not in force yet.
1151. Cf.: section 3 of the Act.
1152. Section 2.
1153. Section 11.
1154. Section 13ff.
1155. Section 14; *see also*: section 15.
1156. Section 3.
1157. Sections 46ff.
1158. *See*: §10.8 of Chapter 6 in Part III.

544–548

Chapter 7. State Responses to Emergency Situations and Terrorism

§1. State of Emergency, State of National Defence, and Martial Law

544. A state of emergency can be declared by the president[1159]

> [a]t a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order...

545. The constitutional provisions on states of emergency not only allow for derogations from particular fundamental rights and freedoms but also extend the power of the president and regulate the limitation of the participation of parliament. The difficult task of the constitutional determination of the state of emergency is the balance between the interest of people to continue with their daily life in a democratic society and the necessity to encounter threats in an adequate way with immediately taken measures.

546. The declaration of a state of emergency has to be proclaimed in the Government Gazette and is subject to approval by the National Assembly: a declaration becomes automatically invalid if it is not approved by a resolution passed by the National Assembly by a two-thirds majority of all its members within a certain period.[1160] This period amounts to seven days if the declaration was made when the National Assembly is sitting or has been summoned to meet.[1161] In any other case, a declaration ceases to have effect at the expiration of a period of thirty days after the declaration was proclaimed.[1162]

547. The National Assembly can at any time, by resolution, revoke its approval of an emergency declaration.[1163] Otherwise the declaration remains[1164]

> in force until the expiration of a period of six months after being so approved or until such earlier date as may be specified in the resolution.

An extension for six months at a time is possible if agreed upon by a two-thirds majority of the National Assembly.[1165]

548. The declaration of a state of emergency grants the president the power[1166]

1159. Article 26(1) of the Constitution.
1160. Article 26(2). – It may be remarked that the National Council is not involved in the decisions on the state of emergency.
1161. Article 26(2)(a).
1162. Article 26(2)(b). – Cf.: Watz (2004): 193 who expresses difficulties with the different timing.
1163. Article 26(3) of the Constitution.
1164. Article 26(4).
1165. Article 26(3).
1166. Article 26(5)(b).

> to make such regulations as in his or her opinion are necessary for the protection of national security, public safety and the maintenance of law and order.

The president can suspend common-law rules, statutory provisions as well as fundamental rights and freedoms with the exception of the non-derogable rights mentioned in Article 24 of the *Constitution*. Any derogation from the applicable law can only apply[1167]

> for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency.

549. Approval of the regulations by the National Assembly is required within fourteen days

> from the date when the National Assembly first sits in session after the date of the commencement of any such regulations[,] otherwise the regulations cease to have legal force.[1168] With regard to the importance of the matter and the fact that parts of the *Constitution* can be suspended, one may expect that a two-thirds majority is required for the approval of the regulations. This view is supported by Watz who argues with article 132 of the *Constitution* which necessitates a two-thirds majority for changes of the *Constitution*.[1169]

550. Article 26 of the *Constitution* allows the detention without trial in states of emergency. In such a case, the president has the duty to establish an Advisory Board, which will release the detained person if it is not satisfied that the detention is "reasonably necessary for the emergency to continue".[1170]

551. In a state of national defence involving another country or in case of a civil war in Namibia, the president can proclaim martial law.[1171] The proclamation will only remain valid "if it is not approved by a resolution passed by a two-thirds majority of all the members of the National Assembly". According to section 28 of the *Defence Act*,[1172] the president then has the power to "call out the whole or any portion of a reserve force for mobilization for service in defence of Namibia". This is also possible for the prevention or suppression of terrorism or internal disorder in Namibia, for the preservation of life, health or property or the maintenance of essential services.[1173] In matters of urgency, the minister responsible for national defence

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1167. Article 26(5)(b).
1168. Article 26(6).
1169. Watz (2004): 191.
1170. Articles 26(3) and 24(2)(c) of the Constitution.
1171. Article 26(7).
1172. Act No. 1 of 2002, as amended.
1173. Section 29(1)(a)–(d) of the Defence Act.

has the right to call out for mobilization. This is, however, only valid for not longer than four days if it is not confirmed by the president prior to that.[1174]

552. In situations of defence or for the prevention or suppression of terrorism, the president and the minister can make several other orders and instructions without the participation of parliament, including actions aiming at the safeguarding of the Namibian borders, the securing of harbours or aerodromes and the control and use of the transport system.[1175]

553. The president has the exclusive right to deploy members of the defence force in order to maintain, bring about or restore peace, security and stability in a foreign country.[1176] Section 32(2) of the *Defence Act* requires that such a presidential decision be made with the consent of the Cabinet. The president is obliged to inform the National Assembly within thirty days of its decision[1177] which has the power to disapprove the president's decision with a two-thirds majority.[1178]

§2. States of Emergency Declared since Independence

554. In September 1994, following an armed attack by UNITA, one of the parties in the Angolan civil war, which had a key stronghold on the Angolan side of the northern border of Namibia, the then President Sam Nujoma called the attack a threat to the stability of Namibia and declared the Angolan-Namibian border closed. Two days later, he issued an executive order requiring the Namibian police and military to "shoot on sight" anyone attempting to cross the Kavango River "illegally". With this, the president unilaterally imposed a *de facto* state of emergency.[1179]

555. Following a failed separatists attack by secessionists on 2 August 1999 in the Zambesi (formerly Caprivi) Region,[1180] the then President Sam Nujoma declared the existence of a state of emergency within the region.[1181] Emergency regulations were issued under Article 26(5)(a) of the *Constitution*. *Proclamation 6*

1174. Section 29(2).
1175. Sections 34–37.
1176. It may be noted that in 1998 (when the Defence Act, 2002 had not yet been in force) the deployment of members of the defence force in the Democratic Republic of Congo by then President Nujoma led to severe criticism as he had taken the decision without any parliamentary participation. *See*: The Namibian of 20 Nov. 2008; Mail & Guardian (South African Newspaper) of 4 Sep. 1998.
1177. Section 32(3) of the Defence Act.
1178. Section 32(5).
1179. Hammond (1997).
1180. *See* above: Part I, Chapter 2, § 10.
1181. Declaration of State of Emergency: Caprivi, Proclamation No. 23 of 1999, effective as of 2 Aug. 1999. It was revoked on 26 Aug. 1999 by Proclamation No. 27 of 1999 (Revocation of Declaration of State of Emergency in the Caprivi Region and Emergency Regulations).

of 1992[1182] suspended the forty-eight hours rule of Article 11(3) of the *Constitution*. Three suspects arrested outside the Caprivi Region later accused the Minister of Home Affairs that they were arrested and detained unlawfully, as the emergency regulations were not applicable outside the Caprivi Region.[1183] The High Court emphasized that a strict or narrow interpretation in regard of the regulations is necessary, in view of the fact it derogates form certain fundamental rights and freedoms.[1184] It was held:[1185]

> Properly construed therefore, the phrase 'and with respect to' in the context used in the regulations means that the regulations were applicable in the Caprivi Region and with reference to matters related to Caprivi but which were confined to or done *inside* the Caprivi Region, in which a state of emergency was declared.
>
> To give the phrase a meaning to the effect that the regulations were applicable to outside Caprivi would amount, in my opinion, to an impermissible extension of the state of emergency. If it was the lawmaker's intention to have the regulations applicable to outside the declared area there can be no real doubt that the President would have declared a state of emergency in the entire country, for he is legally empowered to do so (*see* Article 26 (1) of the Constitution).

A de facto state of emergency is not permitted.

556. States of emergencies were also declared several times in situations of environmental disasters, where heavy rains caused severe flooding and because of drought.[1186]

557. In 2020, President Geingob declared a state of emergency in the whole of Namibia on account of the outbreak of COVID-19 with effect from 17 March 2020.[1187] The COVID-19 pandemic, also known as the coronavirus pandemic, has had a severe impact on several spheres of life worldwide. The coronavirus disease is caused by severe actue respiratory syndrome coronavirus 2 (SARS-CoV-2). The virus was first identified in December 2019 in Wuhan, China and had spread to all continents within a few months, so that the World Health Organisation (WHO) had to declare a Public Health Emergency of International Concern on 30 January

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1182. Emergency Regulations were promulgated in Proclamation No. 24 of 1999 (Emergency Regulations applicable to the Caprivi Region: Article 26 of the Namibian Constitution). These were also revoked by Proclamation No. 27 of 1999 (Revocation of declaration of State of Emergency in the Caprivi Region and Emergency Regulations).
1183. *Sibeya v. Minister of Home Affairs*, *Mutumba v. Minister of Home Affairs*, *Mazila v. Minister of Home Affairs* 2000 NR 224 (HC).
1184. *Ibid*.: 227I.
1185. *Ibid*.: 228I–220B.
1186. Declaration of State of Emergency: National Disaster (Drought): Namibian Constitution, Proclamation No. 14 of 2019. *See* further: Reuters of 17 Mar. 2009; The Namibian of 30 Jun. 2016.
1187. Declaration of State of Emergency: National Disaster (COVID-19): Namibian Constitution, Proclamation No. 7 of 2020.

2020.[1188] On 11 March the WHO declared a pandemic.[1189] In order to contain the pandemic, many governments (partly) shut down public life. Measures included restrictions with respect to social interaction, wearing masks in public and isolation.

558. In Namibia, the corona emergency declaration was made in terms of Article 26 of the *Constitution* read with section 30 of the *Disaster Risk Management Act, 2012*.[1190] Emergency regulations were first issued on 18 March 2020. The regulations declared the Khomas and Erongo Regions to be restricted areas and provided for the closing of schools and higher education institutions, the prohibition of large public gatherings, travel restrictions, quarantine, and other measures.[1191] The Chief Justice was specifically allowed to[1192]

> suspend, extend or relax the procedure and time periods prescribed in the High Court Act, 1990 (Act No. 16 of 1990) and Magistrate's Courts Act, 1944 (Act No. 32 of 1944) and the rules of High Court or a Magistrates' Court.

The restriction of movement applicable to the Khomas and Erongo regions was extended to the whole of the country by an amendment to the first set of emergency regulations issued on 18 April 2020.[1193] This first stage emergency regulations expired at the end of the first lockdown on 4 May 2020 and was followed by regulations making applicable regulations responsive to the different stages of the pandemic.[1194] Because of a higher infection rate, a different set of emergency

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1188. *See* the WHO Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV), 30 Jan. 2020, available at: https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov) (accessed 27 Jan. 2022).

1189. WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 Mar. 2020, available at: https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (accessed 17 Jan. 2022).

1190. Act No. 10 of 2012.

1191. State of Emergency – COVID 19 Regulations: Namibian Constitution, Proclamation No. 9 of 2020.

1192. Section 13(1)(A) of the Regulations. The Chief Justice issued the following directions: Direction relating to judicial proceedings issued by the Chief Justice in terms of regulation 13(1) of the State of Emergency COVID-19 regulations, GN No. 90 of 2020; Amendment to Directions issued by the Chief Justice under Regulation 13 of State of Emergency – Covid-19 Regulations, GN No. 111 of 2020.

1193. Amendment of State of Emergency COVID-19 Regulations: Namibian Constitution, Proclamation No. 13 of 2020.

1194. Stage 2: State of Emergency – Covid-19 Regulations: Namibian Constitution, Proclamation No. 17 of 2020. Stage 3 was provided for by an amendment of the Stage 2 regulations: Amendment of Stage 2: State of Emergency – Covid-19 Regulations: Namibian Constitution, Proclamation No. 21 of 2020; Further Amendment of Stage 2: State of Emergency – Covid-19 Regulations: Namibian Constitution, Proclamation No. 25 of 2020; Further Amendment of Stage 2: State of Emergency – Covid-19 Regulations: Namibian Constitution, Proclamation No. 27 of 2020; Stage 4: State of Emergency – Covid-19 Regulations: Namibian Constitution, Proclamation No. 28 of 2020; Repealed by: Stage 4: State of Emergency – Covid-19 Regulations: Namibian Constitution, Proclamation No. 33 of 2020. The latter Proclamation was amended by: Amendment of Stage 4: State of Emergency-Covid-19 Regulations: Namibian Constitution, Proclamation No. 40 of 2020; Amendment of Stage 4: State of Emergency – Covid-19 Regulations: Namibian Constitution,

regulations was issued for the Erongo Region[1195] and the Walvis Bay Local Authority Area.[1196] In August 2020, a dramatic increase in COVID-19 cases led to the downgrading of the entire country from Stage 4 to Stage 3 by issuing new Stage 3 regulations.[1197]

559. Specific health regulations were issued, including general provisions such as requirements for quarantine and isolation, contact tracing and testing for COVID-19, provisions for cross-border requirements and transportation of goods as well as specific health requirements for different institutions and businesses.[1198] A range of directives was issued by empowered ministers in order to make supplementary, assisting or explanatory rules.[1199] Moreover, the operation of certain laws that were found to otherwise impose heavy burdens on the Namibian people and government throughout the pandemic was suspended.[1200]

560. The state of emergency expired at midnight on 17 September 2020.[1201] COVID-19 was subsequently addressed by applying the *Public and Environmental*

Proclamation No. 44 of 2020, and repealed before its anticipated date of expiry by Stage 3: State of Emergency – Covid-19 Regulations: Namibian Constitution, Proclamation No. 46 of 2020.

1195. Stage 1: State of Emergency – Covid-19 Regulations: Erongo Region: Namibian Constitution, Proclamation No. 24 of 2020; Stage 3: State of Emergency – Covid-19 Regulations: Erongo Region: Namibian Constitution, Proclamation No. 26 of 2020; Stage 3: State of Emergency – Covid-19 Regulations: Erongo Region: Namibian Constitution, Proclamation No. 32 of 2020. Stage 3: State of Emergency – Covid-19 Regulations: Erongo Region, Proclamation No. 39 of 2020; amended by Amendment of Stage 3: State of Emergency – Covid-19 Regulations: Erongo Region: Namibian Constitution, Proclamation No. 43 of 2020.

1196. Stage 1: State of Emergency – Covid-19 Regulations: Walvis Bay Local Authority Area: Namibian Constitution, Proclamation No. 20 of 2020. Amended by: Amendment of Stage 1: State of Emergency – Covid-19 Regulations: Walvis Bay Local Authority Area: Namibian Constitution, Proclamation No. 23 of 2020.

1197. Stage 3: State of Emergency – Covid-19 Regulations: Namibian Constitution, Proclamation No. 48 of 2020. Regulation 4 of these Regulations was substituted by Amendment of Stage 3: State of Emergency – Covid-19 Regulations: Namibian Constitution, Proclamation No. 49 of 2020. Proclamation No. 48 of 2020 was repealed by Stage 3: State of Emergency – Covid-19 Regulations: Namibian Constitution, Proclamation No. 50 of 2020.

1198. State of Emergency – Covid-19: Regulations relating to health matters: Namibian Constitution, Proclamation No. 47 of 2020.

1199. *See* for the complete list of directives: Overview of COVID-19 State of Emergency laws by the LAC, available at https://www.lac.org.na/laws/THE_COVID.pdf (accessed 31 Mar. 2022).

1200. State of Emergency – Covid-19: Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations: Namibian Constitution, Proclamation No. 16 of 2020; State of Emergency – Covid-19: Further Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations: Namibian Constitution, Proclamation No. 18 of 2020. The latter was amended by: Amendment of State of Emergency – Covid-19: Further Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations: Namibian Constitution, Proclamation No. 22 of 2020. State of Emergency – Covid-19: Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations, Proclamation No. 36 of 2020.

1201. State of Emergency – Covid-19: Regulations relating to health matters: Namibian Constitution, Proclamation No. 47 of 2020.

Health Act, 2015,[1202] which was brought into force on 17 September 2020,[1203] and by issuing regulations in terms of this Act.[1204]

561. The lockdown regulations affected and restricted several rights and freedoms contemplated by the *Constitution* including the right to liberty, the right to culture, the right to education, the rights to movement, freedom to practise any religion and the rights of people to conduct certain business operations. In the national report submitted to the Human Rights Council of the United Nations, it was held in this regard:[1205]

> Despite any limitations however, the Government was able to efficiently promote the right of persons to health and to water and sanitation through targeted policies that were aimed at ensuring that the country as a whole is poised to fight the Covid-19 pandemic.
>
> … While other human rights, particularly the right to education and the right to development, have been adversely impacted by the Covid-19 pandemic, it is important to clarify that the Government remains committed and continues to promote these and other human rights through political engagements, socio-economic support and consistent review of policies and regulations.

562. Of particular relevance with respect to limitations is the compliance with Articles 21(2) and 22 of the *Constitution*. The question whether the different measures limiting fundamental rights or freedoms are legitimate means to achieve the objective to contain the COVID-19 pandemic and thus to protect lives has been and should be disputed.[1206] The courts play a decisive role when it comes to the protection of fundamental rights and freedoms from unjustified violations.[1207] In *Namibian Employers' Federation v. President of the Republic of Namibia,*[1208] the applicant successfully challenged the legality of certain parts of the COVID-19 regulations. According to Vimbai Mutandwa, a Legal Advisor at the International Commission of Jurists, this decision is of interest and importance[1209]

1202. Act No. 1 of 2015.
1203. GN No. 230 of 2020.
1204. *See* for a complete list of all versions and amendments of regulations: Overview of COVID-19 State of Emergency laws by the LAC, available at https://www.lac.org.na/laws/THE_COVID.pdf (accessed 31 Mar. 2022).
1205. Human Rights Council (2021): 21.
1206. It has, for example, been discussed by Calitz (2020), van Aardt (2020).
1207. In South Africa, the courts have, e.g., discussed whether the limitation of the right to religious practices is reasonable and justifiable under the Constitution (*Mohamed v. President of the Republic of South Africa (United Ulama Council of South Africa and Another as Amici Curiae)* [2020] 2 All SA 844 (GP).
1208. *Namibian Employers' Federation v. President of the Republic of Namibia*, High Court judgement, Case No. 136/2020 – unreported.
1209. Mutandwa (2020).

> because it upholds the principle of legality and the rule of law by requiring the President to follow constitutional and legal processes in responding to COVID-19.

The Attorney-General announced to intend to appeal the High Court judgement.[1210] The appeal had, though, not been heard by the Supreme Court at the time of this publication.

563. Parts of the emergency regulations were declared unconstitutional and invalid by the High Court in this urgent application that deals, inter alia, with the interpretation of Article 26 of the *Constitution*. It was clarified that for the president to legally exercising his power under Article 26(5)(b), the regulations must be in line with the requirements provided for by Article 24 of the *Constitution*. Regulations must be for a specific period and[1211]

> subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the state of emergency.

It was stressed that[1212]

> if the President makes regulations that do not deal with the situation which has given rise to the State of Emergency or which are contrary to Article 24, the President would have acted *ultra vires* the Constitution.

564. The regulations that were found to be unconstitutional and invalid included a regulation suspending certain provisions of the *Labour Act*,[1213] and making it an offence for an employer to terminate employment, force leave, reduce remuneration, or refuse to reinstate an employee under specific circumstances.[1214] The High Court found that this regulation did not deal with the outbreak of the coronavirus as the obvious intention was to retain the status quo by prohibiting employers to interfere with employee benefits as a result of the COVID-19 impact. The following was held:[1215]

> The determination of the legality of the regulations do not depend on how laudable … they are. The legality of the regulations, strictly interpreted, is measured by enquiring whether they are authorized by the Article of the

1210. The Namibian of 7 Jul. 2020.
1211. *Namibian Employers' Federation v. President of the Republic of Namibi*a, High Court judgement, Case No. 136/2020 – unreported: at 76.
1212. *Ibid*.: at 74.
1213. Act 11 of 2007.
1214. *See*: Regulation 19 of Proclamation 16 of 2020; Regulation 12 of Proclamation 17 of 2020. Regulations 19(1)(a), (b) and (c), (2), (4), (6) and (8), and 25 in part of Proclamation 16 of 2020 and Regulations 12(1)(a) and (b), (2), and (5), and 16 in part of Proclamation 17 of 2020 were declared unconstitutional and invalid.
1215. *Namibian Employers' Federation v. President of the Republic of Namibia*, High Court judgement, Case No. 136/2020 – unreported: at 78.

Constitution cited as the source of the power to make them. The regulations are therefore not "reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency" and to that extent the President breached the principle of legality.

565. It was further found that the president cannot delegate its constitutional power to make laws in emergency situations including the suspension of rights to ministers or the Attorney-General.[1216] The president had delegated the power to ministers to issue directives for the purpose of supplementing or amplifying on any provision of the regulations or ensuring that the objectives are attained.[1217] The president could authorize a minister to issue directives for the purposes of ensuring that the objectives of the regulations are attained but could not deal with matters that are within the ambit of any legislation or other law.[1218] Regulation 14(3) of *Proclamation 9 of 2020* and Regulation 15(3) of *Proclamation 17 of 2020* stated that a directive issued under the regulations must be referred to the Attorney-General for approval and must be published in the Gazette, for the directive to have the force of law. This was also found to be an impermissible delegation of power.[1219]

1216. *Ibid.:* at 90.
1217. *Ibid.:* at 88.
1218. *Ibid.:* at 90.
1219. *Ibid.*

Chapter 8. Other Constitutionally Relevant Bodies

§1. Introduction

566. Apart from the legislative, executive, and judicial bodies which have been dealt with in the previous chapters, the *Constitution* establishes several other entities and bodies with advisory, supervisory, or executive functions. These include the Public Service and the Public Service Commission (§2), the Security Commission (§3), the National Planning Commission (§4), the Central Bank (§5), the police force (§6), the correctional service (§7), the defence force (§8), the Central Intelligence Service (§9) as well as the Auditor-General (§10) and the Ombudsman (§11). Other important bodies are the public procurement institutions (§12), the Competition Commission (§13), and the Anti-Corruption Commission (§14).

§2. Public Service

567. The Public Service established by section 2 of the *Public Service Act*[1220]

> shall be impartial and professional in its effective service of the Government in policy formulation and in the prompt execution of Government policy and directives so as to serve the people of the Republic of Namibia and promote their welfare and lawful interests.

568. The members of the public service are expected to be fully at the disposal of the government, hence, not to perform any remunerative work outside their employment.[1221]

569. The Public Service Commission established by Article 112 of the *Constitution a*dvises the president and reports to the National Assembly on matters regarding employment in the public service. The *Constitution* requires the Commission to be independent and impartial.[1222] The president has the power to nominate while the National Assembly appoints the members of the Public Service Commission.[1223] It consists of a chairperson and at least three but not more than six members, who are entitled to serve for a period of five years and are eligible for reappointment.[1224] The members can be removed before the expiry of their term for good and sufficient reasons.[1225]

570. The functions adhered to the Commission by the *Constitution* are[1226]

1220. Act No, 13 of 1995, as amended.
1221. Section 17(1) of the Public Service Act. – Sub-section 2 allows for exemptions.
1222. Article 112(2) of the Constitution.
1223. Article 112(3) of the Constitution and Public Service Commission Act, 1990 (Act No. 2 of 1990).
1224. Article 112(3) and (4) of the Constitution.
1225. Article 112(4).
1226. Article 113.

(a) to advise the President and the Government on:
  (aa) the appointment of suitable persons to specified categories of employment in the public service, with special regard to the balanced structuring thereof;
  (bb) the exercise of adequate disciplinary control over such persons in order to assure the fair administration of personnel policy;
  (cc) the remuneration of any such persons; … .

§3. The Security Commission

571. The Security Commission is provided for in Chapter 14 of the Constitution. Its functions are in particular[1227]

> to make recommendations to the President on the appointment of the Chief of the Defence Force, the Inspector-General of the Police and the Commissioner-General of Correctional Service.

572. Members of the Security Commission are the Chairperson of the Public Service Commission, the Chief of the Defence Force, the Inspector-General of Police, the Head of the Intelligence Service, the Commissioner-General of Correctional Service, and two members of the National Assembly.[1228]

§4. The National Planning Commission

573. The National Planning Commission is established in the Presidency and led by its Director-General.[1229]

574. The task of the National Planning Commission is to "plan the priorities and the direction of the national, socio-economic development".[1230] The objectives of the Commission include the identification of the socio-economic development priorities, the formulation of short-term, medium-term, and long-term national development plans in consultation with regional councils, and the development of monitoring and evaluation mechanisms to ensure effective implementation of the national development plans. The National Planning Commission is responsible for the evaluation of the effectiveness and the coordination of the development of socio-economic policies to ensure consistency, but also for the mobilization, management, and coordination of international development cooperation.[1231]

1227. Article 114(1)(a).
1228. Article 114(2). – *See also*: section 5 of the Security Commission Act, 2001 (Act No. 18 of 2001).
1229. Article 129 of the Constitution.- *See also* the National Planning Commission Act, 2013 (Act No. 2 of 2013).
1230. Article 129(1) of the Constitution.
1231. Section 4 of the National Planning Commission Act.

§5. The Central Bank

575. The Central Bank is established under Article 128(1) of the *Constitution* and regulated by the *Bank of Namibia Act*.[1232] The object of the bank is the promotion of "monetary stability and to contribute towards financial stability conducive to the sustainable economic development of Namibia."[1233] Part of the functions of the bank are to implement the monetary policy of Namibia, to issue its currency, and to supervise the banks in Namibia.[1234] The head office of the bank is to be situated in Windhoek while branches in other parts of the country – but also, if approved by the Minister of Finance, abroad – can be established.[1235]

576. The powers and functions under the *Bank of Namibia Act* have to be seen in conjunction with the fact that Namibia is, with South Africa, Lesotho, and Eswatini, part of the common monetary area.[1236] Section 45(1) of *Bank of Namibia Act* confirms that the banknotes and coins issued by the South African Reserve Bank are a legal tender in Namibia. The Minister of Finance is authorized to consider appropriate measures "in respect of the continued participation in the common monetary area" after consultation with the Bank of Namibia.[1237]

§6. Police Force

577. Article 118 of the *Constitution* provides for the establishment of the police force. The function of the police force is to secure the internal security of Namibia and maintain law and order.[1238] The Inspector-General of Police leads the police force, appoints members of the police force, and ensures in general terms "the efficient administration of the police force".[1239]

578. The powers and functions of the police are specified in the *Police Act.* Section 14(10) of the *Police Act* requires members of the police to

> use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of an offender or suspected offender or persons unlawfully at large.

1232. Act No. 1 of 2020. – This Act repealed: Bank of Namibia Act, 1997 (Act No. 15 of 1997) and Bank of Namibia Amendment Act (Act No. 11 of 2004).
1233. Section 4(1) Bank of Namibia Act, 2020.
1234. The latter in terms of the Banking Institutions Act, 1998 (Act No. 2 of 1998), as amended.
1235. Section 2(2) of the Act of Namibia Act, 2020.
1236. Namibia joined the common monetary area in 1992. Cf.: South Africa Customs Union Business (2010): 28. The arrangement of the common monetary area between the quoted countries goes back to the Rand Monetary Area, established in 1974. *See* on this topic also below: Part V, Chapter 7, §4.
1237. Section 45(4) of the Bank of Namibia Act, 2020. – The possibility of a Namibian exit, "Nexit", from the common monetary area is a matter raised from time to time, *see*: The Namibian of 21 May 2021.
1238. Cf.: section 13 of the Police Act, 1990 (Act No. 19. of 1990), as amended.
1239. Article 119 of the Constitution.

Hubbard criticizes the Namibian police law as not complying with international standards.[1240] *The Police Act* – so she says – is "very vague, permitting "such force as is reasonable", with no mention of necessity, proportionality or preventative measures."[1241]

579. Apart from the *Police Act*, there are other statutory laws granting powers to the police.[1242] Of specific relevance is the *Criminal Procedure Act* of 1977[1243] which, e.g., empowers the police to search premises[1244] or persons[1245] and seize items.[1246] With respect to the infringement of fundamental rights and freedoms, difference should be made between preventive police powers and police powers as part of criminal proceedings.[1247] A search of premises might be allowed if there are concrete indications of a criminal offence but not because of mere suppositions. The powers of the police in criminal procedures reach further than its preventive powers as the suspicion of a criminal offence justifies the limitation of human rights to a greater extent. The High Court held, in this regard, that the statutory justifications for the use of force in effecting arrest do not apply to harm suffered by third persons, but only to the persons who were being arrested.[1248] Human rights violations by the police in criminal procedures have been a frequent subject of court decisions and legal writing in Namibia, while "the specific powers and means of the police under the Police Act of 1990 seem to attract little attention by legal scholars and in Court decisions in Namibia".[1249] Arzt criticizes the lack of clear distinction between preventive and investigative powers:[1250]

> Preventive powers of police in this context refer to law and order policing and prevention of crime, clearly to be distinguished and separated from investigation of criminal offences. The Police Act of 1990 and other laws under scrutiny here provide for such powers of police, in some parts without clear borderlines and demarcations of preventive and other police powers, e.g., in criminal procedure. This might be considered to be a marginal problem of legal

1240. Hubbard (2019): 73.
1241. *Ibid.*
1242. These include, inter alia: Namibia Public Gatherings Proclamation, 1989 (Proclamation No. 23 of 1989); Immigration Control Act, 1993 (Act No. 7 of 1993); Namibia Central Intelligence Service Act, 1997 (Act No. 10 of 1997); Anti-Corruption Act, 2003 (Act No. 8 of 2003); Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004), Communications Act, 2009 (Act No. 8 of 2009); Prevention of Combating of Terrorist and Proliferation Activities Act, 2014 (Act No. 4 of 2014); Child Care and Protection Act, 2015 (Act No. 3 of 2015.).
1243. Act No. 51 of 1977.
1244. Section 23 of the Act.
1245. Sections 24ff.
1246. Sections 20ff.
1247. This is discussed in detail in: Arzt (2019a); (2019b).
1248. *See*: Hubbard (2019): 39, referring to *S v. Ndamwoongela* 2018 (2) NR 422 (HC).
1249. Arzt (2019a): 8. *See also*: Arzt (2019b): 506.
1250. Arzt (2019a): 27. - Cases about actions of the police and jurisprudential reflections on the authority (including its constitutional limitations) of the police force will be further considered in Part V, below.

dogmatism. From my point of view, however, this has quite an impact on standards of rule of law and legality of policing in every single case.

This would be problematic not only with respect to rule of law and rights-based standards but also when it comes to access to legal protection and justice.[1251]

§7. The Correctional Service

580. The correctional service has been established under Article 121 of the *Constitution*. The correctional service is directed by a Commissioner-General, who is responsible for the appointment of persons into the service and who has to ensure its efficient administration.[1252]

581. The functions of the correctional service are outlined in section 3 of the *Correctional Service Act*[1253] and include the task to ensure the humane and safe custody of prisoners, their health and rehabilitation, to supervise offenders on conditional release and generally manage and control prisons responsibly.

§8. Military Institutions and Offices

582. Article 118 of the *Constitution* provides for the establishment of the defence force by act of parliament. The main function of the defence force is to defend the territory and the national interests of Namibia. The Chief of the Defence Force is vested with the executive command of the defence force[1254] "to ensure the efficient administration of the defence force".[1255]

583. The defence force comprises the army, the air force, and the navy.[1256] Only citizens who have passed prescribed examinations, including medical examination, and meet any other requirements prescribed by regulations[1257] can become members of the defence force.[1258] Section 10 of the *Defence Act* prohibits a member of the defence force from nomination, election or appointment as a member of parliament.

1251. *Ibid.*
1252. Article 122 of the Constitution.
1253. Act No. 9 of 2012.
1254. Section 4(1) of the Defence Act, 2002 (Act No. 1 of 2002).
1255. Article 119(2) of the Constitution.
1256. Section 2 of the Defence Act.
1257. *See*: General Regulations relating to Namibian Defence Force, GN No. 189 of 2010.
1258. Section 7(1) of the Defence Act. Section 7(2) of the Act though allows the minister to authorize the appointment of non-citizens in a temporary capacity but not exceeding a period of five years.

§9. Central Intelligence Service

584. It was only the *Namibian Constitution Third Amendment Act* of 2014[1259] that made the Intelligence Service a matter of the *Constitution*.[1260] The already existing *Namibia Central Intelligence Service Act*[1261] was deemed to have been enacted in accordance with the amended article of the *Constitution* and to provide for the powers and functions of the Intelligence Service in an act of parliament.[1262]

585. The Intelligence Service is headed by a Director-General, assisted by a director and other staff members appointed by the Director-General.[1263]

586. Section 5 of the *Namibia Central Intelligence Service Act* lists the main powers, duties, and functions of the Service as to

> (a) investigate, gather, evaluate, correlate, interpret and retain information, whether inside or outside Namibia, for the purpose of-
> (i) detecting and identifying any threat or potential threat to the security of Namibia;
> (ii) advising the President and the Government of any threat or potential threat to the security of Namibia;
> (iii) assisting the Namibian Police Force by gathering intelligence to be used in the detection and prevention of such serious offences as may be determined by the Director-General after consultation with the Inspector-General of Police;
> (iv) Taking steps to protect the security interests of Namibia whether political, military or economic; … .

587. Certain measures by the Intelligence Service require authorization by a judge, so far access to bank accounts of suspects or intercepting postal articles or communication.[1264]

§10. The Auditor-General

588. Article 127 of the *Constitution* provides for the appointment of an Auditor-General who shall be independent. The Auditor-General derives his responsibilities and duties from sections 25 and 26 of the *State Finance Act*.[1265] The Auditor-General investigates, examines, and audits account-books, accounts, registers or

1259. Act No. 8 of 2014.
1260. Article 120A of the Constitution.
1261. Act No. 10 of 1997.
1262. *See*: section 45 of the Namibian Constitution Third Amendment Act, 2014 (Act No. 8 of 2014).
1263. Section 3 of the Namibia Central Intelligence Service Act, 1997.
1264. Sections 19 and 24(2) of the Act.
1265. Act No. 31 of 1991.

statements by the Permanent Secretary of Finance and by other statutory institutions if so provided by any law.[1266] If the president deems it necessary in the public interest, any other body, association or organization can be subject to an auditing by the Auditor-General.[1267] Certain accounts can though be excluded from the investigation for confidentiality reasons by the president after consultation with the Auditor-General.[1268]

589. The Auditor-General has the discretion to determine the extent of investigations, examinations, and audits and has the power to conduct hearings and collect evidence.[1269] After the end of a financial year, the Auditor-General has to submit reports in connection with any investigation, examination, and auditing carried out drawing attention, for example, to unauthorized expenditures, wasteful utilization of monies, detrimental transactions, or any other matter that the Auditor-General founds to be in the public interest.[1270] These reports are then tabled in the National Assembly for discussion.[1271]

§11. The Ombudsman

590. Article 89 of the *Constitution* makes provision for the office of the Ombudsman as an independent organ of control. The Ombudsman serves as a non-judicial review mechanism. The functions and powers of the Ombudsman are outlined in Chapter 10 of the *Constitution* and the *Ombudsman Act*.[1272]

591. The Ombudsman is independent from the executive, legislative, and judiciary and the *Constitution* explicitly interdicts any interference with the Ombudsman in the exercise of his or her functions by members of the Cabinet or the legislature or any other person.[1273] However, all organs of state are required to provide "such assistance as may be needed for the protection of the independence, dignity and effectiveness of the Ombudsman".[1274]

592. The Ombudsman has[1275]

> the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of Government … .

1266. Section 25(1) of the State Finance Act.
1267. Section 25(2) of the Act.
1268. Section 25(3).
1269. Section 26(1).
1270. Section 27(1) and (6).
1271. Section 27(4) and (5).
1272. Act No. 7 of 1990.
1273. Articles 89(2) and (3) of the Constitution. *See also*: Ruppel; Ruppel-Schlichting (2010): 365.
1274. Articles 89(3) of the Constitution.
1275. Article 91(a).

The *Constitution* further provides that the Ombudsman is tasked[1276]

> to manifest injustice, or conduct by such official which would properly be regarded as unlawful, oppressive or unfair in a democratic society

and[1277]

> to investigate vigorously all instances of alleged or suspected misappropriation of public monies by officials and to take appropriate steps … .

Additionally, the Ombudsman is required to enquire into and investigate complaints regarding the failure to achieve a balanced structuring and equal access by all to the recruitment of the Public Service Commission, the defence force, the police force, and the correctional service and regarding fair administration in relation to those services.[1278]

593. Beyond the function to deal with complaints against officials or organs of the state, the Ombudsman has the duty to investigate complaints concerning practices and actions by persons, enterprises, and other private institutions where such complaints allege that violations of fundamental rights and freedoms have taken place.[1279] This has to be read in line with Article 5 of the *Constitution*, which states that fundamental rights and freedoms applicable to natural and legal persons are to be respected and upheld by all natural and legal persons in Namibia. The Ombudsman's duty to deal with complaints concerning the alleged violation of fundamental rights or freedoms by natural or legal persons can be an important instrument to enforce fundamental rights and freedoms on the horizontal level. Moreover, any act, decision and recommendation made or taken by or under the authority of the state can be brought to the Ombudsman if it contradicts the laws of the country or leads to unreasonable, unjust, unfair, irregular, or discriminatory effects.[1280]

594. Complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia are also to be investigated by the Ombudsman.[1281] This is a unique provision that goes beyond the traditional mandate of an ombudsman and can be regarded as progressive and innovative step to promote environmental protection.[1282]

1276. *Ibid.*
1277. Article 91(f) of the Constitution.
1278. Article 91(b).
1279. Article 91(d) of the Constitution.
1280. Section 3(2) of the Act. *See also*: Article 91(d) of the Constitution.
1281. Article 91(c) of the Constitution.
1282. Ruppel-Schlichting (2008): 275.

595. The Ombudsman not only has a wide field of application but also the duty and power to take appropriate action to call for the remedying, correction, and reversal of instances.[1283] The *Constitution* provides a non-exclusive list of actions that might be taken by the Ombudsman such as the negotiation and compromise between the parties concerned or referring a matter to the Prosecutor-General.[1284] The Ombudsman has, although he or she has the authority to take steps and make recommendations, no power to make orders which can be attributed to the fact that "the emphasis is on solving the problem rather than adopting a legalistic approach to it".[1285] This means that the Ombudsman:[1286]

> works through alternative dispute resolution methods such as negotiation, mediation, consultation, influence, shuttle diplomacy, and informal investigation.

596. The question whether the Ombudsman is entitled or obliged to provide legal assistance in the form of legal representation was answered in the negative by the High Court in *Prosecutor-General v. Ombudsman:*[1287]

> Our finding that the Ombudsman is not allowed to render assistance to persons who challenge the decision of a judicial officer, whether a judge or a magistrate, in our view, accords with the principle of separation of powers. This is because in terms of the Constitution the Ombudsman is independent and subject only to the Constitution and the law. …
>
> The Constitution does not vest the Ombudsman with any adjudicative power and accordingly, the Ombudsman, cannot decide that a fundamental right of a person has been infringed. The Constitution only vests him or her with an obligation to provide assistance to a person who claims that his or her fundamental rights or freedoms have been infringed.

The court concluded:[1288]

> It must be stated that if it was the intention of the lawgiver to imbue the Ombudsman with the power to represent individuals in court proceedings, that power would have been expressed in explicit terms in the Ombudsman Act. The existence by parliamentary sanction of the Directorate of Legal Aid to assist those who do not have the means, detracts from the argument that the Ombudsman's powers to render assistance includes legal representation to those who cannot afford same where they claim their fundamental rights and freedoms have been infringed.

1283. Article 91(e) of the Constitution.
1284. *Ibid.*
1285. Walters (2008): 122.
1286. Ruppel-Schlichting (2008): 285.
1287. 2020 (2) NR 408 (HC): 418H–I, 419B–C.
1288. *Ibid.*: 419E–G.

597. The Ombudsman is required to be a judge of Namibia or a person qualified as a lawyer.[1289] The head office of the Ombudsman is in Windhoek. In order to make the office more accessible to the public, the Ombudsman opened several satellite offices at various towns throughout the country, including Ongwediva, Keetmanshoop, Swakopmund, Otjiwarongo, and Katima Mulilo.[1290] Since the introduction of the *Child Care and Protection Act*[1291] in 2015, the Office of the Ombudsman comprises a children's advocate. The children's advocate assists the Office of the Ombudsman in the performance of its functions relating to children by receiving and investigating complaints and, where appropriate, attempting to resolve such matters through negotiation, conciliation, mediation, or other non-adversarial approaches.[1292]

§12. Public Procurement Institutions

598. Public procurement can be broadly defined as the provision of goods and services or awarding of work assignments by a state body, organization, institution or some other legal person regarded as a procuring entity. In order for a state to satisfy its obligation to achieve, maintain, and enhance the welfare of society, the efficiency and effectiveness of public procurement institutions and processes is decisive.[1293] Although in Namibia, in contrast to South Africa,[1294] the principles governing public procurement in order to satisfy such obligation are not mentioned in the *Constitution*, the state's mandate to achieve, maintain, and enhance the welfare of society and thus to provide for an effective and efficient public procurement system can be derived from the *Constitution*.[1295] Article 1(1) of the *Constitution* establishes the Republic of Namibia as a democratic state and Article 1(2) vests all power "in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State". Article 95 specifies the state's role is within democracy by requiring the state to promote the welfare of the people.[1296]

599. Since the size and volume of government procurement contracts affect the budget spending of governments, which are accountable to the public, and public procurement accounts for a noteworthy proportion of the gross domestic product of many countries, governments should ensure that public procurement institutions and processes not only function efficiently and effectively but also that requirements

1289. Article 89(4) of the Constitution.
1290. Ombudsman (2019): 75ff.
1291. Act No. 4 of 2015.
1292. Section 25(1)(a) of the Child Care and Protection Act.
1293. Schmidt (2017): 51.
1294. Section 217 of the South African Constitution requires public procurement to be fair, equitable, transparent, competitive, and cost-effective.
1295. These include the democratic mandate of the state in Article 1(1) as well as Articles 18, 94A, 95 and 144 of the Constitution. Cf.: Schmidt (2017b): 134f.
1296. For a discussion of state policies, including Article 95, *see*: Part V, Chapter 7.

such as fairness, transparency, and accountability[1297] are guaranteed by providing corresponding legislation. In this respect, Article 18 (the right to administrative justice) and Article 94A (anti-corruption measures) of the *Constitution* are of specific relevance.

600. Finally, Article 144 of the *Constitution* makes the general rules of public international law and international agreements that are binding upon Namibia directly applicable in Namibia. While Namibia has not signed the *Government Procurement Agreement*[1298] by the World Trade Organisation, Namibia is as a party to the *United Nations Convention against Corruption*[1299] (UNCAC) required to implement certain measures in its public procurement systems in order to prevent corruption. Article 9(1) of UNCAC requires the establishment of "appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption".[1300]

601. In Namibia, public procurement is governed by the *Public Procurement Act.*[1301] The prior applicable *Tender Board of Namibia Act*[1302] and subsequent legislation[1303] had superseded the system inherited from South Africa after independence in 1996.[1304] However, neither the institution of the tender board created by the Act nor the procedural requirements differed much from the procurement system as applicable under the South African system and the apartheid regime and by far did not suffice international best practices in public procurement.[1305] The only major reformation after independence had been the introduction of preferential procurement which pursues certain socio-economic objectives, such as the promotion of former disadvantaged groups of society.[1306]

602. The public procurement system under the *Tender Board of Namibia Act* had been subject to severe criticism.[1307] One of the major problems were the tender

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1297. In this respect, Article 18 of the Constitution, the right to administrative justice, can be regarded as key provision for tenderers challenging public procurement processes and decisions. Article 18 will be dealt with in detail in Part V, Chapter 3, §12.
1298. Agreement on Government Procurement, as amended on 30 Mar. 2012. The text is available at: https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf (accessed 27 Jun. 2022).
1299. UN GA Res. 58/4 of 31 Oct. 2003. The text is available in different languages at: https://www.unodc.org/unodc/en/corruption/tools_and_publications/UN-convention-against-corruption.html (accessed 27 Jun. 2022).
1300. *See* for a more detailed discussion of international regulations and guidelines with respect to public procurement: Schmidt (2017b): 138ff.
1301. Act No. 15 of 2015.
1302. Act No. 16 of 1996.
1303. Tender Board Regulations, 1996: Tender Board of Namibia Act, 1996 (GN No. 237 of 1996); Tender Board Regulations, 2001: Regional Councils Act, 1992 (GN No. 41 of 2001); Tender Board Regulations, 2001: Local Authorities Act, 1992 (GN No. 30 of 2001).
1304. Tender Board Regulations, 1970: promulgated in terms of section 26A of Finance and Audit Ordinance 1 of 1926.
1305. Schmidt (2017a): 355f.
1306. Cf.: Schmidt (2017a): 356.
1307. *See*: Links; Daniels (2011), Schmidt (2014), Schmidt (2017a): 353ff.

board's unlawful yielding of decision-making power to the line ministries. According to section 18(2) of the *Tender Board of Namibia Act*, the Board could "require a staff member of any other ministry or of any office or agency to assist the Board with the evaluation of any tender or to make recommendations to the Board in connection with any tender". This was further specified in section 2(2) of the *Tender Board Regulations*, which provides that the Board may, in performing its functions, obtain such expert or technical advice as it may deem necessary. Section 19(1) of the *Code of Procedure*[1308] further stated that the board should, after having opened and listed all tenders, submit the tenders to the relevant office, ministry or agency for its recommendation. In practice, this provision turned out to be problematic and led to several judicial disputes. The courts clarified that the decision of the award had to be taken by the tender board and not by the advising minister.[1309] In several cases, the award decision was set aside because the tender board had acted *ultra vires* by mere rubber-stamping the recommendation obtained from the respective ministry.[1310]

603. Beyond the aforementioned problem, there were several other problems in the Namibian public procurement system and the tender board was repeatedly accused of acting non-transparent and favouring certain bidders.[1311] A particular problem worth mentioning is the frequent use of exemptions in terms of section 17(1)(c) of the *Tender Board Act*, which allowed the Board to exempt any particular case from the regular tender procedure of the Act if it, for good cause, deemed it impracticable or inappropriate to invite tenders. The tender board was thus provided with a *carte blanche* to conduct transactions without adhering to public procurement legislation and thus to avoid any transparency and accountability requirements.[1312] Other critical issues in the public procurement system were the composition of the Board and the lack of an internal, administrative or non-judicial review mechanism, leaving dissatisfied tenderers with the only opportunity to challenge decisions before a court of law under Article 18.[1313]

604. The reform of the *Tender Board of Namibia Act* took more than a decade to produce an outcome.[1314] A bill introduced in parliament was withdrawn after heavy criticism in 2013.[1315] It was only in 2015 that the revised bill finally passed

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1308. Tender Board of Namibia Code of Procedure, 1997 (GN No. 191 of 1997), as amended by GN No. 180 of 2010. The Regional and Local Tender Board Regulations each include a code of procedure.
1309. *See*, *e.g.*: *Disposable Medical Products v. Tender Board of Namibia* 1997 NR 129 (HC).
1310. *Disposable Medical Products v. Tender Board of Namibia* 1997 NR 129 (HC), *CSC Neckartal Dam Joint Venture v. Tender Board of Namibia* 2014 (1) NR 135 (HC), *Minister of Education v. Free Namibia Caterers (Pty) Ltd.* 2013 (4) NR 1061 (SC), *AFS Group Namibia (Pty) Ltd. v. Chairperson of the Tender Board of Namibia*, High Court, Case No. A 55/2011 - unreported. *See also*: Schmidt (2014): 47.
1311. *See*, *e.g.*: Links; Daniels (2011), Schmidt (2014) and also Schmidt (2017): 418, 441ff.
1312. Schmidt (2017): 363.
1313. This will be discussed in Part V, Chapter 3, § 12. *See also*: Schmidt (2014): 48ff.
1314. *See*: Schmidt (2017): 495, 497 and also Links; Daniels (2011): 1.
1315. Cf.: The Namibian of 24 Sep. 2013 and New Era of 3 Oct. 2013.

parliament.[1316] The *Public Procurement Act* changed the institutional and organizational architecture of public procurement and also established procedures to respond to the objectives of a modern public procurement system. The general procurement method is open advertised bidding; the alternative procurement methods outlined in the Act can only be applied as exceptions, if certain requirements are met.[1317] In 2018, the High Court clarified that tenders that had been initiated under the repealed law could be dealt with in terms of the repealed law if all that was left for was to announce the successful tenderer.[1318]

605. The *Public Procurement Act* provides for a Procurement Policy Unit,[1319] a Central Procurement Board of Namibia,[1320] and a Review Panel.[1321] The award of contracts for procurement or disposal of assets that do not exceed the prescribed threshold for public entities lies within the responsibility of accounting officers in public entities.[1322] The wide-ranging competence of the tender board has thus been limited by decentralizing public procurements under a certain monetary amount to the public entities. Furthermore, the local and regional tender boards existing under the prior applicable legislation were abolished. This can be regarded as an important step with respect to harmonization and standardization. The latter are itself important steps to achieve the objectives of public procurement, in particular, competition, fairness, and transparency.[1323]

606. The Central Procurement Board is responsible for the award of and the entering into contracts for procurement or disposal of assets exceeding a certain threshold and for the direction and supervision of accounting officers responsible for contract management.[1324] The Board consists of nine members who have the necessary qualification and experience and are appointed by the Minister of Finance after an open, fair, and transparent recruitment process.[1325] It is further provided that not more than five of the members may be of the same sex.[1326] While the Chairperson and the Deputy Chairperson of the Board are employed full time, the other members are employed on a part-time basis.[1327]

607. The Procurement Policy Unit is a specialized unit within the Ministry of Finance and responsible for advising the minister regarding monitoring compliance with the laws, reviewing the public procurement system, evaluating the impact of socio-economic policy objectives pursued by procurement, and the promotion of the

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1316. The Public Procurement Act, 2015 (Act No. 15 of 2015) was enacted on 31 Dec. 2015.
1317. Section 27 of the Public Procurement Act, 2015.
1318. *Central Procurement Board v. Nangolo No* 2018 (4) NR 1188 (HC): 1203B–J.
1319. Section 6 of the Public Procurement Act.
1320. Section 8.
1321. Section 58.
1322. Section 25.
1323. Cf.: Schmidt (2017): 550f.
1324. Section 8 of the Public Procurement Act, 2015.
1325. Section 11(b) and (c).
1326. Section 11(a).
1327. Section 12(1).

fundamental principles of procurement.[1328] The accounting officers in the public entities are accountable for the full compliance with public procurement legislation and are required to set up an internal organizational structure including a procurement committee and procurement management units.[1329] Accounting officers are not only responsible for procurement planning, the certification of the availability of funds before starting a procurement process but also for keeping records of the proceedings.[1330]

608. The *Public Procurement Act* contains several improvements to the *Tender Board of Namibia Act* of 1996; however, it does not suffice international best practices all the way.[1331] Of particular concern is the provision allowing the Minister of Finance to grant general and specific exemptions from the scope of the Act,[1332] which resembles section 17(1)(c) of the *Tender Board of Namibia Act* and which led to severe problems in the past.[1333] Another issue of concern is the potential abuse of emergency procurement[1334] as there are not sufficient oversight and transparency mechanisms.[1335] Moreover, the transparency requirements do not suffice international standards; especially an adequate access to information is not provided for, meaning that there is not much room for public scrutiny.[1336] In this respect, the procurement portal, which is mentioned in the Act but not further specified, should play a way more important role. Worth mentioning is also the failure to implement an internal review mechanism which is necessary in order to allow for an immediate and unbureaucratic resolution of procurement challenges.[1337] Furthermore, the procedural requirements for the review panel established by the Act by far do not suffice international best practices, in particular the facts that there are several reasons stated which allow the exclusion of the public from the hearings of the review panel.[1338] Of concern is also that all information in review proceedings are strictly confidential and that the disclosing of information is an offence.[1339] The public has thus no opportunity to get access to information and scrutinize public procurement procedures at this stage.

1328. Section 6(1).
1329. Section 25(1).
1330. Section 25(4).
1331. *See*: Schmidt (2017): 537ff.
1332. Section 4(2) of the Public Procurement Act, 2015; *see also*: Schmidt (2017): 539; Links (2017): 12.
1333. *See* on this above.
1334. Section 33 of the Public Procurement Act.
1335. Under the COVID-19 state of emergency in 2020, all non-COVID-19 related public procurement was halted and emergency procurement was gazetted as the only means of procurement during the lockdown period. *See*: Reg. 22 of State of Emergency - Covid-19: Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations: Namibian Constitution, Proclamation No. 16 of 2020. This is discussed in detail in: Procurement Tracker Namibia, compiled by Frederico Links, available at www.ippr.org.na: Issue No. 10 (30 Jun. 2020).
1336. Schmidt (2017): 523ff., 546. *See also*: Links (2015): 13.
1337. Schmidt (2017): 542.
1338. Section 61(1) of the Public Procurement Act.
1339. Section 61(2). *See also* Links (2017): 12.

609. The *Public Procurement Act* has not brought any significant improvements with respect to the efficiency and effectiveness of the public procurement system.[1340] The shortcomings identified in legislation have reflected in practice; the newly established institutions cannot yet live up to its mandate and the implementation of the law is still insufficient. The public procurement system also cannot live up to the envisaged improvement with respect to fairness, transparency, and accountability. The Central Procurement Board of Namibia struggles to function effectively with infighting among the board of directors, slow approval process, and a lack of transparency; to mention just a few of the problems.[1341]

610. A lack of capacity is a major issue threatening the functioning of the system. Moreover, there is still a frequent use of exemptions and a lack of transparency and accessibility to information.[1342] Being aware of the shortcomings inherent to the *Public Procurement Act* and its implementation the executive seems to be willing implementing measures to enhance the functioning of the public procurement system.[1343] This includes rethinking the law as well as the way of implementation. These problems have though already existed under the former bill but have not been efficiently addressed in the lengthy reform process leading to the *Public Procurement Act* of 2015. The chance to design a law minimizing the risk of abuse to the minimum had not been taken. The willingness to change the law and its implementation might thus be again only lip service for those who demand a fairer and more transparent public procurement system.

§13. Competition Commission

611. An important role in safeguarding and promoting competition in the Namibian market is played by the Namibian Competition Commission which was established according to section 4 of the *Competition Act*.[1344] The Commission is independent and required to be impartial.[1345] Apart from assisting and carrying out research for the Minister of Industrialization and Trade, the Commission is responsible for the dissemination of information to persons engaged in trade or commerce and the public, for the liaison and exchange of information knowledge and expertise with authorities of other countries, for the implementation of measures to

1340. Cf. also: Bertelsmann Foundation (2020): 25.
1341. *See*, *e.g.*: Procurement Tracker Namibia (*see* above): Issue No. 1 (July 2018) to No. 10 (June 2020). *See also*: The Southern Times (SADC regional newspaper) of 9 Nov. 2019. In 2020 the office of the Ombudsman found that the appointment of fourteen new staff members in April and May 2020 were irregular, unfair and prejudicial to other candidates; *see*: New Era of 9 Dec. 2020.
1342. *Ibid*.
1343. Procurement Tracker Namibia (*see* above): Issue No. 4 (Apr. 2019), Issue No. 5 (Jun. 2019), No. 6 (Jul. 2019). *See also*: Address of Policymakers Workshop on the Public Procurement – NIP AM 08H30, presented by Calle Schlettwein (Minister of Finance), 15 Jul. 2019, available at https://www.cpb.org.na/index.php/publications/media-statements (accessed 27 Jan. 2022).
1344. Act No. 2 of 2003.
1345. Sections 4(b) and (c) of the Competition Act.

increase market transparency, for the investigation of contraventions of the Act, and for the control of mergers between undertakings.[1346]

§14. Anti-corruption Commission

I. General Information

612. The *Namibian Constitution Second Amendment Act* of 2010[1347] did not only require the state to put in place administrative and legislative measures necessary to prevent corruption,[1348] but also required the establishment of an Anti-Corruption Commission (ACC) as an independent and impartial body.[1349] According to Article 94A of the *Constitution*, the ACC shall consist of a Director-General and a Deputy Director-General, who are appointed by the National Assembly upon nomination by the president for a period of five years, and other staff members.[1350] The *Constitution* further stipulates that the qualifications for appointment and conditions and termination of service of the Director-General and the Deputy Director-General shall be determined in accordance with an act of parliament.[1351]

613. The constitutional amendments in its chapter on anti-corruption measures must be seen in the light of an increasing awareness that corruption is, as a severe problem in Namibia, hindering development. Namibia's anti-corruption efforts can though be dated back to the mid-1990s when a specialist anti-corruption agency was first mooted.[1352]

614. In 2002 and 2004 Namibia ratified several regional, continental, and international anti-corruption instruments, including the *Southern African Development Community Protocol against Corruption*,[1353] the *African Union Convention on Prevention and Combating Corruption*,[1354] the *United Nations Convention against Transnational Organised Crime,*[1355] and the *United Nations Convention against*

1346. Section 16(1).
1347. Act No. 7 of 2010.
1348. Article 94A(1) of the Constitution.
1349. Article 94A(2).
1350. Articles 94A(4) and 94A(5) of the Constitution, as amended by the Namibian Constitution Third Amendment Act, 2014 (Act 8 of 2014).
1351. Article 94A(6) of the Constitution. This is regulated in sections 4–11 of the Anti-Corruption Act, 2003 (Act No. 8 of 2003); as amended.
1352. Links (2016): 3.
1353. The Protocol was adopted and signed by Namibia in 2001. The text is available at: https://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf (accessed 29 Jun. 2022).
1354. The Convention came into force in 2006 and was ratified by the Namibian Parliament in 2004. Text and ratification status are available at: https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption (accessed 29 Jun. 2022).
1355. The Convention came into force in 2009 and was ratified by Namibia in 2002. Text and ratification status are available at: https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html (accessed 29 Jun. 2022).

Corruption.[1356] The ACC was established in 2003 as an institution with investigatory, preventive, and educational functions.[1357] In 2004, the then President Pohamba launched the Zero Tolerance for Corruption Campaign as a coalition of public and private actors.[1358] In 2016, the ACC launched its National Anti-Corruption Strategy and Action Plan 2016–2019[1359] which forms part of Namibia's obligations under UNCAC.[1360] A Proposed Draft National Anti-Corruption Strategy and Action Plan 2021–2025 was prepared by the ACC in March 2021 with the view to serve "as a tool for fostering cooperation and continued synergy across all sectors and spheres of society in Namibia in attaining the national vision for a corrupt-free Namibia."[1361] After outlining the corruption landscape including the causes of corruption, the legal framework, social and economic dynamics and the country context, the plan presents the vision, mission, objectives, pillars and actions of the strategy and implementation measures. Other governmental policies, such as Vision 2030, the National Development Plans and the Harambee Prosperity[1362] also refer to the problem of corruption.

615. Despite announcements and promises to fight corruption, there have only been few visible changes.[1363] Frustration about the government making empty promises is still on the rise.[1364] A major problem is the enforcement of laws. Detected irregularities remain without consequences, as there often is a lack of effective control and enforcement mechanisms.[1365] There have, though, also been

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1356. The Convention came into force in 2005 and was ratified by Namibia in 2004. Text and ratification status are available at: https://www.unodc.org/unodc/en/corruption/uncac.html (accessed 29 Jun. 2022).
1357. The functions of the Commission are outlined in section 3 of the Anti-Corruption Act.
1358. *See*: Website of the Namibia Institute for Democracy, Zero Tolerance for Corruption Campaign, available at http://www.nid.org.na/projects-activities/zero-tolerance-for-corruption-campaign (accessed 8 Jul. 2015).
1359. *See*: Website of the Anti-Corruption Commission, National Anti-Corruption Strategy and Action Plan, available at https://acc.gov.na/documents/31390/31536/National-Anti-Corruption-Strategy-and-Action-Plan-2016-2019.pdf (accessed 31 Mar. 2022).
1360. Article 5(1) of UNCAC.
1361. Available at the Website of the Anti-Corruption Commission: https://acc.gov.na/documents/31390/31530/Updated+Proposed+NACSAP+Namibia+2021-2025+21+April.pdf/fc5b30bf-6d5c-c24a-e586-22ca3b96bd5c (accessed 31 Mar. 2022).
1362. *See* on this also above: Part I, Chapter 1, §7.
1363. Bertelsmann Foundation (2020): 10, 26. *See also*: United Nations Development Programme (2013): 23. In the 2020 Transparency International Corruption Index, Namibia scored 51 of 100 points with 100 points meaning there is no corruption (*See*: https://www.transparency.org/en/countries/namibia# – accessed 5 Apr. 2021).
1364. The Bertelsmann Foundation (2020: 23) remarks in this regard: "The growing discrepancy between the promises laid out in plans and reality was not adequately explained or made transparent by the government. The ministries failed to convincingly explain the lack of delivery. Despite the decline of trust in government delivery, President Geingob continued to make populist announcements, seeking to create the impression that the welfare of the people is his ultimate motive." It continues explaining the discrepancy between promises and reality: "Rather, the party programme and government plans lay out unrealistic goals and then create frustration because raised expectations are not met. This also undermines the credibility of the government and provokes strong sentiments that the new elite is fooling the people."
1365. *See*, *e.g.*: Bertelsmann Foundation (2020): 26.

successes in the fight against corruption, in particular the conviction of politicians and other persons involved in fraudulent practices.[1366]

616. At the national level, the *Anti-Corruption Act* is the key piece of legislation aiming at addressing, preventing, and sanctioning corruption. This Act specifies different forms of corruption and makes corruption a legal offence.[1367] A person convicted of such an offence is liable to a fine not exceeding NAD 500 000 and/or to imprisonment for a term not exceeding twenty-five years.[1368] The Act further regulates investigations of corrupt practices carried out by the ACC and the powers vested in the Commission with regard to investigations.[1369] The ACC is required to submit annual reports to the prime minister[1370] who then forwards them to the National Assembly.[1371] The Commission has though been criticized for not being consistent in reporting information,[1372] which makes it difficult to monitor and evaluate its activities. Despite its broad mandate to investigate and to initiate investigations in alleged cases of corruption, the effectiveness of the ACC is controversial. Indeed, its establishment has been described as "one of the most positive developments in the legal field undertaken by Government".[1373] However, its success depends on different factors including for example the existing structures in the judicial field, the efficiency of the organizational structure, and the quantity and quality of staff.[1374] It is assigned a very important role in the fight against corruption, but there have been instances where the ACC seemed not willing to expedite certain investigations.[1375] Due to limited capacity and resources, the ACC has been unable to handle its workload. Moreover, the shortage of human resources at the office of the Prosecutor-General who has the prosecution power for corruption cases causes a delay in the prosecution of corruption cases.[1376] The ongoing problem of underfunding of the ACC and, in particular, a lack of adequate funding allocation to probe high-profile cases thus hinder the effectiveness of the ACC.[1377]

617. If the Commission has concluded an investigation and is satisfied that a person has committed an offence of corrupt practice under the Act, it forwards the file to the Prosecutor-General for the decision whether prosecution is warranted. The Prosecutor-General may then delegate authority to conduct criminal proceedings in

1366. In 2018, five persons involved in an investment swindle that was revealed in 2005 and cost the Social Security Commission about NAD 20 million were convicted of fraud: *S v. Kapia* 2018 (3) NR 885 (HC).
1367. Chapter 4 (sections 31ff.) of the Anti-Corruption Act.
1368. Section 49 of the Act.
1369. *See*: sections 17ff.
1370. The annual reports are available on the ACC's website: http://www.accnamibia.org/page.php?sid=12&title=Publications&parent=7 (accessed 2 Sep. 2013). An analysis of the performance of the ACC has been conducted by: Tjirera; Hopwood (2011).
1371. Section 16 of the Anti-Corruption Act, 2003.
1372. Tjirera; Hopwood (2011): 5.
1373. O'Linn (2010): 182.
1374. Cf.: *ibid.*: 182f.
1375. Cf.: Schmidt (2017): 396ff.
1376. O'Linn (2010): 183.
1377. The Namibian of 17 Jun. 2020.

court in respect of that matter to any staff member of the Commission who possesses the required legal qualifications to appear in the courts of Namibia.[1378] There have though been several cases where the Prosecutor-General declined prosecutions for lack of evidence or sent dockets back for further information revealing.[1379]

II. The Law on Access to Information and Whistleblowing

618. The detection of corruption is complicated if there is no possibility to get access to information. Access to information constitutes an essential element of good governance and facilitates transparency and accountability. Several international agreements signed and ratified by Namibia[1380] prescribe the enactment of legislation guaranteeing access to information. The government has repeatedly expressed its will to enact an access to information law.[1381] In 2016, civil society organisations under the umbrella of the Access to Information Namibia Coalition[1382] assisted the Ministry of Information and Communication Technology with drafting an access to information bill on the basis of the African Union's Model Law on Access to Information.[1383] The bill was first tabled in parliament in June 2020 and was passed by the National Assembly in June 2022.[1384]

619. An essential role in exposing corruption, fraud, mismanagement, and other forms of misconduct that threaten public health and safety, financial integrity, human rights, the environment, and the rule of law is played by whistleblowers.[1385] Whistle-blowers are among the main triggers for successful corruption investigations as corruption is hard to detect without inside information.[1386] As in many cases corruptive practices occur to the burden of the state treasury, there is no individual victim who could press criminal charges. The importance of whistleblowers is exemplified by the role of Jóhannes Stefánsson in the 2019 fishrot affair who brought to light the biggest corrupt political scandal in Namibia so far. The former managing director of the Namibian branch of the Icelandic fishing company Samherij handed over more than 30.000 documents to WikiLeaks and cable news network Al Jazeera revealing tax evasion and money-laundering. The company

1378. Section 31 of the Anti-Corruption Act, 2003.
1379. Cf.: Tjirera; Hopwood (2011): 1, 7; United Nations Development Programme (2013): 43.
1380. These include, e.g., the UN Universal Declaration of Human Rights (Article 19), the International Convention on Cultural and Political Rights (Article 19), the SADC Protocol on Culture, Information and Sport (Arts 2(d) and 17 ff.) as well as the Declaration of Principles of Freedom of Expression of the African Union (Principles 26 ff.).
1381. *See*: Harambee Prosperity Plan I: Republic of Namibia (2019): 18; Harambee Prosperity Plan II: Republic of Namibia (2021): 20.
1382. *See*: Website of ACTION: https://action-namibia.org/ (accessed 31 Mar. 2022).
1383. This was prepared by the African Commission on Human and Peoples' Rights and is available at https://archives.au.int/handle/123456789/2062 (accessed 31 Mar. 2022). *See* for more details: Links et al. (2017). The authors discuss the status of access to information in Namibia and make recommendations for improving access to information in Namibia.
1384. The Namibian of 22 Jun. 2022.
1385. Transparency International (2013): 24; Devine (2013): 2ff.
1386. *See*, *e.g.*: Latimer; Brown (2008): 775; Transparency International (2009): 3 and (2013): 2.

allegedly secured access to fishing quotas by bribing politicians and businessman between 2012 and 2018 and moving profits out of the country depriving Namibia of valuable tax revenue. Six Namibian officials – including the then Minister of Fisheries and the Minister of Justice – were alleged to have corruptly acquired several millions in bribes from Samherij and were arrested in November 2019.[1387] The Prosecutor-General has decided to arraign the six accused as well as three additional persons involved in the scandal before the High Court. The first pretrial hearing was on 22 April 2021,[1388] thus over eighteen months after the first accused was initially arrested. The High Court refused the bail application of the accused on 1 April 2022. The accused applied for leave to appeal to the Supreme Court, which had not handed down its leave to appeal judgement at the time of this publication.[1389]

620. Without protection whistle-blower face severe consequences such as bullying, threats, and dismissal.[1390] But a whistle-blower can also be faced with claims for damages that resulted from its disclosure. For these reasons, the protection of whistle-blowers is decisive in order to encourage persons to report cases of misconduct, fraud, and corruption.[1391] This requires not only accessible and trustworthy ways to report misconduct but also reliable protection from any possible retaliatory measures.[1392] By protecting whistle-blowers, people will tend to speak out against wrongdoing and thereby the ethos of good governance and transparency begins to gain a foothold and become entrenched in the consciousness of the society.[1393] Whistleblowing is generally in the public interest and has a positive impact on strengthening the rule of law and other elementary aspects of a democratic state.

621. Article 33 of UNCAC requires the state parties to consider

> incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

622. The obligation to protect whistle-blower protection can also be derived from Article 5 of the *African Union Convention on Preventing and Combating Corruption* and Article 4 of the *SADC Protocol on Corruption*. In Namibia the issue of whistle-blower protection had been on the agenda since at least 2007 when then President Pohamba called on the office of the prime minister and the Ministry of

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1387. Corruption Watch (2020); *see also*: The Sun of 9 Jul. 2019.
1388. Windhoek Observer of 15 Dec. 2020.
1389. The Namibian of 21 Jan. 2022. The leave to appeal judgement was announced to be handed down on 22 Jul. 2022.
1390. *See* Latimer; Brown (2008): 775; *see also*: Transparency International (2009): 3 and (2013): 24.
1391. Cf.: OECD (2011): 4.
1392. Cf.: Transparency International (2013): 24.
1393. *See*: Website of the PPLAAF (Plateforme Française de Protection des Lanceurs d'Alerte en Afrique - the Platform to protect whistle-blowers in Africa), Namibia – Country Report; available at: https://www.pplaaf.org/country/namibia.html (accessed 31 Mar. 2022).

Justice to facilitate the tabling of such legislation.[1394] Finally in 2017, the *Whistleblower Protection Act*[1395] has been passed by parliament and signed by President Geingob in October 2017, but had not been put in force up to mid-2022.[1396] The Act establishes an office for the protection of whistle-blowers and stipulates appropriate procedures for making disclosures of improper conduct. Many aspects of the Act have been welcomed and it has found to be at least partly in line with international best practices.[1397] Concerns have been mentioned with regard to section 30(4)(a) of the Act, which states that a disclosure of improper conduct may be protected only if the disclosure is made in good faith, as well as regarding the independence of various bodies.[1398] Finally, the criminal penalties (a fine not exceeding NAD 30 000 or a prison term not exceeding ten years) for intentional making a false disclosure might undermine the whole purpose of the bill by deterring people from "blowing the whistle".[1399] Apart from the Whistleblower Act not yet in force, there is limited protection for reporting persons provided for by legislation.

623. Other pieces of legislation[1400] that can be assigned to anti-corruption measures are for example the *Prevention of Organised Crime Act*[1401] and the *Financial Intelligence Act*[1402] which basically comprise Namibia's anti-money laundering law. Essential with respect to anti-corruption efforts are also effective rules on conflicts of interest. But, as has been discussed above,[1403] there are several provisions aiming at preventing conflict-of-interest situations with most of them lacking enforcement mechanisms to be effective in practice.

1394. Hopwood (2016): 3.
1395. Act No. 10 of 2017.
1396. The Act will come into force on a date set by the Minister in the Government Gazette. *See*, e.g.: The Namibian of 24 Jan. 2020.
1397. IPPR (2017): 1f.; *see also*: Website of the PPLAAF.
1398. IPPR (2017) and Website of the PPLAAF.
1399. The latest draft provided for a fine not exceeding NAD 100 000 or a prison term not exceeding twenty years. The criminal sentence for a false disclosure was though reduced after heavy criticism by the IPPR: *See*: *ibid*.: 4 and also: Website of the PPLAAF.
1400. *See* for a discussion of all relevant laws: United Nations Development Programme (2013): 9ff.
1401. Act No. 29 of 2004.
1402. Act No. 13 of 2012.
1403. Part III, Chapter 4, § 4.

624–629

Chapter 9. The Constitutional Relationship Between Church and State

624. According to Article 1(1) of the *Constitution* the Republic of Namibia is a secular state.[1404] Churches, generally, have the legal status of non-profit association and can be incorporated under section 21 of the *Companies Act*.[1405]

625. There are several references made to religion in the *Constitution*. The Bill of Rights contains articles that ensure that everyone can live out his or her religious beliefs without interference from others as long as other people's rights and freedoms are not violated. Article 10(1) of the *Constitution* prohibits discrimination on the grounds of religion and creed and Article 19 guarantees everyone the right to enjoy, practise, profess, maintain, and promote any religion subject to the *Constitution* and provided that the rights of others or the national interest are not impinged upon. The fundamental freedoms of thought, conscience, and belief, to practise any religion and to manifest such practice are provided for in Article 21(b) and (c).

626. Religion is further acknowledged as a ground that can justify the granting of asylum if a person reasonably fears persecution on the ground of their religion.[1406]

627. Although Namibia is a secular state, official meetings are very often opened with a prayer and officials chosen into public offices may call to the help of God in their oaths of affirmation.[1407]

628. The churches of the black majority of the country supported actively the liberation struggle, but after independence, political influence has dropped significantly[1408] despite official talks between the president and representatives of the Council of the Churches in Namibia.[1409] Zaire even suspects the political proximity and alliances as one possible reason "for hesitancy to speak out or remind the leaders about their role in/and to society".[1410] Many if not most political leaders remain strongly guided by religious faith. In matters, such as abortion and gay rights, religious faith has hindered tendencies to liberalize the inherited law.[1411]

629. The emergence of many new churches after independence, churches outside the so far existing mainstream churches, has prompted the consideration of

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1404. The preamble reveals that the Republic of Namibia has been constituted as a secular state, too.
1405. Act No. 18 of 2004.
1406. Article 97 of the Constitution.
1407. Article 30.
1408. *See*: Diescho (2015a); Diescho (2015b); Zaire (2017): 91 and also: Isaak (1997); Tötemeyer (2010a) and Horn (2008b).
1409. Bertelsmann Stiftung (2014): 7.
1410. Zaire (2017): 91.
1411. *See*: Bertelsmann Foundation (2020): 8. *See also* below: Part V, Chapter 3, § 2.1 and § 5.4.

regulating churches by law. "There is a raising concern of self-proclaimed prophets and pastors, whose many followers believe they have the power to perform miracles and heal the sick …", was said in support of the suggested regulation of churches.[1412] However, so far, the suggestion remained unresponded.

1412. *See*: Mulunga (2019).

630–633

Chapter 10. People's Participation

§1. Referendum

630. The *Constitution* provides for the holding of a referendum regarding matters which are of national interest. In terms of Article 63(g), the National Assembly has the power to initiate, approve, or decide to hold a referendum on matters of national concern. Until 1992, referenda could be held under the *Referendum Ordinance* of 1977.[1413] This Ordinance was repealed by the *Electoral Act* of 1992,[1414] which did not provide for referenda. Only the *Electoral Act* of 2014 filled this legislative gap by introducing detailed provisions on holding referenda.[1415] In 2016, the then Minister of Justice suggested to the National Assembly the holding of a referendum on the prohibition of "poisonous traditional brews and the sale of alcohol in residential areas".[1416] In the ongoing debate about abortion, an anti-abortion movement called for a referendum on abortion.[1417] However, so far no referendum was called by the National Assembly.

631. The direction and supervision over the conduct of a referendum lies with the Electoral Commission.[1418] The *Electoral Act* contains provisions for the conduct of referenda, i.e., regarding the persons entitled to vote, the place and manner of voting, and the announcement and publication of results. The Electoral Commissions has the duty to assess the performance of a referendum and to publish a post-referendum report.[1419]

632. If a bill proposing the repeal and/or amendment of a provision of the *Constitution* is supported by a majority of two-thirds of the members of the National Assembly, but fails the majority of two-thirds of the members of the National Council, the president may, by proclamation, make the bill subject of a national referendum.[1420] If the bill is adopted by a two-thirds majority of the people that cast the vote, then the bill is deemed to have been passed.[1421]

§2. Political Participation and Political Parties

633. All persons shall have the freedom of association, which includes the "freedom to form and join associations or unions, including trade unions and political parties".[1422] In terms of Article 17(1) of the *Constitution*, the right to participate in

1413. Ordinance 3 of 1977.
1414. Act No. 24 of 1992.
1415. Sections 117–134 of the Electoral Act, 2014 (Act No. 5 of 2014).
1416. Cf.: The Namibian of 12 Jul. 2016.
1417. The Namibian of 25 Oct. 2021.
1418. Sections 117 and 119 of the Electoral Act.
1419. Section 133 of the Act.
1420. Article 132(3)(a) of the Constitution.
1421. Article 132(3)(c).
1422. Article 21(e).

political activities is granted to citizens only. All citizens have the right to form and join political parties and to participate in public affairs.[1423]

634. A citizen has the right to vote at the age of 18. To be eligible to a public office, a person has to reach the age of 21.[1424] The right to vote and the right to be elected to a public office "may only be abrogated, suspended or impinged upon by parliament in respect of specified categories of persons on such grounds of infirmity or on such grounds of public interest or morality as are necessary in a democratic society".[1425]

635. The *Electoral Act*[1426] regulates the conduct of elections, offences and penalties, and election applications. The internal functioning of political parties is governed by the constitutions of the parties. A *Code of Conduct* for parties in the election process sets out ethical guidelines to be adhered to by political parties, associations, organizations, and independent candidates during political campaigning.[1427] The code appeals to the responsibility included in the freedom of political campaigning such as the responsibility to accept the freedom of others to express their own and independent opinion. It thus declares any form of intimidation impermissible. This code of conduct is overseen by the Electoral Commission.

636. Political parties have to be registered with the Electoral Commission[1428] to ensure that the objects of the party are not contrary to the laws of the country, or the party does not restrict membership on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.[1429]

637. Evaluating the development of the party landscape since the first free elections in 1990 is beyond the task of this work. However, it should be noted that SWAPO, the ruling party since independence, faces opposition in a way, which was not known in earlier elections. The last national election in 2019 led to losses from which the incumbent head of state, President Geingob, substantially suffered.[1430] The regional and local elections of 2020 expressed trends away from SWAPO: SWAPO lost its dominant position in four regions and also many seats in local

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1423. Article 17(1).
1424. Article 17(2).
1425. Article 17(3).
1426. Act No. 5 of 2014.
1427. As issued in terms of section 145 of the Electoral Act by the Electoral Commission. The code is available on the website of the ECN: https://www.ecn.na/.
1428. Sections 135ff. of the Electoral Act, 2014.
1429. Section 135(2)(c) of the Act.
1430. Cf.: Allgemeine Zeitung of 2 Dec. 2019 but also: Melber (2020b). - In the 2014 general elections, ten parties won seats in the National Assembly: SWAPO 77 seats; DTA 5, RDP (Rally for Democracy and Progress) 3; APP (All People's Party) 2; UDF (United Democratic Front) 2; NUDO (National Unity Democratic Organisation) 2; WRP (Workers Revolutionary Party) 2; SWANU (South West Africa National Union) 1; UPM (United People's Movement) 1; RP (Republican Party) 1. The 2019 election shows this picture: SWAPO 63 seats; PDM (Popular Democratic Movement) 16; LPM (Landless People's Movement) 4; NUDO (National Unity Democratic Organisation) 2; UDF 2; APP 2; NEFF (Namibian Economic Freedom Fighters) 2; RDP 1; CDV (Christian Democratic Voice) 1; SWANU 1.

authority councils.[1431] A new feature is that participants in the last election for regional and local authority councils were, apart from 17 registered political parties, 13 tax payers associations and almost 100 independent candidates.[1432]

638. Before the enactment of the *Electoral Act* of 2014, the only requirement with regard to political party funding was the disclosure of funds received from external sources.[1433] There was neither a legal requirement regarding the amount that private individuals, companies or organizations can donate to a political party, nor for political parties to account for their funding.[1434] Furthermore, there have been no bans on donations of any kind. Hence, anyone, including companies, government contractors, trade unions, etc. could donate any amount of money to support a particular political party.[1435]

639. Since the enactment of the *Electoral Act* of 2014, registered political parties must annually declare their assets and liabilities, including a statement of the sources of funds to the Electoral Commission.[1436] Registered parties are required to maintain and make accessible records consisting of any contribution, donation or pledge of contributions or donation and statements of their accounts to their members, showing the sources of their funds and the name of every person who has contributed to the funds.[1437] The parties are also required to cause their financial accounts to be audited once per year and lodge with the Commission a copy of the audited accounts and also to publish them in at least two daily newspapers.[1438] Any person can, upon payment of the prescribed fee, inspect or be provided with copies of the audited accounts of a registered political party lodged with the Commission.[1439] The *Electoral Act* allows any kind of financing that is intended to be used to support a political party or organization or the candidature of a particular person but requires the disclosure of donations and restricts the total donation amount to a prescribed amount in a financial year.[1440] There is also a limit for the amount a Namibian person or institution is allowed to donate within a financial year.[1441]

640. Public funding is regulated in Part 3 of the *Electoral Act*. Section 154(2) read together with section 154(1) of the Act requires the National Assembly to fund political parties, which are represented in parliament. The funds are allocated in accordance with a formula that is determined by the minister responsible for finance

1431. *See*: Keller (2020) and also: Elections (2020).
1432. Keller (2020): 2. *See also*: Publication of Results and Particulars in Respect of General Elections for Local Authority Councils: Electoral Act, 2014, GN No. 65 of 2021.
1433. Section 46 of the Electoral Act, 1992 (Act No. 24 of 1992).
1434. Boer (2004): 7; *see also:* Hopwood (2005b): 138.
1435. Boer (2004): 7.
1436. Section 139 of the Electoral Act, 2014.
1437. Section 140(1) and (2).
1438. Section 140(3) and (4).
1439. Section 140(5).
1440. Section 141.
1441. Section 141(3).

with approval of the National Assembly and is based on the principle of proportional representation.[1442] It contains restrictions on the use of the funds for any matter or event that contravenes ethical rules binding on the members of parliament or Regional Councils or Local Authority Councils.[1443] For this purpose, a separate banking account must be kept where all funds are deposited and an office-bearer must be appointed as accounting officer. Such accounting officer has a variety of responsibilities and functions with the view to ensuring accountability for the funds, including the preparation and provision of information to the Electoral Commission about the use of the money.[1444] The Auditor-General has the power to "at any time audit any represented political party books and records of account and financial statements relating to monies allocated" and to suspend the allocation of funds if he or she is satisfied on reasonable grounds that the political party has failed to comply with any requirement of the *Electoral Act*.[1445] If any political party spends money allocated to it in contravention of the requirements of the Act, it is liable to repay the monies that were spent irregularly.[1446] Once a year, the National Assembly discusses all received audited statements of funds allocated to political parties.[1447]

641. The provisions related to submission of audited reports by political parties;[1448] declaration of assets and liabilities;[1449] disclosure of foreign and domestic financing received;[1450] accounting of funding received political parties;[1451] and records and audit of registered parties[1452] are not complied with by all parties, although efforts were made by the Electoral Commission consulting political parties regarding compliance with these provisions.[1453] According to the ACC, this trend of non-compliance, "dubbed as 'worrisome', is attributed to an established culture amongst political parties and impunity due to non-enforcement of legal penalties for non-compliance."[1454]

1442. Section 155.
1443. Section 158(1)(c).
1444. Section 158(2-5).
1445. Sections 158(7) and 158(8)(a).
1446. Section 159.
1447. Section 160.
1448. Sections 158 and 160.
1449. Section 139.
1450. Section 141.
1451. Section 158.
1452. Section 140.
1453. ACC (2020): 19.
1454. *Ibid*.

Part IV. The State and Its Subdivisions

Chapter 1. The Unitary State and Its Subcentral Entities

§1. Introduction

642. Namibia is a unitary state – so Article 1(1) of the *Constitution* – meaning that the central government is ultimately supreme but has created sub-national entities to help in fulfilling the obligations of the government, in other words: the central government works with decentralized authorities. Chapter 12 of the *Constitution* contains rules on two sub-central pillars of government: regional and local government. The third pillar: traditional government, is incidentally referred to in this part of the *Constitution*. A fourth pillar on which the central government relies are public enterprises, which are indirectly of constitutional relevance as principles of good governance apply to them in a way that distinguishes public enterprises from enterprises of commercial law.

643. The following first chapter will focus on the decentralization policy of Namibia and on urban and regional planning. Chapter 2 will look at regional and Chapter 3 at local government. Traditional authorities are dealt with in Chapter 4 and public enterprises in Chapter 5.

§2. Decentralization

644. Decentralization is seen by the government of Namibia as an instrument to ensure economic, cultural, and socio-economic development, to provide people at grassroots level with the opportunity to participate in decision-making and to extend democracy as a right based on national ideals and values.[1455] However, the years since the decentralization policy for Namibia was issued have shown how difficult it is to implement decentralization in a country such as Namibia. One of the strong promotors of decentralization in Namibia, Gerhard Tötemeyer, then

1455. Ministry of Regional, Local Government and Housing (1997): 7. *See* further: Ministry of Regional and Local Government and Housing (1997) and (2000); Tötemeyer (2000); cf. also: Association of Regional Councils (1996); Larsen (2002); Hopwood (2005a); Tsamarab (2005); Hegga, Kunamwene, Ziervogel (2020).

Deputy-Minister for Regional Government and Housing, anticipated successful implementation of decentralization may take until 2030.[1456]

645. Decentralization requires sub-central governmental structures, in particular regional and local authorities, which, in Namibia, were either not existing or, when created by the South African administration, done so in accordance with its apartheid policy. Only some settlements in areas dominated by the white part of the population functioned as local authorities. Therefore, it was one of the first tasks of the government after independence to re-determine its regional structure in line with a uniform system of regional government.

646. The boundaries of regions were determined by the Boundaries Delimitation and Demarcation Commission (formerly Delimitation Commission) until the amendment to the *Constitution* of 2014 transferred the respective decisions to the president for acting on the recommendation of the Boundaries Delimitation and Demarcation Commission.[1457] The Boundaries Delimitation and Demarcation Commission, consisting of a full-time chairperson and part-time commissioners, is appointed by the president with the approval of the National Assembly.[1458] Apart from making recommendations to the president regarding the determination of the boundaries and names of regions, constituencies, and local authorities, the Commission's function is to delimit and demarcate the boundaries of Namibia.[1459] Boundaries may be changed, new regions, and constituencies created, and regions and constituencies may be merged.[1460] The *Constitution* emphasizes that the delineation of boundaries shall only be based on geographical consideration; any reference to race, colour or ethnic origin of the inhabitants is prohibited.[1461]

647. As suggested by the First Delimitation Commission, Namibia was divided into 13 different regions and 107 constituencies.[1462] Following the recommendations in the fourth report of the Delimitation Commission,[1463] the Kavango region was split into two regions: Kavango East and Kavango West in 2013, thus increasing the number of regions to 14 and the number of constituencies to 121.[1464]

1456. Tötemeyer (2000): 101. *See also*: Ministry of Regional and Local Government and Housing (2008.)
1457. Article 103(1) of the Constitution.
1458. Article 104(2).
1459. Article 104(1.
1460. Article 103(2).
1461. Article 102(2).
1462. *See*: Government of Namibia (1991a). The Commission was established by the Establishment of the First Delimitation Commission and the Duties thereof Proclamation, 1990 (Proclamation No. 12 of 1990). The functions of the Commission are further specified in the Regional Councils Act, 1992 (Act No. 22 of 1992), as amended.
1463. Cf.: Namibia Economist of 2 Oct. 2015, available at: http://www.economist.com.na/general-news/8571-release-delimitation-report (accessed 10 Oct. 2015).
1464. Creation of new regions and division and re-division of certain regions into constituencies: Regional Councils Act, 1992, Proclamation 25 of 2013. – *See* the list of regions in the annexure of this publication. With the creation of new regions and constituencies, several regions, constituencies, and towns have been renamed. The Caprivi Region was renamed Zambezi Region, and the Lüderitz Constituency was changed to !Nami≠Nûs Constituency.

648. As the decentralization process made little progress in the first years after independence, a policy review was initiated in the mid-1990s leading to the adoption of a Decentralization Policy in 1997.[1465] The document explicitly specifies the functions and duties to be decentralized.[1466] It further suggests a two-step decentralization process first by delegation and ultimately by devolution of the political and administrative responsibility of service provision to the regional councils and local authorities.[1467] While some functions should be decentralized immediately, others should be decentralized in the intermediate or long term. The document also contains implementation guidelines and resource strategies. The *Decentralisation Enabling Act*[1468] was passed in 2000. The Act authorizes the decentralization of functions vesting in line ministries to regional councils and local authorities. The responsible minster may, by notice in the Gazette and subject to provisions in section 2 of the Act, not only decentralize any function determined by him or her to any regional or local authority but also has the power to withdraw delegated and devolved functions.[1469]

649. With reference to section 2 of the *Decentralisation Enabling Act*, administrative functions with respect to communication, communal land, water and forestry, gender equality and child welfare, and education and arts were delegated to regional councils.[1470]

650. Further acts designed to accelerate the decentralization process are the *Trust Fund for Regional Development and Equity Provisions Act*,[1471] establishing a fund to provide regions and local authorities with technical and financial assistance for development projects, as well as the *Regional Councils Amendment Act*[1472] establishing the office of the chief regional officer and paving the way for other new

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1465. For a discussion in this respect, *see*: Hopwood (2005a); Tötemeyer (2010b).
1466. Ministry of Regional, Local Government and Housing (1997): 32ff.
1467. *Ibid.:* 38ff.
1468. Act No. 33 of 2000.
1469. Sections 2 to 6 of the Decentralisation Enabling Act, 2000 (Act No. 33 of 2000).
1470. *See* here.: Decentralisation of Certain Functions of Ministry of Information and Communication Technology to Certain Regional Councils: Decentralisation Enabling Act, 2000 (GN No. 33 of 2015); Decentralisation of Certain Functions of Ministry of Land Reform to all 14 Regional Councils: Decentralisation Enabling Act, 2000 (GN No. 33 of 2016); Decentralisation of Certain Functions of Ministry of Agriculture, Water and Forestry to 13 Regional Councils: Decentralisation Enabling Act, 2000 (GN No. 134 of 2018); Decentralisation of Certain Functions of Ministry of Gender Equality and Child Welfare to all 14 Regional Councils: Decentralisation Enabling Act, 2000 (GN No. 83 of 2018); Decentralisation of Certain Functions of Ministry of Education, Arts and Culture to all 14 Regional Councils: Decentralisation Enabling Act, 2000 (GN No. 388 of 2019); Decentralisation of Certain Functions of Ministry of Labour, Industrial Relations and Employment Creation to all Regional Councils: Decentralisation Enabling Act, 2000 (GN No. 184 of 2021).
1471. Act No. 22 of 2000.
1472. Act No. 30 of 2000.

appointments, and the *Local Authorities Amendment Acts*[1473] amending the original act substantially by introducing institutional changes and enlarging the powers of local authorities.[1474]

§3. Urban and Regional Planning

651. An important step in implementing structured links between urban and rural and regional planning was achieved with the enactment of the *Urban and Regional Planning Act* of 2018.[1475] This act deleted the *Township and Division of Land Ordinance* of 1963, which was amended several times after independence.[1476] Section 2 lists as objects of the Act to

(a) provide for uniform effective and integrated regulatory framework for spatial planning in Namibia;
(b) provide for principles and standards of spatial planning;
(c) decentralize certain aspects of spatial planning in Namibia;
(d) ensure that spatial planning promotes social and economic inclusion;
(e) ensure that there is equity in the spatial planning system;
(f) redress past imbalances in respect of access to land, land ownership and land allocation; and
(g) promote the national land reform objectives.

Section 3 of the Act highlights principles applying to planning: sustainable development, protection of the environment, public participation, harmonization of planning are some of these principles.

652. The body responsible for consolidating planning is the Urban and Regional Planning Board.[1477] This Board consists of fifteen members. Apart from the chairperson appointed by the responsible Minister, there are three ex officio members, the surveyor-general, the registrar of deeds, and the environmental commissioner, and further eleven members appointed by ministers responsible for planning-related matters.[1478] The task of the Board is to advise the responsible minister in all matters

1473. Act No. 24 of 2000 and Act No. 17 of 2002.
1474. A Constituency Development Fund Bill has been under discussion for some time and may be reconsidered. *See*: The Namibian of 16 Dec. 2020.
1475. Act No. 125 of 2018. The act came into operation on 3 Sep. 2020 (GN No. 222 of 2020). *See also*: Regulations relating to Urban and Regional Planning Act, 2018 (GN No. 223 of 2020).
1476. Township and Division of Land Ordinance 11 of 1963, last amended by Act No. 11 of 2000.
1477. Section 4 of the Act.
1478. Section 5(1) and (2) of the Act – Apart from senior officials of various ministries, the Act expects as members of the Board a town and regional planner, nominated by the Namibian Council of Town and Regional Planners, a town and regional planner, nominated by the Association of Local Authorities, a town and regional planner, nominated by the Association of Regional Councils, and a representative of the Council of Traditional Leaders.

related to spatial planning, to recommend to the minister how to handle all sorts of applications related to urban and regional planning, but also on legislative measures related to spatial planning.[1479]

653. Chapter 4 of the Act harmonises national spatial, regional, and urban planning. The national spatial development framework is prepared by the responsible minister.[1480] Preparing regional structure plans is the task of the regional council[1481] and of urban structure plans the task of local authorities.[1482] All drafted plans are submitted to the Urban and Regional Planning Board for recommendation.[1483] The national spatial development framework must be approved by the Cabinet;[1484]the regional and urban structure plans by the responsible minister.[1485]

654. Chapter 5 of the Act contains the rules about zoning and rezoning of land, including provisions to apply to claims of compensation to landowners for the loss and damage caused by measures related to the zoning of land. The claim is directed to the relevant local authority.[1486] In case an agreement on compensation is not reached within a period of ninety days, the matter goes to the minister who will request recommendations from the Urban and Regional Planning Board.[1487] Any matter arising in the process of determining claims for compensation will be subject to arbitration in terms of the *Arbitration Act*[1488] unless the parties agree otherwise.[1489]

655. The establishment, respectively the disestablishment of townships and the alteration of approved townships is regulated in Chapter 6 of the *Urban and Regional Planning Act*.

656. There are several circumstances that impact on or even hinder the implementation of decentralization. These include socio-economic discrepancies, structural legacies from the apartheid era, clashes between tradition and modernity as well as urbanization. A lack of funds and problems to raise own income affects not only local but also regional authorities making them dependent on central government support.[1490] With the exception of a few municipalities, which were able to build up surpluses, many local authorities are in dire need of financial resources.

1479. Section 7 of the Act.
1480. Section 19.
1481. Section 25.
1482. Section 31.
1483. Sections 23, 29 and 35.
1484. Section 24.
1485. Sections 30 and 36.
1486. Section 59(3).
1487. Section 69(6) and (7).
1488. Act No. 42 of 1965.
1489. Section 62(1) of the Urban and Regional Planning Act.
1490. Hopwood (2005a): 11, 12.

657. Local authorities, responsible for services to its population, have incurred huge debts due to resistance of consumers or inability to fully pay for the services provided to them.[1491] Additionally, in many local authorities, several trading services, including water distribution are operated with significant losses.[1492]

658. Apart from the lack of financial resources, capacity-building, including in-service and formal training, has been a major issue with the objective to enable local and regional authorities to effectively use their powers and to live up to their duties and functions.[1493]

659. The exclusion of former non-white areas from municipal administration has been abolished after independence step by step by integrating segregated townships into the municipal administration by extending municipalities to the former non-white areas.[1494] The newly established local authorities were confronted with problems inherited from the old racially segregated system as well as increasing urbanization which had long been hampered under the apartheid regime.[1495]

660. Proclamations of local authority areas in communal areas have not only extensive factual implications for people living in that area but also raise legal problems in regard to land ownership.[1496]

661. Whereas land in the communal area is administered by the respective traditional authority having jurisdiction in an area, the proclamation of a local authority area on communal land terminates the power of traditional authorities to administer the respective land. According to the *Communal Land Reform Act*,[1497] the primary power with respect to allocation and cancellation of customary land rights in communal areas vests in the chief or the traditional authorities. However, section 15(2) stipulates that the land that has been declared a local authority area ceases to be communal land.

662. It was only in 2009 that guidelines for compensation with respect to losses of rights on communal land were approved by Cabinet.[1498] The communal landholder whose land is incorporated into the land of a local authority or has been taken for other developmental reasons has the choice to opt for a residential plot in the proclaimed town or be given alternative land so that farming activities can be

1491. Tötemeyer (2010b): 123; *see also:* Fjeldstad et al. (2005): 12.
1492. Fjeldstad et al. (2005): 12.
1493. Mukwena; Drake (2000): 22ff.
1494. Fjeldstad et al. (2005): 6.
1495. Kuusi (2009): 120.
1496. Cf.: Mapaure (2009b): 10. – A challenging incident in this respect happened when the Helao Nafidi Town Council and private investors in the town clashed with traditional authorities having jurisdiction over communal land now declared part of Helao Nafidi.
1497. Act No. 5 of 2002.
1498. Republic of Namibia (2009).

continued. The guidelines express the expectation that, as a matter of principle, people whose rights on communal land are affected by public needs "be offered an equal size of land elsewhere to continue producing their food".[1499] If alternative land is provided for farming, compensation has to be paid for permanent and non-permanent constructions on the land that has to be left. Costs for the improvement of the new land have to be paid to the landholder. Compensation is also due to the loss of fruit-bearing trees.

663. Urbanization and increasing migration of people to the cities and towns, in particular to Windhoek, in search of work and in hope for a better standard of living is a major challenge. Windhoek is growing at a rate of 3 to 4 % per annum; some 10 000 people move to the capital every year.[1500] Due to the increasing numbers of poor people moving to the cities up to 25% of the Namibian population lives in informal settlements.[1501] The development and upgrading of such informal settlements is a severe financial burden for municipalities and town councils.[1502]

664. In 2011, the boundaries of the City of Windhoek were dramatically expanded by the City Council.[1503] The area of the city has been increased from some 700 to more than 5 000 km^2. The extension poses difficulties in particular with respect to farms now being situated in the city of Windhoek.[1504] Farmers with land within the extended boundaries are now subject to city by-laws.[1505] They concern, e.g., water and waste disposal. Being part of a city has consequences for the holding of animals, the generation of electricity and pumping of water on the farms.[1506]

665. There are different associations operating independently from the Namibian government in the field of decentralized governance. The local authorities created the Association of Local Authorities to have an advocacy body to assist its members in addressing socio-economic problems in a comprehensive and sustainable way with the objective to stimulate growth and financial stability.[1507] The association acts as a liaison between the central government and all local authorities and promotes and supports capacity-building and the striving for independence.[1508]

1499. *Ibid*.: 10.
1500. Windhoek, Namibia metro area population 1950-2020. https://www.macrotrends.net/cities/21925/windhoek/population and City of Windhoek www.windhoekcc.org.na (both accessed 12 Oct. 2020).
1501. Informal Settlement Communities and the Shack Dwellers Federation of Namibia (2009): 9 and Karuaihe (2019).
1502. Fjeldstad et al. (2005): 105.
1503. Cf.: GN No. 184 of 2011.
1504. *See*: Windhoek Observer of 2 Nov. 2012.
1505. *Ibid.*
1506. *See* here, e.g.: Ministry of Environment and Tourism (2012).
1507. Association for Local Authorities in Namibia (2003); *see also*: Namibian Association of Local Authority Officers (2011): 3.
1508. *Ibid.*

666. A similar association exists on the regional level: the Association of Regional Authorities.[1509] It acts as a coordinating body for regional councils with a significant role to play in assisting regional councillors with the execution of their roles and responsibilities and in providing a linkage between regional councils and local authorities.[1510]

1509. Dobiey (2000): 63.
1510. Ministry of Regional, Local Government and Housing (2003): 6.

Chapter 2. Regional Government

667. Each region has a democratically elected Regional Council and a government-appointed Governor.[1511]

668. The functions and powers of the Regional Councils are stipulated in Articles 108 and 110 of the *Constitution* and further elaborated in section 28 of the Regional Councils Act.[1512] The overall important task of Regional Councils is to plan for the development of the region with special regards to the physical, social, and economic characteristics of it. Planning has to take note of the distribution and movement of the population, but also the natural resources and the economic potential in the given region. According to Article 108(c) of the *Constitution*, parliament can assign executive powers to Regional Councils; parliament can in particularly confer to them the authority to raise revenue.

669. The Regional Councils decide on the establishment of an area as a settlement area. Is the Regional Council of the opinion

(a) that by reason of circumstances … provision should be made for the management, control and regulation of matters pertaining to the health and welfare of the inhabitants … ;
(b) that by reason of circumstances …. the area is an area which ought to be developed as a local authority

the Regional Council can declare the area a settlement area.[1513] The management and control of the settlement area is executed by the Regional Council, which in so far acts as if it were a Village Council in terms of the rules for such a council according to the *Local Authorities Act*.[1514] The responsible minister has the power to amend the authority of the Regional Council to act as if it were a Municipal or Town Council.[1515]

670. Each Regional Council establishes a management committee by electing among its members a chairperson and two or three other members depending on the number of members of the Regional Council.[1516] The management committee has a variety of functions, including to ensure that the decisions of the Regional Council are carried out, to consider any matter entrusted to the Regional Council, advise the council and to control the expenditures of money.[1517]

1511. Cf.: Articles 192ff. and 110A of the Constitution.
1512. Act No. 22 of 1992, as amended.
1513. Section 31(1) Regional Councils Act.
1514. Section 32(1) of the Act.
1515. Section 32(4).
1516. Article 109 of the Constitution read together with section 18 of the Regional Councils Act.
1517. Section 22(1) of the Regional Councils Act.

671. According to section 18A of the *Regional Councils Act*, the chairperson of the management committee is responsible to initiate and formulate planning and development policies and to monitor the implementation of the policies. The chairperson is accountable to the government and to the inhabitants of the region. In consultation with the Regional Council, he or she is further responsible to investigate and endeavour to solve any issue pertaining to the region concerned.[1518]

672. Whereas the chairperson of the management committee was the head of the region until 2010, this changed with an amendment of the *Special Advisors and Regional Governors Appointment Act* in 2010.[1519] The amended act gives authority to the president to appoint regional governors for each region. The Namibian *Constitution Third Amendment Act* confirmed this and established regional governors as political heads of the regions.[1520]

673. Regional governors have to "oversee the exercise of any executive function of any function of Government" and be "the link between the central Government and the Regional Councils, Local Authorities, and Traditional Leaders" in their regions.[1521] The governor has the right to require the Regional Council to convene urgent special sessions and address any matter.[1522] At least once every year, regional governors are obliged to attend a meeting of their Regional Councils. This meeting shall occur after the president has addressed parliament on the state of the nation during the consideration of the "official budget" by parliament.[1523]

674. Every Regional Council appoints a chief regional officer who is responsible for the carrying out of the decisions and for the administration of the affairs of the Regional Council.[1524] The council can further appoint such other staff members as it may be necessary to conduct its work.[1525]

675. As stipulated by Article 106(1) and (2) of the *Constitution*, regions are divided into constituencies (at least six and not more than twelve) which can each elect one member to its Regional Council. The date of the elections for the Regional Councils is determined by the President.[1526] Elections have to be held at intervals not exceeding five years.[1527]

1518. Section 18A.
1519. Act No. 6 of 1990, as amended by Special Advisers and Regional Representatives Appointment Amendment Act, 2010 (Act No. 15 of 2010).
1520. Article 110A(1) and (2) of the Constitution, as amended by the Namibian Constitution Third Amendment Act, 2014.
1521. Article 110A(3) of the Constitution.
1522. Article 110A(4).
1523. Article 110A(5) read with Article 32(2).
1524. Section 23(1)(a) Regional Councils Act.
1525. Section 23(1)(b) of the Act.
1526. Article 106(4) and (5) of the Constitution.
1527. Section 7(1) of the Regional Councils Act.

676. According to Article 105 of the *Constitution*, the number of persons being elected to the Regional Council depends on the number of constituencies as determined by the president under Article 103(1) of the *Constitution*. To be elected into a Regional Council, the candidate must be qualified to be elected as a member of the National Council and be resident of the constituency for which he or she wishes to be elected.[1528] Additionally, a person cannot be elected as a member of a Regional Council if he or she is a member of another Regional Council.[1529] Members of the public service that have been elected into a Regional Council are deemed to have resigned from public service with effect from the date of the election.[1530]

1528. Section 6(1)(a) of the Act.
1529. Section 6(1)(b).
1530. Section 6(2).

Chapter 3. Local Authorities

677. The *Constitution* and, in accordance with it,[1531] the *Local Authorities Act*[1532] distinguish between municipalities, towns, and villages.[1533] The *Regional Councils Act* contains rules of local authority for so-called settlement areas.[1534] Settlement areas are areas that may be in the process to be transformed into local authorities proper.[1535]

678. So far, Namibia has seventeen municipalities, twenty-six towns, and nineteen villages.[1536] Settlement areas are established in all regions. Their number differs: there are six in the Kunene Region and some twenty in the Ohangwena Region.[1537]

679. The different types of local authorities result in different degrees of autonomy. What status a local authority has, depends on its financial capacity and its capacity to execute its functions. Municipalities are the highest and most autonomous type of local authority and again subdivided into Part I and Part II municipalities.[1538] Part I municipalities have a solid financial basis and considerable autonomy with regard to the determination of property tax. Part II municipalities are less financially independent. Currently, there exist three Part I municipalities: Windhoek, Swakopmund, and Walvis Bay, and fourteen Part II municipalities.[1539]

680. Part V of the *Local Authorities Act* determines the powers, duties, rights, and obligations of local authorities. Section 30 of the Act contains the very long lists of task local authorities have to fulfil. It is their duty to provide the basic infrastructure for the day-to-day life of the inhabitants of the area. Part of the service to supply includes the service of water and electricity, waste management, the establishment of cemeteries, the maintenance of streets and public places, the provision of public transport, and access to health institutions. Fire brigades but also libraries are matters under the management of local authorities.

681. Municipality Councils consist of seven to fifteen members as determined by the responsible Minister Town Councils of seven to twelve members.[1540] Village Councils have seven members.[1541] The members are elected on party lists in each

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1531. Article 102(4) of the Constitution.
1532. Act No. 23 of 1992, as amended.
1533. Article 102(4) of the Constitution and section 3((2)(a), (b) and (c) of the Regional Authorities Act.
1534. Sections 31ff. of the Act.
1535. Section 31(1)(b).
1536. *See*: Schedule to the Local Authorities Act.
1537. Namibia: Regions, towns, villages & settlements (2020).
1538. *See*: Schedule 1 to the Local Authorities Act, Act No. 23 of 1992 and also: Fjeldstad et al., (2005): 6.
1539. Gobabis, Grootfontein, Henties Bay, Keetmanshoop, Mariental, Okahandja, Omaruru, Otjiwarongo, Outjo, Tsumeb.
1540. Section 6(1)(a) and (b) of the Local Authorities Act.
1541. Section 6(1)(c) Act.

of the wards into which a local authority is divided in terms of section 5 of the *Local Authorities Act*.[1542] The Act provides for a gender quote. In case of a Municipal or Town Council consisting of ten or fewer members or a Village Council at least three and in the case of a Municipal or Town Council with eleven or more members at least five candidates must be female.[1543]

682. All persons who have been resident in the jurisdiction of a local authority area for not less than one year immediately prior to the election and qualified to vote in elections for the National Assembly are entitled to vote in elections for local authority councils.[1544] General elections of members of local authority councils are held on a date determined by the president, not exceeding a period of five years after the last elections have taken place.[1545]

683. According to the *Local Authorities Act*, municipal and town councils elect a mayor and a deputy mayor, village councils a chairperson and a vice-chairperson.[1546] Municipal and town councils further elect management committees consisting of three to five members depending on the number of council members.[1547] The mayor and the deputy mayor are ex officio members of the management committee.[1548] On the recommendation of the management committee and after consultation with the responsible minister, the municipal or town council appoints a town clerk. The village councils appoint a village secretary who acts as the chief executive officer of the village council.[1549]

1542. Section 6(2).
1543. Section 6(4). – The original version of the Act provided for two respectively three female candidates.
1544. Article 111(3) of the Constitution.
1545. Section 8 of the Local Authorities Act.
1546. Section 11(1) of the Act.
1547. Section 21(1).
1548. *Ibid.*
1549. Section 27(1)(a).

684–687

Chapter 4. Traditional Authorities

§1. Introduction

684. Traditional authorities exist in areas in which land is communal, i.e., under the administration of traditional authorities.[1550] This means that traditional authorities have no power over land which belongs to a local authority.[1551] With respect to other governmental matters, traditional authorities have limited jurisdiction where local authorities exist. Section 2(2) of the Traditional Authorities Act confirms that traditional authorities "have jurisdiction over the members of the traditional community in respect of which it has been established". It follows from this that traditional authorities may hear and decide disputes arising in areas under local authorities.[1552]

685. When the future legal structure of Namibia was discussed before independence, traditional authorities were not of concern. Customary law was taken as realty with which the new order had to deal with; the chiefs were not.[1553] This explains why the *Constitution* has a provision on customary law but mentions traditional authorities only in an indirect manner: Article 102(5) of the *Constitution* refers to traditional leaders as members of a Council of Traditional Leaders. Article 102(5) determines the functions of this Council, but not the functions of its members.[1554]

686. However, the fact that the Council of Traditional Leaders was regulated in Article 102 of the *Constitution*, which has as its title: Structures of Regional and Local Government, may be interpreted as a reflection that traditional authorities play roles and functions close to the mentioned other sub-central political entities. The *Namibian Constitution Third Amendment Act* of 2014 supports this, as the inserted new Article 110A(3) of the *Constitution* refers to four governmental bodies which the governor of the region has to link with, one of the four being the traditional leaders.

687. Namibia follows, as many African countries do, the approach of regulated dualism, meaning that the state accepts the dualism between traditional and what is called "modern" governance; it accepts the pluralism of legal and political orders. The traditional authorities are not integrated into the structure of the state, as

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1550. Cf.: section 5(1)(b) of the Traditional Authorities Act, 2000 (Act No. 25 of 2000), according to which the application for approval to design a person for the position of chief or head of traditional community has to indicate "the communal area inhabited by that community".
1551. Cf.: section 20 of the Communal Land Reform Act, 2002 (Act No. 5 of 2002).
1552. *See*: section 3(3)(b) of the Traditional Authorities Act, 2000 (Act No. 25 of 2000).
1553. *See*: United Nations Institute for Namibia (1988): 963.
1554. Constitutions adopted after the Constitution of Namibia, such as the Constitution of South Africa, differ. *See*, *e.g.*: section 211 of the South African Constitution of 1996, which states in its subsection 1 that the "institution, status and role of traditional leadership, according to customary law, are recognized subject to the Constitution". On traditional leadership and decentralization in Namibia, cf.: Ndiyepa (2014), but also Friedman (2005).

regional and local authorities are: they are authorities *sui generis* or in terms of the theory of legal / political pluralism semi-autonomous entities.[1555] Apart from the *Traditional Authorities Act*, the *Communal Land Reform Act* and the *Community Courts Act* are examples for regulated dualism in the legal dispensation of Namibia.[1556]

688. The regulation of dualism has become an extraordinary legal challenge.[1557] It has become a challenge for the legislator but also for the courts to which disputes arising from the said relationship have been submitted. The challenge is extraordinary because the attempts to regulate the relationship between the traditional and the modern order lead into the confrontation of conceptualizations which exceed the scope of the usually practised jurisprudence.[1558]

689. As much as traditional authorities may be *sui generis* authorities, their closeness to the other forms of sub-central governmental entities is supported in case law. Courts had to decide on the designation of traditional authorities and also on how to handle dismissals of traditional leaders from their positions. This will be illustrated below when dealing with relevant cases in the following paragraphs.

690. Based on the fact that the *Constitution* confirms in its Article 66(1) customary law as part of the law of Namibia, it can be reasonably argued that with the confirmation of customary law traditional authorities are implicitly confirmed with their tasks and functions, as they are provided for by customary law. This interpretation has consequences for the scope of statutory regulations of traditional authorities. The constitutional protection of customary law encompasses, therefore, the constitutional protection of traditional authority and limits inroads into it in the same way as it limits inroads into customary law.

1555. Cf. here: Hinz (2002) and in particular Hinz (2013d) where the concept of regulated dualism is placed into a broader perspective of governance.
1556. Act No. 5 of 2002 and Act No. 10 of 2003.
1557. Cf.: Balandier (2013) who was one of the first anthropologists who offered a comprehensive understanding of political anthropology and, in in this, a comparison of traditional and modern governance. The position and function of traditional leaders in modern state structures attracted substantial research, *see* here, e.g., the collection of articles in: Buthelezi; Skosana; Vale (2019), but also: Keulder (1998) and Düsing (2000).
1558. On the call for an extended, i.e., anthropological jurisprudence *see* already: Hinz (2003b), but also Fikentscher (2016) who made this call part of the mottos of his Law and Anthropology. Anthropological jurisprudence is close to "general jurisprudence" as submitted by Twinning (2009). According to Hinz (2022b), anthropological jurisprudence "is part of jurisprudence in the usually defined manner, but focuses on the fact that it is not determined by western legal philosophy. Anthropological jurisprudence notes that different cultures have developed their own, different understandings of societal order, law, and justice. Anthropological jurisprudence is the jurisprudential reflection of a globalizing world. Processes that lead to the enactment of laws, which are related to the plurality of legal orders existing in a society, and also decisions of courts, which deal with conflicts based on the said plurality, play an important part of the development of anthropological jurisprudence."

691. In 1991, a presidential commission of inquiry was set up to investigate the situation of traditional leadership in Namibia.[1559] In its findings, the commission left no doubt that the "retention of the traditional system at this stage of socio-economic development in Namibia is necessary".[1560] The report also stated that many persons to whom the members of the commission could speak underscored the need of enabling traditional leaders to perform, apart from judicial functions, administrative functions as representatives "of their group and protectors of their group rights".[1561] In consequence, the report suggested the enactment of an act that would translate the findings of the commission into law.[1562]

§2. The Traditional Authorities Act

692. The first version of the *Traditional Authorities Act* was enacted in 1995.[1563] The Act was amended in 1997[1564] but replaced by the currently valid version in 2000.[1565] The Traditional Authorities Act can be regarded to be the constitution of traditional governance.

693. The *Traditional Authorities Act*[1566] essentially confirms the role and function of traditional authority, as it is reflected in pre- and post-independence traditional research on traditional communities.[1567] The fact that traditional authorities and customary law in general operate relatively independently from the organs of the state does not exempt them from the rule of the *Constitution*: Both are subject to the *Constitution* and, with this, subject to the fundamental rights and freedoms.[1568]

694. Nevertheless, the *Traditional Authorities Act* accepts that traditional leaders acquire their offices in accordance with customary law. This means that in many cases, if not most, the "supreme traditional leader"[1569] assumes his or her position not through general democratic elections, but in accordance with rules that contain the rights to power of members of what is said to be royal houses. The *Traditional Authorities Act* opts for the election of the leader only if there is no such customary law or there is uncertainty or disagreement among the members of that community

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1559. Republic of Namibia (1991a) – commonly known as Kozonguizi report.
1560. *Ibid.:* 66. - Empirical research done some years later supports the assessment of the commission: cf.: Keulder (1997); Hinz, Katjaerua (1998). But *see also*: Vollan; Blanco et al. (2020).
1561. Republic of Namibia (1991a): 67.
1562. *See*: Draft of the Traditional Authorities Act annexed to: Republic of Namibia (1991a).
1563. Act No. 17 of 1997.
1564. Act No. 8 of 1997.
1565. Act No. 25 of 2000, in force since 17 May 2001 (GN No. 93 of 2001).
1566. Unless otherwise mentioned, the reference to the Traditional Authorities Act is reference to the Act of 2000.
1567. *See* here Hinz (2003a): 51ff. and the literature quoted there. Cf. also: Hillebrecht (1991).
1568. As stated in Article 66 of the Constitution and so repeated in the definition of customary law in section 1 of the Traditional Authorities Act as well as in the section of the Act that deals with the limitations of powers of traditional authorities: section 14(a) Traditional Authorities Act.
1569. So the definition of chief in: section 1 of the Traditional Authorities Act.

regarding the applicable customary law.[1570] The Act also states that traditional leaders may be addressed with their traditional titles, as long as such title does not "derogate from, or add to, the status, powers, duties and functions" of the leader, as set out in the *Traditional Authorities Act*.[1571]

§3. The Recognition of Traditional Community

695. What is a traditional community? The Traditional Authorities Act has a definition, according to which a traditional community means[1572]

> an indigenous homogeneous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognises a common traditional authority and inhabits a common communal area, and may include the members of that traditional community residing outside the common communal area; … .

696. This definition appears not to be of much help in determining which group of people has the right to be accepted under the provisions of the *Traditional Authorities Act* and the *Council of Traditional Leaders Act*. The drafter of the definition was most probably inspired by some outdated anthropology and not concerned of developments in many, if not most traditional areas, that did supersede societal homogeneity.[1573]

697. Despite the fact that the usual language talks about recognized traditional communities, the *Traditional Authorities Act* regulates traditional authority without taking reference to the quality of the community as set out in the quoted definition

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1570. Cf.: section 5(10) of the Traditional Authorities Act. - *See* here also: *Haindaka v. Minister of Urban and Rural Development* 2019 (4) NR 951 (HC), a case that led the High Court to underscore that disagreement about facts did not allow for the call of election: section 5(10) of the Act authorizes elections only in case of absence of or disagreement about customary law on succession.
1571. Cf.: section 11 of the Traditional Authorities Act. The widely accepted address of certain supreme traditional leaders as king or queen was criticized in: *Hikumwah v. Nelumbu*, High Court judgement, Case No. A 15/2012- unreported: at 57ff. The court concluded on the comparison of the Queen of Oukwanyama with the Queen of the United Kingdom by saying that this comparison "was totally misplaced".(60) In the case of *Kahuure v. Mbanderu Traditional Authority*, High Court judgement, Case No.; (P) A 114/2006, – unreported, the court refers to the use of certain traditional titles, including "king" or "queen" and holds: "It is a notorious fact (…) that by their customary law Namibian traditional communities give their traditional leaders all kinds of titles … . Doubtless, these customary titles exist outside Act 25 of 2000 [Traditional Authorities Act]: they are not sanctioned by that Act, but they are not offensive of it." (at 11) *See* further the address of President Geingob of 5 Oct. 2015 to the Council of Traditional Leaders where he said that the "reference to King or Queen [with respect to traditional leaders] is inconsistent with the Constitution which established a republican state meaning that Kingdoms are not recognized." (Geingob 2015:12).
1572. *See*: section 1 of the Act.
1573. *See* on this: Shamena (1998).

of traditional community. The main point of reference of the Act is not the community but the person to be the leader (the leaders) of the community; it is also the leader of the community who has to be designated and eventually recognized and proclaimed in the Government Gazette.[1574]

698. It is up to the traditional community to express its intention to designate a person to become the supreme leader of the community. Designation is defined as "the election or hereditary succession to the office of a chief or head of a traditional community".[1575] It is then to the chief's or traditional council of the community (or if such a council does not exist) the body authorized by the customary law to apply to the responsible minister to approve the designation.[1576]

699. The application must indicate the name of the traditional community; the communal area inhabited by the community; the estimated number of the members of the community; the reason for the proposed designation; the name, office, and traditional title of the person to be designated; the customary law applicable to the designation; and any other information as the minister may prescribe or require.[1577]

700. The minister approves the application unless he / she is of the opinion that

– the person to be designated represents a group who are members of a traditional community which has already a recognized chief;
– the group does not constitute an independent traditional community that inhabits a common communal area of its own; or
– the group does not comprise a sufficient number of members.

Should the minister in such a case conclude that there are "no reasonable grounds for the recognizing such group of persons, as a separate traditional community", he / she must advise the President of Namibia accordingly.[1578]

701. "On receipt of the Minister's advice", the president refers the matter to the Council of Traditional Leaders for consideration and recommendation.[1579] Only after receiving the recommendation or if the council fails to make such a recommendation, the president will either reject or approve the designation.[1580]

702. Should there be a dispute among the members of a traditional community whether the person to be designated is the "rightful or … fit and proper person

1574. Section 6 of the Traditional Authorities Act.
1575. Section 1 of the Act.
1576. Section 5(1)(a) and (b) of the Act. – The Act refers always to "chief or head of traditional authority" although "head of traditional authority" is defined in the same way as chief. Head "means the supreme traditional leader" of the community (section 1 of the Act). It is therefore that the following text will use an abbreviated language and only refer to chief.
1577. Section 5(1)(b)(i)–(vii) of the Act.
1578. Section 5(2) and (3).
1579. Section 5(4).
1580. Section 5(5).

under the customary law" or whether the successor to a chief is "rightful or … fit and proper" to succeed and the members of the traditional community fail to resolve their dispute, they can approach the competent minister with a petition.[1581] The minister is then authorized to appoint a committee to investigate the case.[1582] The minister is not bound to the recommendation of the committee, but both the investigation of the committee and the decision must have "regard … to the relevant customary law and traditional practices of the traditional community" concerned.[1583]

703. Some of the registered communities had to wait for long to achieve the status of recognition. The applications of others are still pending. Newspapers and politicians commented the submissions made to the responsible minister by stating that there is "mushrooming" of traditional authorities.[1584] The former president Pohamba is quoted for having said "that he is swimming in a pool of applications for new traditional authorities".[1585] Pohamba warned that the growing number of groups, which wanted to be recognized as traditional authorities "would only lead to fragmentation, division, and disunity within communities".[1586] The then chairperson of the Law Reform and Development Commission expressed the view that it was up to the government "to set up fixed structures to have more control of the number of traditional authorities as opposed to the current situation where new traditional authorities mushroom overnight."[1587] A leader from the Ondonga Traditional Authority added that Namibia had no law "against clans forming their own chieftaincy".[1588] The then deputy chairperson of the Council of Traditional Leaders and chief of the !Oe-‡Gân Damara community, Gaob (King) Immanuel /Gaseb,[1589] confirmed in a statement of 2015 that there was "chaos" with respect to the applications for recognition of traditional communities and "drastic steps need to be taken". However, /Gaseb was reluctant to accept "a limit on the number of traditional authorities". Such a measure would be – so the chief – "another form of colonialism".[1590]

704. President Geingob repeated the concern about applications for recognition of new traditional communities in his address to the twenty-second annual conference of the Council of Traditional Leaders in 2019,[1591] warning that meeting these calls for recognition "may not only become financially unsustainable, but also lead

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1581. Section 12(1).
1582. Section 12(2). Section 13 regulates the powers of the committee and the obligation of persons requested to appear before the committee.
1583. Section 12(3) and (4).
1584. *See*: The Namibian of 27 Sep. 2013; New Era of 9 Sep. 2014 and to the following: Hinz (2016c).
1585. New Era of 9 Sep. 2014.
1586. *Ibid*.
1587. *See*: The Namibian in www.namibianewsdigest.com/9851/ (accessed 10 Jun. 2015).
1588. *Ibid.*
1589. Now acting chairperson after the death of Omukwaniilwa (King) Immanuel Kauluma Elifas, the first chairperson of the council.
1590. *Ibid.*
1591. Geingob (2019):4.

to further tribal divisions within the Namibian House". New traditional communities cannot be established "on personal motives, reference and ambitions, while all these years [people] … have peacefully resorted under one traditional leader, sharing the same, customs, values, language and culture without any problem". Recognitions should be granted to "legitimate cases", for which "facts should be established beyond doubt".

705. Several cases of intended designation, respectively recognition of chiefs were taken to court: the non-recognition of Paramount Chief Kuaima Riruako was the first case that came to the High Court.[1592] The High Court dismissed Riruako's claim, but Riruako was eventually recognized, not as paramount chief but as chief.[1593]

706. The recognition of the chief of the Ombuku Traditional Community, Hikuminue Kapika, in the Kunene Region occupied the High and Supreme Court.[1594] Hikuminue Kapika followed his father Muniomuhoro Kapika as chief of the Ombuka Community in 1982.[1595] Several applications for recognition to the post-independence government remained unsuccessful.[1596] In 2013 and 2014, problems about Hikuminue Kapika's leadership arose in the community when he gave up his opposition to the construction of the dam at the Epupa Falls.[1597] Certain parts of the community set a process in motion to replace him with his brother Mutaambanda Kapika. This led to the disputed suggestion to designate Mutaambanda Kapika as chief.[1598] The responsible minister, however, arranged for the inauguration of Hikuminue Kapika as chief, a decision, which prompted Mutaambanda Kapika to take the matter to court.[1599] The High Court set the decision of the minister aside; the Supreme Court reaffirmed it.

707. Neither the High Court nor the Supreme Court saw reasons to discuss whether the Ombuku Community was a community to receive a chief in terms of the *Traditional Authorities Act*. Both judgements took this as given and only considered first the customary law applicable to the designation of the chief and second the requirements for administrative justice in terms of the *Traditional Authorities Act* read with Article 18 of the *Constitution*. The Supreme Court was of the opinion that the minister was correct. According to the Supreme Court, the High Court misinterpreted the customary law which was followed in the designation of Hikuminue Kapika and not in what was submitted as designation of Mutaambanda Kapika. In

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1592. *See*: *Riruako v. Minister of Regional*, *Local Government and Housing*, High Court judgement, Case No A 336/2001 – unreported.
1593. Proclamation No. 9 of 2009.
1594. *Kapika v. Minister of Urban and Rural Development* 2018 (2) NR 432 (HC) and *Kapika v. Kapika* 2020 (3) NR 707 (SC).
1595. *Kapika v. Minister of Urban and Rural Development*, *ibid*.: 434H–I.
1596. *Ibid.:* 436D–F.
1597. *Ibid.:* 435B–436A and also: The Namibian of 24 Aug. 2017.
1598. *Kapika v. Minister of Urban and Rural Development*, *ibid*: 436D–F; *Kapika v. Kapika, ibid*.: 710C–714C.
1599. Hikuminue Kapika was registered as chief of the Ombuka Traditional Authority, *see*: Proclamation No. 6 of 2016.

view of administrative law, the Supreme Court held that the High Court went beyond its capacity substituting the decision of the minister with its own impermissible administrative assessment.[1600]

708. Three more cases in which the recognition of chief was debated can be mentioned. The first case is the case of Turimuro Hoveka, representing an Otjiherero-speaking community in Epukiro and the Hoveka Royal House who took the case of non-recognition to court. The High Court dismissed the claim on procedural grounds,[1601] but Hoveka was recognized as chief of the Hoveka community by the responsible minister.[1602]

709. The second case is the case of the /Hai-/Khaua Community, also referred to as the Berseba Nama. Two families, better: clans, the Isaacks and the Goliath clan, were in fight over the right to leadership in the community. The struggle between the two factions prompted different rounds of negotiations to mediate the conflict.[1603] It was only in 2010 that the community accepted Johannes Isaacks as chief and Stephanus Goliath as his deputy.[1604] However, this move did not lead the conflict to rest. The claim for recognition of the Goliath faction was submitted.[1605] The intended installation of Johannes Fleermuys, member of the Goliath faction, was interdicted by the High Court upon application of Isaacks.[1606] The High Court held that after the recognition of Isaacks there was no place for a second chief, as also clearly stated in section 5(1)(b) of the *Traditional Authorities Act*.[1607] The interdict did not prevent members of the community to pursue the inauguration of Johannes Fleermuys. The press reported that Fleermuys was installed towards the end of 2016.[1608] For contravening the order of the High Court Fleermuys and others were fined by the Magistrates' Court for contempt of court in 2020.[1609]

710. The third case is the case of Salmon Josephat Witbooi who was not accepted as a designated person for the position of chief of the Witbooi community.[1610] The applicant was in disagreement with the decision of the responsible minister to accept the designation of another member of the Witbooi family and by doing so excluding him because he was an offspring of the maternal side of the family. The court found that the decision of the minister was faulty because the minister did not follow the rules of the *Traditional Authorities Act* with respect to who is competent for the designation of a person as chief, but also held that[1611]

1600. *Kapika v. Kapika, ibid.:* 729D–E.
1601. *Hoveka v. Minister of Local Government, Housing and Rural Development*, High Court judgement, Case No: 356/13 – unreported.
1602. *See*: New Era of 1 Nov. 2018 and Proclamation No. 29 of 2019.
1603. *See*: Patemann (2002) and also Kössler (2011).
1604. The Namibian of 15 Nov. 2010.
1605. The Namibian of 9 May 2012.
1606. *Isaacks v. Fleermuys*, High Court judgement, Case No.: A 80/2012 - unreported.
1607. *Ibid.*
1608. The Namibian of 6 Jun. 2020.
1609. *Ibid.*
1610. *Witbooi v. Minister of Urban and Rural Development* 2022 (2) NR 383 (HC).
1611. *Ibid.:* 402B.

> accepting the customary law version of the respondents, without necessarily deciding on the correctness of the customary law, is in violation of the Constitution in that that it discriminates against women.

The court found it obviously important to express that the respective piece of customary law is in violation of the equality provision of the *Constitution* although it was – so the court[1612] – for its judgement not necessary to determine the constitutionality of the customary law not allowing matrilineal members of the royal family to ascend to chieftainship. Whether this *obiter dictum* will stand further tests has to be seen. In augmenting against the meaning of the court, one could refer to the so far undisputed rules applied in matrilineal communities – the Owambo communities and the communities in the Kavango regions – according to which only members of the matrilineal line qualify for the position of the supreme leader and also that privileging one line privileges, respectively excludes both genders, males and females.

§4. The Removal of Chiefs

711. The chief is in office until he or she passes away. However, the *Traditional Authorities Act* rules that a chief elected or appointed to a political office is "considered to have taken leave of absence from the office … for the duration that he or she holds such political office".[1613] Holding a political office means to be President of Namibia, member of the National Assembly, the National Council, a Regional Council, and leader of a political party.[1614]

712. Section 8 of the *Traditional Authorities Act* regulates the removal of a chief:

> If there is sufficient reason to warrant the removal of a chief or head of a traditional community from such office, …

it is up to the members of that community to decide on his or her removal in accordance with customary law applicable to the case.[1615] After the removal, the Minister responsible for traditional matters has to notify the President about the removal, who "shall recognize the removal of the chief … by proclamation in the Gazette".[1616]

713. So far, there is no case known in which a removal of a chief was successfully effected. The above-noted try to remove Hikuminue Kapika of the Ombuku

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1612. The last paragraph of the summary of the unreported version of the case. *See also* in the reported version: *Witbooi v. Minister of Urban and Rural Development* 2022 (2) NR 383 (HC): 401J–402F.
1613. Section 15 of the Traditional Authorities Act.
1614. Sub-section 7 of section 15 of the Act.
1615. Section 8(1).
1616. Section 8(3) and (4).

Community and to replace him with another person happened when Chief Kapika was not recognized under the *Traditional Authorities Act*.

714. A case of what could be named an attempt of a hidden removal is the case that affected the Ombalantu Community. After the Ombalantu Community had lost its king many years ago,[1617] the community was governed by a senior headman who, after the enactment of the *Traditional Authorities Act*, was recognized as chief. The fact that the community once was a kingdom was, nevertheless, not forgotten.[1618] Movements to restore the Ombalantu kingdom are reported to go back to 2000 when a member of the allegedly still existing royal family was, according to his statement, confirmed as the king of Ombalantu.[1619] When this movement led to the intention to inaugurate the crowning of this person, the incumbent chief of the Ombalantu, Oswin Mukulu, took the matter to court. The High Court ruled in favour of the chief.[1620] The court held that the coronation of a king in a community which had already a duly recognized chief was in violation of the *Traditional Authorities Act* despite the submission of the person who wanted to be crowned that the king was only meant to be a ceremonial leader and thus, not limiting the authority of the chief.

715. The first case in which there is a strong movement in the community to get rid of his chief is the case of the chief of the Hambukushu Traditional Community. According to a report in the press, the call for removal of the chief was filed to the High Court.[1621]

§5. The Succession to Chiefs

716. In case of the death of the chief, it is the task of those members of the traditional community, "who are authorized thereto by customary law" to designate a new person as the chief of the community.[1622]

717. The last years have shown a number of disputes about successions to chiefs. These disputes also occupied the courts of which some are noted in the following sections.[1623]

1617. Cf. on this: Williams (1991): 135ff.
1618. Cf.: McKittrick (nd).
1619. To this and the following: The Namibian of 19 Sep. 2011 and 6 Feb. 2012.
1620. *Mukulu v. Kalumbu,* High Court judgement, Case No.: A197/2011 – unreported.
1621. *See*: Confidénte of 22 May 2020.
1622. Section 8(2) of the Traditional Authorities Act.
1623. Leaving cases aside where the courts dismissed recognition claims for not meeting basic procedural requirements: The High Court dismissed the application of Deon Ellen Gawanab and other members of the !Khomanin community who disputed the right of Juliana Gawa!nas to become chief of the !Khomanin Traditional Authority ruling that Gawanab did not have *locus standi*. (*Gawanab v. !Khomanin Traditional Authority*, High Court judgement, Case No: A 419/2013, – unreported.) The application of urgency to review the decision to recognize the new chief of the Ondonga community after the death of King Immanuel Kauluma Elifas was dismissed because

718. The case of the succession to Munjuku Ngauva II of the Ovambanderu Community was a matter that generated several court cases and led, with respect to the law of traditional authorities, to a legal dispute to which the court developed an interpretation, which was later revised in a different case. There were three persons who claimed the right to follow the late chief of the Ovambanderu: two sons, Keharandjo II Nguvauva born out of the marriage of the chief, Kilius Nguvauva, son of the chief, but born out of wedlock and Aletha Nguvauva, widow of the late chief.

719. The investigating committee appointed by the responsible minister in terms of section 12(2) of the Act concluded with two suggestions. First, the committee recommended to recognize Keharandjo as chief; alternatively, should there be objections, the recommendation was that an election in terms of section 5(10)(b) of the *Traditional Authorities Act* should take place. After first accepting Keharandjo as chief, the minister changed his position and decided for an election.

720. In a first round of the debate before court, a senior traditional leader of the Ovambanderu and the widow of the late chief applied against the decision of the minister to call the community to elect their chief. The complaint failed in the High and the Supreme Court.[1624]

721. With respect to the claim of the widow of the deceased chief, both courts looked at the customary law on succession of the Ovambanderu Community. The courts identified the rule that a person is only eligible as chief if this person is a descendant of the Nguvauva family. That the widow of the deceased chief was such a descendant was – so the courts – not forwarded to the courts.[1625]

722. In a second round of debate Kilius Nguvauva applied to the High Court for an order to declare his appointment as chief valid and setting aside the decision of the minister that an election should take place.[1626] The High Court approved the designation of Kilius Nguvauva as chief noting that, by that time, Keharandjo had

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the High Court did not follow the submissions of the applicants to reason urgency. (*Kalenga v. Minister of Urban and Rural Development*, High Court judgement, Case No. HC-MD-CIV-MOT-REV-2019/00219, – unreported.)

1624. *Ex Parte Erastus Tjiundikua Kahuure in re: Keharandjo II Nguvauva and Minister of Regional and Local Government and Housing and Rural Development,* High Court judgement, Case No.: 254/2010 – unreported – (referred to in the following as *Kahuure High Court*) and *Kahuure in re: Keharandjo II Nguvauva v. Minister of Regional and Local Government and Housing and Rural Development* 2013 (4) NR 932 (SC) – (referred to in the following as *Kahuure Supreme Court*).

1625. *See*: *Kahuure High Court*, at: 13; *Kahuure Supreme Court*: 941I–942A.

1626. *Nguvauva v. Minister of Regional and Local Government and Housing and Rural Development* 2015 (1) NR 220 (HC): 223I–224G.

passed away and, thus, taking away the dispute and, with this, the need of an election.[1627] It was this conclusion that was revised in a later judgement, which will be considered below.[1628]

723. In several cases, the High and Supreme Court decided, at least partly, in favour of the applicants by modifying the decision of the responsible minister. The first case decided by the High Court was the case of the succession to Chief Christian Zeraeua of the Zeraeua Traditional Community.[1629] There were two candidates for the succession: the son of the late chief, Manasse Zeraeua, and Raphael Kapia. Each candidate had support by one part of the royal family. After a number of meetings in the Zeraeua Community, the responsible minister received two applications for the designation of a new chief, one from the representative of the Zeraeua Traditional Authority in favour of Manasse Zeraeua and one from one part of the royal family in support of Raphael Kapia.[1630] The minister accepted the first application and agreed on the designation of Manasse Zeraeua. The minister explained that, given the described facts and the application from the Zeraeua Traditional Authority, he did not have any choice but had just to comply with the law and approve the designation as applied for.[1631] The High Court held against this view and stated that the minister was incorrect, as he had to evaluate if the application complied with section 5(1) of the *Traditional Authorities Act*. Evaluating would, in particular, include the ascertainment of the customary law applicable to succession of the community at hand. With references to obvious inconsistencies in the application, the court concluded that the minister failed to assess the relevant customary law[1632] and, therefore, set aside the ministerial approval of the designation.[1633]

724. In two more succession cases the courts gave judgements but the expected follow-up to the judgements did not lead (at the time of writing this book) to the recognition of chiefs: the reference is to the judgement about the chieftaincy in Uukwangali after the death of Chief Sitentu Mpasi in 2014 and the one about the chieftaincy in Shambyu after the death of Chief Angelina Ribebe in 2015. In both cases, judgements were delivered by the High Court in 2019.[1634]

1627. Kilius Nguvauva was recognized as chief of the Ovambanderu in November 2014 (Proclamation No. 3 of 2015). As he was holding a political office in terms of section 15 of the Traditional Authorities Act, Gerson Katjirua became acting chief, a position that ended in 2019 (Proclamation No. 41 of 2015 and 32 of 2019).
1628. When dealing with *Haindaka v. Minister of Urban and Rural Development* 2019 (4) NR 951 (HC).
1629. *Hijangungo Kapia v. Minister of Regional and Local Government, Housing and Rural Development*, High Court judgement, Case No.: A 333/2012 – unreported.
1630. *Ibid.:* at 6f.
1631. *Ibid.:* at 26.
1632. *Ibid.:* at 31.
1633. *Ibid.:* at 39. - Manasse Zeraeua was gazetted by Proclamation No. 37 of 2019.
1634. *Ngondo v. Minister of Urban and Rural Development*, High Court judgement, Case No.: HC-MD-CIV-MOT-REV-2017/00199 – unreported – and *Haindaka v. Minister of Urban and Rural Development* 2019 (4) NR 951 (HC).

725. In the Uukwangali case, the debate concerned two possible candidates for the succession to the late chief. After a petition was submitted to the responsible minister in terms of section 12(1) of the *Traditional Authorities Act*, the minister appointed an investigation committee. However, even before the committee was able to report its findings to the minister, the minister approved the requested designation of one of the two candidates, Eugene Kudumo, as chief.[1635] The opposition to this decision resulted in an unopposed order by the High Court, according to which the designation by the minister was set aside.[1636] In order to discuss the situation after this order of the court, the minister called upon a meeting to which the second candidate for the position of chief, Severinus Siteketa, was not invited. Siteketa nevertheless attended the meeting but was not given the opportunity to state his case. The minister approved Kudumo's designation; she did so, as explained in a letter to Uukwangali Traditional Authority, on the basis of the just mentioned meeting.[1637] The court held against this that this procedure violated the *Traditional Authorities Act*. What was expected after the invalidation of the first approval of the designation of Kudumu was a new administrative process that would have required a proper (i.e., new) submission for the approval of the designation of Kudumo. The court concluded:[1638]

> [I]n order to ensure that the third respondent [Eugene Siwombe Kudumo] be properly designated again … it would again have been incumbent on –or at least advisable for the Minister, in view of the still simmering dispute amongst the members of the traditional community – to set in motion the 'settlement of disputes procedure' provided for in Section 12(2). Also such a process was clearly not followed for a second time.

726. The appeal against this judgement failed, as the appellants did not comply with the dates for submission of the heads of arguments.[1639]

727. In the Shambyu case two factions of the royal family nominated two different candidates for the succession of Chief Ribebe: Maria Kanyanda and Sofia Kanyetu.[1640] While the process of designation was administered, Maria Kanyanda died and was replaced with Maria Haindaka. The application for designation of Sofia Kanyetu was submitted by the chief's council of Shambyu, the application for Maria Haindaka by the faction of the royal family who was in her support.[1641] In view of this, the responsible minister appointed an investigation committee. After receiving the report of the committee, the minister decided that the royal family

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1635. *Ngondo v. Minister of Urban and Rural Development*, *ibid.* at: 3.
1636. Cf.: *ibid.:* at 3 (*see* under: 2.5). – GN No. 188 of 1 Aug. 2017 lists Eugene Siwombe Kudumo as chief and member of the Council of Traditional Leaders.
1637. *Ibid.:* at 6.
1638. *Ibid.:* at 36.
1639. *Uukwangali Traditional Authority v. Minister of Urban and Rural Development*, Supreme Court judgement, Case No.: SA 9/2019 – unreported.
1640. To the facts of the case, *see*: *Haindaka v. Minister of Urban and Rural Development* 2019 (4) NR 951 (HC): 954G–955I.
1641. *Ibid.:* 969F – H.

(i.e., the two factions of the family) were given a period of four months to resolve the succession, failing this, elections were to be held to determine who would be the new chief of the community. Maria Haindeka was not satisfied with this decision and obtained an interdict from the High Court stopping the conduct of the election.[1642]

728. While the minister later accepted the view that this case was not a case for conducting an election, the correctness of appointing an investigation committee was not challenged although there was no evidence that a petition in terms of section 12(1) of the *Traditional Authorities Act* was submitted to the minister.[1643] The main issue to remain for a decisions was whether there was still an unsolved dispute about the chieftaincy after the original second candidate Maria Kanyanda had passed away. The other candidate, one of the respondents in the case initiated by Maria Haindaka, was of the opinion[1644] that the dispute had come to an end with the death of Kanyanda: after Kanyanda's death, there was only one application left, the application for the designation of Sofia Kandetu. According to the respondents, the application for the designation of Haindeka was said to have come from a body, the chief's council, which did not exist anymore after the death of Chief Ribebe.

729. The High Court found reasons to argue against this opinion: the High Court held that the existence of the chief's council was not bound to the chief being alive. For the High Court, the chief's council can be compared to a board of directors of a company which would, in case of death of its chairperson, appoint an ad-hoc-chairperson to preside over it until a new chairperson would be found as the rules of the company require.[1645] Differing from the case of *Nguvauva v. Minister of Regional and Local Government and Housing,*[1646] the court of the case of *Haindaka* did not hold that the succession dispute ended with the death of the person nominated for designation. The court noted the individual nominees but related them to the parts of the royal families which nominated them. Therefore, the court stated clearly that the dispute was between the two factions of the royal family, meaning for the understanding of the rules of the *Traditional Authorities Act,* that section 12[1647]

> envisages a dispute to be "amongst members" of the community and not between two persons such as the nominees in the present matter, … .

This means for the case that:[1648]

1642. *Haindaka v. Minister of Urban and Rural Development*, High Court judgement, Case No.: HC-MD-CIV-MOT-GEN-2018/00254 – unreported.
1643. Cf.: *Haindaka v. Minister of Urban and Rural Development* 2019 (4) NR 951 (HC): 956D – E, 964G – H, 971C – D.
1644. *Ibid.:* 957H – J.
1645. *Ibid.:* 969I–971E.
1646. 2015 (1) NR 220 (HC).
1647. *Haindaka v. Minister of Urban and Rural Development*, *ibid.* 965I.
1648. *Ibid.:* 966E–G.

> the death of Ms Maria Kanyanda did not resolve the dispute between the two clans [factions of the royal family] regarding the rightful or fit and proper person to succeed the chief of the Shamby traditional community. The right to nominate a successor vests in the clan and not in an individual. … the … right to nominate a successor did not evaporate or disappear with the death of Ms Maria Kanyanda.

730. The High Court concludes the case by remitting the matter to the minister for decision in terms of section 12 of the *Traditional Authorities Act*.

731. Despite this decision, there was reason for the case to appear again in court. The applicant of the reported case, Maria Haindaka obtained again an interdict from the High Court only shortly after the decision of the High Court preventing the responsible minister from attending the designation of Sofia Kanyetu and from publishing her name in the Government Gazette as the chief of the Shambyu community.[1649] The court found that the applicant was able to show a *prima facie* right that was about to be violated and with this leading to irreparable harm.[1650] Instead of pursuing administrative measures in complying with section 12 of the *Traditional Authorities Act* as instructed by the High Court, the minister obviously only requested rectified nomination forms and chose to approve the nomination of Sofia Kanyetu. As to the harm, the court states:[1651]

> The rituals [the person to be designated during his or her coronation], which appear to include the invocation of ancestral spirits and lighting fires in an unconventional manner, together with anointing the designated person with fat of a lion or python and wearing beats, allegedly to protect them from evil spirits, are carried out in the process leading to the coronation.
>
> I am of the considered view that this highly spiritual exercise … must … be reserved for and only undergone by a person who is eventually unrivalled.

732. The many succession cases are of concern to the Council of Traditional Leaders and to government. On the occasion of the twenty-first annual meeting of the council in 2018, the Deputy Chairperson of the Council Gaob (King) Immanuel /Gaseb reminded the members of the council that traditional leaders promised of "no longer going to give the Head of State headache on issues of chieftainship succession" and asked in view of the still pursued succession cases how to explain this fact. /Gaseb is of the opinion that globalization contributed to the use of traditional

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1649. *Haindaka v. Minister of Urban and Rural Development*, High Court judgement, Case No.: HC-MD-CIV-MOT-GEN-2019/00458 – unreported.
1650. *Ibid.:* at 10.
1651. *Ibid.:* at 8–9.

authorities and traditional leaders "as a tool to advance personal agenda for some members of our society".[1652] President Geingob expressed his concern about the succession cases and stated:[1653]

> Unfortunately, the integrity of our traditional authorities has come under threat, due to the infighting and instance of leadership succession disputes that continue to prevail to date.

The advice of President Geingob was:[1654]

> Forgoing the traditional formula and taking these disputes into the arena of modern day courts erodes the traditional values and norms in our society. I believe that these matters be deliberated on at this conference to ensure that Traditional Authorities maintain their social structure.

§6. The Structure and Function of Traditional Authority

733. Section 2 of the *Traditional Authorities Act* provides for the structure of traditional authorities. In view of the very varying forms traditional authorities have developed over the years, section 2 is a harmonizing rule, uniforming the organization of traditional authorities in the whole of the country. According to the section, there is a chief or head of the traditional community. Apart from the chief, there are senior traditional councillors and traditional councillors. Although it is still common language to refer in certain cases to paramount chief, the new dispensation does, as already mentioned, not know the position of paramount chief anymore.[1655] Section 10 of the Act states that the task of senior traditional councillors to "assist" the chief in the performance of his or her functions and fulfil such other functions as may be given to them by the chief.[1656] The task of traditional councillors is to

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1652. /Gaseb (2018): 4.
1653. Geingob (2018a):1.
1654. *Ibid.:* 2. – *See also*: The Namibian of 29 Apr. 2022. This article notes the provocative statement of Geingob according to which that disputes about traditional leadership should not be taken to the "white courts", meaning that matters of traditional authority should be dealt with under traditional (customary) law.
1655. The legal situation before the enactment of post-independence legislation was different: paramount chief was a legally accepted concept. *See* here, e.g., the discussion initiated by one of the chiefs of the then Caprivi region who claimed to be paramount to all other Caprivian communities and, with this, also in control of all communal land: *Moraliswani v. Mamili*, Supreme Court of South West Africa judgement, no case no, delivered on 12 Jun. 1985 – unreported. The Court discussed in detail the concept of *murintenge* (paramount chief), accepted the possibility of the claiming chief to be *murintenge* by leaving it to the claiming chief to amend his pleading, but held against the alleged right to control all communal land of Caprivi with reference to common law. In the case of *Kahuure v. Mbanderu Traditional Authority*, High Court judgement, Case No.: (P) A 114/2006 - unreported: at 11, the judgement referred, as already mentioned above, to the post-independence use of certain traditional titles, including paramount chief, which were not maintained in the Traditional Authorities Act, but nevertheless to be tolerated and understood in terms of customary law.
1656. Section 10(1)(a) of the Act.

"advise" the chief and also to do what the chief may delegate to him or her.[1657] A further assistance to the chief and the traditional authority as a whole will come from the secretary whose tasks are to be determined by the chief.[1658]

734. According to section 9 of the *Traditional Authorities Act*, each traditional community has a chief's council or a traditional council.[1659] The number of the members of the councils is left to the leader of the community to decide. The leader of the community may also co-opt additional members to serve on the council.[1660] The chief is the chairperson of the council and can appoint other office-bearers of the council as may be necessary.[1661] The task of the council is to do the day-to-day administration of the affairs of the traditional authority.[1662]

735. Section 3 of the *Traditional Authorities Act* contains the list of tasks to be performed by traditional authorities. "Promoting peace and welfare" is the overall function of traditional authorities.[1663] Apart from the ascertainment, observation, and application of customary law, assistance to the law enforcement agencies and cooperation with the government, and the regional and local authority councils are part of the duties of the traditional authorities. The making of customary law has been added to the list of duties and functions with the enactment of the latest version of the Act.[1664] In other words, traditional authorities perform functions comparable to the functions of the state: they run courts, they administer, and they make law – all this being part of the constitutionally guaranteed, albeit limited autonomy of traditional authorities.

736. Apart from constitutional limitations, section 12 of the *Traditional Authorities Act* has to be noted here. Section 12 is a rule to regulate the relationship of traditional authorities and government organs.

737. The first version of section 12 of the *Traditional Authorities Act*[1665] said:

> In the performance of its duties and functions and exercise of its powers under customary law or as specified in this Act, a traditional authority shall give support to the policies of the central Government, regional councils and local authority councils and refrain from any act which undermines the authority of those institutions as established by law.
>
> (1) Where the powers of a traditional authority or traditional leader conflict with the powers of the organs of the central Government, regional councils

1657. Section 10(1)(b).
1658. Section 10(3).
1659. The latter, in case the community is led by a head.
1660. Section 9(1) of the Act.
1661. Section 9(3).
1662. Section 9(4).
1663. *See*: section 3 (1) of the Act, which is the introduction to the following list of tasks and duties.
1664. *See*: section 3(3)(c).
1665. Act No. 17 of 1995.

> or local authority councils, the powers of the central Government, regional councillor, local authority council, as the case may be, shall prevail.

738. The Act of 2000 deleted the second but left the first subsection.[1666] While it is sound to expect from traditional authorities that they support governmental policies (at least as long as these policies are in line with the Constitution, statutory law, and the applicable customary law – which is not said in the Act), it is more than problematic to oblige traditional authorities to "refrain from any act of undermining" governmental institutions. What is undermining? What about criticizing governmental policies, which envisage projects in a given traditional area and which are not favoured by the relevant traditional authority?

739. Section 2(2) of the *Traditional Authorities Act* limits the jurisdiction of traditional authorities to the members of the respective community.[1667] The definition section of the Act defines member to a traditional community to be

> a person either or both of whose parents belong to that traditional community, and includes any other person who by marriage to or adoption by a member of that traditional community or by any other circumstance has assimilated the culture and traditions of that traditional community and has been accepted by the traditional community as a member thereof; … .

740. Apart from the payments for the infrastructure of traditional offices, the state pays allowances to traditional leaders, and to the secretary of the traditional authority.[1668] The chief, six senior traditional councillors and six traditional councillors receive allowances. Additional councillors may be paid by the traditional authority.[1669]

741. Traditional authorities may acquire, purchase, lease or sell movable and immovable property. They hold these properties in trust for the traditional community.[1670] With the consent of the members of the community, the traditional authority is also allowed to establish a Community Trust Fund towards which the members of the community contribute.[1671] It is again a matter for the members of the community to determine by whom contributions and how much should be paid into the fund.[1672]

1666. *See*: section 16 of the Traditional Authorities Act.
1667. *See* to this, however: section 12 of the Community Courts Act (Act No. 10 9 of 2003) on the jurisdiction of community courts jurisdiction as mentioned above.
1668. Section 17(1) of the Traditional Authorities Act. Part of the governmental assistance is also support for the offices of the traditional authorities including an all-wheel driven car.
1669. Sub-section 4 of section 17.
1670. Section 8 (1) and (2) of the Act.
1671. *Ibid.:* sub-section 3.
1672. Sub-section 4.

§7. The Appointment and Removal of Traditional Councillors

742. It is up to the chief to appoint and to remove councillors.[1673] Appointments, removals, and the tenure of both traditional officers have to respect the relevant customary law.[1674] Appointments of senior traditional councillors and traditional councillors have to be communicated to the responsible minister for publication in the Government Gazette.[1675]

743. The qualifications for appointment and the reasons for removal of councillors are determined – so section 10(2) of the Act – by customary law.

744. Removals of councillors occupied the courts. The following will concentrate on three cases: The first case is the case of Kahuure of the Ovambanderu, the second the case of Hikumwah of the Oukwanyama Traditional Authority. Both cases were decided by the High Court and, on appeal, by the Supreme Court.[1676] The High Court decided in both cases in favour of the dismissed traditional leaders, thus, against the concerned traditional authorities, while the Supreme Court dismissed both claims confirming the position of the traditional authorities. The third case to be mentioned below concerns the dismissal of traditional leaders of the Ondonga community: a case of less legal but high political interest.

745. In the first case, eleven traditional leaders of the Ovambanderu Traditional Authority were expelled from their positions after the adoption of, what was called a new constitution[1677] for the community. The applicants questioned the validity of the adoption. The High Court found that the process, which led to the adoption of the constitution violated the requirements of administrative justice guaranteed in Article 18 of the Constitution. In general terms, the judgement said:[1678]

> It needs hardly to be said that in a constitutional democracy like ours, and taking into account Article 18 of the Constitution, it is axiomatic that in exercising his power under Act 25 of 2000, the 2nd respondent [Chief Munjuku II Nguvauva of the Ovambanderu Traditional Authority] is expected to act fairly and reasonably and comply with natural justice because customary law must pay obeisance to the Constitution. … In any case, I do not accept that there is a rule of customary law which allows its traditional leaders to violate the African concept of consensus democracy with impunity.

1673. The secretary is also appointed by the chief, *see*: section 10(3).
1674. Section 10(2).
1675. Section 10(4) and (5).
1676. *Kahuure v. Mbanderu Traditional Authority*, High Court judgement, Case No.: (P) A 114/2006 - unreported; *Mbanderu Traditional Authority v. Kahuure* 2008(1) NR 55 (SC); *Hikumwah v. Nelumbu*, High Court judgement, Case No.: A 15/2012 – unreported – and *Nelumbu v. Hikumwah* 2017 (2) NR 433 (SC).
1677. On the Ovambaderu Constitution *see*: Kaukuata-Tjitunga (2008).
1678. *Kahuure v. Mbanderu Traditional Authority*, *ibid.*: at 67.

746. What happened was that instead of consultations with the members of the community, the process of adopting the new constitution of the community was shortened by the chief who decided to enact the constitution. The High Court found that this process violated the requirements of administrative justice and set the adoption of the new constitution aside and, with this, the expulsion of the applicants from their traditional offices.[1679]

747. The Supreme Court decided against the expelled traditional leaders. The Supreme Court had no problems to accept – as submitted by one of the representatives of the parties to the case – that[1680]

> the decisions taken *by traditional authorities and chiefs are administrative acts performed by such organs of traditional leadership*. Such bodies are accordingly obliged to act in the public interest and their decisions are subject to administrative review.

However, the adoption of a constitution by a community was not an administrative act; the[1681]

> constitution-making process of the Ovambanderu Community was similar to a legislative action and not reviewable.

748. In the second case, traditional leaders of the Oukwanyama Traditional Authority lost their position, as they were accused of behaviour which Queen Mwadinomho Martha ya Kristian Nelumbo of Oukwanyama found to be in violation of customary law and practice. The main legal reference for the High and the Supreme Court were the requirements, which follow from the constitutional rule on administrative justice in accordance with Article 18 of the *Constitution*. The High Court applied the requirements in a strict manner and ordered the reinstatement of the traditional leaders into their positions. The Supreme Court preferred, what is called a "flexible" interpretation of administrative fairness, and found that the proceedings applied by the Oukwanyama Traditional Authority were in line with this understanding of administrative justice and, thus, endorsed the dismissal of the traditional leaders.

749. The High Court stated its legal reference with the following words:[1682]

> The State of Namibia is founded on the principle of the rule of law and all legal subjects are subject to the rule of law. Consequently, since the powers, duties and functions of the first respondent [Queen Nelumbu of Oukwanyama] are prescribed by law, it will be submitted that, when the respondent exercises any

1679. *Ibid.:* at 69ff.
1680. *Mbanderu Traditional Authority v. Kahuure* 2008(1) NR 55 (SC): 65I.
1681. *Ibid.:* 88F.
1682. *Hikumwah v. Nelumbu* High Court judgement 2015 (4) NR 955 (HC): 982F.

> power conferred by law, she exercises a public power and on the basis alone her decisions are administrative in nature and they are consequently reviewable.

After looking at the facts, the High Court summarized:[1683]

> When the applicants were then subjected to the disciplinary proceedings before the 'interim special committee' [of the Oukwanyama Traditional Authority] without warning and any charges having been formulated against them, thereby not affording them adequate time or the opportunity for the preparation and presentation of their defences, such proceedings … clearly offended not only the principles of natural justice but also … the more stringent demands for fair administrative action imposed on the respondents by Article 18 of the Constitution.

750. The adversaries of the dismissed traditional leaders countered the strong interpretation of the rules for administrative justice. For them[1684]

> the Oukwanyama customary law does not prescribe a particular procedure for a disciplinary hearing and that *audi alteram partem* is a flexible doctrine whose content and application may vary according to the power exercised and the circumstances of the case. Council argues that the circumstances of the present case called for a flexible application of *audi* given, firstly, that the proceedings in question took place in the context of customary law administered by a tribal leadership who are lay persons and in relation to persons claiming to be experts in the practice of customary law.

751. The Supreme Court accepted that the principle of *audiatur et altera pars* is flexible. However, the court was of the understanding that the dismissed traditional leaders failed to forward the "specific *bases* for the alleged absence of audi".[1685] If these specific bases were pleaded,[1686]

> the applicants could well have put forward facts and contents why, on the particular facts, the manner in which the respondents were removed did not offend the Constitution.

As pleading to this effect did not happen, the Supreme Court decided in favour of the Queen of Oukwanyama and the Oukwanyama Traditional Authority.

752. A case of particular political, albeit of less legal importance was the case of the dismissal of the traditional councillors of the Ondonga Traditional Authority.

1683. *Ibid.:* 1013I–1014B.
1684. *Nelumbu v. Hikumwah* 2017 (2) NR 433: 440E – G.
1685. *Ibid.:* 446G.
1686. *Ibid.*

The case is politically important, as it concerned the Ondonga Traditional Community and its leader who has played a leading role in the post-independence development of traditional governance. King Immanuel Kauluma Elifas was the chairperson of the Council of Traditional Leaders since the inception of the council and because of his standing in the community of traditional leaders some kind of *primus inter pares*.[1687] One of the dismissed leaders was Senior Councillor Peter Kauluma who assisted the King for some forty years, represented him and spoke on his behalf as the king did not speak English.[1688]

753. The dismissed traditional leaders took their case to court, basically alleging that their dismissal was not a decision of the king: they held that the king was "affected by old age which has resulted in some incoherence and … that he [was] unlikely to have exercised his own and sound judgement to appreciate the import and consequences of the matters at hand."[1689] The High Court decided in favour of the applicant allowing for the call on the king to give evidence to the court.[1690] The appeal against this decision was dismissed in October 2020 by the Supreme Court for procedural reasons.[1691]

§8. The Council of Traditional Leaders

754. As has been mentioned above, the representation of traditional authorities at the level of the state is regulated in Article 102(5) of the *Constitution*. This Article says:

> There shall be a Council of Traditional Leaders to be established in terms of an Act of Parliament in order to advise the President on the control and utilization of communal land and on all such other matters as may be referred to it by the President for advice.

1687. King Elifas was visited by political leaders from all parts of the world, was a traditional leader respected in the whole of Namibia and served as the spokesperson of the Namibia traditional leadership. It was for that reason that King Kauluma and his Senior Councillor Kauluma participated in the inauguration of the Faculty of Law of the University of Namibia in 1994, thus underscoring that traditional governance and customary law were seen as integral part of the law and order of Namibia.
1688. Peter Kauluma was of particular importance for the work on customary law of Namibia. The co-author of this publication, Manfred Hinz, was privileged to work in friendship with Peter Kauluma for many years: Peter was instrumental in opening the way into unobserved fields of customary law. Hinz edited with Peter Kauluma the second edition of the Laws of Ondonga with an introduction reflecting certain parts of the history of the customary law of the Aandonga and the other Oshiwambo-speaking communities (Hinz, Kauluma 1994). Peter Kauluma passed away in February 2019.
1689. *Asino v. Elifas*, High Court judgement, Case No.: HC-NLD-CIV-MOT-REV-2017/00011 - unreported: at 6.
1690. *Ibid.:* at 28.
1691. *Elifas v. Asino*, Supreme Court judgement, Case No.: SA 60/2018 – unreported.

755. The parliament of Namibia met the obligation under Article 102(5) by enacting the *Council of Traditional Leaders Act* of 1997.[1692]

756. Each traditional authority with a recognized leader is entitled to send two delegates to the council which usually include the chief of the community and another person of that community. The persons designated to be members of the council have to be nominated to the minister who publishes the names of the delegates in the Government Gazette.[1693]

757. The members of the council have office for a period of five years, but are eligible for reappointment. After consultation with the traditional authority concerned, the appointment can be terminated by the minister for special reasons.[1694]

758. The members of the council elect their chairperson and vice-chairperson. The responsible minister assists the administration of the council. The chairperson determines time and place of meetings in consultation with the minister and presides over the meetings of the council.[1695] Special meetings can be convened, either by the chair, respectively the vice-chair in case of absence of the chair or by at least one-tenth of the members of the council, subject to consent of the Minister.[1696]

759. The council is mandated to establish committees on any matter in relation to its functions. Regarding matters of communal land, the council can, with the approval of the minister, conduct investigations.[1697]

760. Draft legislation pertaining to communal land is to be tabled to the council for "its consideration and recommendation". Comments and recommendations must be submitted to the minister within ninety days.[1698]

761. The council holds annual, normally one-week-long meetings. The agenda of the meetings, however, show that the council does more than what the Constitution describes as the functions of the council. Looking at the agenda of the council over the years, one can say that the council debates all issues seen of relevance by the traditional leaders.[1699]

762. Many traditional leaders are not satisfied with the limited mandate of the council and wish the council renamed *House*.[1700] Whether the renaming would be

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1692. Act No. 13 of 1997, as amended by the Council of Traditional Leaders Amendment Act, 2000 (Act No. 31 of 2000).
1693. Section 3 of the Act.
1694. Sections 4 and 5.
1695. Section 11(1).
1696. Sub-section 2 of section 11.
1697. Sections 12 and 13.
1698. Section 15.
1699. Information collected by M. Hinz over many years.
1700. Personal information by traditional leaders. – Cf.: the discussion on the House of Traditional Leaders in South Africa: Du Plessis, Scheepers (2000).

possible without amending the *Constitution* is debatable; the extension of the mandate would certainly require a change of the *Constitution*. Apart from this, it was recently suggested to let the chair of the council rotate after five years.[1701]

1701. Cf.: New Era of 14 Sep. 2018.

763–766

Chapter 5. Public Enterprises

§1. Introduction

763. Public enterprises play an important role for socio-economic development in most developing countries by providing key goods and services.[1702] As instruments of public administration, state-owned or, as the language of the law prefers,[1703] public enterprises are established "with the purpose of implementing government policies in specific sectors, i.e., transport, housing, and mining."[1704]

764. The Organisation for Economic Co-operation and Development (OECD) defines state-owned enterprises in its guidelines:[1705]

> [A]ny corporate entity recognized by national law as an enterprise, and in which the state exercises ownership, should be considered as an SOE [state-owned enterprise]. This includes stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or part of their activities, are of a largely economic nature.

765. The *Public Enterprises Governance Act* of 2019 follows this definition, but adds to the formality of ownership a reference to the function of the enterprise:[1706]

> "state-owned enterprise" means a company in which the state is the sole or majority shareholder or a company created pursuant to the provisions of a law in order to fulfil a public regulatory function; … .

766. However, public enterprise carries a broader understanding: According to section 2 of the Act, it is left to the Minister of Public Enterprises to declare any body corporate, any unincorporated business in which the state owns half or more of the interest, and any state-owned enterprise to be a public enterprise. Section 2 of the Act distinguishes between commercial and non-commercial public enterprises. The Ministry of Public Enterprises, established in 2015, is fully responsible for the commercial public enterprises. The authority of the minister over non-commercial public enterprises and extra-budgetary funds is limited; these bodies are under the

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1702. Sherbourne (2014): 377ff.
1703. Public Enterprises Governance Act, 2019 (Act No. 1 of 2019), in operation since 16 Dec. 2019 (GN No. 390 of 2019). The Act repealed the Public Enterprises Act, 2006 (Act 2 of 2006), the State-owned Enterprises Governance Amendment Act 2008, (Act No. 5 of 2008) and the Public Enterprises Act, 2015 (Act 8 of 2015).
1704. Marenga (2020): 96.
1705. OECD guidelines (2015): 14.
1706. Section 1 of the Act.

responsibility of the respective line ministries. There are twenty-one public enterprises classified as commercial, forty-two classified as non-commercial enterprises and eleven named financial institutions and extra-budgetary funds by the Ministry of Public enterprises.[1707]

767. The *Public Enterprises Governance Act* replaced legislation in place before and is said to be an important move to open the way to various reform measures, in particular, to deal with the "high debt ratios [and] bloated wage bills."[1708] The Act[1709]

> will enable the PEs [public enterprises] Ministry to root out mismanagement, corruption and poor performance to increase shareholder value while ensuring PEs meet their core fiduciary roles.

§2. The Regulation of Public Enterprises

768. Section 3 of the *Public Enterprises Governance Act* contains the list of powers and functions of the responsible Minister. Apart from establishing common principles of corporate governance and common policy frameworks for the operation of public enterprises, the minister has the power to determine, in consultation with Cabinet, the number of members of the board of an enterprise, the number of executive members, the required qualifications for members of the boards, and the terms of office.

769. Chapter 2 of the Act deals with the appointment of members of boards. The rule is that, unless the minister authorizes the appointment, a person will not be allowed to be simultaneously on more than two boards. Procedures for appointments are laid down in detail in sections 8 and 9 of the Act. The remuneration and allowance payable to board members will be determined by the Minister of Public Enterprises or the minister under whom the enterprise is located.[1710]

770. Chapter 3 regulates the governance of public enterprises. Within ninety days after the constitution of a board of a public enterprise, the Minister of Public Enterprises or the minister to whom the enterprise belongs has to enter into a written agreement with the board which has to lay down the principles for execution of the task of the enterprise including measures to protect the financial soundness of

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1707. So on the website of the Ministry of Public Enterprises (https://mpe.gov.na - accessed 20 Jun. 2022). Cf. further: Weylandt (2017): 2ff. Commercial public enterprises are, e.g.: Air Namibia, Namibia Ports Authority, Namibia Power Corporation. Non-commercial public enterprises are: Electricity Control Board, National Heritage Council, University of Namibia.
1708. Marenga (2020): 103.
1709. *Ibid.*
1710. Section 18 of the Public Enterprises Governance Act.

the enterprise.[1711] A comparable agreement is also to achieve with individual members of the board within ninety days of their appointment.[1712]

771. The public enterprise is obliged to develop integrated strategic business plans for a period of five years and submit this plan.[1713] In the case of a commercial public enterprise, it is up to the Minister of Public Enterprises to approve the plan or refer it back to the board with comments and instructions for amendments. In the case of a non-commercial public enterprise or an extra-budgetary fund, it is for the relevant minister to forward the plan to the Minister of Public Enterprises for information and comments and approve or reject the plan after considering comments received from the Minister of Public Enterprises. The same procedure applies to the annual business and financial plans.[1714] In addition to this, section 23 of the Act requires a statement on the investment policy of the enterprise. The board of a commercial public enterprise is obliged to submit annually proposals how to deal with profits and apart from this an annual report on the operation of the public enterprise.[1715]

772. The Minister of Public Enterprises is authorized to direct investigations in "relation to any matter concerning the business, trade, dealings, affairs, assets or liabilities of a public enterprise".[1716] In case of a non-commercial enterprise or an extra-budgetary fund, the minister has to consult the respective line minister. The investigation must result in a report that sets out the findings and makes recommendations.[1717]

773. Any public enterprise may be provisionally identified for its restructuring. Consultations with the Cabinet are required.[1718]

774. According to a report of March 2020, the Minister of Public Enterprises expressed excitement that the "implementation of the Public Enterprises Governance Act … is finally a reality".[1719]

1711. Section 11 of the Act.
1712. Section 12.
1713. Section 13.
1714. Section 14.
1715. Section 21.
1716. Section 25(1).
1717. Section 29.
1718. Sections 32ff. (32(1)).
1719. The Patriot of 8 Mar. 2020.

Part V. Citizenship, Fundamental Rights and State Policies

775. Part V is devoted to the individual in the constitutional setting. The constitutional establishment of rights and duties arising for each individual, the definition of the relationship between the individual and the state, and the obligation of the state to protect individuals and identifiable groups have a special meaning in the *Constitution* in light of the deprivation of rights of the majority of people during colonialism and apartheid. The individual is addressed in four different categories: as a citizen (Chapter 1); as a titular and beneficiary of rights and freedoms (Chapters 2–4); as a member of a minority group (Chapter 5); and as an alien (Chapter 6). Chapter 7 deals with the principles of state policies.

776–777

Chapter 1. Citizenship

§1. Historical Context

776. Citizenship describes the state of being a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections.[1720] In Namibia, the enjoyment of full rights as citizens was denied to the majority of Namibian people for a long time. Only a small group of people, the white population, was entitled to certain social, political, and civil rights, whereas the rest of the population remained largely without protection.

777. During German colonial rule, a difference was made between citizens of the *Reich* (*Reichsangehörige – members of the Reich*), natives who were subjects of the *Protectorate (Schutzgebiet)* and, thus, not-*Reich*-citizens, and foreigners.[1721] Section 4 of the *Schutzgebietsgesetz*[1722] referred to the citizens of the *Schutzgebiet* (protectorate) as natives (*Eingeborene)*. Natives were persons under the jurisdiction of colonial law and, so far, not determined by race *per se*.[1723] However, race was indeed introduced in the law of citizenship by administrative decrees issued in German South West Africa,[1724] now differentiating between "natives" (*Eingeborene)* and "non-natives" (*Nicht-Eingeborene*).[1725] Although these terms have never been strictly defined, it was clear that it practically classified different statuses of citizenship restricting rights for a majority of the population. Moreover, difference was made between men and women about citizenship and respective rights.[1726] German men had, e.g., the right to pass their citizenship to the women they married and to their children. Women did not have such a right.[1727] Foreigners were distinguished between foreign nationals, stateless persons of European decent, and members of foreign-coloured population groups.[1728]

1720. Garner (2005): 201f.
1721. Relevant laws were: Gesetz über den Erwerb und den Verlust der Bundes- und Staatsangehörigkeit vom 1. Juni 1870 (Law on acquisition and loss of federal and state citizenship abroad of 1 Jun. 1870), Bundesgesetzblatt des Norddeutschen Bundes (Federal Law Gazette of the North German Confederation) No. 20 of 1870: 355–360, and Reichs- und Staatsangehörigkeitsgesetz vom 22. Juli 1913 (Law for Reich and State Citizenship of 22 Jul. 1913), Reichsgesetzblatt (Government Gazette of the *Reich*) 1913: 583–593. – *See* here also: Fischer (2001): 73 ff.; Wildenthal (1997): 263ff.; Wagner 2002): 236.
1722. Schutzgebietsgesetz (*Protectorate Act*), 1900, Reichsgesetzblatt (Government Gazette of the *Reich*) 1900: 813.
1723. Wildenthal (1997): 266.
1724. *Ibid.:* 267.
1725. *See*: *ibid:* 265ff. with reference to.: Verfügung des Kaiserlichen Kommissars vom 1 Dec. 1893, issued in terms of the 'Kaiserliche Verordnung' of 8th November 1892 concerning the conclusion of marriages and the verification of civil status in the South West African protectorate. This document can be accessed at the National Archives of Namibia: NAN-ZBU 666 FIV r1: 13.
1726. Wildenthal (1997): 265.
1727. Verfügung des Kaiserlichen Kommissars vom 1 Dec. 1893, issued in terms of the 'Kaiserliche Verordnung' of 8 Nov. 1892 concerning the conclusion of marriages and the verification of civil status in the South West African protectorate. This document can be accessed at the National Archives of Namibia: NAN-ZBU 666 FIV r1: 13. *See also*: Wildenthal (1997): 265.
1728. Cf.: Wagner (2002): 236f.

778. After South West Africa became a mandated territory of the Union of South Africa, citizenship in South West Africa was regulated by the laws applicable in the South African Union providing for the status of British subjects and later Union nationals.[1729]

779. After the end of British colonial rule, the *South African Citizenship Act* of 1949[1730] introduced South African citizenship. Hence, in 1949, most people acquired the South African citizenship though remained British subjects by virtue of their South African citizenship. Thereafter persons born in South West Africa after the enactment of the *British Nationality in the Union and Naturalization and Status of Aliens Act*[1731] but before the commencement of the *Namibian Citizenship Act*[1732] were South African and could obtain this citizenship by birth.

780. The *Population Registration Act* of 1950[1733] classified different groups of citizens which were not granted the same social and political rights. Although the status of citizenship was common, not all citizens were equal.[1734] Only white people enjoyed a full entitlement of rights, whereas black and coloured people remained second-class citizens with limited civil, social, and political rights.[1735]

781. After colonialism and the experience of apartheid, it was of specific interest to have all persons in Namibia to enjoy full citizenship rights. As the preamble of the *Constitution* emphasizes "[these] rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid" and the Republic of Namibia has been established to secure "to all our citizens justice, liberty, equality and fraternity". The constitutional interest to "achieve national reconciliation and to foster peace, unity and a common loyalty to a single state"[1736] contributed to a very detailed regulation of citizenship. In *Swart v. Minister of Home Affairs*,[1737] the High Court of Namibia emphasized:[1738]

> Given the historical background within our Constitution was framed, it had to address the diversity of origin of all Namibia's people to bring about one nation under a common citizenship – accommodating everyone with a rightful claim to such citizenship, at the same time, affording others the opportunity to become Namibians should they meet the prescribed criteria.

1729. British Nationality and Status of Aliens Act 1914; British Nationality in the Union and Naturalization and Status of Aliens Act, 1926 (Act No. 18 of 1926); Naturalization of Aliens (South West Africa) Act, 1928 (Act No. 27 of 1928) South West Africa Naturalization of Aliens Act, 1924 (Act No. 30 of 1924).
1730. Act No. 49 of 1949.
1731. Act No. 18 of 1926.
1732. Act No. 14 of 1990.
1733. Act No. 30 of 1950.
1734. Klaaren (2000): 224.
1735. Cf. here: Sippel (2001): 303f.
1736. Preamble of the Constitution.
1737. 1997 NR 268 (HC).
1738. *Swart v. Minister of Home Affairs* 1997 NR 268 (HC): 274A–B.

§2. The Law of Citizenship

782. The *Constitution* contains very detailed provisions on citizenship. This is partly due to the fact that Namibia was a new country when the *Constitution* was drafted and, hence, no one was a Namibian citizen as such.[1739] It was further important to ensure citizenship for all Namibians that have left or had to leave Namibia for exile in the past and also for their families and descendants, so that they had an opportunity to return to Namibia as to "take up their rightful places in a free, unified and sovereign Namibia".[1740] Persons who have migrated or immigrated to the territory of Namibia and have recognized Namibia as their home country sometimes for a number of generations should also obtain the opportunity to become Namibian citizens.[1741]

783. Citizenship establishes rights as well as duties and it guarantees full enjoyment of all rights to all citizens. Citizenship also connotes the duty to respect the *Constitution*, to live in accordance with the laws of Namibia, to respect other people's rights and freedoms, and to pay taxes. In *Tlhoro v. Minister of Home Affairs*, the High Court held:[1742]

> Citizenship is a personal bond between an individual and the State. It signifies continuing membership of an independent political community and whilst it incorporates all the civil and political rights arising from that legal relationship, it also entails the duty of obedience and fidelity.

784. Article 4 of the *Constitution* provides for citizenship by birth, by descent, by marriage, by registration and by naturalization. It further includes provisions for the loss of citizenship. The constitutional provisions on citizenship are complemented by the *Act to Further Regulate the Acquisition or Loss of Namibian Citizenship*,[1743] which regulates in more detail the acquisition or loss of Namibian citizenship.[1744] The *Namibian Citizenship Special Conferment Act*[1745] and the *Namibian Citizenship (Second) Conferment Act*[1746] were enacted to regulate the conferment of Namibian citizenship upon certain descendants of persons who left Namibia owing to persecution by the colonial government which was in control of the country before 1915.[1747] The Acts give descendants of persons that are or were Namibian citizens by birth and had left Namibia due to persecution the right to acquire Namibian citizenships within a certain period of time after the commencement of the acts, if certain conditions are met.

1739. Light (2000): 164ff.
1740. *Thloro v. Minister of Home Affairs* 2008 (1) NR 97 (HC): 104E.
1741. Cf.: *ibid.*: 104B–C.
1742. *Ibid.:* 99A–B.
1743. Act No. 14 of 1990.
1744. According to Article 4(9) of the Constitution, parliament is entitled to make further laws regarding the acquisition of loss of Namibian citizenship not inconsistent with the constitution.
1745. Act No. 14 of 1991.
1746. Act No. 6 of 2015.
1747. *See*: section 2 of both acts.

§3. Types of Citizenship

785. Citizenship by birth for people born in Namibia before the date of independence is granted to those "whose fathers or mothers would have been Namibian citizens at the time of the birth of such persons", if the *Constitution* had been in force at that time.[1748] People born in Namibia before the date of independence are citizens by birth also if their "fathers or mothers were ordinarily resident in Namibia at the time of the birth of such persons".[1749] However, this does not apply if the fathers or mothers were enjoying diplomatic immunity, were career representatives of another country, or were members of any police, military or security unit of another country and were not ordinarily resident for a continuous period of not less than five years in Namibia at the time of independence or of the birth of the respective person.[1750]

786. Persons born after the date of independence are Namibian citizens if one of their parents is a Namibian citizen at the time of the birth of such person.[1751] A person born in Namibia after the date of independence is also a Namibian citizen if the father or mother is ordinarily resident in Namibia at the time of the birth of such person and is not enjoying diplomatic immunity, a career representative of another country, a member of any police, military or security unit seconded for service within Namibia by a foreign government, or an illegal immigrant.[1752] However, these exceptions do not apply to children who would otherwise be stateless.[1753] If a father or mother is "ordinarily resident" in Namibia must be considered on its own facts. The Supreme Court[1754] found it not to be a technical expression, stressed the importance of generous and purposive interpretation of the "spirit and tenor" in light of the *Constitution* and criticized the High Court's mechanical approach in this regard:[1755]

> The court a quo adopted a test which it considered was capable of mechanical application and not requiring the exercise of discretion based on the facts of a particular case, although incongruously a suggestion was made that the facts of the case should determine whether ordinary residence was established. In my view, the court a quo unduly sought to promote the interest of officialdom through certainty at the expense of the interests of the child. A more beneficial interpretation would have yielded an entirely different result to that reached by the court a quo. …
>
> In its 'spirit and tenor' the Constitution of Namibia seeks to avoid statelessness and to grant citizenship by birth to as varied a class of people as possible

1748. Article 4(1)(a) of the Constitution.
1749. Article 4(1)(b).
1750. *Ibid*.
1751. Article 4(1)(c) of the Constitution.
1752. Article 4(1)(d).
1753. *Ibid.*
1754. *See*: *MW v. Minister of Home Affairs* 2016 (3) NR 707 (SC).
1755. *Ibid.:* 719G–J.

as exemplified by the extension of citizenship by birth even to the offspring of illegal immigrants in order to avoid statelessness.

Against that backdrop, art 4(1)(d) must be given a generous and purposive interpretation that advances the interests of a child born in Namibia rather than one that limits such interests.

787. Persons not born in Namibia but with a father or mother who is a citizen of Namibia or, if born before independence, would have qualified for Namibian citizenship by birth, can acquire citizenship by descent if they comply with such requirements of citizenship as may be required by act of parliament.[1756]

788. A person who in good faith marries a Namibian citizen and has ordinarily resided in Namibia subsequent to such marriage as the spouse of such person for at least ten years and then applies to become a citizen of Namibia shall be a citizen of Namibia by marriage. The same applies to a person who, prior to the coming into force of the *Constitution,* in good faith married a person who would have qualified for Namibian citizenship, if the *Constitution* had been in force. This provision has been amended in 2010 in respect of the minimum duration of marriage before a foreign spouse can apply for citizenship.[1757] The original provision required a foreign spouse to be married for a minimum of only two years. The amended provision was enacted in order to prevent fraudulent marriages, whereby foreign nationals marry Namibians only for the purpose to obtain citizenship.[1758] The marriage does not have to be a civil marriage but can also be a marriage by customary law.[1759] Ordinary residence for purposes of acquiring citizenship by marriage means lawful residence.[1760]

789. Citizens by registration could if they have been ordinarily resident in Namibia for a continuous period of at least five years at the date of independence apply for Namibian citizenship within a period of twelve months from the date of independence if they renounced the citizenship of any other country of which they were citizens.[1761]

790. Citizenship by naturalization can be obtained by persons who are ordinarily resident in Namibia at the time of the application, have been so for a continuous period of not less than ten years and satisfy any other criteria pertaining to health, morality, security or legality of residence as may be prescribed by law.[1762] It

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1756. Article 4(2) of the Constitution. Those requirements have been defined in section 2(2) of the Act to Further Regulate the Acquisition or Loss of Namibian Citizenship and section 2(1) of the Namibian Citizenship Special Conferment Act.
1757. Article 4(3) of the Constitution, as amended by the Namibian Constitution Second Amendment Act, 2010 (Act No. 7 of 2010).
1758. *See*, *e.g.*: The Namibian of 8 May 2009.
1759. Article 4(3) of the Constitution.
1760. *Minister of Home Affairs v. Dickson* 2008 (2) NR 665 (SC): 683A.
1761. Article 4(4) of the Constitution.
1762. Article 4(5)(a)–(c).

is important to note that the required period or residence has been changed in the *Namibian Constitution Second Amendment Act*[1763] from five to ten years.

791. According to the *Constitution*, parliament may authorize by law the conferment of Namibian citizenship upon any fit and proper person by virtue of any special skill or experience or commitment to or services rendered to the Namibian nation.[1764]

§4. Loss of Citizenship

792. Namibian citizenship is lost if a person renounces his or her citizenship "by voluntarily signing a formal declaration to that effect".[1765] Moreover, all Namibian citizens that are not Namibian citizens by birth or descent may be deprived of their citizenship for specific reasons.[1766] These reasons include the acquisition of "the citizenship of any other country by voluntary act", the serving or volunteering "to serve in the armed or security forces of any other country without the written permission of the Namibian Government" and the reception of permanent residence in another country while being absent from Namibia for a period of more than two years without the written permission of the Namibian government.

793. Section 26 of the *Namibian Citizenship Act*[1767] prohibiting dual citizenship was found not to be applicable to Namibian citizens by birth or descent, given the constitutional rights of those citizens.[1768] Section 26 must be interpreted in light of the overall constitutional scheme for citizenship, meaning that citizenship by birth may not be regulated or derogated from by statutory provisions and that citizenship by descent may be regulated only by a requirement of registration.[1769]

§5. Non-citizens in Namibia

794. It must be mentioned that the *Constitution* is not only applicable to Namibian citizens but that aliens residing in or visiting Namibia also have rights and duties under the *Constitution*. This includes persons having a permanent residence or temporary residence permit, an employment or study permit, or a visitor's entry permit, but also persons seeking or being granted asylum. The legal position of these groups of persons will be dealt with below in Chapter 6 on the legal position of aliens.

1763. Act No. 7 of 2010.
1764. Article 4(6) of the Constitution.
1765. Article 4(7).
1766. Article 4(8).
1767. Act No. 14 of 1990.
1768. *Thloro v. Minister of Home Affairs* 2008 (1) NR 97 (HC): 106E–H; *Le Roux v. Minister of Home Affairs and Immigration* 2011 (2) NR 606 (HC): 607H–I; *see also*: *Berker v. Minister of Home Affairs and Immigration* 2012 (1) NR 354 (HC): 355F–G.
1769. *Ibid.*

Chapter 2. The Bill of Rights

§1. Introduction

795. The inclusion of a bill of rights in the *Constitution* must be seen in consideration of the history and the experiences of colonialism, racism, and apartheid. The preamble of the *Constitution* states:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;
> Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status; …
> Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid; … .

796. The *Constitution*, therefore, has a very substantial chapter on human rights. In addition to this, Namibia has become signatory to several human rights conventions and instruments[1770] soon after independence: Namibia, for example, on 30 October 1990, acceded the *Convention on the Rights of the Child***,** and, on 28 November 1994, the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights* as well as the optional and second optional protocol to the latter convention. Moreover, it has signed the *Convention on the Elimination of all Forms of Discrimination against Women* on 23 November 1992, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment* on 28 November 1994, the *Convention relating to the Status of Refugees and the Protocol Relating to the Status of Refugees,* both on 17 February 1995, and the *Convention on the Prevention and Punishment of the Crime of Genocide* on 28 November 1994. In 1992, Namibia ratified the *African (Banjul) Charter on Human and People's Rights*. The *International Convention on the Elimination of All Forms of Racial Discrimination*, which was acceded by the UN Council for Namibia on 11 November 1982, applies, according to Article 143 of the *Constitution*, to Namibia as successor to the council. In 2007, Namibia acceded the *Convention on the Rights of Persons with Disabilities.*

797. The observance and the promotion of human rights in Namibia has in the past been evaluated generally favourable; nevertheless, several shortcomings have

1770. A complete list of international agreements applicable to Namibia can be found at NamLex: NAMLEX, Appendix, Index of international law applicable to Namibia, Legal Assistance Centre, 31 Oct. 2020.

been identified that require positive action by the government.[1771] Of particular concern have been the use of excessive force by the police,[1772] poor detention conditions,[1773] long delays in hearing cases in the regular courts, and an uneven application of constitutional protections in the customary system. Additionally, domestic violence, discrimination of women, sexual exploitation of children, child labour, child abuse, discrimination, and violence based on sexual orientation and gender identity have been criticized as being prevalent in Namibia.[1774]

798. With regard to the delay of justice, specific attention should be drawn to the Caprivi treason trial.[1775] It has been the longest and largest trial in the history of Namibia. The delays of the trial but also the treatment of the accused have been criticized by the local, regional, and international communities.[1776] Participants in the Caprivi secessionist movement on the side of the Caprivi Liberation Army were charged with high treason, murder, sedition, and other offences.

799. The trial started in 2003. The thirteen main accused charged with high treason were tried in a separate leg of the proceedings leading to the conviction of ten and the acquittal of two of the accused in 2007.[1777] The Supreme Court though set aside the convictions by the High Court and referred the matter back for retrial in July 2013. The High Court closed its case in September 2020 and thereby rejecting the deputy-prosecutor general's request for a postponement to get witnesses from Botswana to testify in the trial who were not able to travel to Namibia due to that country's coronavirus pandemic lockdown. The proceedings against all other than the thirteen main accused continued until February 2013, the evidence submitted by the prosecution was found not to support the charges against forty-three of the accused, and they were acquitted and set free. The remaining thirty accused received their verdict in December 2015. They were found guilty and sentenced to prison for ten to eighteen years.[1778] Some of the accused who were found not guilty in February 2013 instituted damages claims against the state arguing that the continuation

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1771. *See*, *e.g.*: US Department of State, Bureau of Democracy (2020); Bertelsmann Stiftung (2014); NamRights (2011).
1772. *See* on this, e.g.: Hubbard (2019): 4–7. During enforcement of a COVID-19 state-of-emergency measure closing informal markets in a village in the north of Namibia, two police officers, e.g., beat to death a man in an escalating dispute. *See*: The Namibian of 21 Apr. 2020.
1773. The shortcomings identified by the Ombudsman in certain police stations or correctional facilities include overcrowding, lack of regular food of wholesome quality, broken or malfunctioning taps, showers, toilets and kitchen equipment as well as dirty cells and facilities. In some instances, juveniles were held with adults in rural detention facilities due to a lack of separate facilities for juveniles. *See*: Ombudsman (2019): 43ff.; 60ff.
1774. US Department of State, Bureau of Democracy (2020); Bertelsmann Stiftung (2014); NamRights (2011); Hubbard (2019; Ombudsman (2019).
1775. The Namibian of 15 Sep. 2015. *See* for more detailed information on the Caprivi secessionist movement: Part I, Chapter 2, § 10.
1776. *See*, *e.g.*: Amnesty International (2015); National Society for Human Rights (2006).
1777. One of the accused had died in custody.
1778. The Namibian of 18 Dec. 2015.

with their prosecution was malicious. While the High Court had awarded them damages in different cases,[1779] the Supreme Court reversed these decisions on appeal.[1780] The Supreme Court found that the prosecution had sufficient evidence at its disposal for it to believe in the guilt of the accused and to continue to prosecute them until they were found not guilty in February 2013.[1781] The claims based on malicious prosecution would thus be unsuccessful. With regard to damages because of a violation of constitutional rights,[1782] the Supreme Court declined to decide the issue of the alternative claim for constitutional damages as a court of first and final instance and referred the question on constitutional claims back to the High Court.[1783] While most of the decisions of the High Court were still outstanding at the time of this publication, in *Mahupelo v. Minister of Safety and Security,*[1784] the High Court rejected constitutional claims by arguing that[1785]

> where the Supreme Court found that the prosecution of the plaintiff was lawful, awarding constitutional damages is inappropriate because it will give rise to a situation where the Supreme Court finds that the prosecution of the plaintiff from the beginning to the end was lawful, while this court has to find that it was not, if it is to uphold the claim for constitutional damages. In my considered view that will be contrary to the doctrine of stare decisis and art 81 of the Constitution and as counsel for the defendants put it, 'judicial policy dictates that this is not possible'.

800. An important function in disclosing human rights violations and assisting victims of human rights violations can be assigned to human rights watch organizations. Namibia has a diverse landscape of non-governmental organizations with about 650 national and foreign organizations.[1786] The primary human rights non-governmental organizations are the Legal Assistance Centre and NamRights (formerly known as National Society for Human Rights) which have made many

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1779. *Mahupelo v. Minister of Safety and Security* 2017 (1) NR 275 (HC); *Makapa v. Ministry of Safety and Security*, High Court judgement, Case No. 57/2014 - unreported; *Mutanimiye v. Minister of Safety & Security*, High Court judgement, Case No. I3427/2013 - unreported; *Kauhano v. Minister of Safety and Security*, High Court judgement, Case No. I 3952/2013 - unreported; *Mwambwa v. Minister of Safety and Security*, High Court judgement, Case No. I 105/2014 - unreported.
1780. *Minister of Safety and Security v. Mahupelo* 2019 (2) NR 308 (SC); *Minister of Safety and Security v. Makapa* 2020 (1) NR 187 (SC); *Minister of Safety and Security v. Mutanimiye* 2020 (1) NR 214 (SC); *Minister of Safety and Security v. Kauhano* 2020 (3) NR 611 (SC); *Minister of Safety and Security v. Mwamba* 2021 (3) NR 790 (SC).
1781. *Ibid.*
1782. According to Article 25(4) of the Constitution, monetary compensation can be awarded for damages suffered in consequence of an unlawful denial or violation of fundamental rights or freedoms.
1783. *Minister of Safety and Security v. Mahupelo* 2019 (2) NR 308 (SC); *Minister of Safety and Security v. Makapa* 2020 (1) NR 187 (SC); *Minister of Safety and Security v. Mutanimiye* 2020 (1) NR 214 (SC); *Minister of Safety and Security v. Kauhano* 2020 (3) NR 611 (SC); *Minister of Safety and Security v. Mwamba* 2021 (3) NR 790 (SC).
1784. *Mahupelo v. Minister of Safety and Security* 2020 (2) NR 433 (HC).
1785. *Ibid.:* 449D–E.
1786. Bertelsmann Stiftung (2014): 9.

contributions to the human rights culture. The Legal Assistance Centre was founded with its major objective to create and maintain a human rights culture and make law accessible to everyone. It works in the fields of education, law reform, research, litigation, legal advice, representation, and lobbying since 1988.[1787] NamRights, founded in 1989, is a private, independent, non-profit and non-partisan human rights monitoring and advocacy organization envisaging a world free of human rights violations.[1788] Apart from those institutions, trade unions play an important role in fighting for the improvement of labour conditions, including humane conditions and treatment at the workplace.[1789]

§2. The Scope of Fundamental Rights and Freedoms under the Namibian Constitution

801. Chapter 3 of the *Constitution*, titled *Fundamental Rights and Freedoms,* contains a comprehensive list of human rights. This bill of rights is based on the *Universal Declaration of Human Rights.*[1790] It guarantees the protection of life[1791] and liberty,[1792] respect for human dignity,[1793] freedom from slavery and forced labour,[1794] the right to equality and freedom from discrimination,[1795] freedom from arbitrary arrest or detention,[1796] the right to a fair trial,[1797] the right to privacy,[1798] family rights,[1799] children's rights,[1800] property rights,[1801] the right to political activity,[1802] the right to administrative justice,[1803] the right to culture,[1804] and the right to education.[1805]

802. So-called first-generation rights, i.e., civil and political rights, found acknowledgement in the eighteenth as well as the nineteenth century and have built

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1787. *See*: Website of the Legal Assistance Centre: https://www.lac.org.na (accessed 8 Feb. 2022).
1788. This has been taken from the former website of the organization which is no longer active. https://web.archive.org/web/20110902211031/http://www.nshr.org.na/index.php?module=Pages&func=display&pageid=2 (accessed 8 Feb. 2022).
1789. Jauch (2018); Shindondola-Mote; Namukwambi (2012).
1790. Geingob (2010): 97; Horn (2010): 64.
1791. Article 6 of the Constitution.
1792. Article 7.
1793. Article 8.
1794. Article 9.
1795. Article 10.
1796. Article 11.
1797. Article 12.
1798. Article 13.
1799. Article 14.
1800. Article 15.
1801. Article 16.
1802. Article 17.
1803. Article 18.
1804. Article 19.
1805. Article 20.

the core of the defence strategy against arbitrary use of power by governments.[1806] In contrast, second-generation rights – which are related to a social welfare function of the state – have only been acknowledged since the beginning of the twentieth century.[1807] However, the justiciability of economic, social, and cultural rights on the constitutional level is far more complicated than that of first-generation rights and the guarantee of such rights highly depends on the availability of resources.[1808] This is even more valid for third-generation rights composed of solidarity or group rights and first articulated in the second half of the twentieth century because their "realization is predicated not only upon both the affirmative and negative duties of the state, but also upon the behaviour of each individual".[1809] Thus, several states refrain from granting such rights constitutional status, while still acknowledging that there is a positive duty on the states to ensure the well-being of their citizens. Most of the fundamental rights in the *Constitution* are first-generation rights. The only exception is the right to education which can be assigned to the second-generation rights. Several second- and third-generation rights have though been integrated into the *Constitution* as state policy principles under Chapter 11 of the *Constitution*.

803. According to Article 5 of the *Constitution*, the fundamental rights and freedoms are to be respected and upheld by the executive, legislature and judiciary and all organs of the government and its agencies, and "where applicable to them, by all natural and legal persons". Hence, it can be assumed that the *Constitution* does not solely provide for vertical effect of fundamental rights and freedoms but also for horizontal effect of fundamental rights and freedoms if they are applicable to legal and natural persons.[1810] The reservation "where applicable to them", however, leaves open to what extent the horizontal effect is valid. It can be assumed that this is determined by the nature of the fundamental right in question, the possible degree of protection that can be granted to persons without limiting other people's rights and the seriousness of the violation. In case of a restaurant owner denying a man not dressed well enough for entrance into his location, a conflict between the fundamental right to property and the right to freedom from discrimination is caused. It would then be up for a court to decide which right prevails and whether the interference with a person's right is severe enough to give rise to judicial action. Direct effect of Article 10(2) of the *Constitution* was confirmed in *Kauesa v. Minister of*

1806. As, e.g., by the Virginia Declaration of Rights of 1776 in the United States, the Déclaration des Droits de l'Homme et du Citoyen of 1789 in France or the Belgian Constitution of 1831. *See*: Tomuschat (2014): 137–138.
1807. Tomuschat (2014): 139.
1808. The justiciability of second-generation rights, for example, poses questions regarding the separation of powers doctrine, individually invocability and (supervisory) remedies. *See*, *e.g.*: Christiansen (2007); Heyns; Brand (1998); Allsop (2020).
1809. *See*: Ruppel (2009b): 103.
1810. The direct effect of fundamental rights and freedoms in the Namibian Constitution doubted by: Watz (2004): 78.

Home Affairs[1811] where the High Court held that "the protection is for all persons against discrimination by any persons as well as by the government."[1812]

804. In *Hipandulwa v. Kamupunya*,[1813] a private businessman who had chained the plaintiff half-naked to a tree for several months was found to be liable for damages because he violated the plaintiff's dignity and her right to liberty. The court, however, did not consider the question of horizontal effect of these rights. Although the question has not been dealt with by the Namibian judiciary, Article 5 of the *Constitution* clearly offers the possibility for seeking judicial protection of human rights in regard to perceived violations by other persons. The South African Constitutional Court suggested a narrow interpretation of the constitutional provision that a fundamental right also binds natural or juristic persons in *Du Plessis and Others v. De Klerk* "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".[1814] Private litigants could not invoke their constitutional rights against another private litigant, but only against organs of government. Only where a party alleged that a statute or executive act relied on by the other party was invalid for being inconsistent with constitutional rights, those rights would be relevant to private litigation.[1815]

§3. Enforcement of Fundamental Rights and Freedoms

805. The fundamental rights and freedoms of the *Constitution* are enforceable by the courts in the manner prescribed in the *Constitution*.[1816] The legal procedure to enforce constitutional rights is determined in Article 25(2) of the *Constitution*. According to that, aggrieved persons who claim that their fundamental rights or freedoms have been infringed or threatened can take court action or approach the ombudsman for legal assistance or advice.

806. If a violation or deprivation of fundamental rights or freedoms is established, the court can make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provision of the *Constitution*.[1817] This also applies to cases in which the court comes to the conclusion that grounds exist for the protection of fundamental rights or freedoms by interdict.[1818] The court can award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such

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1811. 1994 NR 102 (HC).
1812. *Ibid.:* 128I.
1813. 1993 NR 254 (HC).
1814. 1996 (5) BCLR 658 (CC). The constitutional provision in question is section 8(2) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) which equals the same article of the then applicable South African Interim Constitution (Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993)). *See* here also: Horn (2014).
1815. *Du Plessis and Others v. De Klerk* 1996 (5) BCLR 658 (CC).
1816. Article 5 of the Constitution.
1817. Article 25(3).
1818. *Ibid.*

unlawful denial or violation of its fundamental rights or freedoms.[1819] The latter provision has been described by Carpenter as "an innovation which would strike anyone schooled in the Anglo-American tradition of administrative law"[1820] which does not generally acknowledge a right to compensation.[1821]

807. The interpretation of the scope of "aggrieved person" is decisive for the question who can challenge alleged violations of rights and freedoms. In this respect, the courts so far stuck to the common-law approach to *locus standi*, meaning that "aggrieved person" under Article 25(2) of the *Constitution* is interpreted as being equivalent to having *locus standi* in terms of common-law principles. This would imply that the *Constitution* did not widen the scope of *locus standi*.[1822] Naldi, however, argued that the formulation in Article 25(2) can be understood as also making "allowance for action to be brought in the public interest".[1823] He states that it does not say that his or her fundamental right has been threatened or infringed but "a" fundamental right.[1824] The wording of the provision thus not necessarily requires that only the person affected by the violation of a fundamental right can institute proceedings, but suggests that also other persons might have *locus standi*. This restricting contemplation of Article 25(2) has been criticized by the High Court in *Namrights Inc v. Government of Namibia*[1825] where it was held that "all the provisions of article 25 must be read globally and intertextually in order to get the true meaning of those provisions". Article 25(3) which grants the courts the power "to make all such orders as shall be necessary and appropriate to secure *such applicants* the enjoyment of the rights and freedoms *conferred on them*" would suggest that the vindication of rights or freedoms is only possible with respect to rights "conferred on" the applicant, thus only if the person is affected by the violation of such rights.[1826]

808. The Law Reform and Development Commission welcomed an expanded approach to standing in constitutional cases.[1827] It recommended the introduction of a statute to reform both, the common law on standing and standing in constitutional cases with the key components being a relaxation of the "direct and substantial interest" requirement and a recognition of public interest standing, representative standing, and organizational standing.[1828] No such statute has been enacted and the

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1819. Article 25(4) of the Constitution.
1820. *Ibid.*
1821. In Germany, e.g., it has been acknowledged that a general right of compensation for violations can be construed through interpretation of constitutional principles, although the constitution does not explicitly provide for monetary compensation for human rights violations. *See*, *e.g.*: Grzeszick (2013): 113f.
1822. Cf.: *Labuschagne v. Master of the High Court of Namibia*, High Court judgement, Case No. A 283/2010 – unreported.
1823. Naldi (1997): 12f.
1824. *Ibid.:* 13.
1825. 2020 (1) NR 36 (HC): 40G.
1826. *Ibid.:* 40H.
1827. Law Reform and Development Commission (2014).
1828. *Ibid.*

question whether *locus standi* under the *Constitution* is broader then under common law remains still unsettled. Hubbard stressed in this regard that[1829]

> with some disagreement between High Court cases, several cases expressing support for a broad approach to constitutional standing without actually needing to resort to that breadth in the cases at hand and the Supreme Court not yet having given a definitive ruling on the issue. Only the Uffindell and Petroneft cases appear to have expressly relied upon expanded approaches to standing in the constitutional context for their decisions.

809. The approach to allow only persons with a substantial and direct interest in the outcome of the proceedings is not unusual and follows the notion that courts should not provide an alternative forum to the political process for the disclosure of widely held grievances, as this would be contrary to the clear separation between the legislature and the judiciary.[1830] The requirement of a direct and substantial interest in the outcome of the proceedings is the ordinary common-law principle.[1831] But also non-common law jurisdictions as Germany follow a similar approach. Only persons affected in their own rights have a right to review. An administrative act or decision affecting the general public, e.g., can only be challenged if the applicant's own rights are violated.[1832] South Africa follows a different approach with section 38(d) of the *Constitution* explicitly including persons acting in the public interest, thus implying a substantial departure from a strict definition of *locus standi*.

810. Regarding the meaning of direct and substantial interest, the Namibian High Court found, for example, that a mere financial interest is not sufficient[1833] and that the interest should not be too remotely connected to the relief requested and not be of an abstract or academic nature.[1834]

811. In *Kerry McNamara Architects Inc v. Minister of Works, Transport and Communication*[1835] the question of *locus standi* in respect to Article 18 was discussed. This case deals with the question of who can bring applications to court regarding an award decision by the tender board. The two applicants had agreed with one of the tenderers to render services to their company in case the tender

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1829. Hubbard (2017): 226.
1830. Cf.: Cane (1995): 277.
1831. *Trustco Ltd t/a Legal Shield Namibia v. Deeds Registries Regulation Board* 2011 (2) NR 726 (SC). *See also*: Hazel (2014).
1832. *See*: Article 93(4a) Grundgesetz für die Bundesrepublik Deutschland (German Constitution); § 42(2) Verwaltungsgerichtsordnung, 1991 (Administrative Courts' Act).
1833. *See*: *MWeb v. Telecom* 2012 (1) NR 331 (HC): 336G, citing the following two South African cases: *United Watch Diamond Company (Pty) Ltd v. Disa Hotels Ltd* 1972 (4) SA 409 (C): 415F–H, *Cabinet of Transitional Government for the Territory of South West Africa v. Eins* 1988 (2) SA 369 (A): 388A–B.
1834. *Trustco Ltd t/a Legal Shield Namibia v. Deeds Registries Regulation Board* 2011 (2) NR 726 (SC): 732 E.
1835. 2000 NR 1 (HC).

would be successful. The tender was awarded to another company that tendered a lower price. The question was discussed whether the applicants' rights were of derivative nature or the applicants' interests were directly and substantially affected by the particular administrative actions. The court made clear that "tenderers would be the only persons who have the necessary *locus standi* to review and insist on compliance with the regulations".[1836] And it was held, that the two applicants "do not fall within that category of persons whose interests were directly and substantially affected by the particular administrative acts".[1837]

812. The strict interpretation of *locus standi* has, however, been modified in later cases, which accorded also indirectly concerned persons *locus standi* and, thus, suggest that the constitutional standing is broader than common law standing. In *Uffindell t/a Aloe Hunting Safaris v. Government of Namibia*,[1838] the court argued that a broader interpretation is required for the legal right to challenge alleged breaches of fundamental rights and freedoms, including administrative action, as an "aggrieved person" as provided for by Article 25(2) of the *Constitution*.[1839]

813. In respect of the court's statement made in the *McNamara* case, the court held that

> judicial precedent on the interpretation of that phrase is limited and will undoubtedly require further judicial elaboration in future to determine which persons and classes of persons (or their representatives) are accorded the right to seek protection or enforcement of their fundamental rights from the Courts.[1840]

In *Petroneft International v. the Minister of Mines and Energy*,[1841] the court agreed with the remarks made in the *Uffindell* case but distinguished it from the matter in the *McNamara* case:[1842]

> Mr Namandje on the other hand submitted that only Namcor would have standing by reason of the fact that the mandate is to it. But this narrow approach does not take into account the full contractual setting which arose from and was dependent upon the mandate. I agree with Mr Gauntlett that this approach is untenable as it would effectively amount to the Government being afforded the opportunity to contract out of the Constitution by incorporating a parastatal which it controls and then exercising statutory powers through it. It would also seem to me that the position in the McNamara matter is distinguishable. That

1836. *Kerry McNamara Architects Inc v. Minister of Works, Transport and Communication* 2000 NR 1 (HC): 11A.
1837. *Ibid.:* 11A–B.
1838. 2009 (2) NR 670 (HC).
1839. *Ibid.:* 678E–681.
1840. *Ibid.:* 681B–C.
1841. High Court judgement, Case No. A 24/2011 – unreported.
1842. *Ibid.:* at 65.

> decision should be understood within its factual context. It was in a tender context where an unsuccessful tenderer had brought a review and then withdrew it.

The court held that subcontractors of that unsuccessful tenderer would not have standing to review the allocation of the tender.

814. In the case of *Maletzky v. Attorney General and Others*,[1843] the High Court though, refused such wide interpretation by emphasizing that

> Article 25 (2) was not intended to widen the ambit [of locus standi] to include persons who would otherwise not have had standing to bring proceedings. The Namibian Constitution has … not extended the common law requirements of locus standi.

815. In *Katjivena v. Prime Minister of the Republic of Namibia*[1844] the High Court found in this respect, that no private person can proceed by *actio popularis*. The court clarified that a private individual can only sue on his own behalf not on behalf of the public.[1845]

816. That a person cannot claim on behalf of a third party without providing good reasons and without proving that the third party cannot make the application has been emphasized in *Vaatz v. the Municipal Council of the Municipality of Windhoek:*[1846]

> The supplementary affidavit does not satisfy the requirements … the applicant does not show in his papers why those persons cannot make the application themselves; neither has the applicant satisfied the Court that he has good reason to make the application on behalf of those persons.

An example for a case in which an exception is made to the rule that an individual only has standing to protect his or her own interests is where an individual has been wrongfully deprived of his or her liberty and is thus unable to approach a court for relief.[1847]

817. In *Namibian Employers' Federation v. President of the Republic of Namibia*,[1848] the High Court clarified[1849] that a person is aggrieved if seeking clarification on the constitutionality of a provision. This had also been established in

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1843. *Maletzky v. Attorney General*, High Court judgement, Case No. 298/2009 – unreported.
1844. *Katjivena v. Prime Minister of the Republic of Namibia* 2016 (3) NR 903 (HC)
1845. With reference to the South African decision *Wood v. Ondangwa Tribal Authority* 1975 (2) SA 294 (A).
1846. *Vaatz v. The Municipal Council of the Municipality of Windhoek*, High Court judgement, Case No. A 287/2010 – unreported: at 10.
1847. *See*: *Wood v. Ondonga Tribal Authority* 1975 (2) SA (AD) 294: 311 A.
1848. High Court judgement, Case No. 136/2020 – unreported.

Trustco Ltd T/A Legal Shield Namibia v. Deeds Registries Regulation Board,[1850] where the importance of such approach was outlined as follows:

> In a constitutional state, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights. … The rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements.[1851]

818. In *Namibian Employers' Federation v. President of the Republic of Namibia* the High Court also emphasized that it was not necessary for an applicant to wait with seeking legal protection until he or she is charged or imprisoned on account of contravening the provision in question. It held:

> If the applicants are correct, and the regulations are either *ultra vires* or in conflict with the Constitution, then they will have successfully vindicated their rights. If they are incorrect, then they will have obtained clarity on their legal entitlements.[1852]

§4. Limitations and Restrictions of Fundamental Rights and Freedoms

819. An unequivocal right in the *Constitution* is certainly the prohibition of the death sentence.[1853] Moreover, the right to life (Article 6) and the right to dignity (Article 8(1)) can be regarded as inviolable. Most other fundamental rights of the *Constitution* are subject to certain qualifications or exceptions. Fundamental rights and freedoms can be limited if the requirements in Articles 21(2) and 22 of the *Constitution* are met. The general approach to the limitation of fundamental rights and freedoms in Namibia was clarified by the Supreme Court in *Attorney-General of Namibia v. Minister of Justice*:[1854]

> [T]he Namibian Constitution does not have a general limitation clause which restricts the scope of some or all of the fundamental rights and freedoms entrenched therein. The approach adopted by the founders of our Constitution is different: on the one end of the spectrum are those fundamental rights and freedoms which are inviolable, such as the rights to life and dignity entrenched

1849. By referring to *Alexander v. Minister of Justice* 2010 (1) NR 328 (SC), in which the High Court noted the decision in *Myburgh v. Commercial Bank of Namibia* 2000 NR 255 (SC) as well as *Transvaal Coal Owners Association v. Board of Control* 1921 TPD 447.
1850. 2011 (2) NR 726 (SC).
1851. *Ibid.*: 733C–D.
1852. *Namibian Employers' Federation v. President of the Republic of Namibia*, High Court judgement, Case No. 136/2020 – unreported.
1853. Cf.: *S v. Vries* 1998 NR 244 (HC): 277 H.
1854. 2013 (3) NR 806 (SC): 827D–F.

> in articles 5 [the court probably meant Article 6] and 8. On the other end of the spectrum are those rights and freedoms where limitations are authorised in the clearest of language and the extent of those limitations are extensively defined, such as in article 21 entrenching fundamental freedoms. In between those rights and freedoms at either end of the spectrum, are a number of other rights and freedoms of which the scope and application is qualified by phrases such as 'according to law', 'in accordance with law' or 'according to procedures established by law'.

820. In *S v. Vries*,[1855] the High Court stressed the necessity to determine the true meaning of a right also with respect to its qualifications and exceptions:[1856]

> Some of the articles providing for the fundamental rights set out qualifications or exceptions in the article itself. Apart from this, the fundamental rights are not further defined. It follows therefore that in most cases, if not all, an enquiry must first be conducted by the Court into the true meaning of the right, its content and ambit, and the qualifications and exceptions which have become part and parcel of the right, irrespective of qualifications and exceptions added by the constitution itself or legislation in accordance with the letter and spirit of the Constitution. This consideration obviously includes a determination of the intention of those who negotiated and enacted the Constitution and the objective intended with the fundamental right.

821. According to Article 22 of the *Constitution*, limitations upon fundamental rights and freedoms are only allowed if they are authorized by the *Constitution*. Any law that provides for a limitation of a fundamental right or freedom needs to fulfil certain criteria. It[1857]

> shall be of general application, shall not negate the essential content of the respective fundamental right or freedom, and shall not be aimed at a particular individual.

822. In addition, the law has to "specify the ascertainable extent of the limitation" and make reference to the article or articles that justify the limitation.[1858] Article 22 of the *Constitution*, hence, contains four principles that are required to be met if a certain fundamental right or freedom is limited in its application. These principles can be traced to German Constitutional Law[1859] and include the

1855. 1998 NR 245 (HC).
1856. *Ibid.:* 277I–278B.
1857. Article 22(a) of the Constitution.
1858. Article 22(b).
1859. Cf. Watz (2004): 87ff.

guarantee of essential content,[1860] the single-case law prohibition,[1861] the obligation to quote the provision justifying the limitation,[1862] and the principle of clarity and definiteness of the wording of enactments.[1863] However, in particular the inclusion of the guarantee of essential content may involve challenges with respect to interpretation as it is difficult to determine what the essential content is as has become obvious in German case law.[1864] South Africa which had included the principle in its *Interim Constitution* did, e.g., not include it in its *Constitution* of 1996 because of the vagueness of the term "*essential content*".[1865]

823. In contrast to the fundamental human rights, the *Constitution* provides for a general restriction on fundamental freedoms.[1866] This is due to the difference in the nature of rights and freedoms. A *right* is usually understood to be a privilege given to all citizens, whereas *freedom* means not having constraints to conduct actions. Actions can have consequences for other people and possibly violate their fundamental rights. Therefore, it is necessary to ensure that freedoms exercised by one person can only be exercised in so far as they do not violate other persons' rights.

824. The freedoms, as stipulated in Article 21 of the *Constitution* can be restricted by law if they are reasonable, necessary in a democratic society and required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.[1867] The constitutionally allowed justifications for restrictions of freedoms have been criticized as too broad, especially the reasons of morality and national interest would be too vague and would allow nearly any restriction of fundamental freedoms.[1868] Furthermore, the restrictions are not tailored to the different freedoms set out in Article 21(1) of the *Constitution* which

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1860. The term used in the German Constitution is *Wesensgehaltsgarantie* and can be found in Article 19(1) of the Grundgesetz für die Bundesrepublik Deutschland (German Constitution).
1861. The term used in the German Constitution is *Verbot des Einzelfallgesetzes*. This requires any legislation limiting the fundamental right to be applicable in general terms rather than for a specific case. *See*: Article 19(1) of the Grundgesetz für die Bundesrepublik Deutschland (German Constitution).
1862. The term used in the German Constitution is *Zitiergebot*. This requires the legislator, when enacting legislation having the effect of limiting a fundamental right, to quote the respective fundamental right. *See*: Article 19(1) of the Grundgesetz für die Bundesrepublik Deutschland (German Constitution).
1863. The term used in the German Constitution is *Bestimmtheitsgrundsatz*. This is an essential principle of the principle of the Rechtsstaat and presupposes clear and definite phrasing of legislation in order to enable citizens to recognize what legal consequences their conduct may have. This is derived from Articles 20 and 28(1) of the Grundgesetz für die Bundesrepublik Deutschland (German Constitution).
1864. *See*, *e.g.*: BVerfGE 16, 194 ff.; BGHSt 4, 375ff.; *see also*: Kaufmann (2002): 23.
1865. *See*, *e.g.*: Mostert (2000): 363ff.
1866. *See*: Article 21 of the Constitution.
1867. Article 21(2) of the Constitution.
1868. Watz (2004): 160.

indeed would require particular limitations.[1869] The courts, hence, play an important role in the interpretation of limitations and restrictions of fundamental freedoms.

825. An important example is *Kauesa v. Minister of Home Affairs*,[1870] where the Supreme Court of Namibia established principles for the limitation of fundamental freedoms guaranteed in Article 21. Influenced by Canadian jurisprudence, in particular the case *R v. Oakes*,[1871] the court held that, in assessing the extent of the limitations to rights and freedoms permitted by Article 21(2) of the *Constitution*, it[1872]

> must be guided by the values and principles that are essential to a free and democratic society which respects the inherent dignity of the human person, equality, non-discrimination, social justice and other such values.

It was further emphasized that[1873]

> [i]t is important that Courts should be strict in interpreting limitations to rights so that individuals are not unnecessarily deprived of the enjoyment of their rights.

826. The court explained how freedoms enshrined in Article 21(1) and limitations upon it should be interpreted and stressed that limitations must be exceptions rather than a general rule:[1874]

> It is important to bear this in mind: sub-article (1) of article 21 protects freedom of speech and expression and sub-article (2) creates a restriction purposely enacted to soothe the relationships between those exercising their constitutionally protected rights and those who also have their own rights to enjoy. This is why the restrictions applied to rights and freedoms are to be restrictively interpreted in order to ensure that the exceptions are not unnecessarily used to suppress the right to freedom guaranteed in article 21(1)(a). A restrictive interpretation of the exceptions or restrictions makes it possible for the exceptions to be used for the purposes contemplated in article 21(2). In our view the restriction should be reconcilable with the freedom of speech protected by article 21(1)(a).

827. As the following excerpts from Namibian case law indicates, any restriction or limitation of a fundamental right or freedom by statute must pass the rationale connection or proportionality test. To pass this test the statute must on the one

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1869. *Ibid.:* 160ff.
1870. 1995 NR 175 (SC).
1871. (1986) 26 DLR (4th) 200: 227; 24 CCC (3d) 321: 348.
1872. *Kauesa v. Minister of Home Affairs* 1995 NR 175 (SC): 186H–I.
1873. *Ibid.:* 190F–G.
1874. *Ibid.:* 190I–B.

hand have a legitimate state interest, and on the other hand, there must be a rational connection between the statute's means and goals.

828. Regulation 58 (32) under the Police Act 1990[1875] was found to be unconstitutional *in Kauesa v. Minister of Home Affairs.*[1876] The regulation rendered unfavourable comments made by a member of the Police Force in public upon the administration of the police force or any other government department an offence. The court held:[1877]

> We are of the view that reg 58(32) is arbitrary and unfair. Its objective is obscured by its overly breadth. It cannot easily be identified. Because of that it seems to us that there is no rational connection between the restriction and the objective. The limitation is not proportional to the objective so it does not attain the particular effect which is justified by a 'sufficiently important objective'.

829. In *Africa Personnel Services v. Government of Namibia*, the court specified the requirements of the proportionality test:[1878]

> The three criteria, whether applied jointly or severally in determining the constitutionality of a limiting measure, are interrelated by the overarching requirements of 'proportionality' and 'rationality'. They are implicit in the words 'reasonable', 'necessary' and 'required'. Every restrictive measure must be rationally related and proportionate to the constitutionally permissible objective it seeks to attain.

830. As has been mentioned above,[1879] Article 24 of the *Constitution* allows for certain derogations from the bill of rights in times of national defence or in public emergencies under Article 26. In this context, it must be stressed, that only the right to freedom from arbitrary arrest and detention, the right to privacy, the right to property, the right to political activity, the right to assemble peaceably and without arms, the right to withhold labour, the right to move freely throughout Namibia, the right to reside and settle in any part of Namibia, the right to leave and return to Namibia, and the right to practise any profession, or carry on any occupation, trade or business can be derogated from or suspended. Derogations from or suspension of all other fundamental rights and freedoms are in contrast unexceptionally prohibited by Article 24(3).

1875. Act No. 19 of 1990.
1876. 1995 NR 175 (SC).
1877. *Ibid.:* 190H–I.
1878. 2009 (2) NR 596 (SC): 641 E - F.
1879. Part III, Chapter 7.

§5. ONUS OF PROOF

831. The onus of proof that a fundamental right is violated was found to be generally on the applicant.[1880] In *S v. Vries*, the High Court held:[1881]

> In view of the fact that the Court is dealing with one of the fundamental human rights enumerated in articles 5–20, and not with an alleged violation of a fundamental freedom enumerated in article 21(1) where the limitation clause article 21(2) applies, the *onus* is throughout on the one alleging that the provision unconstitutionally violates the fundamental rights contained in article 8 of the Namibian Constitution.

That the onus of proving a limitation or restriction on a right or freedom guaranteed by the bill of rights was on the party alleging that there is such limitation or restriction was emphasized by the Supreme Court in *Kauesa v. Minister of Home Affairs*,[1882] by referring to several foreign judgements.[1883]

832. Once the onus has been discharged, the person seeking to assert that the limitation is justifiable within the meaning of Article 21(2) of the *Constitution* bears the onus of establishing that.[1884] Such an approach would neither infringe the right to liberty nor the equality provision.[1885]

833. In *S v. Dausab*,[1886] the applicant argued that his right to liberty and to equality were infringed by a provision that the applicant, who was charged with two counts of murder and two counts of contravening the provisions of the *Arms and Ammunition Act,*[1887] bears the onus of proof why he should be released on bail. The provision would be unconstitutional. The High Court of Namibia held that the rights contained in Articles 7 and 10 of the *Constitution* were not infringed by placing an onus on an accused person in bail applications.[1888] This was restated and continued in *S v. Shanghala:*[1889]

1880. *Kauesa v. Minister of Home Affairs* 1995 NR 175 (SC): 189I; *S v. Vries* 1998 NR 245 (HC): 277F; *Chairperson of the Immigration Selection Board v. Frank* 2001 NR 107 (SC): 132D; *S v. Van den Berg* 1995 NR 23 (HC): 40.
1881. 1998 NR 244 (HC): 277F.
1882. 1995 NR 175 (SC).
1883. *R v. Oakes* (1986) 26 DLR (4th) 200: 225, (1986) 1 SCR 103; *Qozeleni v. Minister of Law and Order* 1994 (3) SA 625 (E): 640F–I; *R v. Edwards Books & Art Ltd* (1986) 35 DLR 4th 1: 4, (1986) 2 SCR 713; *Park-Ross and Another v. Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C): 162B–C.
1884. *Kauesa v. Minister of Home Affairs* 1995 NR 175 (SC): 189I-J; *Chairperson of the Immigration Selection Board v. Frank* 2001 NR 107 (SC): 132J–133A; *Africa Personnel Services v. Government of Namibia* 2009 (2) NR 596 (SC): 640G–641G.
1885. *Ibid.*
1886. *2011* (1) NR 232 (HC).
1887. Act No. 7 of 1996.
1888. *Ibid.*: 237A.
1889. 2022 (2) NR 536 (HC): 539H–540A.

> An applicant for bail bears the specific onus to prove on a preponderance of probabilities that the interest of justice permits his release. This means that an applicant must specifically make out his own case and not necessarily rely on the perceived strength or weakness of the state's case. In so doing, an applicant must place before a court reliable and credible evidence in discharging this onus.

Shanghala and five other applicants who had been arrested as suspects in the fishrot corruption case[1890] applied for bail pending trial. The court stressed what is expected from the applicants in order to make out their cases:[1891]

> In the instant case, the applicants had to place before the Court primary facts which must be used as a basis to infer the existence of further facts namely that their constitutional rights are being violated or infringed. They did not do that. What they did is that they pleaded a legal result and parroted Articles 7, 8, and 12, of the Constitution. … It must be remembered that in this matter all the applicants were arrested on the strength of warrants of arrest issued by a judicial officer, and the legality of the warrants of arrest was tested in this Court; meaning that their arrests are neither unlawful nor arbitrary but in accordance with the law.

The applications for bail were dismissed.

834. In *Premier Construction CC v. Chairperson of the Tender Committee of the Namibia Power Corporation Board of Directors*, the High Court emphasized that it is a constitutional imperative that the onus of proof is on the applicant who alleges a violation of his or her constitutional basic human rights and further that this proof should be a conclusive proof.[1892] This was further specified by the Supreme Court in *Nelumbu v. Hikumwah*[1893] by stating that an applicant alleging the breach of Article 18 of the *Constitution* which implicates different principles must[1894]

> say which of these possible avenues of attack he or she relies on and on what factual material. The applicant for review bears the onus in its full sense: the evidential burden and making out the case for review. True, once there is prima facie evidence the decision-maker bears the onus of rebuttal; that is to say to justify the decision-making.

1890. *See* on this above: Part III, Chapter 8, § 14.2.
1891. *S v. Shanghala* 2022 (2) 536 (HC): 552H–553B.
1892. *Premier Construction CC v. Chairperson of the Tender Committee of the Namibia Power Corporation Board of Directors*, High Court judgement, Case No. A 200/2014 – unreported.
1893. 2017 (2) NR 433 (SC).
1894. *Ibid*.: 443H.

Chapter 3. The Contents of the Bill of Rights

§1. Introduction

835. In the following paragraphs, the different human rights as guaranteed in the *Constitution* will be consecutively presented. It will also be analysed how Namibian courts have interpreted and applied the bill of rights in case law.

§2. The Rights to Life And Liberty

I. Introduction

836. Article 6 of the *Constitution* provides that the right to life shall be respected and protected. This likewise restricts the state and other persons to interfere with the life of others and confers a positive duty to the state to protect this right. Article 6 further prohibits the imposition of death sentences in Namibia.[1895]

837. The right to liberty in Article 7 is not absolute but prohibits the deprivation of personal liberty if it is not according to procedures established by law. Personal liberty can be broadly interpreted as the general freedom of action.[1896]

838. The right to life is intricately connected to the question about the legality of abortions; with opponents of abortions arguing that prenatal humans should be regarded as persons from the moment of conception thus having the same fundamental right to life before birth as humans have after birth. In Namibia, abortion is regulated by the *Abortion and Sterilisation Act*.[1897] Under these legal provisions, woman can only have an abortion in cases of incest, rape or when the pregnancy is deemed a health risk to the life of the mother. In 1996, the then Minister of Health and Social Services put forth a draft bill allowing abortion on demand during the early stages of pregnancy.[1898] However, the bill was withdrawn by the minister in 1999 arguing that there was a strong opposition from the public. The government said that wide-ranging consultations with communities including churches indicated 99% of Namibians did not want abortion to be legalized – this conclusion was though not supported by any opinion poll or sample survey.[1899] About two decades later calls for the legalization of abortion have intensified; but the Namibian society

1895. Despite the constitutional prohibition of death penalty, from time to time the re-imposition of the death penalty is suggested to tackle the high number of committed crimes. *See*, *e.g.*: Links (2011): 29f.; New Era of 2 Oct. 2020.
1896. Cf.: Watz (2004): 100.
1897. Act No. 2 of 1975, as amended.
1898. Horn (2008b): 419. The discussion of abortion law and reform efforts has also been discussed by: Husselmann (2019).
1899. Hubbard (1999); Links (2001): 30.

remains divided on the issue.[1900] Multiple human rights organizations and womens' groups from Namibia as well international pro-abortion groups increased pressure on the government to reform the abortion legislation.[1901] The problem of illegal and unsafe abortions threatening the life of the woman seeking abortion is named as a major negative effect of the applicable strict abortion legislation.[1902] There is, though, still a strong opposition against general legalisations of abortions; with most of them stating that such legalization would be contrary to their religious beliefs.[1903] On 25 June 2020, the then Deputy Minister of Health tabled a motion on legalising abortion in the National Assembly to push for a debate on the topic.[1904] The motion was criticized by other politicians arguing the motion had been tabled without considering "constituent traditions and religious approvals".[1905] While there was a public debate on the matter, the government had not unfolded its plans regarding a reform of the abortion law when this publication was finalized.

II. Case Law Regarding Imprisonment, Bail, Detainment, and Restraint

839. The protection of life and liberty was considered in *State v. Tcoeib*[1906] in regard to the question whether the life sentence is unconstitutional per se. It was found that life imprisonment cannot be equated with the death penalty and does not infringe Article 6 of the *Constitution*.[1907] It would not terminate the life of the imprisoned.[1908]

840. In *Julius v. Commanding Officer, Windhoek Prison; Nel v. Commanding Officer, Windhoek Prison*,[1909] the High Court stressed that imprisonment limits the

1900. *See*: The Southern Times of 10 Jul. 2020. *See also*: "Abortion is legal in Namibia, but only if a woman is in danger or has been sexually abused. Activists are demanding reform", CNN News of 27 Nov. 2020, available at: https://edition.cnn.com/2020/11/26/africa/namibia-abortion-reform-intl/index.html (accessed 31 Mar. 2022).
1901. *See*: *Ibid*. In 2020, a petition calling for a reform of the abortion law was initiated and then signed by several thousand people. At the date of this publication, this petition had more than 62,000 signatories. *See*: https://www.change.org/p/honorable-dr-kalumbi-shangula-minister-of-health-and-social-services-legalize-abortion-in-namibia (accessed 21 Jun. 2022).
1902. *See*: The Southern Times of 10 Jul. 2020, and also: "Abortion is legal in Namibia, but only if a woman is in danger or has been sexually abused. Activists are demanding reform", CNN News of 27 Nov. 2020, available at: https://amp.cnn.com/cnn/2020/11/26/africa/namibia-abortion-reform-intl/index.html (accessed 18 Jul. 2022).
1903. *See*: *Ibid.* Anti-abortion activists carried out counter-protests. The organization Pro-Life Namibia has, e.g., initiated a counter petition with the aim to reject the legalization of abortion in Namibia. Up to date, about 15,000 persons have signed the petition. *See*: https://www.change.org/p/namibia-government-pro-life-namibia-rejecting-the-legalisation-of-abortion-in-namibia#:~:text=Pro-Life%20Namibia%20started%20this%20petition%20to%20Namibia%20Government,seeks%20support%20with%20a%20target%20of%201500%20signatures. (accessed 31 Mar. 2022).
1904. The Namibian of 26 Jun. 2020.
1905. The Sun of 4 Mar. 2021.
1906. *State v. Tcoeib* 1999 NR 24 (SC).
1907. *Ibid.:* 31E–F.
1908. *Ibid.:* 31C–D.
1909. 1996 NR 390 (HC).

right to personal liberty.[1910] But as this right is not absolute, a person's liberty can be restricted, however, only by a legal procedure which is not contrary to the *Constitution*.[1911] An unlawful arrest infringes the right to liberty as guaranteed in Article 7 of the *Constitution*. In this case, certain parts of section 65 of the *Magistrates' Court Act*[1912] were found to violate the right to fair trial, basically since an order for imprisonment could be made in the person's absence, meaning the person would have no opportunity to give reasons to the court in defence against his or her imprisonment.[1913]

841. Unlawful imprisonment constitutes a violation of the right to liberty and thus gives rise to damage claims. The determination of the amount of the damages awarded requires the court to take into account[1914]

> the manner which bought about the complainant's plight and the degree of impairment of dignity and discomfort which occurred as a result. Obviously also the length of the detention will play a role as well as the court's duty to give recognition to the value of an individual's liberty as enshrined in the constitution and to take all these aspects into account when awarding damages ultimately. There surely is no *numerus clausus* as regards the factors a court can take into account in this regard, for as long as they are relevant to the determination of damages.

842. In *Alexander v. Minister of Justice*,[1915] the Supreme Court acknowledged that Article 7 of the *Constitution* does not confer on any person in criminal or extradition cases an unqualified right to be released on bail. Nevertheless, the right to apply for bail has to be granted to all persons.[1916] Section 21 of the *Extradition Act*[1917] – basically prohibiting the granting of bail after the committal of a person to prison – was found to be unconstitutional and was struck down by the court. The following remarks were made:[1918]

> All the above instances referred to pinpoint the unfairness and the arbitrariness of the provisions of s 21. Primarily it stems from the fact that the legislature, by enacting the section, did not consider and take into consideration the fact that circumstances among various persons may differ from one person to the other and that there may be instances where the State, in order to comply with

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1910. *Julius v. Commanding Officer*, *Windhoek Prison*; *Nel v. Commanding Officer*, *Windhoek Prison* 1996 NR 390 (HC): 393H.
1911. *Ibid.:* 393I–394C.
1912. Act No. 32 of 1944.
1913. *Julius v. Commanding Officer*, *Windhoek Prison and Others*; *Nel v. Commanding Officer*, *Windhoek Prison* 1996 NR 390 (HC): 394J–395A; 397E.
1914. *Hoeseb v. The Registrar of the High Court,* High Court judgement, Case No. I 2912/2013 - unreported: at 27.
1915. 2010 (1) NR 328 (SC).
1916. *Alexander v. Minister of Justice* 2010 (1) NR 328 (SC): 361J–362A.
1917. Act No. 11 of 1996.
1918. *Alexander v. Minister of Justice* 2010 (1) NR 328 (SC): 366C–H.

> its duty to surrender a requested person, does not require detention by such person – at least not until the surrender is imminent. Although it is accepted that the right to liberty will have to give way where circumstances require the incarceration of a person to be extradited in order for the Namibian State to comply with its duty, by enacting a blanket prohibition on the granting of bail, in the circumstances set out in s 21, the essential content of the right to liberty was completely negated and the Namibian State's duty to surrender a requested person to the requesting State, after his or her committal, completely trumped the constitutional right. This is not permissible and the effect of s 21 on the constitutional right goes much further to impair the constitutional right than what is reasonably necessary.

843. By applying the requirements established in *Alexander v. Minister of Justice*, the High Court declared, in *Kennedy v. Minister of Safety and Security,*[1919] a part of section 103(3) of the *Correctional Service Act*[1920] that deals with the confinement and restraint of offenders unconstitutional. The possibility to order the confinement of an offender with mechanical restraint was found not to pass the proportionality test:

> The only fly in the ointment is the provision that 'mechanical restraint' may be ordered by second respondent. In my view this provision containing the phrase 'with or without mechanic restraint' offends a requirement of the Alexander requirements, because the impairment of the rights of applicants in that regard is not proportional to the objective.

844. In *Gawanas v. Government of the Republic of Namibia*,[1921] the applicant was detained in a healthcare centre after being charged with the crime of child

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1919. 2020 (3) NR 731 (HC): 747H – I.

1920. *Ibid.:* Act No. 9 of 2012. The relevant part of section 103 reads:

> (1) Where the officer in charge considers it necessary-
> (a) to secure or restrain an offender who has-
> (i) displayed or threatened violence;
> (ii) been recaptured after escape from custody or in respect of whom there is good reason to believe that he or she is contemplating to escape from custody; or
> (iii) been recommended on medical grounds for confinement in a separate cell by a medical officer;
> (b) for the safe custody of an offender, that such offender be confined; or
> (c) for any other security reason,
>
> such officer in charge may order that such offender be confined, with or without mechanical restraint, in a separate cell and in the prescribed manner, for such period not exceeding 30 days as such officer in charge considers necessary in the circumstances.

1921. 2012 (2) NR 401 (SC).

stealing. The government of Namibia was found liable for its omission to take reasonable steps to secure the release of the applicant, once her doctors considered her continued detention in the institution unnecessary.[1922] It was held:[1923]

> Although the court [a quo] may have been correct that one of the considerations that informed the adoption of articles 7 and 8 of the Constitution was caused by detention without trial during the apartheid era, the principles of liberty and dignity are far wider in their scope. A person compulsorily detained in a mental institution is physically restrained and his or her right of freedom of movement has been taken away. He or she is subject to certain discipline enforced by the institution where he or she is detained. … I conclude therefore that compulsory incarceration in a mental institution where a person is mentally fit, does impair the liberty and dignity of a person.

845. In determining what is "reasonable" in the circumstances the court takes the provisions of Articles 7 and 8 of the *Constitution* into account and, in particular, bears in mind, as noted above, that the compulsory detention of a person in a mental institution in a case, that a person is mentally fit, will be a limitation of that person's liberty and dignity.[1924]

III. The Law of Patient Autonomy

846. The right to autonomy of patients as part of the right of self-determination about the own body belongs to the heart of the constitutional protected dignity und liberty of human beings. If it comes to medical treatment, it has to be balanced with the physician's duty of care. In principle, every human being has the right to decide for its own on the nature and the extent of medical treatment. This includes the decision against medical treatment even in situations where this leads to the death of the patient. However, there might be circumstances in which a person is not able to take such decision; for example, when being unconscious or *non compos mentis*.[1925] In such circumstances the decision about medical treatment might behoove others. A delicate question is further, if a person's decision about or against medical treatment is absolute or if there are reasons allowing for carrying out medical treatment against the will of the patient. This might be discussed in cases where constitutional rights of others such as the children of a patient are affected by the patient's decision. What can also be discussed in this respect, is whether the constitutional protection of the right to life requires the state to protect a person's life against his or her will.[1926]

1922. *Gawanas v. Government of the Republic of Namibia* 2012 (2) NR 401 (SC): 413I–414A.
1923. *Ibid.:* 407F–H.
1924. *Ibid.:* 409H–I.
1925. Meaning: to be not able to think clearly. On the criteria to *non compos mentis see*: Visser (2016): 50.
1926. *See* here again: Visser (2016): 53f.

847. In 2015, the Supreme Court delivered a judgement on the very sensitive issue of patient autonomy.[1927] A 38-year-old married women with three children challenged two judgements of the High Court.[1928] The first judgement appointed her brother as her curator for the purpose of authorizing the administration of medical procedures on her, if so advised by health professionals.[1929] The second High Court decision directed the relevant physicians to render appropriate medical treatment to appellant.[1930] The latter decision was justified by two main arguments. On the one hand, the applicant was found not to be *compos mentis* to exercise her right to refuse treatment. On the other hand, it was found that the scope of her right to self-determination should be considered against the rights of the children, the wider family and society in general.

848. The applicant stated that she would not accept a blood transfusion if complications arose during delivery. The background for this decision was that the applicant and her husband were Jehovah's Witnesses who followed a specific moral and religious code that included a scriptural command to abstain from the ingestion of blood. In early September, the applicant appointed her husband as her designated healthcare agent and a third person as an alternate healthcare agent by way of signing a document titled "Durable Power of Attorney for Health Care". A few days later, she began bleeding and was brought to the Mediclinic Hospital in Windhoek. The child was successfully delivered but due to complications a part of her uterus was removed. During the operation, the applicant sustained a major haemorrhage leading to a notable drop of her haemoglobin reading what usually indicates the transfusion of blood.[1931]

849. On 13 September, the applicant's brother filed an ex parte application to be appointed the curator of the applicant in order to authorize the administration of medical procedures, including blood transfusions, if so advised by health professionals. Neither the applicant nor her husband were informed by this application at this time. The fact that the applicant had appointed her husband as her healthcare agent was not brought to the attention of the court.[1932] The court granted the application by relying on evidence by the applicant's physician who stressed that the applicant would require a blood transfusion.[1933] She lodged an urgent application seeking to rescind the order of the High Court opposing the decision to appoint her brother as her curator as well as to order a blood transfusion in contravention of her religious beliefs and her right to bodily autonomy.[1934] The High Court rejected the

1927. *ES v. AC* 2015 (4) NR 921 (SC). A discussion of the case and the general matter of patient rights can be found in: Visser (2016).
1928. *Ex Parte: Chingufo,* High Court judgement, Case No. A 216/2012 – unreported; *In Re Efigenia Semente; Semente v. Chingufo*, High Court judgement, Case No. A 216/2012 - unreported. The High Court decisions are discussed in: Horn (2013b); and partly in: Visser (2016).
1929. *ES v. AC* 2015 (4) NR 921 (SC): 924F–G.
1930. *Ibid.:* 924G–I.
1931. *Ibid.:* 926A–C.
1932. *Ibid.:* 926E–G.
1933. *Ex Parte: Chingufo*, High Court judgement, Case No. A 216/2012 – unreported.
1934. *Ibid.:* 927F.

applicant's rescission application and acceded to her brother's counter-application to order the authorization of the responsible physician to administer any appropriate treatment.[1935] The applicant, however, sufficiently recovered before a blood transfusion was administered and was discharged from hospital.[1936] She filed an appeal against the judgements of the High Court.[1937]

850. The Supreme Court first answered the question whether the appeal is moot. It came to the conclusion that it must be decided although it is – with respect to the order to administer appropriate treatment – partly moot because of its overall meaning for the interpretation of basic human rights and its practical impact particularly for medical practitioners.[1938] The court then made some general remarks on foundations of the principle of patient autonomy in light of the *Constitution* and in general:

> In a case concerning the refusal of an adult patient of full mental capacity to have a blood transfusion administered, the starting point must be the principle of patient autonomy, which embodies both art 7 (protection of liberty) and art 8 (respect for human dignity) of our Constitution. The principle of patient autonomy reflects that it is a basic human right for an individual to be able to assert control over his or her own body. Adhering to this principle requires that a patient must consent to medical procedures after having been properly advised of their risks and benefits, so that the consent is informed. Medical practitioners must inform their patients about the material risks and benefits of the recommended treatment but it is up to the patient to decide whether to proceed with a particular course of treatment. For this reason, it is the patient's judgment of his or her own interests that is the most important factor.[1939]

851. The court emphasized that patient autonomy means that a patient may refuse to undergo specific medical procedures, and that such "refusal must ordinarily be respected so long as the patient is an adult of sound mind and the patient understands the implications of the refusal".[1940] The reasons for the refusal are not to be questioned by medical professionals or judicial officers.[1941] In this regard, the court cited from a South African judgement[1942] in which the court stressed that a patient's decision to refuse medical treatment had to be accepted even if it was grossly unreasonable in the eyes of the medical profession.[1943] The court further commented on the role of advance directives or powers of attorney setting out an

1935. *Ibid.:* 929H.
1936. *Ibid.:* 930C.
1937. *Ibid.:* 930D.
1938. *Ibid.:* 930E–931D.
1939. *Ibid.:* 933E–934A.
1940. *Ibid.*: 933H.
1941. *Ibid.*: 933I–J.
1942. *Castell v. De Greef* 1994 (4) SA 408 (C).
1943. *ES v. AC* 2015 (4) NR 921 (SC): 934C.

individual's treatment decisions, which may include the pre-emptive refusal of certain treatments and the designation of a specific person to make healthcare decisions on behalf of a patient unable to take decisions for him or herself. It held:[1944]

> No such legislation has been passed in Namibia, but in my respectful view written advanced directives which are specific, not compromised by undue influence, and signed at a time when the patient has decisional capacity constitute clear evidence of a patient's intentions regarding their medical treatment. To subject a patient to treatment against his or her stated wishes in circumstances where there is no reason to believe that the patient has changed his or her view (i.e. the instructions contained in the advanced directive are consistent with the conduct and communications of the patient) risks contravention of that person's constitutional rights, including Art 7 (protection of liberty) and Art 8 (respect for human dignity).

852. For the present case this would mean that the question whether the applicant was *compos mentis* after her haemoglobin level has dropped to a critical level was irrelevant. Relevant were her intentions and wishes regarding her medical treatment which had been clearly outlined in the durable power of attorney. The applicant had signed the document voluntarily at a time where she was competent to make such decision. There were also no hints to suggest that she changed her mind at any time, before and after the operation.[1945]

853. In how far the interests of children play a role with respect to a parent's decision to choose or refuse a certain medical treatment was discussed by referring to foreign case law, in particular case law of the United States.[1946] It was first stressed that Article 15 (1) of the *Constitution* indeed envisaged that children have the constitutional right to know and be cared for by their parents. But this right would not be absolute since the wording of the *Constitution* ("as far as possible") anticipated circumstances that may prevent children being raised by their natural parents.[1947] The Supreme Court concluded that[1948]

> [t]he weight of authority to which this court was referred would support the conclusion that the interests of children in parental care should not outweigh the interests of parents in being able to make decisions about medical treatment that affect the parents themselves.

854. The right to bodily autonomy would be an inalienable human right, whether one is a parent or not. It argued as follows:[1949]

1944. *Ibid*.: 935E–G.
1945. *Ibid*.: 936E–H.
1946. *Ibid*.: 937G–939B.
1947. *Ibid*.: 937E–G.
1948. *Ibid*.: 937G.
1949. *Ibid*.: 939H–940C.

> Were courts to hold that the right of parents to exercise this right would be limited in the best interests of children the logical endpoint may be that parents of young children should not be employed in the armed forces, that they should be prohibited from engaging in high-risk sports, or publicly censured for consuming non-prescribed drugs and alcohol. The most extreme application of this principle might require a parent being compelled to undergo an operation for the purposes of organ donation if his or her child required a kidney to survive. Even though as a society we recognise and promote the importance of families and relationships, this court is also compelled to protect the liberty, self-determination and dignity of the individual, especially in matters where medical treatment to one's own person is concerned.

855. The court concluded that moral autonomy[1950]

> is of central importance to the protection of human dignity and liberty in free and open democracies such as ours.

§3. The Right to Dignity

I. Introduction

856. Article 8 protects the right to dignity declaring that the dignity of all persons shall be inviolable. The right to dignity is also referred to in the Preamble of the *Constitution*, where it is held that "… we the people of Namibia … desire to promote amongst all of us the dignity of the individual …" Article 8 further specifies certain scenarios in which respect for human dignity shall be guaranteed. These include any judicial or other proceedings before any organ of the state and the enforcement of a penalty. Moreover, torture and cruel, inhuman, or degrading treatment or punishment, are explicitly prohibited. The criminal law framework is currently under review in order to incorporate the crime of torture in legislation in accordance with international obligations. The *Prevention and Combating Torture Bill,*[1951] which will address this issue, is currently pending. In 2019, the Ministry of Justice tabled the *Prevention and Combatting of Torture Bill* in parliament.[1952] It was subsequently withdrawn for further consultations after it was found that some provisions may be unconstitutional.[1953]

1950. *Ibid.*: 940E.
1951. The bill is available at the website of the Namibian parliament: https://www.parliament.na/wp-content/uploads/2021/04/B5-2019.pdf (accessed 18 Jul. 2020).
1952. New Era of 31 Oct. 2019.
1953. Ministry of Gender Equality and Child Welfare (2020): 12.

II. Corporal Punishment under Article 8

857. In *Ex parte Attorney-General: In Re Corporal Punishment*[1954] the state's obligation to protect Article 8(2)(b) was emphasized to be absolute and unqualified.[1955] The Supreme Court remarked that

> [a]ll that is therefore required to establish a violation of art 8 is a finding that the particular statute or practice authorised or regulated by a State organ falls within one or other of the seven permutations of article 8(2)(*b*) [which are torture, cruel treatment, inhuman treatment, degrading treatment, cruel punishment, inhuman punishment, degrading punishment] … ; 'no questions of justification can ever arise' … .[1956]

858. The court took note of the constitutional law of Germany according to which corporal punishment imposed by judicial authorities is regarded as unconstitutional.[1957] The court decided that imposing corporal punishment by any judicial or quasi-judicial authority upon any person violated Article 8 of the *Constitution*. The infliction of corporal punishment in government schools was also held to be in conflict with Article 8.[1958] In the later decision of *S v. Sipula*,[1959] the High Court accepted that the ruling of the Supreme Court also outlawed corporal punishment imposed and executed by a customary court in the now Zambesi Region despite the respective customary law was not explicitly declared unconstitutional by the Supreme Court. Therefore, and as it was also doubtful whether the accused, a tribal policeman, who was executing the order of the customary court, was aware of the unlawfulness of his act, the accused was acquitted.

859. In 2016 and several years after the *Education Act*[1960] prohibited corporal punishment in schools,[1961] the High Court clarified that this prohibition not only applies to public but also private schools.[1962] The High Court further stressed that no parent or learner can overrule the prohibition by consenting to corporal punishment.[1963]

1954. 1991 NR 178 (SC).
1955. *Ex parte Attorney-General: In Re Corporal Punishment* 1991 NR 178 (SC): 187I.
1956. *Ibid*.: 187I–188A.
1957. The court referred to an earlier edition of Münch, Kunig (2021). Cf. also: the decision of the German Federal Administrative Court: BVerwGE 26, 161: 168.
1958. *Ex parte Attorney-General: In Re Corporal Punishment* 1991 NR 178 (SC): 197C–E.
1959. *S v. Sipula* 1994 NR 41 (HC).
1960. Act No. 16 of 2001.
1961. Section 56(1) of the Act.
1962. *Van Zyl v. The State*, High Court judgement, Case No. 25/2014 – unreported.
1963. *Ibid.*

III. The Length of Sentencing and the Right to Dignity

860. Whether life sentence infringes Article 8(1) was tested in *State v. Tcoeib*.[1964] Life imprisonment with the rationale to remove the offender from society was referred to as having – as the most severe and onerous sentence – exceptional character:

> [I]t is resorted to only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimize the extreme degree of disapprobation, which the community seeks to express through such a sentence.[1965]

861. The court denied an impermissible invasion of Article 8(1) by life sentencing because in the legislative setting in Namibia, there is a reasonable opportunity to be released after a certain period of time:[1966] According to section 117 of the *Correctional Service Act*[1967] read with the respective regulations offenders are eligible for parole after twenty-five years if sentenced to life imprisonment. The Supreme Court reasoned as follows:[1968]

> It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amount to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances). The crucial issue is whether this is indeed the effect of a sentence of life imprisonment in Namibia.

In regard to the scope of the right to dignity, it was held:[1969]

> The obligation to undergo imprisonment would undoubtedly have some impact on the appellant's dignity but some impact on the dignity of a prisoner is inherent in all imprisonment. What the Constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed in the conviction of a person per se.

862. Difference must, hence, be made between invasions of the dignity of persons which can be permissible and infringements. This means, that – in contrast to

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1964. 1999 NR 24 (SC).
1965. *Ibid*.: 32B–C.
1966. *State v. Tcoeib* 1999 NR 24 (SC): 37C–D. *See also* above: §2 of this chapter.
1967. Act No. 9 of 2012.
1968. *Ibid*.: 33D–F.
1969. *Ibid*.: 38C–D.

Article 8(2)(b) which was found to be absolute in *Ex parte Attorney-General: In Re Corporal Punishment* – Article 8(1) is not absolute but allow for permissible invasions of dignity.

863. In *S v. Gaingob*[1970] the Supreme Court discussed whether it would be contrary to the *Constitution* to impose sentences of imprisonment which would exceed the life expectancy of an accused. The appellants were convicted of several criminal offences, including murder, and sentenced to imprisonment of sixty-seven and respectively sixty-four years. The Court made reference in particular to the courts' ruling in *S v. Tcoeib* (see above) and to the approach of the European Court of Human Rights and came to the following conclusion:[1971]

> The absence of a realistic hope of release for those sentenced to life imprisonment would in accordance with the approach of this court in Tcoeib and the ECHR thus offend against the right to human dignity and protection from cruel, inhuman and degrading punishment.

864. It then posed the following question:[1972]

> But what of inordinately long sentences of imprisonment which could or would likewise have the effect of removing the right to hope of eligibility for release on parole or probation?

865. The Supreme Court found inordinately long, fixed terms of imprisonment amounting to de facto or informal life sentences as cruel, degrading, and inhuman punishment and an infringement of the right to human dignity as such sentences factually exclude the possibility of offenders being considered for parole under the life imprisonment regime contemplated by the *Correctional Service Act*. Whereas according to section 117 of the Act offenders are eligible for parole after twenty-five years if sentenced to life imprisonment, offenders sentenced to a de facto life sentence are only eligible for parole under section 115 of the Act which reads as follows:

> (1) Notwithstanding the provisions of this Act, no offender who has been sentenced to a term of imprisonment of twenty years or more for any of the scheduled crimes or offences is eligible for release on full parole or probation, unless he or she has served, in a correctional facility, two thirds of his or her term of imprisonment …

866. This means that, if an offender, as the third applicant in this case, aged at the time of sentencing thirty-five years, was sentenced to sixty-four years imprisonment, he or she would be only eligible for parole after forty-two years and eight

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1970. 2018 (1) NR 211 (SC).
1971. *Ibid*.: 225E–F
1972. *Ibid.:* 225F.

months, meaning at the age of about 77 years and seventeen years later than he or she would have been eligible for parole if sentenced for life imprisonment. In fact, an effective sentence of more than thirty-seven and a half years would mean that such offender is worse off than those sentenced to life imprisonment.[1973] The Supreme Court concluded the following:[1974]

> It is the prospect of eligibility of parole after 25 years which renders the most severe sentence of life imprisonment compatible with Art 8. Where trial courts impose excessively long sentences to circumvent the right of that hope of release represented by their eligibility for parole (and the proper application of the criteria embodied in the applicable sections), the resultant sentences will infringe offenders' Art 8 right to dignity. By removing an offenders' realistic hope of release, the statutory purpose of rehabilitation trenchantly stressed in the Act, and further explained in the affidavit by the Deputy Commissioner-General of NCS, is fundamentally undermined.

867. The sentences of the accused were set aside and replaced with sentences of life imprisonment as the crimes committed were found to be brutal and vicious in the extreme and perpetuated with premeditation and thus justifying the permanent removal of the offenders from society.[1975]

868. In *McNab v. Minister of Home Affairs NO*,[1976] the court found certain prison conditions to violate the right to dignity. The claim for damages, however, failed on procedural grounds.[1977] The plaintiffs in this case were held in a small, overcrowded, and poorly ventilated cell, which was filthy and infested with cockroaches and lice. The plaintiffs were further caused to relieve themselves in full view of other detainees. Such conditions were held to be degrading, inhuman, and in violation of arrested persons' fundamental rights.

869. In *Namunjepo v. Commanding Officer Windhoek Prison*,[1978] the Supreme Court found that placing prisoners in irons violated Article 8(2)(a) as well as Article 8(2)(b) of the *Constitution*. Although imprisonment was found to affect a prisoner's rights including the right to dignity, this did not mean that the prisoner had no right to dignity. To put a person in chains was decided to be at least degrading treatment and thus contrary to Article 8(2)(a) and 8(2)(b). If an authority violated the right to dignity, it could be liable to monetary compensation.[1979]

1973. *See*: *ibid*.: F–G.
1974. *Ibid*.: 227B–D.
1975. *Ibid*.: 227H–228A.
1976. 2007 (2) NR 531 (HC).
1977. *McNab v. Minister of Home Affairs NO* 2007 (2) NR 531: 552G–553B.
1978. 1999 NR 271 (SC).
1979. *Engelbrecht v. Minister of Prisons and Correctional Services* 2000 NR 230 (HC).

870. The case of *Namunjepo v. Commanding Officer Windhoek Prison* was referred to in *Kennedy v. Minister of Safety and Security.*[1980] The "conduct of placing unconvicted trial awaiting persons in chains and other mechanical restraints like handcuffs" was found to be "unconstitutional on the basis that it is, 'under any circumstances', offensive of art 8(2) of the Constitution." In this case, an appeal has been filed against the High Court judgement but had not been heard at the time of this publication.[1981]

871. In *S v. Vries*,[1982] it was found that the proportionality test as applied in the USA whereby the courts analyse[1983]

> whether a particular sentence amounts to "the unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the offence"

should be followed in Namibia. The mandatory minimum sentence of three years for second or subsequent offender in terms of section 14(1)(b) of the *Stock Theft Act* of 1990[1984] was declared to violate Article 8 of the *Constitution*. As it was "likely to arise commonly in regard to other offenders",[1985] the words providing for the minimum sentences were struck down.

872. In *Daniel v. Attorney-General; Peter v. Attorney-General*,[1986] the provisions of sections 14(1)(a)(ii) and 14(1)(b) of the amended *Stock Theft Act* of 2004 were found to be unconstitutional. It was established that the minimum sentences of respectively twenty years (where the value of stock was above NAD 500) and thirty years for a second offender (irrespective of the value of the stock) were[1987]

> grossly disproportionate in that they unfairly and unjustly punish those who are caught and convicted, not because their crimes deserve the sentences meted out to them, but to deter others from committing the same crime and that the people who fall foul of the minimum sentences are thus used as instruments of deterrence in violation of their right to recognition of and respect for their innate human dignity and that they are therefore used as a means to an end and not as an end in themselves as the Constitution requires … .

Deterrence would not justify the sacrifice of human dignity. Focusing on deterrence would lead to losing the proportionality between the offence and the period of

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1980. 2020 (3) NR 731.
1981. *See*: The Namibian of 2 Sep. 2020.
1982. 1998 NR 244 (HC).
1983. *S v. Vries* 1998 NR 244 (HC): 280G–H.
1984. Act No. 12 of 1990.
1985. *S v. Vries* 1998 NR 244 (HC): 282C.
1986. 2011 (1) NR 330 (HC).
1987. *Daniel v. Attorney-General; Peter v. Attorney-General* 2011 (1) NR 330 (HC): 355 F - G.

imprisonment, in particular regarding the broad and universalistic human right culture and the subscription to the inherent dignity of all members of the human family under the *Constitution*.[1988]

873. The Supreme Court dismissed the appeal by the Prosecutor-General. It basically followed the High Court's arguments and elaborated the following:[1989]

> The sentences prescribed in the impugned sections are disproportionate to the crime. The legislature effectively obliges a sentencing court to impose sentences that are grossly disproportionate, especially in cases in which there are no substantial and compelling circumstances but nevertheless the crime does not warrant such a severe sentence which can be easily envisioned in many hypothetical cases as well as the facts in the cases at hand. Such sentences amount to cruel, degrading and inhuman treatment. There is no correlation between the crime and the sentence, particularly the value of stock. Further, the discretion granted to the court clearly does not permit the court to evade all possible violations of an offender's constitutional rights as this discretion is limited. The Attorney-General was thus justified in conceding that the sentences breached article 7 of the ICCPR and article 5 of the African Charter. I am of the opinion that they also breach Art 8(2)(b) of the Namibian Constitution.

The court further stressed:[1990]

> The benchmark set by the minimum sentences makes the impugned provisions of the Act unconstitutional as it creates sentences that are far too draconian thereby abridging the fundamental rights conferred on persons by Art 8(1) of the Constitution. Although property is worthy of protection, it is inimical to the constitution and the values underpinning it to afford property greater and more aggressive protection than that afforded to human life.

874. In *S v. Likuwa*,[1991] the High Court had to rule on the matter whether section 38(2)(a) of the *Arms and Ammunition Act*[1992] which provides for a minimum sentence of ten years' imprisonment for the import, supply or possession of certain heavy armament such as machine guns (as outlined in section 29(1)(a) of the same Act), violated Article 8(2)(b) and was therefore unconstitutional. The court found the disproportionality test as applied in *S v. Vries*[1993] applicable and held:[1994]

1988. *Ibid.:* 354H–355A.
1989. *Prosecutor-General v. Daniel* 2017(3) NR 837 (SC): 851B–E.
1990. *Ibid.:* 852B–C.
1991. 1999 NR 151 (HC).
1992. Act No. 7 of 1996.
1993. 1998 NR 244 (HC).
1994. *S v. Likuwa* 1999 NR 151 (HC): 156B–156D.

> While I accept that a sentence of ten years' imprisonment for certain contraventions of s 29(1)(*a*) would not be an inhuman or cruel punishment there is no real doubt in my mind that such a lengthy sentence for a contravention where a machine rifle is obtained and possessed simply for the protection of livestock is. And such cases, as I have earlier demonstrated, are not merely hypothetical. They are real. … Such a sentence imposed in the circumstances just referred to is so clearly excessive that I cannot envisage any reasonable man imposing it. The minimum sentence of ten years' imprisonment is, in my view, grossly disproportionate when seen in the light of the very wide net cast by s 29(1)(*a*) of the Act.

875. Whether the minimum sentence as provided for by section 38(2)(a) should only be declared to be of no force or effect in the present case or unconstitutional per se, the court decided that the words "of not less than ten years, but" should be struck out from section 38(2)(a) because "cases such as the present one are likely to be quite common".[1995]

§4. The Prohibition of Slavery and Forced Labour

876. Article 9 outlaws slavery and servitude. It further prohibits forced labour but, in the same breath, specifies several forms of labour which do not fall under this provision, including, e.g., labour required in consequence of a sentence or order of a court, labour required of members of the defence force, the police force, and the correctional crevice in the pursuance of their duties, labour required during any period of public emergency, or labour reasonable required as part of reasonable and normal communal or other civic obligations.

§5. The Equality Provision

I. Introduction

877. The equality provision of Article 10(1) of the *Constitution* stipulates that all persons shall be equal before the law. With view to past discrimination during apartheid, the principle of equality and the prohibition of discrimination is a key theme in the *Constitution*. According to Hubbard, the "constitutional context makes it clear that Article 10 is aimed at the achievement of substantive equality rather than formal equality, as a means to right past wrongs."[1996] The preamble, for example, contains several references to equality by emphasizing the importance of the "recognition of … the equal … rights of all members of the human family" and "the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status".

1995. *Ibid.:* 156E.
1996. Hubbard (2010): 216.

Article 23(1) criminalizes racial discrimination. The promotion of equal opportunity for women is stipulated as state policy by Article 95(a) of the *Constitution*.[1997]

878. Sub-Article 2 of Article 10 prohibits discrimination on the ground of sex, race, colour, ethnic origin, religion, creed or social or economic status. It has often been criticized that certain grounds as disability and age as well as language have not been included as specific grounds.[1998] The Supreme Court took note of this and held in *Müller v. President of the Republic of Namibia*:[1999]

> [T]he grounds enumerated in art 10(2) are all grounds which in the past were singled out for discrimination and which were based on personal traits where the equal worth of all human beings and their dignity was negated.

879. The inclusion of ethnic origin has to be assigned special importance in the African context since the borders of most African states – Namibia is no exception – were artificially delineated by the colonial powers; thus, several ethnic groups were integrated into one state.[2000]

880. Given the need to apply the equality provision to women, the *Married Persons Equality Act* deserves special mentioning.[2001] The Act abolished the system of patriarchy in marriages by confirming equality within civil marriages. The Act further provides women married in community of property equal access to bank loans and equal power to administer joint property. However, the Act only applies to civil marriages and not to marriages under customary law.[2002]

II. Criminalisation of Racial Discrimination and Affirmative Action

881. The right to equality and freedom of discrimination is reinforced by Article 23 of the *Constitution*. This article prohibits the practice of racial discrimination and the practice and ideology of apartheid. Article 23 renders such practices and the propagation of such practices criminally punishable by the courts. The means of such punishment can be determined by parliament as it "deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices". The *Racial Discrimination Prohibition Act*[2003] as amended by the *Racial Discrimination Prohibition Amendment Act*[2004] makes several acts and practices of racial discrimination and apartheid an offence, if none of the exemptions stated in section 14(2) of the Act apply. These include acts and practices in relation to public amenities, the

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1997. *See* below: Chapter 7, § 2.1 of this part.
1998. Carpenter (1991): 34; Naldi (1995): 61.
1999. 1999 NR 190 (SC): 202E.
2000. Naldi (1997): 54. *See* on this also above: Part I, Chapter 1 in general and Chapter 2, §4.
2001. Act No. 1 of 1996. Cf. here: Hinz (1998b).
2002. Rights concerning marriages are discussed in more detail in this chapter below: § 9.2.
2003. Act No. 26 of 1991.
2004. Act No. 26 of 1998.

provision of goods and services, immovable property, educational and medical institutions, employment, associations, religious services, and involving the incitement of racial disharmony and victimization.

882. Despite the extensiveness of the prohibition of racial discrimination, Article 23(2) allows parliament to enact affirmative action measures. Article 23(2) reads as follows:

> Nothing contained in article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices, or for achieving balanced structuring of the public service, the defence force, the police force, and the correctional service.

It is further, in regard to affirmative action legislation, provided that it shall be permissible for parliament to have regard to the fact that women in Namibia have traditionally suffered special discrimination.[2005] Such legislation must however comply with Article 22 which has been outlined above and provides for certain criteria that have to be met if fundamental rights or freedoms are limited.[2006]

883. Affirmative action legislation in Namibia includes the *Affirmative Action Employment Act*[2007] which regularizes the application of affirmative action in employment, the *Labour Act*[2008] with affirmative action measures providing for equal employment opportunities and an equitably representation in the workforce of an employer,[2009] the *Public Service Act*[2010] which authorizes the Public Service Commission to appoint or promote any person or staff member if necessary for achieving a balanced structuring of the Public Service even if such an appointment or promotion contradicts the general conditions in regard to filling of posts as contained in section 18 of the Act. Furthermore affirmative action can be identified as underlying policy of land reform.[2011] The link between land reform and affirmative action can be best illustrated by referring to the preamble of the *Agricultural (Commercial) Land Reform Act*.[2012] It states as one purpose the allocation of land to such Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.

2005. Article 23(3) of the Constitution.
2006. Cf.: *Kauesa v. Minister of Home Affairs* 1994 NR 102 (HC): 138G–H.
2007. Act No. 29 of 1998.
2008. Act No. 11 of 2007.
2009. Section 5(4)(a) of the Labour Act, 2007 (Act No. 11 of 2007).
2010. Act No. 13 of 1995.
2011. *See*: *Kessl v. Minister of Land Resettlement and Two Similar Cases* 2008 (1) NR 167 (HC).
2012. Act No. 6 of 1995.

884. The *Local Authorities Act*[2013] which paved the way for the first local authority elections after independence made the first local authorities' elections subject to an affirmative action provision for women which ensured that women were included on all party lists.[2014] It provided for a quota of at least two women on a municipal or town council of ten or fewer members, and at least three women on municipal or town councils consisting of ten or more members. As the outcome of the elections demonstrated, the first affirmative action legislation was a true success. About 32% of the elected councillors were women. In 1997, the *Local Authorities Amendment Act*[2015] introduced a similar quota system for all future local elections, meaning that all party lists are required to contain a certain minimum number of female candidates.

885. In the economic sector, the introduction of the *National Equitable Economic Empowerment Framework (NEEEF)*[2016] is on the agenda. While the necessity to address socio-economic inequality is undisputed, the suitability of NEEEF legislation to achieve this objective is highly contested. Progress towards reducing inequality in the socio-economic sector since independence have been slow. Namibia is an economically very unequal nation with a majority remaining structurally excluded from meaningful participation in the economy.[2017] The NEEEF has been on the table to address socio-economic inequality since 2008.[2018] Stated aim of the policy is the promotion of inclusive economic growth based on equitable and sustainable redistribution of wealth and income.[2019] With view to translating the policy into law a first draft of a bill was issued in 2016. This bill though "raised a number of concerns with private sector and was heavily debated across the country at that time."[2020] A second draft released later that year was likewise withdrawn after further public outcry.[2021] Another version of the bill was launched in 2018 and has been approved by Cabinet.[2022] A particularly contested provision making it mandatory for white-owned businesses to sell a 25 percent stake to blacks was removed

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2013. Act No. 23 of 1992.
2014. *See*: section 6 of the first version of the Act.
2015. Act No. 3 of 1997. *See*: section 2(1) of the Amendment Act and section 6(4) of the Local Authorities Act, Act No. 23 of 1992, as amended.
2016. Originally, when introduced in 2008, this policy was called Transformation Economic and Social Empowerment Framework (TESEF). It was replaced with the New Equitable Empowerment Framework (NEEEF) in 2011.
2017. *See*: Website of the World Bank, Country overview: Namibia, available at: https://www.worldbank.org/en/country/namibia/overview (accessed 31 Mar. 2022); UNDP (2020).
2018. *See*: Website of the Office of the Prime Minister, Republic of Namibia, National Equitable Economic Empowerment Framework (NEEEF), available at: https://opm.gov.na/neeef (accessed 21 Jun. 2022).
2019. EPRA (2020): 6.
2020. *Ibid. See* further: Consolidated Comments on the New Equitable Economic Empowerment Framework and the NEEEF Draft Bill Submitted by Namibia Chamber of Commerce and Industry Windhoek April 2016, available at: https://cms.my.na/assets/documents/p1ako1nvlc129o10fm1544b95v2f1.pdf (accessed 31 Mar. 2022).
2021. EPRA (2020): 6.
2022. *Ibid.*

from the draft after heavy criticism.[2023] Such mandatory 25% equity stake is part of South Africa's black economic empowerment legislation,[2024] which has been criticized as failing to redress inequalities and instead benefiting a small number of wealthy, politically well-connected individuals.[2025]

886. Despite the removal of the equity stake provision, the business sector warned of negative effects for the Namibian economy arguing that this policy would lead to capital flight and scare away investors who might not be willing to cede stakes in their companies.[2026] The Economic Policy Research Association of Namibia regards the bill as ineffective to achieve the envisaged objectives as it[2027]

> pays lip service to transformation and include economic growth and will act as a special purpose vehicle' to centralise excessive power in the hands of a select few. It cannot address the root causes of the socio-economic marginalization of those who are most vulnerable and affected by poverty and unemployment.

887. It is not possible to rely on affirmative action as stipulated in the *Constitution* to enforce any claims against the government and to use it to justify discrimination. In this regard, the High Court emphasized in *Kauesa v. Minister of Home Affairs*[2028] that "the Namibian Constitution does not elevate 'affirmative action' … to the status of fundamental right provided for in arts 6 to 20 of the Constitution or even the status of a fundamental freedom provided for in art 21(1) of the Constitution".[2029] The court found measures for affirmative action being required not to violate the rights to dignity, equality and non-discrimination and also the prohibition on discrimination in employment contained in section 7 of the *Racial Prohibition Discrimination Amendment Act* of 1991.[2030] This clarifies that Article 23(2) of the *Constitution* does require affirmative action measures to be compatible with the equality principle. Furthermore, the court found Article 23(2) to be incompatible with the pre-independence *Constitutional Principles of 1982,*[2031] the *Universal*

2023. This was announced by President Geingob at the Economic Growth Summit. *See*, *e.g.*: New Era of 1 Aug. 2019.
2024. Broad-Based Black Economic Empowerment Act, Act No. 53 of 2003 (South Africa).
2025. Sharife; Anderson (2019); BusinessTech (South Africa) of 28 Jul. 2015, available at https://businesstech.co.za/news/business/94401/how-many-black-south-africans-benefit-from-bee/ (accessed 31 Mar. 2022).
2026. *See*, *e.g.*: New Era of 16 Jul. 2020; Windhoek Express of 2 Mar. 2021.
2027. EPRA (2020): 4.
2028. 1994 NR 102 (HC). The High Court judgement in the Kauesa case was indeed overruled by the Supreme Court, which, though, did not deal with the remarks made by the court a quo in this respect, but emphasized that this does not mean that it approves or endorses the opinions expressed in the judgement a quo(*Kauesa v. Minister of Home Affairs* 1995 NR 175 (SC)).
2029. *Kauesa v. Minister of Home Affairs* 1994 NR 102 (HC): 141E.
2030. *Ibid.:* 139C–D.
2031. The Constitutional Principles and Guidelines, Security Council Document S/15287. *See* on this above: Part 1, Chapter 1, § 6.

Declaration of Human Rights,[2032] and the *Banjul Charter*[2033] and should therefore be read in the light of these instruments.[2034] What the *Constitution* envisaged were[2035]

> necessary corrective measures, but not revenge; not discrimination in reverse; not the mere changing of roles of perpetrator and victim.

888. Naldi argues that this dictum seems to undermine affirmative action to the point where it is rendered wholly ineffectual:[2036]

> The very essence of affirmative action is that it results in preferential treatment for certain groups within society who have been traditionally disadvantaged but if this is then considered unconstitutional on the basis, inter alia, that it is inherently discriminatory it becomes nugatory.

889. That discrimination on the basis of race was unlawful if there was no permissible legislation under Article 23(2) of the *Constitution* was restated in *Grobelaar v. Council of the Municipality of Walvis Bay.*[2037] The High Court held:[2038]

> The so-called land policy and the manner in which it was applied at the auction is clearly discriminatory on grounds of colour and therefore in violation of article 10. Parliament has not enacted legislation under article 23(2) to provide for the implementation of such a policy. As such it is clearly illegal.

890. In *S v. Van Wyk*,[2039] the court stressed the commitment to Articles 10 and 23 of the *Constitution* in a case involving racial discrimination. The Supreme Court had to consider an appeal against a conviction for murder and against the resultant imposition of a sentence of twelve years' imprisonment. The High Court had established that the appellant, a young white male, had acted highly racially motivated by attacking and killing a black male.[2040] The Supreme Court examined the racist nature of the crime which raised issues under Articles 10 and 23. The special importance of anti-discrimination and equality was stressed in light of the past. Additionally, it was emphasized how strictly contradictions to the *Constitution* should be dealt with. The Supreme Court found Articles 10 and 23 to[2041]

2032. Universal Declaration of Human Rights, 1948, UN GA Res. 217 A(III).
2033. The African (Banjul) Charter on Human and People's Rights was adopted on 27 Jun. 1981 and entered into force on 21 Oct. 1986; OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), also available at: https://achpr.org/public/Document/file/English/banjul_charter.pdf (accessed 18 Jul. 2022).
2034. *Ibid.:* 141B–C.
2035. *Ibid.:* 143F.
2036. Naldi (1997): 56.
2037. 2007 (1) NR 259 (HC).
2038. *Grobelaar v. Council of the Municipality of Walvis Bay* 2007 (1) NR 259 (HC): 272A–B.
2039. 1993 NR 426 (SC).
2040. 1992 NR 267 (HC).
2041. *Ibid.:* 452H – I.

> demonstrate how deep and irrevocable the constitution commitment is to … equality before the law and non-discrimination and to the proscription and eradication for the practice of racial discrimination and apartheid and its consequences. These objectives may rightly be said to be fundamental aspects of public policy.

It was further said more generally that throughout the Constitution there is[2042]

> one golden and unbroken thread – an abiding 'revulsion' of racism and apartheid … no other Constitution in the world … seeks to identify a legal ethos against apartheid with greater vigour and intensity.

It was also emphasized that the court[2043]

> will deal extremely severely with persons … who act contrary to the Constitution and public policy. Any person who will offend against this will be extremely severely punished.

III. Case Law with Regard to Article 10

891. In *Mwellie v. Ministry of Works, Transport and Communication*[2044] it was held that Article 10(1) is not absolute; it would permit "reasonable classifications which were rationally connected to a legitimate object".[2045] The appellant, an employee of the Ministry was dismissed and raised a special plea based on section 30(1) of the *Public Service Act*, 1980.[2046] Section 30 limited the time in which employees of the state could bring an action to twelve months. The appellant contended that section 30(1) was in conflict with Article 10(1) of the *Constitution*. The court decided that the classification was rationally connected to a legitimate object, reasoning that the employer had the right to know as soon as possible whether or not to fill a vacancy and it would be of equal importance to the employees whether or not he would be reinstated. The court was also satisfied that the period of twelve months was not unreasonable. Therefore, section 30 was not found to be unconstitutional.

892. Of specific relevance with view to jurisprudence on Article 10 is the South African case *President of the Republic of South Africa v. Hugo.*[2047] It was decided in 1997 and has been referred to by Namibian courts in several of their judgements. The appellant, a widower and father of a son claimed that an act of the South

2042. *S v. Van Wyk* 1993 NR 426 (SC): 456A.
2043. *Ibid.:* 456G–H.
2044. 1995 (9) BCLR 1118 (Nm).
2045. *Ibid.:* 1132F. *See also:* 1134G–1135A.
2046. Act No. 2 of 1980.
2047. *President of the Republic of South Africa v. Hugo* 1997 (6) BCLR 708.

African head of state,[2048] which provided for certain categories of prisoners to be granted a special remission of the remainder of their sentences, including "all mothers in prison on 10 May 1994 with minor children under the age of 12 years", was discriminatory on the grounds of sex and gender. Because the discrimination was based on one of the grounds listed in section 8(2) of the *Constitution of South Africa*,[2049] section 8(4) of that *Constitution* required the court to presume that the discrimination was unfair, until the contrary was proved. The court held:[2050]

> To determine whether that impact was unfair it is necessary to look not only at the group which had been disadvantaged, but at the nature of the power in terms of which the discrimination was effected and, also the nature of the interest which had been affected by discrimination.

The court further made an important remark in stating that[2051]

> the fact that the individuals who were discriminated against by a particular action … were not individuals who belonged to a class which had historically been disadvantaged did not necessarily mean that the discrimination was fair.

Nevertheless, it was found that the Act was consistent with the *Constitution* arguing that it may have denied men an opportunity it afforded women, but it did not fundamentally impair men's right of dignity or sense of equal worth and, hence, the impact upon the relevant fathers was not unfair.[2052]

893. In *Müller v. President of the Republic of Namibia,*[2053] the approach in the *Mwellie* case was taken up by the Supreme Court; under Article 10(1), challenged legislation would be unconstitutional if it allowed for differentiation between people or categories of people and such differentiation was not based on a rational connection to a legitimate governmental purpose.[2054] However, the rational connection test could not be applied to determine whether discrimination based on one of the grounds set out in Article 10(2) existed. A German national wanted to marry a Namibian woman and assume her surname. While it does not involve any bureaucratic complexity for a woman to assume her husband's surname, men have to comply with certain formalities, settled in section 9 of the *Aliens Act*.[2055] The claim to the court was that this provision was violating Article 10 of the *Constitution*. With respect to the purpose the following remarks were made:[2056]

> The purpose of article 10 is clearly not only to prevent discrimination and inequality but also, in our context and history, to eliminate them … .

2048. This act was signed by the President and the two Executive Deputy Presidents acting pursuant to his powers under section 82(1)(k) of the interim Constitution.
2049. Act No. 200 of 1993.
2050. *President of the Republic of South Africa v. Hugo* 1997 (6) BCLR 708: at para. 43.
2051. *Ibid.:* 40.
2052. *Ibid.:* 47.
2053. 1999 NR 190 (SC).
2054. *Ibid:* 200A.
2055. Act No. 1 of 1937.
2056. *Ibid.:* 198D.

The Supreme Court then established that under Article 10(2) it was necessary to inquire whether there exists a differentiation between people of categories of people, whether such differentiation is based on one of the enumerated grounds, whether such differentiation amounted to discrimination against such people or categories of people, and once it is determined that the differentiation amounted to discrimination, it is unconstitutional unless it was covered by the provisions of Article 23 of the *Constitution*.[2057]

894. The court further emphasized that not every differentiation based on the enumerated grounds would be unconstitutional, only those which unfairly or unjustly discriminated against a complainant.[2058] Whether the differentiation amounts to discrimination depends on[2059]

> the complainant's position in society, whether he or she suffered from patterns of disadvantage in the past and whether the discrimination is based on a specified ground or not. Furthermore, consideration should be given to the provision or power and the purpose sought to be achieved by it and with due regard to all such factors, the extent to which the discrimination has affected the rights and interests of the complainant and whether it has led to an impairment of his or her fundamental human dignity.

However, it was also made clear that these factors do not constitute a closed list but that other factors may emerge as the quality jurisprudence continues to develop, which "would most certainly also be true of the development of this jurisprudence in Namibia".[2060]

895. The appeal against the High Court judgement was dismissed on the grounds that the differentiation neither impaired the dignity of the appellant, nor was the purpose of the provision to impair the dignity of males or disadvantaged males as a group.[2061] The Supreme Court stressed the important social and legal function of surnames and referred to the long-standing practice that women assume the surname of their husbands.[2062] It was further considered that the applicant did not belong to a previously disadvantaged group.[2063] This argument led to the assumption that discrimination is more likely to be unfair in cases where the discriminated person belongs to a prior disadvantaged group. And, *vice versa*, the bar is set lower for discrimination of persons who were not disadvantaged in prior than for the prior disadvantaged groups. Or more drastically spoken, certain groups might be

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2057. *Müller v. President of the Republic of Namibia* 1999 NR 190 (SC): 200B–D.
2058. *Ibid.:* 203E–F.
2059. *Ibid.:* 202I–203A. – Here the court followed approaches developed in South Africa, *see*: *President of the Republic of South Africa v. Hugo* 1997(6) BCLR 708; *Harksen v. Lane NO* 1997(11) BCLR 1489.
2060. *Müller v. President of the Republic of Namibia* 1999 NR 190 (SC): 203B.
2061. *Ibid.:* 203G–H.
2062. *Ibid.:* 204B.
2063. *Ibid.:* 203H.

"excluded from constitutional relief because they do not fall in the category of previously disadvantaged".[2064] The standard of protection against discrimination for these people is thus reduced. This approach seems to disrespect the fact that groups that have not been discriminated in the past can actually become subject of discrimination; the court's argument does hence not seem to fully reflect the spirit of the *Constitution* to eliminate any forms of discrimination.

896. The test applied in the aforementioned case was also applied in *Frans v. Paschke*,[2065] leading to the declaration that the common-law rule in terms of which illegitimate children could not inherit intestate from their fathers is unenforceable on the date of independence, hence, with retroactive effect.

IV. Same-Sex Relationships and Transgender Issues

897. In 2001, the Supreme Court in the Frank case[2066] denied that Article 10(2) of the *Constitution* protects homosexuals by referring to the norms and values of the Namibian people. The norms and values were determined by the fact that no one in parliament had repudiated anti-gay rhetoric by the then President and the then Minister of Home Affairs.[2067] According to Coleman:[2068]

> The Supreme Court judgment in the Frank matter is not only outdated it is wrong. The biggest flaw of the judgment is that it did not interpret the Namibian Constitution in a generous and purposeful fashion.

898. In 2021, the High Court dismissed an urgent application by a gay couple demanding the right to bring their infant daughters to Namibia after being born to a surrogate in South Africa.[2069] It found that the applicant had not correctly and formerly applied for the issuance of travel documents. Therefore, the court could – in absence of a minister's decision – not exercise its powers to review and set aside such decision because this would be contrary to the principle of separation of powers.[2070] The Minister of Home Affairs then granted permission to the couple's daughter to enter the country a few weeks later.[2071]

2064. Horn (2013a): 284.
2065. 2007 (2) NR 520 (HC).
2066. *Chairperson of the Immigration Selection Board v. Frank* 2001 NR 107 (SC).
2067. *Ibid.:* 150E–G.
2068. Coleman (2017): 157.
2069. *Lühl v. Minister of Home Affairs and Immigration*, High Court judgement, Case No. 94/2021 – unreported.
2070. *Ibid*: at 44ff.
2071. *See*: Media Release, issued by Etienne Maritz (Executive Director), Ministry of Home Affairs, Immigration, Safety and Security, 18th May 2021 (Twitteraccount of the Ministry). *See also*: Allgmeine Zeitung of 18 May 2021.

899. In January 2022, the High Court ruled that the marriages of two same-sex couples conducted outside of the country are not granted legal recognition in Namibia.[2072] The High Court had to consider two cases in which two men and two women married in South Africa, respectively in Germany where same-sex marriages are legally possible have brought their case to the High Court. The applications were dismissed with the argument that the High Court was bound by the decision of the Supreme Court in the Frank case because of Article 81 of the *Constitution* and the principle of *stare decisis*. It stressed that the Supreme Court's decision must be followed, even if the decision was wrong. The High Court then clarified that it believed that the decision of the Supreme Court with view to same-sex relationships should be changed by critically assessing the reasons in the Supreme Court judgement and urged the court to overturn its decision. With regard to the protection of sexual orientation by Article 10(2), the High Court held the following:[2073]

> To interpret that the prohibited form of discrimination on the basis of sex does not include sexual orientation is also untenable. Article 10(2) goes further to prohibit discrimination on the basis of social status, and to then state that all these exclude sexual orientation, constitutes a narrow interpretation of a constitutional provision. This restrictive approach, couched in tabulated legalism cannot be sustained in a society founded on democratic values, social justice and fundamental human rights enshrined in the Constitution.

900. According to the Ombudsman, there has been a positive change in social attitudes regarding equal rights and protection under law in recent times.[2074] In 2017, the Council of Churches in Namibia released a statement rejecting any form of discrimination based on sexual orientation while sticking to its general anti-homosexual position.[2075] There are still parts of political parties which strongly oppose homosexuality and make homophobic remarks[2076] and members of sexual minorities still experience discrimination.[2077]

901. Currently, the sodomy law under the inherited Roman-Dutch common law and prohibiting consensual same-sex sexual activity between men is still applicable, although Article 10(1) establishes that all persons are equal before the law.[2078] Although these laws have rarely been enforced since independence,[2079] "its

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2072. *Digashu v. Government of the Republic of Namibia*; *Seiler-Lilles v. Government of the Republic of Namibia,* High Court judgement, Case No. 447/2017 and Case No. 427/2018 - unreported.
2073. *Ibid*.: at 121.
2074. Ombudsman (2019): 20.
2075. 'Namibia: Church defends gay rights', 11 Apr. 2001, available at: https://allafrica.com/stories/200104110268.html (accessed 1 Apr. 2021).
2076. Swapo Party Youth League Secretary-General Efraim Nekongo, for example, said that the youth league thinks homosexuality is "satanic and demonic". *See*: The Namibian of 24 May 2021 and of 26 May 2021.
2077. Cf.: Bertelsmann Foundation (2020): 11, 19.
2078. Under the common-law offences of sodomy and unnatural sexual offences as applicable in Namibia and South Africa all sexual contact between males were criminal offences. In South

mere existence on the statute books continues to have a detrimental effect on the lifes of members of the LGBTI [lesbian, gay, bisexual, transsexual/transgender and intersexual] community in Namibia."[2080] With respect to sodomy, the Law Reform and Development Commission conducted a study on this matter and recommended the repeal of the law criminalizing sodomy.[2081] The study concludes:[2082]

> Although Namibia as a state has on many occasions reported that it does not criminalize homosexual people, or gay men in this instance, one cannot deny the stigmatization that these laws create for homosexual man. In actual fact, these laws reduce them to criminals. …
>
> The existence of the crimes of sodomy and unnatural sexual offences amounts to unconstitutional discrimination.

§6. The Prohibition to Arbitrary Arrest or Detention

I. Introduction

902. According to Article 11(1) of the *Constitution*, "no persons shall be subject to arbitrary arrest or detention".

903. The inclusion of comprehensive requirements that have to be met when a person is arrested or detained has to be seen in the light of history where arbitrary arrests and detentions were of regular occurrence.[2083] It is required that any arrested person is informed promptly and in a language he or she understands of the grounds for the arrest.[2084] A person arrested and detained has to be brought before the nearest magistrate or other judicial officer within a period of forty-eight hours of their arrest.[2085] However, if this is not reasonably possible, the arrested and detained person shall be brought before the magistrate of other judicial officer as soon as possible thereafter.[2086]

Africa, the common-law crimes of sodomy and "commission of an unnatural sexual act" were declared to be unconstitutional (and therefore invalid) by the Witwatersrand High Court on 8 May 1998 in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice 1998 (6) BCLR 726 (W)*, and this judgement was confirmed by the Constitutional Court a few months later (1999 (1) SA 6; 1998 (12) BCLR 1517 (9 Oct. 1998)). Section 299 of the Criminal Procedure Act, 2004 (Act. No. 25 of 2004) also refers to the "offence of sodomy". *See also*: Hubbard (2000); Coleman (2017).

2079. *See* for a list of numbers of sodomy cases reported to the Namibian Police between 2003 and 2019: LRDC (2020): 8.
2080. Ombudsman (2019): 20.
2081. The LRDC prepared the report on the abolishment of the common-law offences of sodomy and unnatural sexual offences within phase 2 of its obsolete law project: LRDC (2020).
2082. *Ibid*.: 65f.
2083. Cf.: Carpenter (1991): 35.
2084. Article 11(2) of the Constitution.
2085. Article 11(3).
2086. *Ibid.*

904. What is meant by "reasonably possible" is not further specified and is left open to (judicial) interpretation. Watz argues in this regard that "reasonably possible" is too vague to meet the principles of the rule of law.[2087] The detainment "beyond such period without the authority of a Magistrate or other judicial officer" is prohibited. The scope of Article 11 is restricted by Sub-Article 4 which renders the forty-eight hours rule inapplicable for illegal immigrants held in custody under any law dealing with illegal immigration.[2088] Nevertheless, illegal immigrants cannot be denied the right to consult a legal practitioner of their choice, except if such denial is in accordance with the law or necessary in a democratic society in the interest of national or for public safety.[2089]

905. The onus of proof that an arrest and detention was lawful rests on the state. This was emphasized in *Amakali v. Minister of Prisons and Correctional Services.*[2090]

II. Case Law with Regard to Article 11

906. In *Iyambo v. Minster of Safety and Security,*[2091] the arrest and detention of the plaintiff was found to be unlawful under Article 11(2) because it was not clear on the evidence that the police officials formally arrested the plaintiff and informed him about the grounds of the arrest.[2092] An infringement of Article 11(3) of the *Constitution,* which requires arrested persons to be brought before a magistrate or other judicial officer within a period of forty-eight hours, was denied based on the following reasoning:[2093]

> On my calculation, since the day of arrest and detention was a Thursday, 10 September, the next court day on which the plaintiff could have reasonably been brought to the magistrate was Friday, 11 September. After that the next court day was Monday, 14 September, that is, the date on which he was brought to the magistrate. I find that it was not 'reasonably possible' for the defendant's police officials to have brought the plaintiff before the magistrate on 12 or 13 September 2009. On my reckoning, it would seem the plaintiff was brought before a magistrate within 48 hours of his arrest and detention.

The plaintiff was awarded damages for the period of days during which his detention was unlawful due to the lack of formal arrest and information on the grounds

2087. Watz (2004): 103.
2088. *See* on this also below: Chapter 6, § 2.
2089. Article 11(5) of the Constitution.
2090. 2000 NR 221 (HC): 224A. – Cf. generally on the pre-trial criminal procedure: Mapaure; Ndeunyema et al. (2014).
2091. 2013 (2) NR 562 (HC).
2092. *Iyambo v. Minister of Safety and Security* 2013 (2) NR 562 (HC): 565B.
2093. *Ibid.:* 564I–565B.

of arrest; the Ministry of Safety and Security was found not to be liable for the plaintiff's detention in custody beyond forty-eight hours after he had appeared in the Magistrate's Court.

907. In *S v. Mbahapa*,[2094] the court interpreted "as soon as possible" and held:[2095]

> There must, of course, be an element of reasonableness implied but once the circumstances are such that it is reasonably possible to take the arrested person before a magistrate, that must be done. If it is not then the arrested person is deprived of his fundamental right to freedom as guaranteed by the Constitution.
>
> As I have indicated, what is possible or reasonably possible must be judged in the light of all the prevailing circumstances in any particular case. Account must be taken of such factors as the availability of a magistrate, police manpower, transport, distances and so on. But convenience is certainly not one such factor.

908. In Gabriel v. Minister of Safety and Security,[2096] the court was required to decide[2097]

> [w]hether, in law, the defendant having admitted that the arrest and detention of the plaintiff on the 25th September 2008 was unlawful and wrongful, the plaintiff's appearance in court on 29th September 2008 for a remand for further investigation makes the further detention of the plaintiff lawful notwithstanding his unlawful arrest and detention on the 25th of September 2008.

The court based its decision on two South African cases[2098] and found that[2099]

> when the Plaintiff was brought before the Magistrate and his detention was further ordered, the lawfulness, or not, of his arrest and previous detention became irrelevant.

909. However, that this dictum needed further qualification was stressed in *Iyambo v. Minister of Safety and Security*.[2100] The arrest and the original detention would be irrelevant only if the plaintiff was brought before a magistrate within forty-eight hours of his or her arrest and the magistrate then extended the original

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2094. 1991 NR 274 (HC).
2095. *Ibid.*: 280F–G.
2096. 2010 (2) NR 638 (HC).
2097. *Ibid.:* 650A–B.
2098. *Isaacs v. Minister van Wet en Orde* 1996 (1) SACR 314(A); *Minster of Law and Order v. Kader* 1991(1) SA 40(A). The Court stressed, at 653D–E, that South African decisions are, since independence, not binding on Namibia but of persuasive value.
2099. *Gabriel v. Minister of Safety and Security* 2010 (2) NR 648 (HC): 655B–C.
2100. 2013 (2) NR 562 (HC): 564A.

detention beyond forty-eight hours.[2101] Reference was made to the case *Sheehama v. Minster of Safety and Security*[2102] where it was held that when an applicant is arrested and detained in custody beyond forty-eight hours of his arrest without the authority of a magistrate or other judicial officer and after the expiration of the forty-eight hours, the applicant is brought before a magistrate or other judicial officer and no evidence is placed before the magistrate or other judicial officer explaining the satisfaction of the magistrate or other judicial officer the reason why that was not reasonably possible, any order purporting to authorize the continued detention of the applicant is in violation of Article 11(3) of the *Constitution* and therefore unconstitutional.[2103] In this case, the objectives and the importance of Article 11(3) were explained:[2104]

> One must not lose sight of the fact that the object of art 11(3) of the Namibian Constitution is to ensure the prompt exhibition of the person of an arrested and detained individual before a magistrate or other judicial officer so as to prevent the detention of a person incommunicado which is itself an affront to our constitutionalism, democracy and respect for basic human rights. It is also an assurance to the magistrate or other judicial officer that the arrested and detained person is, for instance, alive and has not been subjected to any form of torture or to cruel, inhuman or degrading treatment while in the hands of those who have detained him or her; treatment that is outlawed by art 8(2) of the Namibian Constitution. The 48 hour rule is therefore one of the most important reassuring avenues for the practical realization of the protection and promotion of the basic human right to freedom of movement guaranteed to individuals by the Namibian Constitution.

910. The first time, the Supreme Court dealt with the application of the forty-eight-hours rule was in the matter *Minister of Safety and Security v. Kabotana.*[2105] The respondent had been arrested by the Namibian police in the aftermath of an armed attack in and around the town of Katima Mulilo by members of the Caprivi secessionist movement. At this time the state of emergency declared earlier had been lifted already. After being arrested on Wednesday morning, the respondent was detained at Katima Mulilo police station from 15h49. On Thursday, the police officers were busy with further arrests. After conducting interviews and taking warning statements from the respondent and other arrested persons, the respondent was taken to the Katima Mulilo Magistrate's Court in the afternoon where there was no magistrate or prosecutor available as the responsible magistrate had left on prior arrangements at 14h00. The respondent was brought to Grootfontein and appeared before court on Monday, 6 September 1999.

2101. *Iyambo v. Minister of Safety and Security* 2013 (2) NR 562 (HC): 564A–B.
2102. 2011 (1) NR 294 (HC).
2103. *Sheehama v. Minster of Safety and Security* 2011 (1) NR 294 (HC): 296D–297B.
2104. *Ibid.:* 295I–296B.
2105. *Minister of Safety and Security v. Kabotana* 2014 (2) NR 305 (SC). - This judgement is discussed in detail in: Ndeunyema (2014).

911. The High Court upheld the claim for unlawful detention and awarded damages to the respondent. Additionally, the High Court had made a specific finding that the respondent was detained unlawfully. The Minister of Safety and Security appealed against this finding and the award of damages. The Supreme Court dismissed the appeal. The court stressed the importance of the forty-eight-hours rule as constitutional right in light of history:[2106]

> The right to be brought before a court within 48 hours is undoubtedly an important constitutional right accorded to arrested persons, which in the light of our pre- Independence history of detention without trial and other related injustices, should be guarded jealously.

912. When determining what test to apply in order to decide what is "reasonably possible", the High Court found the approach developed in the Mbahapa case the correct test. In essence, it provides for a case-by-case decision by considering all prevailing objective circumstances, including e.g., the availability of a magistrate, police manpower, transport, and distances, whereas other criteria such as convenience can never justify a derogation from the forty-eight-hours rule. The application of the private law standard of negligence, which the counsel for the appellant had suggested, would though not be appropriate to determine what is "reasonably possible" as constitutional infringements are of a different kind than ordinary delicts.[2107]

§7. The Right to a Fair Trial

I. Introduction

913. Article 12 of the *Constitution*, the right to a fair trial, outlines several requirements that need to be followed in order for a trial to be fair, including a fair and public hearing by an independent, impartial, and competent court or tribunal established by law, the taking place of a trial within a reasonable time, public judgements in criminal cases, the presumption of innocence, the right to call witnesses, the provision of adequate time and facilities for the preparation and presentation of the defence, the entitlement to be defended by a legal practitioner of own choice, the right of charged persons to refuse to testimony against themselves or their spouses, the prohibition to admit evidence obtained by means of torture or cruel, inhuman or degrading treatment or punishment and the principles *ne bis in idem (*not being dealt with twice by a court for the same matter) and *nulla poena sine lege* (no punishment without law). According to Naldi, the guarantees of Article 12 of the *Constitution* "appear to be the minimum acceptable rather than an exhaustive list".[2108] This would mean that other principles beyond the scope of the explicitly mentioned ones can be derived from the right to a fair trial.

2106. *Ibid*.: 310D–E.
2107. *Ibid*.: 320J–311A.
2108. Naldi (1995): 61.

914. The principles of Article 12 apply to both civil and criminal law including proceedings at labour courts, which are less formal than ordinary courts.[2109] Whether the protections by Article 12 also apply to disciplinary proceedings is debated. The High Court opted against an application.[2110] The Supreme Court[2111] has though indicated that disciplinary proceedings might fall within the ambit of Article 12 of the *Constitution.* This might be the case if the disciplinary proceedings determine civil rights and obligations. The court referred to jurisprudence of the very similarly worded Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and came to the following conclusion:[2112]

> What is clear from the jurisprudence under Art 6 is that it governs proceedings that have a decisive effect on civil rights and obligations. This approach derives, it would seem, from the employment of the noun 'determination' in the provision. This word also appears in Art 12. And the approach adopted by the European Court, and by courts in the United Kingdom in interpreting the Convention, is a sound approach that should perhaps be adopted in Namibia.

915. Restrictions of the principles of a fair trial can be found in Article 12(1)(a) and (3). Article 12(1)(a) allows the exclusion of the public and/or the press "from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society".[2113] Article 12(3) restricts the obligation to give judgements in criminal cases in public if "interests of juvenile persons or morals otherwise require".

916. Several of the principles mentioned in Article 12 were applicable under common law before the *Constitution* was enacted. However, the inclusion of these principles as fundamental rights in the *Constitution* ensures that a restriction on account of accused persons appearing before court is no longer possible and gives those persons an adequate remedy to seek justice in case they feel that their right is violated. The common-law principles are hence not only in some respects narrower or less specific but can be derogated from whereas the *Constitution* is supreme.[2114] A very particular problem in Namibia is the backlog of criminal cases which has severely affected the right to a fair trial and in specific the right to be tried within a reasonable time as the numerous cases regarding this issue reveal.[2115] Reasons are manifold: a lack of staff, high staff turnover because of bad working conditions, a

2109. *National Housing Enterprises v. Beukes* 2011 (2) NR 609 (LC).
2110. 1990 NR 332 (HC): 341C.
2111. *Makando v. Disciplinary Committee for Legal Practitioners* 2016 (4) NR 1127 (SC).
2112. *Ibid.:* 1144A–B.
2113. *See* here also: section 13 of the High Court Act (Act No. 16 of 1999), but also the discussion of plans to amend the rules of the High Court to limit access to an electronic justice case file. *See* on this: The Namibian of 18 Feb. 2020.
2114. Cf.: Skeen (2000): 110.
2115. *See*, *e.g.*: Nakuta (2011): 2, 7, 19; Links (2018) and also above: Chapter 2, §1 of this part.

huge influx of cases, lengthy adjournments, and limited court resources. Reforms and government action are urgently needed to achieve a reduction of the backlog of criminal cases.[2116]

II. The Right to Fair Trial Before a Competent Court within a Reasonable Time

917. The requirements for the hearing to be conducted by a competent court of law, as stated in Article 12(1)(a) of the *Constitution,* were considered in *National Housing Enterprises v. Beukes.*[2117] It was found that the term "competent" implicated that a court has jurisdiction and was authorized to hear a matter and properly constituted.[2118] In order to be properly constituted, the court has to be presided over by a person who is adequately qualified and has sufficient skills to hear a matter.[2119]

918. That trials – as postulated in Article 12(1)(b) of the *Constitution* – must take place within a reasonable time, has occupied courts extensively. The meaning of "reasonable time" and "shall be released" has been subject to litigation. It was confirmed that unjustified delays of trials violate Article 12(b), and that the right to a fair trial has to be balanced with the interests of the administration of justice.

919. In *S v. Heidenreich*,[2120] an accused was arrested on charges including attempted murder and brought before a lower court in June 1993. The matter was postponed on several occasions and ultimately postponed to 23 February 1994. This trial date was agreed upon between the prosecution and the defence. However, the defence submitted that the trial should not proceed on that day or indeed at all and that the accused ought to be released in terms of Article 12(1)(b). The magistrate followed the defence and ordered the release of the accused. When the case was reviewed by the High Court, the court considered the meaning of "reasonable" in Article 12(1)(b) of the *Constitution*. The court referred to the South African judgement in *In re Mlambo*[2121] and observed that "reasonable" is a relative term and what constitutes a reasonable term had to be determined according to the facts of each individual case.[2122]

920. The courts have to balance the fundamental right of an accused "to be tried within a reasonable time against the public interest in the attainment of justice in the context of the prevailing economic, social, and cultural conditions".[2123] Factors

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2116. Prosecutor-General of Namibia (2014); The Sun of 7 Feb. 2019; New Era of 27 Sep. 2021 also: General Assembly (2011): 5, para. 29.
2117. 2011 (2) NR 609 (LC).
2118. *National Housing Enterprises v. Beukes* 2011 (2) NR 609 (LC): 614D.
2119. *Ibid.:* 614D–E.
2120. 1995 NR 234 (HC).
2121. 1992 (4) SA 144 (ZS).
2122. *S v. Heidenreich* 1995 NR 234 (HC): 241C–D.
2123. *Ibid.:* 241D.

identified in the case of *Barker v. Wingo*[2124] decided by the Supreme Court of the United States of America were quoted that are important to determine whether an accused has been deprived of his right in Article 12(1)(b). These include the length of the delay, the reasons given by the state to justify the delay, the manner in which a defendant had made an attempt to assert his right and the strength of its efforts to do so, and the possibility of prejudice to the accused.[2125] The elements of potential prejudice to the accused as identified in *Barker v. Wingo* and cited in the case of *Heidenreich* are oppressive pretrial incarceration, the anxiety inherent in the awaited trial condition, and the possibility that the defence would be impaired.[2126] Regarding the onus of proof that the delay was unreasonable, the court considered and confirmed the judgement in *S v. Strowitzki*[2127] where it was found that the onus rested on the accused.[2128] The following judgement was made:[2129]

> A delay of eight months in bringing the accused to trial on a serious charge such as attempted murder is not in itself presumptively prejudicial and as the accused did not seek to show that he had suffered any serious prejudice or would suffer any if a further postponement were to be granted and as he had not previously complained of delay I am of the opinion that the magistrate should not have made an order in terms of article 12(1)(b).

921. The meaning of "shall be released" in Article 12(1)(b) of the *Constitution* was interpreted at length in *S v. Myburgh.*[2130] The Supreme Court referred to several Namibian and foreign cases and emphasized that so far the High Court could not find a uniform solution for the meaning of "shall be released".[2131] It would have now become necessary to provide an authoritative and binding final decision.[2132] The court made clear that the term is couched in mandatory and peremptory terms.[2133] The form of the order of release was found to depend on the degree of prejudice caused and the jurisdiction of the court.

922. In *S v. Timotheus*,[2134] the question arose whether the rejection of an application for bail was wrong because the "magistrate did not take into account, alternatively attached insufficient weight, to Article 12(1)(b) of the Namibian

2124. 407 US 514 (1972).
2125. *S v. Heidenreich* 1995 NR 234 (HC): 241G–242C.
2126. *Ibid.:* 242B.
2127. 1994 NR 265 (HC).
2128. *S v. Heidenreich* 1995 NR 234 (HC): 243A–B.
2129. *Ibid.:* 243I–244A.
2130. 2008 (2) NR 592 (SC). *See also*: *Malama-Kean v. Magistrate, District of Oshakati* 2002 NR 413 (HC).
2131. *S v. Myburgh* 2008 (2) NR 592 (SC): 606E.
2132. *Ibid.:* 606E.
2133. *Ibid.:* 623G–624B.
2134. 1995 NR 109 (HC).

Constitution".[2135] By referring to the right to liberty and the right to fair trial, the High Court emphasized that an accused had a right to apply for bail but not a right to bail and that[2136]

> the article relied on can only be applicable and relied upon, if there is an undue delay to charge the accused person or to bring him to trial for hearing after he has been charged.

The court then held:[2137]

> The provisions provided for in the Namibian Constitution read with Act 5 of 1991[2138] are in the public interest and in the interests of the administration of justice. For there shall be no fair trial as anticipated by article 12 of the Namibian Constitution or possibly no trail at all if a situation is allowed to develop whereby the accused interferes with the State witnesses or police investigation. If a reasonable possibility exists that this might be the case, it will be in the best interests of the administration of justice then not to take the risk and allow such an accused out on bail, even where it is shown that he will likely not abscond.

923. Nevertheless, the High Court stressed in *S v. Moussa* that[2139]

> it is trite that pre-trial incarceration should not be used as a substitute for post-trial incarceration. And it becomes even more repulsive and greatly prejudicial to the accused where the pre-trial incarceration is prolonged endlessly because the accused's trial is nowhere in sight, as in the present matter.

In this case, the decision by the court *a quo* refusing to admit an accused bail who had been incarcerated for seven years awaiting trial on charges of kidnapping and robbery with aggravating circumstances was set aside. Some of the co-accused escaped after they had been arrested and remained unaccounted for since. The state had not yet given the accused the opportunity to demonstrate his lack of guilt in court because it was waiting to have all the accused together in court for the trail. This absolute uncertainty would violate the appellant's right guaranteed to him by article 12(1) of the *Constitution*.[2140]

924. In *S v. Uahanga and Others*,[2141] the decision by the magistrate to acquit an accused relying on his right to a speedy trial was held to be correct. After several

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2135. *S v. Timotheus* 1995 NR 109 (HC): 114D–E.
2136. *Ibid.:* 114H–I.
2137. *S v. Timotheus* 1995 NR 109 (HC): 114I–115B.
2138. Criminal Procedure Amendment Act.
2139. 2015 (3) NR 804E–F.
2140. *Ibid*.: 804B–E.
2141. 1998 NR 160 (HC).

postponements, the trial could still not take place on the set date because there was no prosecutor available. The court admitted that the delay had indeed not been unduly long but found the explanations for the continual postponements unsatisfactory.[2142] It was argued that the[2143]

> circumstances of any further delay, as a consequence of the slovenly conduct on the part of the prosecution, is in my view prejudicial in the context of the facts in this matter.

In a similar case, where the accused's matter was postponed several times because the written authority of the Prosecutor-General was not to hand, the court held the following:[2144]

> It is incomprehensible that an accused can be deprived of his liberty for months on end, waiting for a decision to be made by the Prosecutor-General. To allow an accused to languish away in custody, basically at the whim of the Prosecutor-General, cannot be countenanced and would be contrary to article 12(1)(b) … . The magistrate should have placed the prosecution on terms. Where the said certificate is not forthcoming within a reasonable time the prosecutor will have to decide whether to proceed against the accused on the basis of common-law offence, for example theft, a statutory offence, … or withdraw the case.

III. The Presumption of Innocence

925. Article 12(1)(d) of the *Constitution* provides that:

> All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

The presumption of innocence was found to implicate that in criminal cases, other than in civil cases, in general the state rather than the accused bears the onus of proof. In *S v. Pineiro*,[2145] a section of the *Sea Fisheries Act*[2146] putting the onus of proof on the accused was held to be void because it was contrary to the presumption of innocence as guaranteed by Article 12(1)(d). Several statutory provisions placing the burden of onus of proof in criminal cases on the accused were declared unconstitutional.

2142. *S v. Uahanga* 1998 NR 160 (HC): 166D–E.
2143. *Ibid.:* 166D–E.
2144. *S v. Amujekela* 1991 NR 303 (HC): 305A–C.
2145. 1991 NR 424 (HC).
2146. Act No. 58 of 1973.

926. In *Attorney-General of Namibia v. Minister of Justice*,[2147] sections 245 and 332(5) of the *Criminal Procedure Act*[2148] were declared unconstitutional to a certain extent. It was admitted that reverse onus presumptions and evidential presumptions are not per se unconstitutional.[2149] Thus a reverse onus presumption based on a rational connection to a legitimate governmental purpose can be in line with the *Constitution*.[2150] But it was also held that[2151]

> [t]he shifting of the onus from the state to the accused in respect of such an important element of the offences in question is a significant departure from the evidential norm which would otherwise apply in criminal law and procedure. The Court is therefore obliged to scrutinise the justification for the deviation closely and to satisfy itself that the presumption is fair, rational and not disproportionate in its impact.

927. In *S v. Shikunga*,[2152] section 217(b)(ii) of the *Criminal Procedure Act*[2153] which provides that the onus of proof that a statement was not made freely and voluntary lies with the accused was declared to violate Articles 7 and 12 of the *Constitution* because it[2154]

> permits a court, in certain circumstances to convict an accused person whose guilt has not been established beyond reasonable doubt. A person convicted of an offence in these circumstances cannot be said to have had a 'fair trial' in which he or she was 'presumed innocent until proven guilty'.

The court made reference to common law, where[2155]

> a confession made by an accused person is not admissible against him or her unless it is established that it was freely and voluntary made, and that he or she was in sound and sober sense and not unduly influenced thereto. This is a crucial requirement in a fair system of justice. It goes to the heart of the rights expressly protected by art 12 of the Constitution.

928. In this case, the appeal against the decision of the High Court which had felt bound by the decision in *S v. Titus*,[2156] where the impugned section was held

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2147. 2013 (3) NR 806 (SC).
2148. Act No. 51 of 1977.
2149. *Attorney-General of Namibia v. Minister of Justice* 2013 (3) NR 806 (SC): 836B.
2150. *Ibid.*
2151. *Ibid.:* 841I–842A.
2152. 1997 NR 156 (SC).
2153. Act No. 51 of 1977.
2154. *S v. Shikunga* 1997 NR 156 (SC): 163I–J.
2155. *Ibid.:* 164A–B.
2156. 1995 (3) BCLR 263 (Nm).

not inconsistent with the *Constitution*, was allowed and *S v. Titus* was found to be wrongly decided.[2157] Then the effect of a constitutional irregularity with a basis in the common law was explained:[2158]

> Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims – the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld.

929. In *Prosecutor-General of the Republic of Namibia v. Gomes*[2159] the Supreme Court on the contrary found a reverse onus of proof section not to infringe Article 12 of the *Constitution*. The respective section, section 7 of the *General Law Amendment Ordinance 12 of 1956* basically requires citizens found in possession of stolen goods obtained otherwise than at a public sale to establish reasonable grounds to believe that they were not stolen when acquiring them. The court held that there would be[2160]

> a sufficiently close and rational connection between those targeted by the section, its purpose and the reverse onus embodied in it.

930. The wide prevalence of robbery and theft and its deleterious impact upon society together with the difficultness of establishing how someone got in possession of goods would justify the reverse onus of proof.[2161] A very similar or even nearly identical South African provision had been found unconstitutional in *S v. Manamela.*[2162] The Supreme Court though emphasized the differences between Namibian and South African constitutional law. The right to remain silent would be not expressly stated in the Namibian *Constitution* unlike in South Africa.[2163] The constitutionality of the provision in question would thus only depend on whether there is an infringement of the presumption of innocence.[2164]

2157. *S v. Shikunga* 1997 NR 156 (SC): 164F–G.
2158. *Ibid.:* 170I–171B.
2159. 2015 (4) NR 1035 (SC).
2160. *Ibid.*: 1056E.
2161. *Ibid.*: 1056F–G.
2162. 2000 (3) SA 1 (CC).
2163. *Prosecutor-General of the Republic of Namibia v. Gomes* 2015 (4) NR 1035 (SC): 1053A.
2164. *Ibid.*

931. The presumption of innocence has to be defined as obliging the state generally to prove all elements beyond reasonable doubt,[2165] as was held in *S v. Van den Berg*[2166] where section 35A(b) of the *Diamond Industry Protection Proclamation*[2167] was declared unconstitutional. Article 12(1)(d) was interpreted as allowing for statutory exceptions to that rule, which needed, however, to suffice the requirements of Article 22 of the *Constitution*.[2168] The court further made the rational connection test applicable for the interpretation of Article 12(1)(d).[2169] Section 35 A of the proclamation was found not to survive the rational connection test because it placed the onus solely on the accused to prove an element of the offence.[2170] It would further negate the essential content of innocence contained in Article 12(d) and be ambiguous, arbitrary, unreasonable, and unnecessary.[2171]

932. In *S v. Acheson*, the court related the presumption of innocence to the question whether bail should be granted. It stated several factors that should be considered when deciding whether or not bail should be granted. It argued that[2172]

> [a]n accused person cannot be kept in detention pending his trail as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.

IV. Defence Rights

933. There has been a range of cases regarding Article 12(1)(e) which reads:

> All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

934. The question what information can be withheld by the state in a criminal case has been dealt with in *S v. Scholtz*,[2173] *S v. Nasser*,[2174] *S v. Angula; S v.*

2165. *S v. Van den Berg* 1995 NR 23 (HC): 64H–I.
2166. 1995 NR 23 (HC).
2167. Proclamation No. 17 of 1939.
2168. *Ibid.:* 65A.
2169. *Ibid.:* 65E.
2170. *Ibid.:* 66H–I.
2171. *Ibid.:* 66I–J.
2172. *S v. Acheson* 1991 NR 1 (HC): 19D–E.
2173. 1998 NR 207 (SC).
2174. 1994 NR 233 (HC).

Lucas;[2175] and others.[2176] That disclosure of information is the general rule was held in *S v. Nassar*:[2177]

> The State bears the onus of showing on a balance of probabilities that its refusal to disclose information in the police docket is fully covered by one of these privileges.

The purpose of Article 12 in this respect was explained, as follows:[2178]

> The State inevitably enjoys an enormous advantage in a criminal trial. … The State and an accused do not stand on an equal footing and the purpose of Article 12 is to ensure that the imbalance is, so far as possible, redressed.

It was further emphasized that 'facilities' in Article 12(1)(e) is not limited to physical facilities and that the right includes that all reasonably practicable facilities at the disposal of the state have to be disclosed to the accused in order to ensure a fair trial.[2179] Specifically in criminal cases this would mean that[2180]

> an accused who is tried on indictment is entitled to all relevant information pertaining to the charge or charges made against him, inclusive prosecution witness statements if he is to have a fair trial.

It was also found that the prosecution has to disclose information to the accused without waiting for a request to be made.

935. In *S v. Scholtz*, the court held that[2181]

> [t]he State is entitled to withhold any information contained in the docket, if it satisfies the Court on a balance of probabilities that it has reasonable grounds for believing that the disclosure of any such information might reasonably impede the ends of justice or otherwise be contrary to the public interest.

The effect of withholding information on the system of justice was emphasized as follows:[2182]

> Any system of justice that tolerates procedures and rules that put accused persons appearing before the courts at disadvantage by allowing the prosecution

2175. 1996 NR 323 (HC).
2176. Reference was often made to the South African case *Shabalala v. Attorney-General of Transvaal* 1996 (1) SA 725 (CC).
2177. *S v. Nassar* 1994 NR 233 (HC): 260C.
2178. *Ibid.:* 262H–263A.
2179. *Ibid.:* 258E–F.
2180. *Ibid.:* 259A.
2181. *S v. Scholtz* 1998 NR 207 (SC): 210H.
2182. *Ibid.:* 228E–G.

> to keep relevant materials close to its chest in order to spring a trap in the process of cross-examining the accused and thereby secure a conviction cannot be said to be fair and just. Full disclosure is in accord with articles 7 and 12 of the Constitution.

It would be necessary to disclose information at the earliest possible time in order to be effective.[2183] This was specified to be different in each case: soon after arrest, long before the accused is asked to plead or after the witness has given his evidence-in-chief.[2184]

936. Whether the principles developed in *S v. Scholtz* are also applicable to lower courts was answered in *S v. Angula* and *S v. Lucas*.[2185] The question was generally answered in the positive but, according to the court, the imperatives of fairness would not require that in each and every prosecution in the lower courts the accused should have access to the contents of the police docket.[2186] Whether or not disclosure was necessary in order to ensure a fair trial has to be decided on a case-by-case basis.[2187] The court, however, laid down some guidelines to assist lower courts.[2188] In general, disclosure would be necessary in those matters involving some complexity of fact or law and in which there was a reasonable prospect of a sentence of imprisonment. In those cases, the state was obliged to serve the material upon which it intended to rely as founding the prosecution case to the defence. The state would be entitled to refuse disclosure where it could show on a balance of probabilities that disclosure might reasonably impede the ends of justice or otherwise be contrary to the public interest.[2189]

937. That "the order refusing disclosure of police witness statements to the defence was tantamount to a denial of the right to a fair trial to an account person"[2190] was confirmed in *S v. Kandovazu*.[2191] In regard to the effect of a trial violating the fundamental right to a fair trial, the Supreme Court held:[2192]

> If the irregularity is of such a fundamental nature that the accused has not been afforded a fair trial then a failure of justice per se has occurred and the accused person is entitled to an acquittal for there has not been a trial … .

938. The right to be represented by a lawyer of one's choice as stated in Article 12(1)(e) of the *Constitution* implicates a duty to the court to inform the person

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2183. *Ibid.:* 228G.
2184. *Ibid.:* 228G–H.
2185. 1996 NR 232 (HC).
2186. *S v. Angula* and *S v. Lucas* 1996 NR 323 (HC): 326G.
2187. *Ibid.:* 327F.
2188. *Ibid.:* 327H.
2189. *Ibid.:* 328D–F.
2190. *S v. Kandovazu* 1998 NR 1 (SC): 8B.
2191. 1998 NR 1 (SC).
2192. *Ibid.:* 8A.

appearing before it of this right. This was emphasized in *S v. Kau*[2193] and *S v. Mwambazi*.[2194] An exception might though apply if it appears that the person already knows about his or her rights, for example, in case that the accused is a lawyer.[2195] In *S v. Willemse*,[2196] it was found that the failure by a court to inform and explain in detail the rights to an unrepresented accused who does not understand his or her rights violates his or her right to fair trial. Whether a failure to inform an accused of his or her right constitutes an irregularity has to be determined according to the facts of each case and in respect of the extent of the accused's own knowledge of his or her rights.[2197]

939. Although there is no right to legal aid in Article 12, the Supreme Court ruled in the case of *Government of the Republic of Namibia v. Mwilima and all other accused in the Caprivi treason trial*[2198] that if a trial without legal representation would be grossly unfair, the government was required to provide legal aid and a judge would be required to refuse to proceed before legal representation is ensured. This would arise because of the duty to uphold the right and freedoms as provided by Article 5 of the *Constitution*.[2199] The complexity of the case was found to require that the respondents were legally represented and the government had to provide such representation.[2200]

940. In *S v. Luboya*,[2201] the appellants were two foreign nationals charged with the crime of theft. They did not know about their right to apply for legal aid and were not legally represented. The Supreme Court argued that this violated the appellants' right to a fair trial in combination with the right to administrative justice. The court stated:[2202]

> The court a quo equally failed to respect and uphold the appellants' rights. I have already shown herein that it was evident to the Judge a quo that the charges which the appellants were facing in the trial before him, were quite serious and that they faced a prospect of long-term imprisonment in the event of being convicted as charged. Yet he allowed the trial to proceed to conclusion without allowing the appellants an opportunity to seek legal aid as was done by the accused in the *Mwilima* case. Had the judge handled the case in that manner his action would have conformed with the *Khanyile* principle [a principle developed from *S v. Khanyile and Another* 1988 (3) SA 795 (N)] which, as I have earlier herein indicated, states that where a judge perceives

2193. 1995 NR 1 (SC): 7C.
2194. 1990 NR 353 (HC): 356A–B.
2195. *S v. Kau* 1995 NR 1 (SC): 7C–D.
2196. 1990 NR 344 (HC).
2197. *S v. Mwambazi* 1990 NR 353 (HC): 356B–D. *See also*: *S v. Malumo* (2) 2007 (1) NR 198 (HC), *S v. Mbahapa* 1991 NR 274 (HC).
2198. 2002 NR 235 (SC).
2199. *Government of the Republic of Namibia v. Mwilima and all other accused in the Caprivi treason trial* 2002 NR 235 (SC): 258F.
2200. *Ibid.:* 263F–246B.
2201. 2007 (1) NR 96 (SC).
2202. *S v. Luboya* 2007(1) NR 96 (SC): 109E–H.

> that a trial without legal representation would be grossly unfair he or she should refuse to proceed with it until legal representation for the accused is secured. The failure by the judge to do so did, in my considered view, constitute a denial of the appellants' right to a fair trial which is guaranteed to them by art 12(1)(*a*) of the Namibian Constitution.

V. The Right Against Self-Incrimination and Testimonial Privileges

941. Article 12(1)(f) of the *Constitution* states:

> No person shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such person's testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.

In *S v. Minnies,*[2203] the High Court confirmed that testimony obtained by torture shall not be admitted in evidence.[2204]

942. The admissibility of evidence that has been obtained in violation of the right to fair trial was dealt with in *S v. Malumo.*[2205] It was held that the court had discretion whether or not to exclude evidence which had been obtained without warning an accused of his constitutional rights and his rights against self-incrimination.[2206] The accused was not informed of his right to legal representation, his right against self-incrimination as well as his right to remain silent. The court stressed that the violation of these rights was[2207]

> of such a nature that at least it would, in the event of this court eventually convicting the accused person, taint such conviction.

The interest that the integrity of the judicial process is upheld would thus prevail. The evidence was found to be inadmissible.[2208]

943. In the case *S v. Kukame,* the accused was interviewed without a lawyer on his side although he expressed his wish to have a legal representative. The court held that the interview should have been stopped immediately, except to find out who the lawyer of the accused was in order to be able to contact the lawyer.[2209] It was further found that[2210]

2203. 1990 NR 177 (HC).
2204. *S v. Minnies* 1990 NR 177 (HC): 199C, G–H.
2205. 2007 (1) NR 198 (HC).
2206. *S v. Malumo* (2) 2007 (1) NR (HC): 215A.
2207. *Ibid.:* 216C.
2208. *Ibid.:* 216C.
2209. *S v. Kukame* 2007 (2) NR 815 (HC): 836I–837A.
2210. *Ibid.:* 837A–B.

> [t]he right to have access to a lawyer is inextricably linked with the right no to be compelled to make a confession, which is one of the requirements for admissibility. By continuing with the interview and posing further questions which ultimately led thereto that the accused made a statement, a violation of the accused's constitutional rights occurred.

The finding that, if evidence is obtained in conflict with the accused's constitutional rights, the court had a discretion to allow it or to exclude it, was confirmed as the exercise of this discretion would depend on whether the irregularity was fundamental and would taint conviction.[2211] If it was fundamental but would not taint the conviction, the court could admit the evidence. In this case, the ignorance of the accused's statement to exercise his right to a lawyer was found to be fundamental; therefore, the confession made was inadmissible.[2212]

944. In *S v. NV*[2213] the High Court had to decide whether section 195(1)(a) of the *Criminal Procedure Act*[2214] – compelling a wife or husband of an accused to give evidence against the accused in a case where the accused is charged with an offence committed against her or himself or her spouse or a common child – was in conflict with Article 12(f) of the *Constitution*. In this case the accused was charged with kidnapping and repeatedly raping the complainant and with assaulting her. By the time the complainant testified, she was married to the accused. She then wanted to withdraw the charges against the respondent arguing she had forgiven her husband. The state though proceeded with the trial. The counsel for the appellant of the case, the husband of the complainant, argued that the complainant was not a compellable witness, and when she first gave an indication that she did not want to give evidence and continue with the case, the court should have intervened and should have explained to her that she could not be made to give evidence against her spouse. The counsel further argued that the provisions of the *Criminal Procedure Act* have been overridden by the provision of Article 12(1)(f) of the *Constitution* and they are thus rendered unconstitutional.[2215]

945. The counsel of the accused stressed that constitutional law takes supremacy over all other laws or legislation:[2216]

> [T]he Constitution is the Supreme law of Namibia and takes preference over all other laws or legislation in conflict with it. Although the complainant was a competent witness, she was not a compellable witness, so counsel argued.

Article 12 of the *Constitution* does not contain any limitation. The limitation of Article 12(f) is thus not authorized by the *Constitution.*

2211. *Ibid.:* 837I, 839A.
2212. *Ibid.:* 839B -C.
2213. 2017 (3) NR 700 (HC).
2214. Act No. 51 of 1977.
2215. *S v. NV* 2017 (3) NR 700 (HC): 703I–704A.
2216. *Ibid.*: 704B–D.

946. However, the High Court took a different approach. After citing Articles 8, 10, 12(1)(a), 12(1)(f) and 14 of the *Constitution*, the High Court argued:

> I have referred to the above Articles of the Constitution, because Article 12(1)(f) should not be read in isolation but rather in conjunction with other provisions of the Constitution. In the present matter, the Articles referred to are applicable to the issue at hand. As mentioned before, Article 8 provides for respect for human dignity which should be afforded to all persons including spouses. Article 10 deals with equality and freedom from discrimination, which are afforded to all persons, of course including spouses. Article 14(3) describes the family as 'the natural and fundamental unit of society', which is entitled to protection by society and the State.[2217]

947. Although the court recognized that there was "some tensions" between Article 12(1(f) of the *Constitution* and section 195(1) of the Criminal Procedure Act, the court upheld the provision of the Act:[2218]

> Although there appears to be some tension between the provisions of art 12(1)(f) and s 195 (1) of the Criminal Procedure Act in the sense that art 12(1)(f) does not include in it the exceptions provided for in s 195(1), the Constitution should not be interpreted mechanically. As pointed out above, it must be interpreted in a way that best promotes basic human rights and not in the manner that diminishes them. Article 12(1)(f) of the Constitution should not be understood to take away the right of the bodily integrity of the spouse who has been a victim of abuse by his/her spouse. As already indicated, the core value of the Constitution is to protect fundamental human rights. Such rights include non-discrimination on the ground of social status.

948. Non-discrimination would be a constitutional core value and, thus, guide the interpretation of the stated tension between the constitutional provision and the rule of the Criminal Procedure Act. In this sense, the judge of the court stated:[2219]

> In my opinion s 195(1)(*a*) promotes the core values of the Constitution as it compels a spouse to give evidence against the other spouse where any offence is committed against the person of either the spouse or of their children. It prevents situations such as the one exemplified by the facts of this case whereby one partner in a domestic relationship is alleged to have been abused by the other and after criminal charges are laid against the alleged abuser, the couple marries and now it is argued that the complainant is not a compellable witness. The section promotes the values enshrined in the Constitution as it enables the State to compel the alleged victim of domestic violence to testify against her or his spouse to ensure that the State fulfils the obligation imposed on it by art

2217. *Ibid*.: 705H–I.
2218. *Ibid*.: 706E–707E.
2219. *Ibid*.

14(3), namely to give protection to the family, the fundamental unit of the society. It also ensures, amongst other things, that spouses who are victims of the alleged crimes of violence on their person or their children are not discriminated against on the ground of social status, namely being spouses of alleged perpetrators.

949. Therefore, the court concluded:[2220]

> The argument that the complainant who is an alleged victim of domestic violence at the hands of her husband is not a compellable witness merely because she is the Respondent's wife, who apparently does not want to proceed with the charges she has laid against her husband, is fundamentally flawed. As pointed out above, it has the effect of depriving the spouse of the protection she is entitled to. It also appears to encourage spouses who are accused of domestic violence against their partners to escape the consequences of their alleged criminal conduct. Such a situation is not what is intended by art 12(1)(f). Such an interpretation will also deprive spouses who are victims of domestic violence at the instance of their spouses of their dignity as it would have the effect of condemning them to perpetual abuse without the intervention of the law, so long as they remain married to their spouses and they are unwilling or reluctant to testify possibly for domestic considerations. For these and many other reasons, I am not persuaded that s 195(1)(*a*) has been rendered unconstitutional by the provisions of art 12(1)(*f*) of the Namibian Constitution. On the contrary, the section is in harmony with the Article in question.

950. The court in this case failed to establish that Article 12(1)(f) is not subject to qualifications and thus cannot be derogated from. It basically argued that it is necessary to compel the witness to testify in order to protect her right to bodily integrity. The court failed to consider that Article 12(1)(f) must be read in light of the right of self-determination inherent in Article 7 of the *Constitution* and including the right of self-determination about the own body which belongs to the heart of the constitutional protected dignity und liberty of human beings. As Article 12(1)(f) prohibits the compulsion of persons to testify against their spouses, it makes it a free decision of the person to testify or not and, therefore, a question of self-determination. Furthermore, the court did not substantially interpret Article 12(1)(f) in order to justify the violation thereof. The rationale of Article 12(1)(f) includes the idea to protect the witness from the conflict situation resulting from self-loyalty and the duty to testify the truth. Hence, Article 12(1)(f) does protect at first place the spouses' freedom of decision to testify or not.

951. It seems that the High Court sacrificed this fundamental right for the sake of attacking the general problem of domestic violence. While it is the state's role to attack domestic violence, also by penalizing the abusers and create the best possible

2220. *Ibid.*

situation to forestall domestic violence and to help and protect victims of domestic abuse, the government should enact measures as helping, protecting, supporting abused spouses with view to put them in a position to lead a self-determined life and take a qualified and independent decision about pursuing criminal charges against their spouse. While the decision was surely taken with a good intention, it is not based on correct constitutional interpretation. The High Court in this case not only substantially erred in establishing a violation of a fundamental right and considering whether limitations are authorized and can be justified but also severely interfered in the right to self-determination as part of the dignity of a person and thus exercised a form of state paternalism not intended for in the *Constitution*. It remains to be seen whether the Supreme Court gets the opportunity to review this decision.

§8. The Right to Privacy

952. The right to privacy as stipulated in Article 13 of the *Constitution* applies to persons' homes, correspondence, and communications. Interference with privacy is possible if it is in accordance with law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or moral, for the prevention of disorder or crime or for the protection of the rights or freedoms of others. These restrictions seem broad and comprehensive, and it has to be noted that limitations do not require an act of parliament, meaning that even executive orders can restrict the right to privacy.[2221] Carpenter criticizes that the formulation of "necessary in a democratic society" is too broad and that the term "economic well-being" makes the right to privacy dependent on the goodwill of the executive.[2222] Sub-Article 2 of Article 13 of the *Constitution* states that an authorization by a competent judicial officer is needed in order to search persons or homes of individuals. However, with view to the protection of the public interest of effective criminal prosecution, a search of a person or home without authorization is possible[2223]

> in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied.

953. In Nghimwena v. Government of the Republic of Namibia, it was held in this respect that[2224]

2221. Cf.: Watz (2004): 109.
2222. Carpenter (1991): 36.
2223. Watz (2004): 111.
2224. High Court judgement, Case No. I 2782/2005 – unreported.

> [i]t would be a matter for the Courts to determine whether a matter falls within or without the saving clause. The Court, in coming to its decision, in exercise of its discretion will no doubt be guided by the principle of fairness to ensure Justice to both sides.

The court justified the location of a suspect's mobile phone without having a court order with the great urgency to intercept the suspect. The suspect was likely to have been involved in a robbery and still be in possession of some of the money. The court argued:

> Granted the publicity that the case enjoyed at the time, it was necessary for the Police to get Killingi before some brave person and member of the public got in his way, with resultant injury to the suspect or member of the public. Embarking on a Court of application for an order, would have costs and lost a lot of valuable time.

Weighing the significance of the breach of the suspect's right to privacy against the goal of achieving justice, the court decided for the latter to be more important in this case. The court referred to the South African case *S v. Ngcobo*[2225] where it was held that a court must be careful not to tip the scales of justice in favour of a litigant alleged to have deliberately trampled on the rights of others too easily.

§9. The Protection of the Family and Children's Rights

I. Introduction

954. The protection of the family, as stipulated in Article 14, includes the right to marry and to start a family as well as equal rights as to marriage, during marriage and at its dissolution. Article 14 also requires that a marriage can only be concluded if it is based on the free and full consent of the intending spouses. It further guarantees the protection of the family as a natural and fundamental group unit of society by society and the state.

II. Rights Concerning Marriage

955. Sub-Article 2 of Article 14 of the *Constitution* prohibits forced marriages as it establishes that marriages require free and full consent of the intending spouses. As both arranged and forced marriages for young women have been a common practice in some communities in Namibia, the constitutional protection guaranteed in Article 14(2) is a key provision to secure in particular women's rights.

2225. 1998 (10) BCLR 1248 (N).

956. The marrying partners have to be of full age.[2226] The age of majority is set at 18 years.[2227] Nevertheless, people between the age of 18 and 21 need the consent of parents or guardians;[2228] people under the age of 18 may enter into a marriage with the consent of parents or guardians and the responsible Minister.[2229]

957. Child marriage is still an unsolved matter in rural areas where families negotiate the marriage of their children and force them into relationships at a very early age.[2230]

958. The reform of the law regarding divorce has been on the agenda for long. The law still in place is that divorce is based on fault.[2231] The Law Reform and Development Commission has prepared a draft bill to change the law.[2232]

959. It is still a matter of debate to what extent the rights set out in Article 14 of the *Constitution* – men and women "shall be entitled to equal rights as to marriage, during marriage and at its dissolution" – are also enjoyed by people married under customary law without the translation of these rights into an act regulating customary marriages.[2233] Although a draft bill on customary marriages was completed by the Law Reform and Development Commission, this draft bill has not been submitted to parliament.[2234] The draft bill basically envisages a treatment of customary marriages equal to the treatment of civil marriages.

960. The constitutional support for this is found in Articles 66 and 19 of the *Constitution*, but also in Article 4(3)(b), which accepts customary marriages as valid requirement for citizenship by marriage, and Article 12(1)(f), which gives the right to refuse testimony also to the partner in a customary marriage. This constitutional support has also to be considered in disputes about customary marriages before the expected act is in place. Traditional authorities have introduced customary law certificates issued by their offices, which are used to support claims for pension by one partner in a customary marriage after the death of the other.[2235]

2226. Article 14(1) of the Constitution.
2227. Section 10(1) of the Child Care and Protection Act, 2015 (Act No. 3 of 2015).
2228. Section 10(10) of the Act.
2229. Section 26 of the Marriage Act 25 of 1961 (SA), as amended.
2230. Cf.: New Era of 26 May 2017; Allgemeine Zeitung of 21 Jun. 2018.
2231. The divorce law is based in the Roman-Dutch common law and the Divorce Laws Amendment Ordinance No. 18 of 1935, SA OG No. 643 of 1935. Cf.: Legal Assistance Centre (2000):
2232. *See*: Legal Assistance Centre (2000) and (2005a).
2233. Marital power is one of the problems. The repeal of marital power of men by the Marriage Persons Equality Act, 1996 (Act No. 1 of 1996) only applies (as mentioned already) to civil marriages.
2234. *See*: Law Reform and Development Commission (2004) and further: Becker; Hinz (1995) and Hinz (2008b); Legal Assistance Centre (2005b); Ruppel (2010); University of Wyoming Human Rights Clinic (2015): 5ff., 10ff.
2235. The legal quality of these certificates is debated. However, the traditional authorities are entitled to develop their customary law by enacting new rules. *See*: section 3(3)(c) of the Traditional Authorities Act. *See* here also Hinz (2008b). – According to recent oral information, a redrafted bill on customary marriages is expected to be tabled to parliament soon.

961. Old legislation is still regulating marriages in the northern part of the country differently from marriages in the southern part, i.e., the parts south of the red line.[2236] South of the red line, the default matrimonial property regime is in community of property while the default regime for the marriages north of the red line is out of community of property.[2237]According to reports in newspapers, the repeal of Proclamation 15 of 1928 is now on the agenda of government.[2238]

III. Children's Rights

962. Article 15 of the *Constitution* confers several rights to children: the right to a name, the right to acquire a nationality, the right to know and be cared for by their parents, which is, however, "subject to legislation enacted in the best interests of children". Economic exploitation, certain kind of child labour and preventive detention of children under 16 are prohibited under Article 15. Sub-Article 2 prohibits economic exploitation of children under the age of 16. Furthermore, any work that is hazardous, interferes with the education, or is harmful to the health or physical, mental, spiritual, moral or social development of children is forbidden. The employment of children under the age of 14 to work in factories and mines is generally prohibited. Exceptions and the conditions and circumstances thereof can though be regulated by an act of parliament. The *Constitution* thus does not prohibit child labour per se, but only certain kind of labour. According to Sub-Article 4, any arrangement or scheme whereby the minor children of an employee on a farm or other undertaking is compelled to work for or in the interest of the employer is regarded as compelling the performance of forced labour as stipulated in Article 9 of the *Constitution*. Finally, Sub-Article 5 establishes that no law authorizing preventive detention can allow the detainment of children under the age of 16.

963. Beyond the protection of children under Article 15 of the *Constitution*, section 3 of the *Labour Act*[2239] prohibits any employment of children under 14 and makes the employment of children between 14 and 16 and between 16 and 18 subject to certain restrictions.[2240] Violations of this provision constitute offences that can lead to imprisonment for a period not exceeding four years and fines up to NAD

2236. Native Administration Proclamation, 1928 (Proclamation No. 15 of 1928 - SA OG No. 284 of 1928), as amended. – On the red line *see* in Part 1, Chapter 2, § 1 and § 10.7 of this chapter.
2237. *See*: section 17(6) of the proclamation. For a detailed discussion of this issue, *see*: Becker; Hinz (1995): 27ff.; Agnew; Hubbard (2001). Cf. also: *Mofuku v. Mofuku* 2001 NR 318 (HC) – a decision, in which section 17(6) of the proclamation was applied and *Shipanga v. Shipanga*, High Court judgement, Case No. I 259/2012 – unreported – in which the court said that "[a]rguably section 17(6) of the Proclamation is unconstitutional on the basis that it infringes other provisions of the Constitution, and I express no view on that" because this "point was not raised in argument before me". (at 16)
2238. The Matrimonial Property Regime Bill providing for a uniform matrimonial property regime for all civil marriages and repealing the remainder of the proclamation was submitted by the Ministry of Home Affairs in September 2019. *See*: Ministry of Gender Equality and Child Welfare (2020): 22.
2239. Act No. 11 of 2007.
2240. Section 3(1–5) of the Labour Act, 2007 (Act No. 11 of 2007).

20 000.[2241] On the international level, Namibia entered into commitments to protect the rights of children. It ratified several ILO Conventions, such as the *Minimum Age Convention* of 1971[2242] and the *Worst Forms of Child Labour Convention* of 1999.[2243]

964. Children's rights are further given effect by the *Child Care and Protection Act* of 2015 which was promulgated in February 2019[2244] and addresses several issues Namibian children are concerned with. The Act creates mechanisms and institutions to secure the protection of children's rights.[2245] Together with the commencement of the Act, the Minister of Gender Equality and Child Welfare made regulations regarding child care and protection[2246] and relating to children's court proceedings.[2247]

965. The *Child Care and Protection Act* repealed and amended a range of other applicable statutory laws from the apartheid era as well as the *Children's Status Act.*[2248] The latter provided, e.g., for equal treatment for children born outside marriage as for those born inside marriage. The Act did not only terminate discrimination against illegitimate children, bringing legitimate children on par but also recognized that persons other than the parents of the child may have an interest in its well-being.[2249] Respective provisions have been integrated into the *Child Care and Protection Act*.

966. The Act conforms to Namibia's regional and international agreements[2250] for the protection of children, such as the *United Nations Convention on the Rights of the Child,*[2251] the *African Charter on the Rights and Welfare of the Child*[2252] and the *Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption*.[2253]

967. The *Child Care and Protection Act* defines a child as a person who has not attained the age of 18.[2254] By attaining the age of 18 a person attains majority,[2255] whereas under the formerly applicable *Age of Majority Act,*[2256] majority was

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2241. Section 3(6) of the Labour Act.
2242. No. 138. Ratified on 15 Nov. 2000.
2243. No. 182. Ratified on 15 Nov. 2000.
2244. Act No. 3 of 2015. For its enforcement, *see*: GN No. 4 of 2019.
2245. Cf. also: UNICEF (2015).
2246. Child Care and Protection Regulations: Child Care and Protection Act, 2015 (GN No. 5 of 2019).
2247. Regulations Relating to Children's Court Proceedings: Child Care and Protection Act, 2015 (GN No. 6 of 2019).
2248. Act No. 6 of 2006. *See*: section 257 of and Schedule 1 to the Child Care and Protection Act.
2249. Ambunda; Mugadza (2009): 27; !Owoses-/Goagoses (2009): 188.
2250. *See* for more details: Ruppel (2009b): 53–100.
2251. 1990. Ratified on 30 Sep. 1990.
2252. 1990. Ratified on 26 Aug. 2004.
2253. 1993. Ratified on 21 Sep. 2015.
2254. Section 1 of the Act.
2255. Section 10(1).
2256. Age of Majority Act, 1972 (Act No. 57 of 1972).

attained at the age of 21. It specifies parental responsibilities and regulates foster care and other issues important for parents and caregivers, such as adoption, custody, maintenance, and access.[2257]

968. The Act provides for the establishment of a National Advisory Council on Children, which is responsible for the promotion of children's rights.[2258] The Act further establishes children's courts and outlines procedural requirements for children's courts.[2259]

969. The Act also includes a comprehensive chapter on residential childcare facilities and places of care and shelters.[2260] Moreover, the employment of people that have been convicted of certain offences to look after children is prohibited.[2261] The problem of child trafficking[2262] has been addressed by including general provisions in respect of child trafficking and protective measures in respect of victims of child trafficking.[2263] Additionally, there are certain protective measures relating to the health of children and other protective measures[2264] such as the introduction of criminal liability for persons subjecting a child to social, cultural, and religious practices which are detrimental to his or her well-being.[2265] To prevent baby dumping, which has become a severe problem in Namibia, the Act establishes procedures and safeguards so that unwanted children can be dropped off anonymously at safe places.[2266] The Act also introduces measures about state grants to children, in particular the state maintenance grant, the child disability grant, the foster parent grant, the residential childcare facility grant, and the short-term emergency grant.[2267]

970. The statutory framework to protect children's rights is complemented by the Combating of Domestic Violence Act,[2268] the Combating of Immoral Practices Amendment Act,[2269] the Combating of Rape Act,[2270] Combating of Trafficking in

2257. Sections 96–199 of the Child Care and Protection Act.
2258. The council is established by section 11 of the Child Care and Protection Act, 2015 (Act No. 3 of 2015). The functions of the council are defined in section 12 of the Act.
2259. Sections 38ff. of the Child Care and Protection Act. *See* on this already above in Part III, Chapter 6, §4.
2260. Sections 64–91 of the Act.
2261. Section 238.
2262. *See* on this: Conteh (2009): 375ff.
2263. Sections 200–218 of the Child Care and Protection Act.
2264. Sections 220–237 of the Act.
2265. Section 226.
2266. Section 227.
2267. Sections 240ff.
2268. Act No. 4 of 2003. An amendment bill is planned by the government with view to strengthening safeguards for children who may be affected by domestic violence. *See* on this: Ministry of Gender Equality and Child Welfare (2020): 13.
2269. Act No. 7 of 2000.
2270. Act No. 8 of 2000. The Act is also to be presumably amended to, inter alia, strengthen the rights and the protection of children. *See* on this: Ministry of Gender Equality and Child Welfare (2020): 13.

Persons Act,[2271] and the Maintenance Act.[2272] The Namibian government has adopted several policies and measures to fulfil its mandate to protect children's rights under the Constitution, including, for example, the National Policy Options for Educationally Marginalised Children, the Education Sector Policy for Orphans and Vulnerable Children and the School Policy on the Prevention and Management of Learner Pregnancy, Integrated Early Childhood Development Service Delivery Framework, the National Agenda for Children, to name just a few.[2273] This shows the government's commitment to address and improve the situation of children in Namibia.[2274]

Nevertheless, despite significant efforts to guarantee children's rights, children still face severe challenges due to poverty, debt, inadequate policy support and services, HIV/AIDS, discrimination, and harmful cultural practices.[2275] Moreover, child labour on communal farms which can be attributed to the agricultural and pastoral traditions still prevailing in rural areas has been recognized as a particular problem.[2276] Additionally, several violations of children's rights through commercial sex exploitation have been noticed and call for government action to eliminate those forms of exploitation and guarantee the children's rights provided by the *Constitution* and legislation.[2277]

971. The procedures applicable to children, who are in conflict with the law and are accused of committing offences are so far contained in the *Criminal Procedure Act*.[2278] There has been no criminal justice system tailored to the special needs and the vulnerability of children.[2279] The *Child Care and Protection Act* contains some provisions regarding juvenile justice, including rules concerning the detainment of children in police or prison cells and the establishment of child detention centres.[2280] Of specific concern with regard to juvenile justice is still the low minimum age of criminal responsibility, which is seven years of age.[2281]

972. In 1994, the Committee on the Rights of the Child as established by the UN *Convention on the Rights of the Child* recommended a reform of the juvenile justice system in order to bring the system into line with the convention and international

2271. Act No. 1 of 2018.
2272. Act No. 9 of 2003.
2273. For an overview of the laws and policies relating to the protection of children's rights until 2009, *see*: Ambuda; Mugadza (2009). For a more recent overview, *see*: Ministry of Gender Equality and Child Welfare (2020): 13ff.
2274. Ambunda; Mugadza (2009): 46.
2275. *Ibid.*
2276. *See*: Ministry of Labour and Social Welfare (2008): 2; US Department of State, Bureau of Democracy (2020): 17; Mapaure (2009a): 209ff.
2277. *Ibid.*
2278. Act No. 51 of 1977. - *See* for more details on the child justice situation in Namibia: Sloth-Nielsen (2019): 208f.
2279. Cf.: Schulz (2009); Ambunda; Mugadza (2009): 46.
2280. Sections 231 and 69 respectively of the Child Care and Protection Act. *See* for more detail: Sloth-Nielsen (2019): 211ff.
2281. Committee on the Rights of the Child (2012): at 73. *See also*: Schulz (2009): 305ff.

standards.[2282] As a consequence, the government established a National Interministerial Committee on Juvenile Justice (IMC) in order to bring together key role players to discuss and recommend ways of improving the juvenile justice system in Namibia in 1997.[2283] This led to the implementation of several practices on the ground, improving juvenile justice, such as the national child witness programme[2284] or the equipment of court rooms with witness friendly facilities.[2285] It, though, did not yet lead to the enactment of specific child justice legislation, although a first draft of a *Child Justice Bill* was finished already in 2002.[2286]

973. Schulz acknowledges that[2287]

> by joining hands with the IMC since the mid-1990s, the Namibian government has set in motion development of a juvenile justice practice, albeit within the remits of the single track system under the CPA [Criminal Procedure Act] 51 of 1977, which has considerably improved the plight of the children in Namibia in conflict with the law.

But he also regards law reform as necessity,[2288]

> if a restorative juvenile justice approach is to be given breathing space; without legislation peremptorily imposing the application of restorative justice principles, the application of these principles will remain haphazard, and thus provide an uneven application. Without a comprehensive legislative effort, there is no guarantee that all children in Namibia receive the same treatment. This should in itself give rise to constitutional challenges.

974. The revitalization of the traditionally practised initiation of girls in Northern Namibia, called *Olufuko* in Oshiwambo, has led to the ongoing debate whether the fact that the girls show themselves bare breasted in public violates their rights. *Olufuko* was, at least officially, not performed until 2012 when the town of Outapi conducted the first after-independence *Olufuko* festival.[2289] The revitalization of *Olufuko* prompted controversial opinions. While some maintained that *Olufuko* was a traditional custom to promote proper sex education and referred to the right to culture and the need to give culture as it was part of the history and development of Namibia its recognized place, there were others who pleaded for the abolition of

2282. Committee on the Rights of the Child (1994): at 11, 20.
2283. *See*: Schulz (2009): 287; Sloth-Nielsen (2019): 206.
2284. The Child Witness Support programme was funded by USAID and run by the Legal Assistance Centre since June 2009. *See*, *e.g.*: The Namibian of 7 Dec. 2011.
2285. In 2020, there were ten court rooms equipped with such witness friendly facilities. *See*: Ministry of Gender Equality and Child Welfare (2020): 26.
2286. Schulz (2009): 6–8.
2287. *Ibid*.: 304.
2288. *Ibid*.: 305.
2289. Kuoppola (2018): 4.

Olufuko as it was harmful and even violating the rights of the girls undergoing *Olufuko*. Girls, some of them only aged 12, did not have a say on whether they wanted to participate in *Olufuko*. Being forced to unclothe them during rituals belonging to *Olufuko* was said to be degrading.[2290]

975. The human rights organization NamRights took its complaint against *Olufuko* to court but lost the case on procedural grounds, NamRights not having *locus standi*.[2291]

976. A research study for the Town Council of Outapi by the Multidisciplinary Research Centre of the University of Namibia concluded its report with a number of recommendations including the call on the Town Council to continue hosting *Olufuko* as a cultural rite sanctioned by the Constitution.[2292] One of the authors of the report was – in her assessment of the case in her academic submission of the evaluation of the *Olufuko* festival of 2016 – less straightforward than the report:[2293]

> The young girls would be in their traditional clothes, bare breasted as people would come and watch the ritual and take pictures of the initiates. At the Olufuko Festival 2016, I observed that the people took selfies with the girls and posted them on social media. How would this affect the girls? … For future research it would be interesting to study how Olufuko affects the lives of the initiates.

977. The Legal Assistance Centre called on the responsible minister or the Ombudsman to establish a commission "to examine the social, cultural and religious traditions affecting Namibian children". The *Child Care and Protection Act* provided – so the Centre – a framework, "but this framework must be developed and applied in order to prevent harm to Namibia's children".[2294]

§10. The Right to Property

I. Introduction

978. Article 16 of the *Constitution* entails the right

> 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.

2290. *Ibid.*: 4f. Allgemeine Zeitung of 23 Aug. 2018 and 9 Oct. 2019; Nampa news of 30 Jul. 2019.
2291. *Namrights Inc v. Government of Namibia* 2020 (1) NR 36 (HC).
2292. MuAshekele et al. (2018): 82.
2293. Kuoppola (2018): 72f.
2294. Legal Assistance Centre (2021): 2.

979. What falls under property according to Article 16 is not defined in the *Constitution* but left to legislative determination and judicial interpretation.[2295] The right to property can be limited for non-Namibians, as parliament may by legislation restrict the right of non-Namibians to acquire property.[2296] Furthermore, as provided for in Sub-Article 2 of Article 16, property can be expropriated if it is in the public interest and in accordance with requirements and procedures to be determined by act of parliament. The *Constitution* further provides that such an expropriation has to be subject to the payment of just compensation. Article 16 has to be read together with Article 23 of the *Constitution.* Sub-Article 2 of Article 23 authorizes parliament to enact

> legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws of practices or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory law or practices.

Sub-Article 2 of Article 23 specifies this clause on affirmative action by making it particularly permissible to have regard to women in Namibia [who] have traditionally suffered special discrimination.

980. Given the history of colonial exploitation and discriminatory distribution of all kinds of property, the constitutional recognition of the right to property and the confirmation of access to property, access to land as the main basis for production of food makes the law of property a political field of general interest.

981. In its approach to land, the Supreme Court has taken note of this political history of the country. The court refers to it in its interpretation of land-relevant law and, by doing so, joins the very early vote of the court about the *Constitution* being guided by an "ethos that presides and permeates the processes of judicial interpretation".[2297] Whether this ethos will sufficiently assist the interpretation of Article 16 to support the aspiration and intention of the new post-independence political and constitutional dispensation is certainly an issue of debate and can eventually only be judged when analysing legislation enacted and policies implemented to reform pre-independence structures.[2298]

982. Article 16 of the *Constitution* guarantees all persons the right to all forms of immovable and movable property but allows the regulation of the right to property by persons who are not Namibian citizens. Such a regulation was enacted with

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2295. Cf. to this and the following: Amoo (2014).
2296. Article 16(1) of the Constitution.
2297. *Kashela v. Katima Mulilo Town Council* 2018 (4) NR 1160 (SC): 1173Dff., 1175D – F, quoting *S v. Van Wyk* 1993 NR 426 (SC): 456G–H.
2298. Amoo; Harring (2010): 300ff.; *see also* further publications by Harring, quoted in Amoo; Harring (2010): 308. These authors have a critical view on Article 16 and its drafting process in which political compromises had to be achieved.

the *Agricultural (Commercial) Land Reform Act* of 1995[2299] according to which foreigners, after the commencement of the Act, cannot acquire agricultural land without the prior consent of the responsible Minister.[2300]

983. Apart from property held by natural or legal persons, the state of Namibia holds ownership: the state holds state land, i.e., land for public use, land held by public enterprises and environmentally protected land of natural parks. Article 100 places the ownership of land, water and natural resources within the Namibian territory and the economic zone of Namibia to the ownership of the state if the mentioned items are not otherwise lawfully owned.

984. The *Communal Land Reform Act* documents one important area of property-related customary law: the rights on communal land.[2301] Communal land is also vested in the state. However, there is a growing awareness that individual rights on communal land enjoy constitutional protection.[2302]

985. Property of the defunct Government of South West Africa and of the equally defunct second-tier governments shall, according to Article 124 of the *Constitution* read with Schedule 5 to the *Constitution*, have become property of the Government of Namibia. The transferred property will remain subjected "to any existing right, charge, obligation or trust on or over such property".[2303]

986. Article 16 of the *Constitution* leaves it to the political and economic circumstances to confirm and, if needed, to determine the protection of the protectable items. The commonly envisioned parts of movable and immovable property Article 16 has in mind are regulated by the rules of inherited common law and by statutes.[2304] Statutes may extend the scope of proprietary interests. One recent statutory amendment offers so-called flexible rights to land.[2305] The flexible rights allow for

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2299. Act No. 6 of 1995, as amended, in force since 1995, respectively 1996.
2300. Section 58 of the Act – for exceptions *see*: section 62. Cf. also: Regulations in relation to Acquisition of Agricultural Land by Foreign Nationals, 1996 (GN No. 257 of 1996), as amended – Cf. here also the Petition of 18 Mar. 2019 submitted to the National Assembly by the Affirmative Repositioning Movement (AR) with the request to enact the Regulation of Land Ownership by Foreign Nationals Bill according to which no land in Namibia be owned by foreigners. (Section 3(2)(a) of the draft bill https://www parliament.na/wp-content/uploads/2021/08/Petition-by-AR-Movement-on-the-Regulation … . ; accessed 20 Jul. 2022). The proposed draft bill is before parliament, but was critically observed, i.e., by Women's Action for Development (The Namibian of 27 Apr. 2022) and the Legal Assistance Centre (2022). *See also*: The Namibian of 20 Apr. 2022.
2301. Communal Land Reform Act, 2002, Act No. 5 of 2002, as amended.
2302. This matter will be explored later in this sub-chapter on the right to property.
2303. Sub-Article 3 of Schedule 5 to the Constitution.
2304. The, so far, most comprehensive analysis of the Namibian law of property is: Amoo (2014).
2305. Flexible Land Tenure Act, 2012, Act No. 4 of 2012, in operation since May 2018 (GN No. 100 of 2018). *See also*: Flexible Land Tenure Regulations: Flexible Land Tenure Act, 2012, 2018 (GN No. 101 of 2018) and Establishment of Land Rights Office: Flexible Land Tenure Act, 2012, 2018 (GN No: 102 of 2018).

upgrading from one kind of title to another, i.e., from a starter title to land hold and eventually to freehold title.[2306] Section 2 of the *Flexible Land Tenure Act* states as the objects of the act:

(a) to create alternative forms of land title that are simple and cheaper to administer than existing forms of land title;
(b) to provide security of title for persons who live in informal settlements or who are provided with low income housing;
(c) to empower the persons concerned economically by means of these rights.

987. Constitutional reflections of the right to property are not necessarily identical with the understanding of property in private law.[2307] The constitutional notion of property covers a broad range of rights on tangible objects, but also non-tangible objects which are of special interest for societal and more specific for economic activities and, thus, protected by law beyond the protection of contractual obligations.[2308]

988. The following will elaborate on

– the general limitations of the right to property; (§10.2)
– the expropriation of commercial land; (§10.3)
– communal land; (§10.4)
– the right to natural resources; (§10.5)
– the protection of traditional knowledge; (§10.6) and
– land reform, ancestral land, and the way forward (§10.7).

989. Intellectual property law has not been given a separate entry as this would have led to elaborations surpassing the available space. Namibia is part of the World Intellectual Property Authority (WIPO) and the African Regional Intellectual Property Organization (ARIPO). Namibia joined important international instruments,[2309]repealed inherited, outdated laws, enacted its *Industrial Property Act* in 2012[2310] and established its own Business and Intellectual Property Authority

2306. *See*: Sections 9, 10, 14, 15 of the Act, and: Ministry of Land Reform (2016): 4ff.
2307. Amoo; Harring (2010); but also: van der Walt (1999).
2308. *Ibid.*
2309. *See*: BIPA at: https://www.bipa.na (accessed 30 Jan. 2021). Namibia being member of the WTO, the TRIPS agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994) applies to Namibia. Cf. here also: Amoo; Harring (2010): 305ff.
2310. Act No. 1 of 2012, in force since June 2018 (GN No.: 113 of 2018). – Cf. also: *Gemfarm Investments v. Trans Hex Group* 2009 (2) NR 477 (HC), a judgement, in which the inherited statutory intellectual property law was stated to be out of time (*see* further: Amoo; Harring (2010): 307, Jacobs (2017)). The Industrial Property Act repealed these statutes (section 239 of the Act): Patents, Designs, Trade Marks and Copyright Act, 1916 (Act No. 9 of 1916), as amended; Patents, Designs and Trade Marks and Copyright Proclamation, 1923 (Proclamation No. 17 of 1923); Patents, Trade Marks and Copyright Proclamation, 1940 (Proclamation No. 33 of 1940 and Trade Marks in South West Africa Act, 1973 (Act No. 48 of 1973). On copyrights *see*: Copyright and Neighbouring Rights Protection Act, 1994 (Act No. 6 of 1994).

(BIPA).[2311] The protection of traditional knowledge will be dealt with as this is still an underexplored legal field.

990. Taxes are inroads into property and may affect all sorts of immovable and movable property. Nevertheless, the part on general limitations of the right to property does not go into details as far as tax law is concerned, but will only refer to the *Agricultural (Commercial) Land Reform Act* and the *Land Valuation and Taxation Regulations* which were – as already mentioned in the chapter on the judiciary – disputed before the courts but confirmed in their constitutionality.

II. The General Limitations of the Right to Property

991. The right to property is not an absolute right. Property has inherent limitations, can carry burden imposed by the state. The Supreme Court clarified this matter in the *Grape Growers* case.[2312]

992. In this case, the Supreme Court had to decide whether certain sections in Part XV of the *Minerals (Prospecting and Mining) Act*[2313] were constitutional. Section 109 of the Act reads:

> When it is reasonably necessary for the holder of a non-exclusive prospecting licence, a mineral licence or a mining claim to obtain a right –
>
> (a) to enter upon land in order to carry on operations authorized by such licence or mining claim on such land;
> (b) to erect or construct accessory works on any land for purposes of such operations;
>
> …
>
> and who is prevented from carrying on such operation by reasons thereof –
>
> (i) that the owner of the land in question … refuses to grant such right
>
> …
>
> may apply to the Commission [Minerals Ancillary Rights Commission as per section 108 of the Act] to grant such right to him or her.

2311. Business and Intellectual Property Authority Act, 2016 (Act No. 8 of 2016), in force since January 2017 (GN No. 293 of 2016). – The establishment of BIPA responded obviously to need: it is reported that BIPA received about 2,700 applications in 2018. (Cf.: Allgemeine Zeitung of 11 Sep. 2018).

2312. *Namibia Grape Growers and Exporters Association v. The Ministry of Mines and Energy* 2004 NR 194 (SC) - appeal confirming the judgement of the High Court: *Namibia Grape Growers and Exporters Association v. The Ministry of Mines and Energy* 2002 NR 328 (HC). *See* on this also: Amoo (2014): 68ff. Cf. also: Garib (nd).

2313. Act No. 33 of 1992, as amended.

993. According to section 110 of the Act, the Commission shall make the necessary inquiries and affected parties shall be entitled to be heard.[2314] It is also the obligation of the Commission to determine an amount to be paid as "just" compensation for the granting of a right in terms of the referred section 109 to the owner of the land.[2315]

994. The court took note of the constitutional provisions on the limitations of fundamental rights and freedoms[2316] and concluded the questioned rules in the *Minerals (Prospecting and Mining) Act* were in line with the *Constitution*. The court stated in general terms:[2317]

> The owner of property has the right to possess, protect, use and enjoy the property. This is inherent in the right to own property. It is, however, in the enjoyment and use of property that an owner may come into conflict with the rights and interests of others and it is in this sphere that regulation in regards to property is mostly needed and in many instances absolutely necessary. Such regulation may prohibit the use of the property in some specific way or limit one or other individual right without thereby confiscating the property and without thereby obliging the State to pay compensation.

995. The court referred in support of this argument to many laws that regulate movable and immovable property by limiting the right to handle the respective property. The court continued by saying:[2318]

> It is in my opinion inconceivable that the founding fathers of our Constitution were unaware of the vast body of legislation regulating the use and exercise of rights applicable to ownership or that it was their intention to do away with such regulation. Without the right to such control it seems to me that it would be impossible for the legislature to fulfill its function to make laws for peace, order and good governance of the country in the best interest of the people of Namibia.

996. However, limitations of the right to property must comply with certain requirements:[2319]

> [A]rt 16 protects ownership in property subject to its constraints as they existed prior to Independence and that art 16 was not meant to introduce a new format free from any constraints then, on the strength of what is stated above, and bearing in mind the sentiments and values expressed in our Constitution, it

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2314. Section 110(1) and (2) of the Act.
2315. Section 112.
2316. Articles 131, 22, and 23.
2317. *Namibia Grape Growers and Exporters Association v. The Ministry of Mines and Energy* 2004 NR 194 (SC) 210J–211A.
2318. *Ibid.:* 211G.
2319. *Ibid.:* 212D–F.

> seems to me that legislative constraints placed on the ownership of property which are reasonable, which are in the public interest and for a legitimate object, would be constitutional. To this may be added that, bearing in mind the provisions of the Constitution, it follows in my opinion that legislation which is arbitrary would not stand scrutiny by the Constitution.

997. This led the court to conclude:[2320]

> The Mineral Act does not more than give effect and content to the right so vested by the Constitution and Part XV contains reasonable provision or the balancing of this right vis-à-vis any other interest or right, e.g. that of the landowner. Providing, as it does, for a proper hearing, the payment of compensation where necessary and control by the Courts of the land in regards to any order by the … Commission, there is no basis upon which the provisions of Part XV can be said to be unreasonable.
>
> … Part XV is enacted in the public interest and for a legitimate object and is a reasonable mechanism whereby similar contesting rights are balanced to ensure equal protection of those rights in terms of the Constitution.

998. An important instrument in the land policy of Namibia is taxing agricultural land. Section 76 of the *Agricultural (Commercial) Land Reform Act*[2321] enables the government to impose a land tax. The aim of taxing land is to encourage the efficient use of commercial agricultural land, to discourage multiple farm ownership, reduce land prices, remove skewed pattern of land ownership, bring relief to poverty through resettlement, and source the Land Acquisition and Development Fund.[2322]

999. The quoted section 76 leaves it to the minister responsible for land in concurrence with the Ministers of Agriculture and the Minister of Finance to determine the rate of the tax by giving notice in the Government Gazette. The tax may be different with respect to the nationality or residence of the owner, the size of the land, the number of farms owned, or the activities carried out on the land.[2323] The notice of the minister is subject to approval by the National Assembly.[2324]

2320. *Ibid.:* 212H–213C.
2321. Act No. 6 of 1995, as amended by section 2 of the Agricultural (Commercial) Land Reform Second Amendment Act, 2003 (Act No. 19 of 2003).
2322. Cf.: Norregaard (2013): 16. - The Land Acquisition and Development Fund has been established by sections 13A, B, C of the Agricultural (Commercial) Land Reform Act. – *See* here the above reported constitutional debate in the *Kambazembi* cases (Part III, Chapter 6, §10.4).
2323. *See*: sections 76 (1A) and 76B of the Agricultural (Commercial) Land Reform Act, 1995 (Act No. 6 of 1995). – Section 76B gives the minister the right to exempt from land tax, e.g., persons belonging to those contemplated in Article 23 of the Constitution.
2324. Section 76(4) Agricultural (Commercial) Land Reform Act.

III. The Expropriation of Commercial Land

1000. The possibility of expropriating land has been on the political agenda in Namibia since the legal order for a democratic order of Namibia was discussed. Article 16 was agreed upon as a compromise, allowing expropriation under certain conditions. The *Agricultural (Commercial) Land Reform Act* of 1995[2325] accepts that expropriation of commercial land will only be an exceptional option. The first option for the state is to buy land on sale. It is the task of the responsible minister to acquire agricultural land[2326]

> to make such land available for agricultural purposes to Namibian citizens who do not own … agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory law or practices.

For the acquisition of land, a Land Acquisition and Development Fund is established.[2327]

1001. Whenever agricultural land is intended to be alienated, the state has a preferential right to purchase.[2328] This provision has become referred to as the principle of "willing buyer, willing seller". A seller of agricultural land is obliged to offer the land first to the state.[2329] It is then up to the state to decide whether it will buy the offered land or to issue a waiver so that the owner will be permitted to sell the land to any other interested buyer.[2330] What will happen if the seller and the state are not in agreement about the price for the land, is regulated in the *Agricultural (Commercial) Land Reform Act* in detail.[2331] Should the parties eventually fail to reach an agreement, the minister may "subject to the payment of compensation in accordance with the provisions of this [Agricultural (Commercial) Land Reform] Act, expropriate" the land.[2332] A possible expropriation has to comply with the rules set out in the *Regulations on Criteria to be used for Expropriation of Agricultural Land* of 2016.[2333] For conducting expropriation, the minister has to collect information on the land in question, i.e., its ownership and the situation of its current utilization, but also carry out a suitability assessment of the land for the purposes stated in section 14 of the Act.[2334] Carrying capacity, existing infrastructure, soil condition

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2325. Act No. 6 of 1995, as amended.
2326. Section 14(1) of the Act.
2327. Sections 13Aff.
2328. Section 17(1).
2329. Section 17(2). – The pre-emptive right of the state does also apply to commercial land that is to be auctioned. *See*: *PDS Holding (BVI) LTD v. Minister of Land Reform*, High Court judgement, Case No.: HC-MD-CIV.MOT-GEN-2017/00163 – unreported.
2330. Section 17(6).
2331. Section 17(6)–(11).
2332. Section 20(1).
2333. GN No. 209 of 2016.
2334. Sections 2 and 3 of the Regulations.

are elements to consider for this assessment.[2335] The whole process leads to scoring the suitability, ranging between "highly suitable" for expropriation to "not suitable".[2336]

1002. In 2008, the High Court decided on the expropriation of commercial farms and delivered a judgement which was of great influence for the understanding of Article 16 of the *Constitution* and land reform: the judgement of the *Kessl* case[2337] is still a landmark decision in the law of property.[2338] The case concerned farms owned by German citizens. Although the owners of the farms did not live in Namibia, the farms were commercially used with farm workers employed to work on the farms. The responsible Ministry decided to expropriate the farms. The case came to court with the submission of the owners that their right to be heard was violated. The court decided in favour of the farm owners and set the expropriation orders aside.[2339]

1003. The High Court held in very clear words that *audiatur et altera pars* also applied to processes of expropriation:[2340]

> According to art 16(2), the State … may expropriate property. This must be done in accordance with the requirements and procedures laid down in the Act. The decision-maker then has to act fairly, reasonably and in compliance with the statutory requirements, the requirements of the common-law and of art 16 of the Constitution. Article 18 cannot be disregarded during the process of expropriation of property in terms of art 16(2), even if it is in the public interest to expropriate such property.

And:[2341]

> Rejecting, as we do, the argument that art 16 stands alone, means that the requirements of art 18 are applicable and the conduct of the administrative official, the minister in this case, must be fair and reasonable, as well as legitimate. For administrative action to be fair, it is implied that the rules of natural justice, and in particular the principle of *audi alteram partem*, have to be applied by the decision-maker before he makes his decision.

1004. With respect to the substance of the process followed by the responsible Ministry, the court observed that the minister did not consider the suitability of the expropriation in view of section 14 of the *Agricultural (Commercial) Land Reform*

2335. Section 4.
2336. Section 5.
2337. *Kessl v. Ministry of Lands Resettlement* 2008 (1) NR 167 (HC).
2338. Cf.: Harring; Odendaal (2008).
2339. *Kessl v. Ministry of Lands Rsettlement* 2008 (1) NR 167 (HC): 222I–223C.
2340. *Ibid.:* 198D–E.
2341. *Ibid.:* 199B–C.

Act.[2342] Such an assessment was called for, irrespective of the fact that the farm owners were not Namibian and also absent from Namibia. Article 16(1) of the *Constitution* allowed to regulate the acquisition of property by non-Namibians, but[2343]

> [o]nce property has been acquired by a foreigner, he cannot be deprived of it, unless it is expropriated in terms of article 16(2) of the Constitution.

As long as the land was obtained in accordance with the law, there was no reason to act against absentee owners. Nowhere in the law is a rule that allows discrimination of absentee farmers.[2344]

1005. In was also in 2008 that the Tribunal of SADC decided on the expropriation of farms in Zimbabwe. Expropriated farmers challenged the decision of expropriation after losing the case in Zimbabwe before the Tribunal of SADC.[2345] Although Namibia was not a party to this case and the case did not deal with the law of Namibia, the case was observed in public and had influence on the public opinion about expropriation.

1006. In the interest of the government to reform the situation of many and large farms being owned by whites, the *Constitution of Zimbabwe* was amended to vest ownership of certain farm land in the state. The amendment of the *Constitution* also stated that no compensation be paid for the land so acquired and the acquisition of the land be not stand for challenge in court.[2346] The Supreme Court of Zimbabwe dismissed the claim of the farm owners against this measure of inroads into their property.[2347] The SADC Tribunal, which, in accordance with Article 18 of its protocol, had jurisdiction over disputes between natural person and the SADC community,[2348] ruled in favour of the farm owners.

1007. The SADC Tribunal held that the amendment to the *Constitution of Zimbabwe* violated "the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, … ".[2349] Although the amendment to the *Constitution of Zimbabwe* did not explicitly refer to "race", the fact that the amendment affected white farmers only constituted "indirect discrimination" for the

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2342. *Ibid.:* 202ff.
2343. *Ibid.:* 217G.
2344. *Ibid*.: 217ff.
2345. *Mike Campbell (Pvt) Ltd. v. The Republic of Zimbabwe*, SADC Tribunal judgement, [2008] SADCT 2.
2346. Section 16b of the Constitution of Zimbabwe as contained in section 2 of the Constitution of Zimbabwe Amendment Act, 2005 (Act No. 17 of 2005).
2347. *Mike Campbell (Pvt) Ltd. v. Minister of National Security Responsible for Land, Land Reform and Resettlement*, Supreme Court judgement, Judgement No. SC 49/07 – unreported.
2348. Protocol on Tribunal in the Southern African Development Community of 2000.
2349. *Mike Campbell (Pvt) Ltd. v. The Republic of Zimbabwe*, SADC Tribunal judgement, [2008] SADCT 2: before Part VI.

Tribunal.[2350] The denial of compensation was not acceptable to the Tribunal as this was against the *Lancaster House Agreement* that set the conditions for the independence of Zimbabwe.[2351]

1008. The Government of Zimbabwe refused to accept the verdict of the Tribunal and declared it was not bound by it. It argued the tribunal was not properly constituted as its protocol had not been ratified. In the following, the summit of SADC decided to review the original protocol on the Tribunal and suspended its work for the time being.[2352] A revised version of the protocol was adopted in 2014. The new protocol lacks jurisdiction for disputes between natural persons and the SADC community.[2353] The protocol did not lead to the re-establishment of the Tribunal.[2354]

IV. Communal Land

1009. Almost 40% of the land of Namibia is communal land and half of the population depends on this type of land.[2355] But what is communal land, how is it regulated and to what extent do communal land and rights to it enjoy constitutional protection?

1010. The *Communal Land Reform Act*[2356] defines communal land to be basically the land of the geographical areas of the now defunct ethnic governments. Schedule 1 to the Act refers to Kaokoland, Damaraland, Owamboland, Kavango, Caprivi, Bushmanland, Hereroland West and East, and Namaland. Unalienated state land can be declared communal land or incorporated into it.[2357] The authority to do this vests in the President of Namibia who can also withdraw communal land required in the public interest.[2358] In the latter case, the withdrawal cannot be done unless the rights in respect of the land in question have first been "acquired by the State and just compensation for the acquisition of such rights is paid to the persons concerned".[2359] The land of local authorities established on communal land will cease to be communal land.[2360]

1011. The *Communal Land Reform Act* recognizes three rights to be allocated in respect of communal land: customary land rights, occupational land rights, and

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2350. *Ibid.:* in Part VI.
2351. *Ibid.:* Part VII and: Lancaster House (1979); Annex C, Declaration of Rights, V.
2352. Cf here: Ruppel; Bangamwabo (2008), Oppong (2011); Ndlovu (2011). This will be discussed in more detail in Chapter 7, §4.1 of this part.
2353. Protocol on the Tribunal in the Southern African Development Community of 2014: Articles 33ff.
2354. *See* here: Fabricius (2019).
2355. *See* here: Adams; Werner (1990); Hinz (1998); Mendelsohn; Shixwameni; Nakamela (2012).
2356. Act No. 5 of 2002.
2357. Sections 15(1)(b) and (c) of the Act.
2358. Section 16(1).
2359. Section 16(2).
2360. Section 15(2).

rights of leasehold.[2361] Foreign nationals can acquire customary land rights or leaseholds of communal land only after written authorization of the responsible Minister.[2362]

1012. For the use of communal land, the Act distinguishes between different customary land rights namely the right to a farming unit, the right to a residential unit, and a "right to any other form of customary tenue that may be recognized and described by the Minister" in the Government Gazette[2363] and the less formalized right to grazing.[2364] Freehold ownership of and in communal land is not possible.[2365]

1013. "[A]ll communal land areas vest in the State", but the state is obliged to hold communal land[2366]

> in trust for the benefit of the traditional communities residing in those areas, and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.

1014. The chief or traditional authority has the power to allocate or cancel customary land rights.[2367] The size of land to be obtained under customary is limited to a maximum of 50 hectares. If an application is made for more land, it must be submitted to the responsible Minister.[2368] Upon receiving an application for land, the chief or traditional authority may before deciding on the application make investigations and, if community members hold against the allocation of the right, conduct a hearing to clarify the matter.[2369]

1015. The allocation of customary rights is subject to the ratification by the Land Board.[2370] Land Boards were introduced by the *Communal Land Reform Act*.[2371] Land Boards are composed of government officials, traditional authorities, representatives of the organized farming community, and representatives of the regions in which the board operates. At least four women with relevant expertise and four

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2361. Section 19(1). – The rule on occupational land rights (sections 36A–36G) came into the Act with the Communal Land Reform Amendment Act 2013 (Act No. 13 of 2013).
2362. Section 17B(1) of the Act.
2363. Section 21 of the Act.
2364. Section 29.
2365. Section 17(2).
2366. Section 17(1). – This is a compromise formula that avoids the word 'ownership' and 'ownership of the state'. *See* on the debate prior to the enactment of the Communal Land Reform Act: Hinz; Malan (1997).
2367. Section 20 of the Communal Land Reform Act.
2368. Section 23 of the Act read with regulation 3 of Regulations made in terms of Communal Land Reform Act, 2003 (GN No. 37 of 2003), as amended.
2369. Section 22(3) of the Act.
2370. Section 24.
2371. Sections 2 and 3.

government officials are added.[2372] The Land Board has to determine whether the decision of the chief or traditional authority followed the rules of the Act. It must veto the allocation of the right to land if the land has already been allocated to another person, the size of the land in question is beyond the maximum prescribed size or the land has been reserved for common usage or any other purpose in the interest of the public.[2373]

1016. According to section 26 of the Act, customary land rights are valid for the duration of the life of the person to whom it was allocated. With the death of the holder the land right reverts to the chief or traditional authority. However, the reversal is subject to an obligation of reallocation to the surviving spouse or if there is no surviving spouse to a child whom the chief or traditional authority determines to be entitled.[2374]

1017. The legislative intervention in favour of spouses and children was the result of concerns about the discriminatory treatment of widows and children of deceased holders of customary land rights. The Oshiwambo-speaking communities changed their respective customary law which left widows and children without rights with respect to land of their deceased husbands and fathers already in 1993.[2375] The customary law up to then was that the widow had to pay for the land on which she has lived during the time of her marriage with the holder of the land.[2376] The change of customary law enacted in 1993 provided that widows would have the "right to remain on the land if she so wishes".[2377] The changed customary law goes further than the *Communal Land Reform Act* as it confirms the right to land of the widow without any process of reallocation.

1018. Whether this customary law prevails over the statute or whether the statute repealed it, is open for discussion although there are good arguments to maintain the changed customary law as it is in strong support of the right to the equality of women.

2372. Section 4.
2373. Section 24(4).
2374. Section 26(2). – With this provision, the Act responded to problems as they emerged under the customary law of matrilineal Owambo and Kavango communities in which widows very often suffered from the expulsion of the land on which they lived during their marriage. The very much debated issue was solved by changing the relevant customary law and later also reflected in the Communal Land Reform Act. *See* here: Hinz; Kauluma (1994) and Hinz (1997). Otherwise, the rule in section 26(2) of the Communal Land Reform Act, according to which, upon the death of the holder of a customary land right, gives authority to reallocate the right on land, is debatable as this may lead to conflicts as the customary law of some communities knows customary land rights that do not end with the death of a person. Cf. here: Hinz (1998c).
2375. *See* on this: Hinz; Kauluma (1994); Hinz (1997).
2376. *See* for the old law of the Aandonga: Ooveta (1994): 63.
2377. So in the law of the Aandonga: Ooveta (1994): section 9; *see* further the decision of the customary law workshop of Owambo Traditional Leaders in: Ooveta (1994): 89f.

1019. Customary land rights may, in accordance with customary law, be cancelled by the chief or the traditional authority if the holder of the right violates conditions attached to the right, uses the land for a purpose not recognized under customary law, or on another ground prescribed.[2378] Additional grounds in this sense have been set out in regulation 6(1) to the Act. One of them is that cancellation is possible if the "land right has been kept dormant for three consecutive years". Cancellation will only have effect after ratification by the Land Board.

1020. Customary land rights valid immediately at the time before the commencement of the *Communal Land Reform Act* remain valid when the holders apply for this to the Land Board within a certain period after the Act has become effective.[2379]

1021. The *Customary Land Reform Act* introduced the obligation to register customary land rights. It is the task of the Land Board to cause the registration after the ratification of the allocation of land and issue the right holder a certificate of the registration.[2380]

1022. Fencing of communal areas is a very challenging problem in the administration of communal land. Fences prevent people from using commonage land for grazing. Fences have been inherited from the time before the enactment of the *Communal Land Reform Act,* but they are also reported to being done after the Act said a clear no to fencing.[2381] The *Communal Land Reform Act* prohibits fences unless authorization was received for the fence.[2382] With respect to fences pre-existing the Act, the Act requires application like for any other right under customary law. Application and authorization are not necessary[2383]

> if the holder of a customary land right or a right of leasehold wants to fence in homesteads, cattle pens, water troughs or cop fields.

1023. The "commonage in the communal area of a traditional community is available for use of the lawful residents … for the grazing of their stock".[2384] As grazing is the first purpose of the commonage, activities apart from grazing, e.g., erecting of buildings or cultivating, is not allowed unless authorization is given by

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2378. Section 27(1) of the Communal Land Reform Act.
2379. Section 28 of the Act. – The period for application for recognition of existing customary land rights was extended several times, cf. here: GN No. 19 of 2014.
2380. Section 25. – It is noteworthy that the traditional communities in the Kavango regions have so far refused to register their customary land rights. *See* here: Namwoonde (2012) and The Namibian of 12 Nov. 2021. Cf. further the debate on the concept of ownership under customary and statutory law in: Hinz; Ruppel (2008a); Mendelsohn (2008); Mapaure (2012).
2381. Cf. here: Werner (2011); Kashululu; Hebinck (2020).
2382. Sections 18 and 28(8). – Disputes about fences also occupied the courts: *see*, *e.g.*: *Chairman Ohangwena Communal Land Board v. Tileinge Wapulile,* Supreme Court judgement, Case No.: SA 81/2013 – unreported – and *Godfried Ndjamo Tjiriange v. Chief Sam Kambazembi*, High Court judgement, Case No. A 164/2015 – unreported.
2383. Regulation 27(3) to the Act.
2384. Section 29(1).

the chief or the traditional authority and ratified by the Land Board.[2385] The chief or traditional authority can set out rules for the use of commonage, including the kind and number of stock and also determine areas where grazing is subject to rotation.[2386] Non-residents can receive grazing rights, withdrawable at any time "due to drought or any other reasonable time".[2387] The chief, the traditional authority or the Land Board may exclude areas of commonage to be used for the allocation of rights under the *Communal Land Reform Act*. The same is possible for the President of Namibia in case there is need of land "for any purpose in the public interest".[2388]

1024. Rights of leasehold on communal land can be granted by the Land Board.[2389] The land on which a leasehold for agricultural purposes may be granted must be designated by the responsible minister after consultation with the traditional authority in the territory of which the land is located.[2390] The authority to grant leasehold rights is again a matter of the Land Board upon consent by the traditional authority.[2391] The maximum size of land for a leasehold is 100 hectares.[2392] Leaseholds will not be granted to land which another person holds under customary law.[2393] The duration of leasehold rights shall not exceed ninety-nine years; a leasehold for a period exceeding ten years needs ministerial approval.[2394]

1025. Occupational land rights are available to a "ministry, agency, office, church or any other institution providing public services".[2395] Government projects, projects of state-owned enterprises, health facilities, educational, social or sport facilities, facilities of non-profit making organizations, and community projects qualify for occupational land rights.[2396] The areas on which occupational land rights may be granted have to be designated in the way already determined for the designation of areas for leaseholds.[2397] Consultations with the traditional authority concerned are required. The occupational right is granted by the Land Board, but needs consent of the traditional authority.[2398]

1026. In order to protect holders of rights on communal land under the law prior to the *Communal Land Reform Act*, the Act deals with rights which were, after the Act, meant to be leasehold rights and occupational rights comparably to the procedure applied to customary rights in place before the commencement of the Act.[2399]

2385. Section 29(4).
2386. Section 29(2)(a).
2387. Section 29(3).
2388. Section 29(1)(b) and (c).
2389. Section 30(1).
2390. Section 30(1) and (2).
2391. Section 30(4).
2392. Regulation 13(1) to the Act.
2393. Section 31(2) of the Act.
2394. Section 34(1) and (2).
2395. Section 36A(1) of the Act.
2396. Section 36A(2).
2397. Section 36A(3)
2398. Section 36A(6).
2399. *See*: Sections 35 and 36F.

1027. When looking at the debate in general and on the Second National Land Conference of 2018 in particular,[2400] it is obvious that many matters related to the *Communal Land Reform Act* are still open for discussion. From the constitutional law point of view, however, the most challenging issue is the position of the right to land under customary law and whether and to what extent such right may be protected by the *Constitution*. Questions of this nature arose when rights to land under customary law were claimed to be part of the joint estate of a married couple and also where customary land rights were affected by interventions following the establishment of local authorities. A judgement of the High Court on the first question is worth to note. The judgement of the Supreme Court ruled on the second may lead to a revision of understanding of communal land rights.

1028. In the case of *MM v. VT* the High Court had to decide whether a wife married in community of property and now in divorce could claim that a customary land right granted to her husband was part of the joint estate.[2401] The court denied this, interpreting customary land rights being comparable to usufructs, which gives the holder the personal right to enjoy the benefits of the object of ususfruct and, with this, excludes, e.g., its sale.[2402] And, customary land rights – so the court[2403]

> may not be allocated to more than one person jointly. Had the legislator intended the same, it would have said so either expressly or by necessary implications.

1029. The judgement of the *MM v. VT* deserves a critical observation:[2404] the customary land right may have similarities with usufruct, but it is wrong to assume from assessed similarities that the customary law land right as a whole is like usufruct. Further: although the practice of allocation of customary land rights may show that the majority of applications are applications of (single) men, there is nothing in the *Communal Land Reform Act* to support the statement that joint application is excluded. In interpreting the silence of the Act, one should understand that the *Communal Land Reform Act* is a piece of partial codification of customary law. Therefore, the question to ask was what the respective customary law had to say about a possible joint application for the land right. And even if the customary law would not give the answer that customary land rights can be jointly applied for and held, the discussion about the rights of widows to customary land after the decease of their right-holding husbands should have led to consider whether what the court

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2400. On this later in this part.
2401. *MM v. VT* 2017 (3) NR 743 (HC).
2402. *Ibid.:* 748Dff., 748G–749B.
2403. *Ibid.:* 749C–D.
2404. The case of *MM v. VT* was followed with just repeating a paragraph from this case in: *WWB v. Aipanda N O*, High Court judgement, Case No. I 402/2014 – unreported, at: 81. Reference be also made to *LM v. JM*, High Court judgement, Case No: A 22/2013 – unreported – in which the claim of a woman married under customary law of the Maharero Traditional Community against her eviction from the common home after divorce and against the denial of her having a share in a joint estate was dismissed, but also to *M v. M*, High Court judgement, Case No. A/22/2013 – unreported.

eventually accepted as existing law would be constitutionally acceptable as possibly discriminating against the women requesting divorce. What has been recognized as discriminatory in case of the end of the marriage because of the death of the husband is not less discriminatory in case of divorce! The mere reference to the *Communal Land Reform Act* that reallocation is not a matter for the court to order but for the traditional authority to decide[2405] does certainly not give justice to the case.

1030. How customary land rights were affected by interventions by local authorities was argued in the *Kashela* case that went up to the Supreme Court. The Town Council of Katima Mulilo claimed to have full rights over communal land transferred to it while the appellant of the case held that her customary land right has remained in existence and was to be respected by the Town Council. The Supreme Court decided in favour of the applicant.[2406]

1031. The father of the appellant held a customary right on a piece of land, which was transferred to the Town Council of Katima Mulilo in terms of the *Local Authorities Act* in 1995. Despite the transfer, the father of the appellant continued to live on the land, as he did before. He died in 2001. His daughter, the appellant, took over from her father as heir according to the customary law of the Mafwe Traditional Community. It was after this that the Katima Mulilo Town Council rented out portions of the land and offered these portions for sale. The appellant objected to this. The Supreme Court identified two questions to be answered in its judgement:[2407]

> [W]hat obligations or liabilities did KTC [Katima Mulilo Town Council] assume when that land was declared KTC's land and became its property? … assuming that the late Mr Andrias Kashela [the father of the appellant] retained or acquired any rights over the land upon its proclamation as town land, did those rights survive his death and pass on to the heir?

1032. In its answer, the Supreme Court referred to Schedule 5 to the *Constitution* and the words in its Sub-Article 3 according to which the transfer of rights is bound to "obligations" and "trust". In this sense, so the court, language employed "aimed at recognizing that in such land there are interests short of rights in the black-letter law sense. That is so because the legal framework that governed communal land prior to independence treated it as trust land".[2408] The transfer of and to the state did not take away the obligation following from the right-inherent trust:[2409]

2405. *MM v. VT, ibid.:* 750H.
2406. *Kashela v. Katima Mulilo Town Council* 2018 (4) NR 1160 (SC). The judgement of the Supreme Court set aside the judgement of the High Court, Case No. I 1157/2012 – unreported.
2407. *Kashela v. Katima Mulilo Town Council* 2018 (4) NR 1160 (SC): 1174C–D.
2408. *Ibid.* 1176H–1177A.
2409. *Ibid.*: 1177C.

> An obligation which involves recognition and respect for the rights of the members of the community to live on the land, work it and sustain themselves.

And:[2410]

> The state, as owner of land, in the context of … [Schedule] 5, has social 'obligations' which a private owner does not have. It has to use that land for the public good.

1033. That the land in question ceased to be communal land does not lead to losing the protection given by Schedule 5 of the *Constitution*. The land was transferred to the government "subject to any existing rights … obligations over the property", as said in the mentioned schedule. The court concludes: the appellant[2411]

> acquired a right of exclusive use and occupation of the land in dispute upon passing of her father and … [it] survived and attached to the land even after the proclamation as town land.

1034. The Supreme Court reached its vote without entering into the discussion whether customary land rights were rights protected under Article 16 of the *Constitution*. The lawyer representing the appellant submitted arguments to this effect.[2412] The court did not dismiss these arguments, but was, nevertheless, reluctant to base its conclusion on them preferring the less challenging reference to Schedule 5 to the *Constitution*; less challenging as this reference would lead to the protection of customary land rights without immediately invoking the obligation to compensation in case of expropriatory inroads into customary land rights. So far, the interpretation of customary land rights as rights protected under Article 16 was for the Supreme Court "perhaps, an undue emphasis on Art 16".[2413]

1035. The use of the word "perhaps" appears to be an indication that the nature and concept of rights under customary land law will remain on the agenda for argumentation if other cases reach the court. However, what the Supreme Court offers so far is certainly an important step ahead in the need to protect rights under customary land law.

1036. The *Kashela* case could lead to reconsider the *Rehoboth* case decided some twenty-five years ago. In this case, the courts declined the claim of the Bastergemeente to land as the property of the Basterland had been transferred to the defunct government of Rehoboth and, therefore, became part of the property of the

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2410. *Ibid.* 1177E.
2411. *Ibid.*: 1178F.
2412. *Ibid.* at: 1169B–1170F.
2413. *Kashela v. Katima Mulilo Town Council* 2018 (4) NR 1160 (SC), 1176C.

Government of Namibia under Schedule 5 to the *Constitution*.[2414] The reading of the trust clause in the schedule in the *Kashela* case could now result in a different assessment of the Rehoboth case, i.e., the recognition of the land rights of the Bastergemeente.

1037. In the case of *Joseph v. Joseph*,[2415] the Supreme Court further strengthened the position of holders of rights on communal land. In this case, the court had to decide on whether the holder of a communal land right had the right to pursue the eviction of another person from communal land having no rights to the land. According to section 43 of the *Communal Land Reform Act* chiefs, traditional authorities and land boards may institute legal action for eviction of a person not having the right to occupy the land. The Supreme Court confirmed the common-law right to legal action by the holder of the right as section 43 did in its wording not exclude the right of the land right holder: *ubi jus, ibi remedium*.[2416]

V. The Right to Natural Resources

1038. The judgement of the Supreme Court in the *Kashela* case has certainly contributed to the clarification of the relationship between state ownership of communal land and rights on communal land under customary law. Still open for debate is state ownership, respectively state jurisdiction, and customary land law with respect to natural resources on communal land. While it is well-established in general law to separate animals, trees, plants, mineral resources and water from land, customary law does not have a comparable fragmentation, but maintains a holistic approach. From a customary law perspective, wild animals, trees and plants, minerals, and water are mere accessories to land.[2417] In common law, wild animals, minerals, water are under the jurisdiction of the state, are owned by the state or, at least strongly regulated. To what extent the jurisdiction of the state, the claimed

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2414. *Rehoboth Bastergemeente v. The Government of Namibia* 1996 NR 238 (SC). *See* on this already : Part I, Chapter 1, § 2.

2415. *Joseph v. Joseph* 2020 (3) NR 689 SC.

2416. Meaning: Where's a right, there's remedy! *Ibid.:* 699B. With this the Supreme Court opted against the views held in *Ndevahoma v. Shimwooshilil* 2019 (2) NR 394 (HC). As a consequence, the Supreme Court declared regulation 35 of the Regulations Made in Terms of Communal Land Reform Act section 45, 2002 (GN No. 37 of 2003) invalid. Regulation 35 made an offence if "[a]ny person other than a Chief, Traditional Authority or a board evicts any person occupying communal land from communal land which he or she legally occupies". Does this mean that persons who occupy the land legally may be evicted by the chief "without recourse to the law"? The court held that this was not intended and the Regulation 35 was, therefore, *ultra vires* (*Ibid.*: 700Cff. 706J).

2417. Cf.: Agenda 21 (1992: Chapter 26.1). Agenda 21 summarises the holistic approach to land by indigenous people, as follows: "Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands. ... [T]he term "lands" is understood to include the environment of the areas which the people concerned traditionally occupy. ... They [the indigenous people] have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment."

ownership and the statutory regulations (restrictions), are valid inroads into customary law, i.e., constitutional in terms of the constitutional confirmation of customary law in Article 66(1) of the *Constitution*, has to be explored from case to case.

1039. The Nature Conservation Ordinance of 1975,[2418] the Minerals (Prospecting and Mining) Act,[2419] the Water Resources Management Act of 2013,[2420] the Access to Biological and Genetic Resources and Associated Knowledge Act,[2421] the Forest Act,[2422] and the Inland Fisheries Resource Act[2423] are important legislative instruments in support of the prominence of public interests.[2424] These acts affect possible collective and individual interests protected by customary law and common law.

1040. The *Nature Conservation Ordinance*[2425] provides for a Nature Conservation Board and contains rules on the establishment of nature reserves, conservancies and wildlife councils, hunting rules, problem animals, and indigenous plants.[2426] The *Ordinance* has been amended several times after independence of the country and is expected to be replaced by a *Wildlife and Protected Areas Management Act* for which a draft bill is being worked out by the responsible Ministry.[2427]

1041. As far as game is concerned, the *Ordinance* states in section 29(1) that the owner of an enclosed farm or a piece of land not smaller than 1,000 hectares

> be the owner of all huntable game, huntable birds and exotic game on such farm or piece of land … .

1042. Huntable game, huntable birds and exotic game "on any land, including communal land, owned by the State"[2428] are *res nullius* and can only be hunted (and with this acquired) with permission of the responsible Minister.

2418. Ordinance 4 of 1975 (SA OG 3469), as amended.
2419. Minerals (Prospecting and Mining) Act, 1992 (Act No. 33 of 1992).
2420. Water Resources Management Act, 2013 (Act No. 11 of 2013) – the Act is not in force.
2421. Act No. 2 of 2017 – the Act came into operation on 1 Nov. 2021 (GN No. 236 of 2021). *See also*: Regulations under Access to Biological Resources and Associated Traditional Knowledge Act, 2017 (GN No. 161 of 2021).
2422. Forest Act, 2001 (Act No. 12 of 2001); *see also*: Forest Regulations: Forest Act, 2001 (GN No. 170 of 2015).
2423. Act No. 1 of 2003; *see also*: Inland Fisheries Resource Regulations (GN No. 118 of 2003), as amended.
2424. *See* here: Hinz (2012): 2ff.
2425. Ordinance No. 4 of 1975.
2426. Sections 3ff.; 13ff.; 25ff.; 52ff.; 72ff. – Cf. on the state of protected areas: Ministry of Environment and Tourism (2010) and Barnard; Bown; Jarvis; Robertson (1998).
2427. *See*: The Namibian of 3 Sep. 2009.
2428. Section 28(1) Nature Conservation Ordinance.

1043. Special rules applying to hunting on communal land were repealed in 1986 with exception of a resolution permitting the Ju/'han San of Tsumkwe East to hunt traditionally, i.e., with bow and arrow.[2429]

1044. The right

> in relation to the reconnaissance or prospecting for, and the mining and sale or disposal of, and the exercise of control over, any mineral or group of minerals vests in the state.[2430]

1045. The *Water Resources Management Act* of 2013 states in its section 4:

> The State, in its capacity as owner of the water resources of Namibia by virtue of Article 100 of the Namibian Constitution has the responsibility to ensure that water resources are managed and used to the benefit of all people in furtherance of the objects of this Act.

1046. This statement of ownership was already contained in the *Water Resources Management Act* of 2004, but not in the water law to be repealed.[2431]

1047. The *Access to Biological and Genetic Resources and Associated Knowledge Act* provides for a comparable rule with respect to biological and genetic resources:[2432]

> [A]ny right in relation to the access to or prospecting for, and the collection and sale or disposal of, and in the exercise of control over any biological or genetic resource vests in the State … .

1048. The approach to forests in the *Forest Act* differs from the so far reported acts dealing with natural resources. Privately owned forests remain privately owned. State inroads are provided for with respect to forests in communal areas. Section 13 of the Act authorizes the responsible minister to declare a forest on communal land a state forest or regional forest reserve should the minister have "reasonable grounds" satisfying that[2433]

2429. *See* here details in: Hinz (2003c): 21ff.
2430. Section 2 of the Minerals (Prospecting and Mining) Act. – *See* about this: Renkhoff (2016): 139ff. and Odendaal; Hebinck (2019).
2431. So far applicable is: Water Act 54 of 1956 (SA). Section 4 of the Water Resources Management Act, 2004 (Act No. 24 of 2004) stated that "ownership of water resources in Namibia below and above the surface of the land belongs to the State". *See* on the ownership provisions in the two Acts: Mapaure (2012b); Pinto (2014) and also Hegga; Kunamwene; Ziervogel (2020).
2432. Section 5 of the Act.
2433. *See*: sections 13(2) and 14(1) Forest Act – cf. here: GN 15 of 2022 with is the motive to declare a substantial part of communal land in the Zambezi Region the Zambezi State Reserve Forest.

(a) any communal land needs to be managed as a classified forest for the purposes of managing forest resources of national importance or to preserve the ecosystems and other components of biological diversity; and
(b) effective management cannot be achieved through management of that communal land as a community forest; … .

1049. Person or communities holding "a legal right or claim in or to the communal land in question, but who or which … looses that right or claim" are entitled to compensation.[2434]

1050. In attempts to support community-oriented instruments with respect to the administration and management of natural resources, communal conservancies, community forests, and community fishery reserves were introduced.

1051. The policy that led to the *Nature Conservation Amendment Act* of 1996[2435] and, with this, to the introduction of communal conservancies was driven by the intention to restore the rights of rural communities to wildlife. The policy was informed by anthropological evidence which showed that traditional communities had a balanced approach to the use of animals as part of their natural resources, which appeared to be in support of the conservation policy of the state.[2436]

1052. Some 88 conservancies have been approved; the conservancies cover about 19% of the land of Namibia,[2437] thus covering one-half of the communal land. The purpose of conservancies is to enable the inhabitants of communal land to contribute to the sustainable management and utilization of game in communal areas. The expectation is to achieve this through the engagement of the local people, who will, in turn for accepting responsibility, gain benefits from income generated by the utilization of wildlife in their areas.

1053. Section 3 of the Nature Conservation Amendment Act reads:[2438]

> Any group of persons residing on communal land and which desires to have the area which they inhabit, or any part thereof, to be declared a conservancy, shall apply therefor to the Minister in the prescribed manner … .

2434. Sections 13(6) and 14(6) Forest Act. The respective sub-section 7 determines as possible compensation "equivalent rights to land or alternative access to forest produce".
2435. Act No. 5 of 1996, amending Nature Conservation Ordinance 4 of 1975.
2436. To this and the following, *see*: Hinz (2011c); (2012): 2ff. and (2016c), the website of the Namibian Association of CBNRM Support Organisation www.nacso.org.na, the contributions by: Anyolo (2012a) and (2012b) and in general: Boudreaux (2010); Stamm (2017).
2437. NACSO (nd2).
2438. Section 24A Nature Conservation Ordinance.

1054. The application for the establishment of a conservancy has to entail a constitution.[2439] Regulation 155B of the *Regulations relating to Nature Conservation*[2440] gives a detailed list of matters, which a conservancy constitution must provide for.[2441]

1055. What is a conservancy? The *Nature Conservation Amendment Act* defines conservancy incidentally when it describes the duties of the body in charge of a conservancy, the conservancy committee. The conservancy committee has[2442]

> rights and duties with regard to the consumptive and non-consumptive use and sustainable management of game in such conservancy in order to enable the members of such community to derive benefits from such use and management.

1056. Although the Act does not mention land and the tenure of land, the establishment of a conservancy has a bearing on land tenure. Giving the sustainable management of game prominence must mean that certain modes of production on the land the game of which has to be managed, e.g., cattle husbandry, will be excluded or, at least, limited. Such a change in the customary land tenure not only affects individual customary rights holders, who could be part of "any group", but also the overall responsibility of traditional authorities over the communal land in their jurisdictions. The *Nature Conservation Amendment Act* of 1996 did not provide any role for traditional authorities in the process of establishing communal conservancies. However, research has shown that in most – if not all – cases, the relevant traditional authorities have played a role in the establishment of such conservancies.[2443]

1057. A case, decided by the High Court of Namibia, offers new insights into the relationship between the administration of conservancies in communal areas by the committee of the conservancy and the power to allocate rights under the *Communal Land Reform Act*.[2444] Given the growing importance of communal conservancies, the decision deserves special attention.[2445]

1058. The High Court had to decide on rights granted by the !Kung Traditional Authority in Tsumkwe West in the N≠a Jaqna Conservancy. The claim of the committee of the N≠a Jaqna Conservancy was mainly directed against twenty-two persons who had occupied land in the N≠a Jaqna Conservancy, but also against the

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2439. Section 24A (2) (b) Ordinance.
2440. GN No. 240 of 1976, as amended. The section referred to in the text was enacted by the amendment the regulations of 1996 (GN No. 304 of 1996).
2441. Cf. here also: Ministry of Environment and Tourism (2013): 5ff.
2442. Cf.: section 24A (1)(a) Nature Conservation Ordinance and regulation 155B (3) of the Regulations.
2443. Cf.: Hinz (2003c) 82ff.
2444. *N≠a Jaqna Conservancy Committee v. The Minister of Lands and Resettlement*, High Court judgement, Case No. A 276/2013 – unreported.
2445. Cf.: Hinz (2018). – The following text refers to this paper. Cf. also: van der Wulp (2016) and Hays; Hitchcock (2020).

Minister of Lands and Resettlement, the chairperson of the Otjozondjupa Communal Land Board, the !Kung Traditional Authority and the Minister of Environment and Tourism. The respondents claimed to have rights to use the land in the conservancy granted by the !Kung Traditional Authority. The land claimed for was mainly used for grazing. The occupants had also erected fences around the land.

1059. The court ruled that those respondents whose land rights were not ratified by the Communal Land Board did not have the right to occupy land in the N≠a Jaqna Conservancy and had to leave the land within a given period of time. Fences had to be removed, as the fences were not erected, i.e., to protect a homestead as would have been allowed under section 27 of the Regulations to the Act.[2446]

1060. On the procedural side, the court had to decide whether the applicant had *locus standi*. Section 43(2) of the *Communal Land Reform Act* gives the chief or the traditional authority the right to "institute legal action for the eviction of any person who occupies any communal land" without the right properly acquired under the Act. For the court, it follows from common law that a case has to be heart when a person demonstrates that he or she has "a direct and substantial interest in the outcome of legal proceedings".[2447] The applicant represents the N≠a Jaqna Conservancy, which – so the court – is a juristic person in the form of a *universitas* as provided for under common law. According to the constitution of the N≠a Jaqna Conservancy, the objectives of the conservancy was, in line with the objectives of the introduction of conservancies into the *Nature Conservation Ordinance*, namely "that the primary objective of the conservancy is to enable the inhabitants of the conservancy to derive benefits from the sustainable management of the consumptive and non-consumptive utilization of the natural resources of the conservancy."[2448]

1061. "Did the respondents unlawfully settle in the conservancy?" was the question the court pursued in the substantial part of its decision. The court found:[2449]

> During the years 2002 to 2013 …. respondents occupied land in the applicant's conservancy and erected their private fences within the applicant's conservancy outside the settlement area enclosing the commonage to the exclusion of the local community and the respondents farm with livestock. None of the respondents are members of the !Kung Traditional Community and none have acquired any customary or other legal right to occupy the commonage. Despite demand from the applicant, the respondents have failed or refused to remove their fences or vacate the respective occupied areas and to restore vacant

2446. Regulations Made in Terms of the Communal Land Reform Act, 2002 (GN No. 27 of 2003), as amended.
2447. At: 41 of the *N≠a-Jaqna Conservancy* decision.
2448. *Ibid.:* at 45.
2449. At: 54.

possession of the commonage to the applicant, its members and the local community.

1062. Therefore, the court decided in favour of the conservancy. However, the decision lets open what would be the legal position if the !Kung Traditional Authority and the Communal Land Board decided correctly in allocating land rights in the N≠a Jaqna Conservancy respectively endorsing the granting of the right. In other words: are the rules set out in the constitution of the N≠a Jaqna Conservancy and its management plan rules that bind the chief and traditional authority when granting land rights and also bind the Communal Land Board with the effect that it would have to veto the right when a matter comes before it where the chief or traditional authority granted land rights in a conservancy and by doing so violated the rules for managing the conservancy? This question leads to another: what are the rules that govern the authority of the chief or the traditional authority when granting customary land rights?

1063. The *Forest Act* gives the responsible minister the authority to establish community forests:[2450]

> The Minister may, with the consent of the chief or traditional authority for an area which is part of communal land or such other authority which is authorized to grant rights over communal land enter into a written agreement with any body which the Minister reasonably believes represents the interests of the persons who have rights over that communal land and is willing to and able to manage that communal land as a community forest.

1064. Some 43 community forests projects are reported to exist in 2020. Most of them overlap with communal conservancies.[2451]

1065. The *Inland Fisheries Resources Act* allows for the establishment of fishery reserves. According to section 22 of the Act, the Minister, on his or her own initiative, or in response to an initiative of any regional council, local authority council or traditional authority, and in consultation with the regional council, local authority council or traditional authority concerned, may by notice in the Gazette declare any area of inland waters as a fisheries reserve, if the conditions call for such an action to support the sustainability of fish resources.[2452]

2450. Section 15(1) of the Forest Act.
2451. Cf.: NASCO (nd1) and Schusser (2012).
2452. Section 22(1) Inland Fisheries Resources Act. – Several areas declared fisheries reserves, cf.: GN No. 276 of 2015; GN No. 297 and 298 of 2016, GN No. 65, 66, 67, and 68 of 2020 and GN 206 of 2021. On fisheries reserves, including the need to amend the law on fisheries reserves: Consultants for Fishery, Aquaculture and Regional Development: (2002); Jones (2008); Hay (nd).

VI. The Protection of Traditional Knowledge

1066. Why is it relevant to protect traditional knowledge?[2453] Traditional knowledge represents the cooperative efforts of communities. Plants used in accordance with traditional knowledge do very often carry symbolic values. When certain traditional sculptures are crafted, the process of crafting may be informed by inherited practices and with performing rituals in order to generate religious potential to be activated when the need arises.[2454] Traditional knowledge about plants, in particular their medicinal facilities, holds extreme societal values and is, above this, in high demand by manufacturers of industrially produced pharmaceuticals. More than half of the world population relies on traditional medicine. In some countries, more than 70% of the people depend on traditional medicine. More than 80% of the medicines used worldwide are of plant origin. ARIPO maintains that "a significant part of the global economy is based on the appropriation of traditional knowledge".[2455]

1067. How can legal protection be provided 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 legislation, and decided cases, is unable to protect traditional knowledge. As a rule, intellectual property law aims at unknown knowledge generated by an individual.[2456] Hence, the main purpose of such law is to protect the knowledge of the mentioned individual against the unauthorized trading of this knowledge. The need to create so-called *sui generis* protection for traditional knowledge was, therefore, seen to be a logical consequence.

1068. The *Convention on Biological Diversity* of 1992, adopted at the Earth Summit of 1992 and in force since 4 June 1993, translated important parts of the Agenda 21 into a binding international treaty.[2457] The Convention contains a variety of obligations for actions by its members to protect biological diversity found in the member countries. Particularly noteworthy is that the Convention refers repeatedly to traditional knowledge. Article 8(j) of the Convention expects that the members of the Convention respect traditional knowledge.

1069. Article 10(c) of the Convention demands from the members of the Convention to: "[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 pursuance of the *Convention*, the international community adopted the *Nagoya Protocol* in 2010 which came into force in 2020.

2453. The following relates on: Hinz (2022): 455ff. On traditional knowledge in general, *see*: Posey; Dutfield (1996); WIPO (2001); Wekesa (2009); Githae (2009); Tobin (2009); Kamau (2009); Amoo; Harring (2010); 302ff.; further: Chennells (2013); Vilho (2014); Chinsembu (2015) and Nandjembo (2017).
2454. Wekesa (2009): 212.
2455. ARIPO (2006).
2456. Cf. on this: Matsushita et al. (2006): 695f.; Oguanaman (2006).
2457. Namibia signed the Convention in 1992 and ratified it in 1997.

The objective of the protocol is, as stated in its Article 1 the "fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by the appropriate access to genetic resources". According to Article 3, the protocol is meant to apply also to "traditional knowledge associated with genetic resources".

1070. At the regional level ARIPO adopted the *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* on 9 August 2010. The protocol was ratified by Namibia and came in force on 11 May 2015. This protocol covers a broad range of intellectual products usually not part of what is covered by the commonly applied law of intellectual property.

1071. The preamble of the *Swakopmund Protocol* acknowledges the value of traditional knowledge systems and their contribution to local and traditional communities as well as "all humanity".

1072. The beneficiaries of traditional knowledge are the holders of that knowledge, i.e., the local and traditional communities, but also recognized individuals within the communities who are involved in the creation, preservation, and transmission of traditional knowledge.[2458] The right to authorize the exploitation of rights to traditional knowledge vests in the "owners" of the rights. Owners shall also have the right to prevent anyone from the exploitation of their rights.[2459] The owners of traditional knowledge have the right to assign the right to somebody else and also to conclude licensing agreements. However, traditional knowledge belonging to a local or traditional community may not be assigned.[2460] Compulsory licences are possible in case that traditional knowledge is not sufficiently exploited by the rights holders and there is an interest of public security or public health.[2461] The fair and equitable sharing of benefits generated by the commercial or industrial use of the knowledge is to be part of the mutual agreement between the parties.[2462] The use of traditional knowledge "beyond its traditional context" shall be acknowledged to the holders.[2463]

1073. A special rule protects genetic resources: authorized access to traditional knowledge associated with genetic resources does not imply the right to access genetic resources.[2464]

1074. The *Swakopmund Protocol* is to be implemented by a "national competent authority" which each member of the protocol is expected to establish. This has been done with the enactment of the *Business and Intellectual Property Authority*

2458. Section 6 of the Protocol.
2459. Section 7(1) and (2).
2460. Section 8.
2461. Section 12.
2462. Section 9.
2463. Section 10.
2464. Section 15.

Act of 2016. The Business and Intellectual Property Authority is "responsible for the administration and protection of business and intellectual property"[2465] including matters of traditional knowledge.[2466]

1075. The already above-mentioned *Access to Biological and Genetic Resources and Associated Traditional Knowledge Act* focuses on a number of matters regulated in the *Nagoya* and *Swakopmund Protocols*.[2467] While the rights to biological and genetic resources vest in the state, traditional knowledge associated with such resources "vest[s] in the particular local community which holds and applies such knowledge for the sustainable conservation of the genetic resources". It is also the respective local community which enjoys the utilization of the traditional knowledge including "the fair and equitable sharing of the benefits".

VII. Land Reform, Ancestral Land and the Way Forward

1076. After Namibia gained its independence, the unequal distribution of agricultural land and the high rates of unemployment drew the attention of government to the issue of land redistribution. The land question was a sensitive issue as the black communal farmers and the white commercial farmers – the latter holding most of the agricultural land – had opposing interests.[2468] White farmers opposed the redistribution of commercial farms arguing that it would have a devastating effect on the economy and the environment and cause massive unemployment among black farm workers.[2469] Black communal farmers were demanding redistribution with the view to relieve the pressure on grazing land in communal areas.[2470]

1077. Commercial agriculture is the biggest single employer in the country. In 2001, about 230 000 Namibians were employed or belonged to families employed on commercial farms.[2471] By expropriating commercial farms, they are likely to lose their jobs with a lack of alternatives. Hence, as De Villiers states, "a cost benefit

2465. Section 3 of the Business and Intellectual Property Authority Act.
2466. Cf.: BIPA at www.bipa.na/intellectual-property "Traditional knowledge and cultural expressions" (accessed 1 Feb. 2021). *See also*: BIPA (2019): 30.
2467. *See* the critical remarks on the act by: Chinsembu; Chinsembu (2020).
2468. It will not be possible to give a full account of what happened in the last thirty years. Only some selected matters can be highlighted in the following. Cf. on land reform in Namibia, including the First and Second National Land Conference of 1991, respectively 2028: Botelle; Rohde (1995); Harring; Odendaal (2002): 31; Hunter (2004); Werner; Kruger (2007); von Wietersheim (2008); Thran (2014); Knobloch (2014); Werner (2018); Melber (2019); De Villiers, S.; Christensen, Å.; Tjipetekera, C. et al. (2019); Odendaal; Werner (2020); Amoo (2020). *See also* the collections: Land Conference Supporting Documents by the Namibia University of Science and Technology: http://dna.nust.na/landconference/landconference.html and the one by the Ministry of Land Reform: www.mlr.gov.na/land-conference1 (both accessed 26 Jan. 2021).
2469. *Ibid.*
2470. *Ibid.*
2471. Werner (2001): 260.

analysis is required to ensure that the net result of people benefiting from land reform outstrips the potential unemployment that may result from commercial operators winding down".[2472]

1078. Reform of land matters has been on the political and legal agenda since the debate about the *Constitution*. How to achieve distribution of commercial land to change the inherited pattern of ownership dominated by only a small part of the Namibia people was one matter; how to improve land tenure in communal land the other. The political and legal approaches to reform the existing distribution of land were guided by Article 16 of the *Constitution*.

1079. The First National Conference on Land Reform and the Land Question in 1991 to discuss the issue of land reform, gave all different interest groups the opportunity to represent their interests and achieve the greatest possible consensus on major issues.[2473] Despite the quite moderate and practical recommendations adopted at the conference were not binding on the Namibian government, the recommendations of the conference became guidelines for its land policy. The recommendations include the reallocation of underused land, the prohibition of large farms, and the implementation of a land tax.[2474] The conference further resolved that foreigners should not be allowed to own farmland and that land of absentee landlords should be expropriated.[2475] It was further recommended to reform communal land rights, to create technical committees to study the situation and to make recommendations.[2476] Regarding the question raised by many coming from communities that suffered under colonialism whether ancestral land should be returned the conference, despite acknowledging past injustices, came to the conclusion that it was, under the existing conditions, impossible to open avenues for claiming ancestral rights:[2477]

> Before Namibia was colonized at the end of the 19th century, the boundaries between the Namibian communities were not precisely demarcated and shifted frequently. The claims of different communities will inevitably overlap. During the colonial period, there have been large population movements and a mixing of previously distinct communities.

1080. A Second National Land Conference was held in 2018. The conference took stock of what happened in the years after the first land conference to settle the land question. "Undelivered promises" was the heading of a critical research which looked at what happened after the first conference.[2478] The official view found more

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2472. De Villiers (2003): 37.
2473. *Ibid.:* Adams; Devitt (1992): 7, but also: Republic of Namibia (1991b).
2474. Harring; Odendaal (2002): 32; Adams; Devitt (1992): 7.
2475. Adams; Devitt (1992): 8.
2476. Harring; Odendaal (2002): 32.
2477. So point 2 of the consensus document of the conference: https://mlr.gov.na/Land-conference1 (accessed 11 Mar. 2021); *see also*: Harring; Odendaal (2002); Adams; Devitt (1992): 8.
2478. Melber (2019): 75.

lenient words, but also did not ignore the severeness of the land question and the difficulties in implementing land reform:[2479]

> The slow pace of land acquisition, the scarcity of such land, inadequate financial resources to acquire land remain a bottleneck in the attainment of land reform objectives in the country. Other challenges include pending legislative enactments on land ownership by foreign nationals … . Further, the inability to satisfy demand for land for those who need it as well as uneven distribution of land offers across the administrative regions of the country, just to mention a few.

1081. According to figures made available in 2018, 70% of the commercial farms were owned by whites[2480] and this despite the National Resettlement Programme which mandated to acquire farms from willing sellers and settle people in need of land and despite the Affirmative Action Loan Scheme of the government.[2481] Up to 2018, the government had bought 443 farms for resettlement under the National Resettlement Programme amounting to 37% of the farms offered to government for buying.[2482]

1082. The records of the farms used for resettlement is also not convincing. They are not convincing in terms of the management of the resettled farms, but also in terms of the criteria applied for resettlement. Settlement often face problems due to low levels of education of the people resettled as well as disparity in skills of the resettled people.[2483] In addition to this, the resettlement policy revealed that the actual costs of resettlement only started after the return of land, and hence the question has arisen whether the process of acquisition is indeed sustainable.[2484] The ownership of farmland is also still inextricably connected in people's minds to a source of wealth, ignoring the amount of work needed to maintain the sustainability of land.[2485]

1083. The question of criteria to be applied to potential beneficiaries even led to a legal dispute. When the Ombudsman asked for the list of the beneficiaries of the resettlement programme, the responsible Ministry provided the list only after legal actions against the minister were considered.[2486] In commenting on the list, the Ombudsman called on the government to clarify the goals and objectives of the resettlement programme and criticized that "ordinary people had been sidelined in

2479. Government of the Republic of Namibia (2018): 4. Cf. also: Geingob (2018a): 5, 7f.
2480. Namibia Statistics Agency (2018): 33 – the Statistics Agency refers to "previously advantaged".
2481. Cf. on the resettlement programme and the Affirmative Action Loan Scheme: Werner, Odendaal (2010) and Agribank (2020).
2482. *Ibid.:* 39, 40. – According to Government of Namibia (2018): 4, the number of farms acquired by government was 524.
2483. Sachikonye (2004): 74.
2484. De Villiers (2003): 36.
2485. Sherbourne (2004): 9.
2486. Cf.: The Namibian of 17 Oct. 2018.

favour of the rich and middle-class, such as permanent secretaries, directors, and other high-ranking officials and employees of the ministry itself".[2487]

1084. Apart from assessing the reform policy since the first land conference, the Concept Paper for the Second National Land Conference identified the following list of Emerging Land Matters to be considered by the second land conference:[2488]

– ancestral land claims for restitution;
– the willing seller – willing buyer principle for agricultural acquisition;
– the National Resettlement Programme and resettlement criteria;
– the expropriation of agricultural land;
– urban land reform programmes;
– the removal of the veterinary cordon fence;
– land valuation and pricing;
– pre and post-resettlement support to resettled farmers;
– affirmative action schemes and programmes;
– accessibility to land by women and youth;
– bankability of communal land; and
– land productivity and employment creation.

1085. The conference was preceded by regional consultations which resulted in reports which were submitted to the conference. Different from the first conference, the second conference did not lead to one final document that summarized the main matters of the conference for political implementation. The second conference produced some forty resolutions covering aspects of the list of the quoted emerging land matters.[2489]

1086. It is worthwhile to have a look at the statement of President Geingob after the conference.[2490] Geingob did not leave doubts that the main result of the conference was to bring work in motion:[2491]

> The Conference laid the challenges bare, and also highlighted the lack of accountability, which has led to high levels of mistrust we as Government are doing on the Land Question.

1087. Some of the burning issues were explicitly mentioned by the president in the mentioned statement.[2492] The Urbanization and Spatial Development Policy is one. The president refers to statistical information according to which some 900 000

2487. Quoted from The Namibian of 22 Oct. 2018, *see also*: The Patriot of 28 Sep. 2018 and: Ombudsman of Namibia (2018).
2488. Government of the Republic of Namibia (2018): 6ff.
2489. The list of the resolutions can be found at: https://cmsmy.na/assets/documents (accessed 25 Jan. 2021).
2490. Geingob (2018b).
2491. *Ibid.:* 2.
2492. *Ibid.:* 3ff.

Namibians are living in informal settlements. " … the sheer scale of informal settlements undermines the dignity of our fellow citizens."[2493] With respect to resettlement, communal land, and ancestral land, the president expressed satisfaction about the discussion "that allowed Namibians to air their views".[2494] With respect to ancestral land, recommendations are expected by a commission to be appointed to investigate the claims for ancestral land. Land owned by government must become more productive. An assessment of the status of resettlement farms is to be done in order to identify requirements for improved productivity. The communal farmers in the North should be supported by creating additional abbatoirs so that these farmers will have good opportunities to provide their products for consumption in entities owned by government north of the red line. The law prohibiting illegal fencing in communal areas should be enforced. It is expected that illegal fences are identified and notice be given to those "committing the illegal act of fencing areas to remove their fences within a reasonable timeframe".[2495] Whether the concluding call on all to "proceed with urgency and avoid excuses and explanations as to why things cannot be done"[2496] will bear results has to be seen.

1088. Although the Second National Land Conference raised strong concerns against the principle of willing buyer – willing seller, according to the Prime Minister of Namibia – so a report in the media – it will remain the main principle in the implementation of land reform. It will do because of Article 16: " … the express deletion of the principle from the *Agricultural (Commercial) Land Reform Act* of 1995 would be a futile exercise as the right to buy and sell remains entrenched in Article 16".[2497]

1089. The revision of the position on the claim and right to ancestral land in the Second National Land Conference is in particular in line with case law in which ancestral land claims were accepted.[2498] As an immediate result of the land conference of 2018, a Commission of Inquiry into Claims of Ancestral Land Rights and Restitution was appointed the President of Namibia. The Commission submitted its report in July 2020.[2499]

2493. *Ibid.:* 3.
2494. *Ibid.:* 5.
2495. *Ibid.:* 7.
2496. *Ibid.*
2497. The Namibian of 20 Jan. 2021.
2498. GN No. 59 of 2019 – *see also*: Proclamation No. 5 of 2019 declaring the Commissioner Act, 1947 (Act No. 8 of 1947) applicable to the Commission of Inquiry. – With respect to relevant case law, *see*: *Mabo v. Queensland (No.1)*, [1988] HCA 69; *Mabo v. Queensland (No. 2)*, HCA [1992] HCA 23; *Alektor Ltd. v. Richtersveld Community* 2003 (12) BCLR 1301 (CC). Further: In Botswana, in 2004, Sesana and others who belong to a San community in Botswana successfully applied to the High Court of Botswana arguing that the government of Botswana unlawfully deprived them of their land and therefore had to restore it to their lawful possession (*Sesana and Others v. Attorney-General* (2006) AHRLR 183 (BwHC 2006)). The High Court referred to international cases and recognized the native title doctrine, which stipulates that indigenous people have rights and interests to their land that come from their traditional laws and custom.
2499. Republic of Namibia (2020).

1090. The report is a very comprehensive assessment of the problem of ancestral land. It follows the list of tasks outlined in the government notice appointing the members of the Commission and to determine the terms of reference of the Commission.[2500] The terms of reference cover all possible aspects related to ancestral land: the generation of a common understanding of ancestral land rights; the establishment of the size of lost ancestral land; the measures to restore social justice; the determination of claims for ancestral land vis-à-vis the principles and standards of human rights as guaranteed in the Constitution; the renaming of places with colonial names; the erection of monuments in remembrance of the victims of genocide, to quote some of the tasks from the terms of reference. Part of the terms of reference was also to draft legislation on how to cater to ancestral land claims.

1091. The Commission started working in March 2019 and published its report in 2020.[2501] It held public hearings, commissioned three studies, one on the history of land dispossession, one on legal aspects of the claims for ancestral land and one on the National Resettlement Programme,[2502] invited the public to submit contributions, conducted fact-finding missions, and had retreat session to review the collected material.

1092. Many institutions and individuals participated in the inquiry and provided their statements to the Commission. At the end, the Commission collected evidence related to[2503]

– ancestral land losses as a direct result of colonialism;
– loss of ancestral land as a result of proclamations by the Namibian government;
– communal land administration disputes; and
– generational farmworkers and landless communities.

1093. In its final summary, the Commission expressed that it[2504]

> is of the firm conviction that claims of ancestral land rights and restitution are genuine, and that they have been largely a reaction to a land reform process that has been perceived to fall short of addressing the genuine needs of landless communities in the country. The inquiry of the Commission has heightened expectations for restitution among affected communities. The heightened expectation translates to a need by the Government to regards the issue as a serious national concern that requires urgent attention, action and prioritization through policy, legislation and programmes.

2500. GN No. 59 of 2019. – The Commission was chaired by High Court Judge Shafimana Ueitelle.
2501. Republic of Namibia (2020): 9ff. and Appendix B.
2502. *See* here: Werner (2020); Nakuta (2020) and Namibia Statistics Agency (2020).
2503. Republic of Namibia (2020): 205.
2504. *Ibid.:* 272.

1094. How to deal with ancestral claims? The report of the Commission provides a wealth of material, material on the possible scope of ancestral claims and the very tangible expectations for actions with respect to losses that occurred during and after colonialism. The wealth of material will assist in assessing problems in the societies that have accumulated over the many years of inroads into rights to land. Is there a need to limit ancestral claims and how to handle claims from different claimants but on the same piece of land? Whether there should be a cut-off date is a matter of controversy. The Commission opted against a cut-off day but for a date after which claims would not be accepted anymore.[2505] With regard to overlapping claims and rights, the Commission referred to conflict management mechanisms of the communities involved that are expected to reach mutually accepted solutions.[2506]

1095. The Commission proposed a draft bill on ancestral land claim and restitution.[2507] According to this, there should be a Commission on Restoration and Restitution of Ancestral Rights to Land, an Ancestral Land Restitution Fund, and a Tribunal. The Commission would be the entry point to assess ancestral claims, the fund would be under the jurisdiction of the Commission and the Tribunal to hear objections to the decision of the Commission. Appeals against the decision of the Tribunal would lie with the High Court.

1096. A claim based on ancestral rights was already under legal scrutiny. Members of the Hai//om Traditional Community have taken the claim to their ancestral land, part of which now belongs to the Etosha National Park to court. The High Court ruled against the members of the community for procedural reasons, denying the applicants the right to claim.[2508]

1097. The Supreme Court dismissed the appeal against the decision of the High Court on albeit differently argued procedural grounds.[2509] The further debate on ancestral land will certainly lead to a substantial answer to the claims of the Hai//om community.

1098. The decision of the First National Land Conference not to restore ancestral land left a bitter taste in the mouth of those who lost their land without any compensation.[2510] Nevertheless and despite the complexity of land reform, the rule of law was maintained: the *Kessl* judgement provided a clear positioning of the Namibian land reform to the adherence to the rule of law and against what

2505. *Ibid.:* 73.
2506. *Ibid.:* 75.
2507. *Ibid.:* Appendix J.
2508. *Tsumib v. The Government of the Republic of Namibia*, High Court judgement, Case No. A 206/2015 – unreported. *See* on the case: Hitchcock (2013): 37 and further: Legal Assistance Centre (2020a); Dieckmann (2020); Odendaal; Gilbert; Vermeylen (2020).
2509. *Tsumib v. Government of the Republic of Namibia* 2022 (2) NR 558 (SC).
2510. Republic of Namibia (2020): 41.

happened in Zimbabwe and was confirmed in the reported *Campbell* case. However, the land issue is still far from being resolved and more drastic and radical changes are called for. The radical movement Affirmative Repositioning Movement was able to encourage several thousand mostly young Namibians to hand in applications for land and threatened to take the land by force should the applications not have been processed and approved by July 2015.[2511] Before this could happen, the government entered into an agreement with the movement by offering the service of 200 000 plots of land over the next ten years.[2512] In other words the commercial sector and the law applicable to it allows for remedies by intervening into the market system with means available by it.

1099. The situation in the communal areas is different. The understanding of communal land is not market-oriented. Nevertheless, market mechanisms have started occupying this sector and with this led to societal frictions, which are difficult, not to say impossible to solve. Communal land is still largely dominated by forms of communal land tenure with land being cultivated on a household basis, and grazing lands being used collectively.[2513] Communal land holders need money for infrastructural purposes like commercial farmers, but their land tenure right is limited and, therefore, communal farmers cannot offer their land as security for funding or loans or for trading.[2514] This stresses the importance of bringing security of tenure, security of investment, equitable infrastructure, and market participation to communal areas.[2515] The increasing fencing off of communal land could be interpreted as sign of inadequacy of communal landownership for successful farming. The fact that part of the communal land has, thus de facto, already been taken out of the communal usage creates friction within the communities.[2516]

VIII. The Right to Bequeath Property to Heirs

1100. Part of the guarantee of property in terms of Article 16 of the *Constitution* is the right to bequeath his / her property to his / her heirs including to do this by disposing of the property by writing a will. The formalities to be met when writing

2511. Cf.: New Era of 13 Feb. 2015 and further: von Wietersheim (2008); Werner; Odendahl (2010). - AR was founded in 2014. The founders, members of SWAPO, were expelled from the party, but were reinstated after thy won court actions against SWAPO.
2512. Cf.: The Namibian of 27 Jul. 2015.
2513. Pankhurst (1996): 65. – Land policy and land reform must consider both: commercial and communal land. Whether it would be of help to marry the regulations of the two sectors in one statute, as the Minister of Land Reform tried to do with tabling a Land Bill in 2016 is certainly debatable (National Assembly (2016)). The Bill was withdrawn because it was objected because of lack of consultation. Cf. on the 2016 Land Bill: Werner (2017).
2514. Harring (1996): 472.
2515. Fuller (2004): 86.
2516. *Ibid.:* 70.

a will are contained in the *Wills Act*.[2517] The High Court considered the compliance with these formalities in the case of *Mwoombola v. Master of the High Court*.[2518] The Master of the High Court found a will invalid for not complying with the provisions of Section 2(1)(a)(iii) and (iv) of the Wills Act, as the deceased and the witnesses had only initialized the first three pages of the four pages will instead of signing these pages. The last page of the will though contained the full signatures of the testatrix and the witnesses as required by the act. The only two children of the deceased sought an order declaring that the testamentary document be accepted as the last will and testament of the deceased.

1101. The High Court confirmed that the provisions of the *Wills Act* for a will determine the validity of the will in principle. It then, however, emphasized that the supremacy of the *Constitution* cautioned the court to apply statutory law enacted before independence without considering its constitutionality. In this sense the judge of the High Court said:[2519]

> In my view the question that confronts me has arisen at a different historical period in our development. The issue has arisen at a period where Namibia as a Nation became a constitutional state and where constitutional supremacy has replaced parliamentary supremacy or sovereignty. It is therefore no longer appropriate for courts to simply defer to what parliament or the legislature says, but to go further and ask the question whether the statutory provisions, in question, promote the spirit of the Constitution and whether the strict application of the statutory provision will or will not amount to the violation or negation of a fundamental human right.

The High Court then referred to freedom of testation as part of Article 16 of the *Constitution*:[2520]

> I am therefore of the view that the first principle of the law of wills enshrined in our Constitution is the freedom of testation. Although the legislature limits the power of testation in various ways within the province that remains to the testamentary power, virtually the entire law of wills derives from the premise that a person has the fundamental right to dispose of his or her property as he pleases in death as in life. The rules governing testamentary capacity and the construction of wills must, therefore, not result in interfering with or depriving a testator or testatrix of his or her freedom of testation.
>
> … The essential *rationale* of these rules [the rules on formalities] is that when the purposes of the formal requirements are proved to have been served, literal and exact compliance with the formalities themselves may be excused.

2517. Act No. 7 of 1953.
2518. 2018 (2) NR 482.
2519. *Ibid.*: 490G–491A.
2520. *Ibid.:* 491C–H.

> The courts have boasted that they do not permit formal safeguards to be turned into instruments of injustice in cases where the purposes of the formalities are substantially satisfied. Why has the Wills Act not been interpreted with a similar level of purposiveness?

The High Court found the signing of three of the four pages only with initials in this case as substantially complying with the formalities prescribed by the *Wills Act* and fulfilling its purpose to identify the persons who were present at the execution of the document and to eliminate as far as possible, the perpetration of fraud. It emphasized that this interpretation considered that the right to dispose of own property as one pleases in death and in life is a fundamental right.[2521]

1102. Looking beyond the case before it, the judge of the High Court recommended a revision of the *Wills Act*:[2522]

> I therefore strongly recommend that the Law Reform and Development Commission investigate the possibility of revising the Wills Act, 1953 so as to address the violation of the fundamental human rights that may be caused by the strict and unyielding interpretation of the 1953 Wills Act.

§11. The Right to Political Activity

1103. Article 17 of the *Constitution*: the right to political activity, grants all citizens the right to participate in peaceful political activity intended to influence the composition and policies of the government and the right to form and join political parties. The right to political activity can be restricted by "qualifications prescribed by law as are necessary in a democratic society to participate in the conduct of public affairs, whether directly or through freely chosen representatives". The right to vote, as mentioned above,[2523] applies to all citizens who have reached the age of 18. To be able to claim the right to be elected to public office, there is an age requirement of 21. In respect of specified categories of persons, parliament can abrogate, suspend or impinge upon those rights for the reasons of infirmity, public interest or morality.[2524]

1104. The right to vote is further specified in the *Electoral Act*.[2525] Anyone entitled to vote under the *Constitution* can register as a voter, save of persons subject to an order of a court declaring him or her to be of unsound mind or mentally

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2521. *Ibid.*: 492E–G.
2522. *Ibid.:* 493C–F.
2523. Part III, Chapter 10, § 2.
2524. This restriction (cf.: Watz (2004): 139) is questionable as the vagueness of the reasons justifying the denial of voting rights could be used to deprive nearly anyone of its voting rights.
2525. Act No. 24 of 1992, as amended.

disordered or defective and of persons detained as a mentally ill person under the provisions of any law.[2526] Any refusal of registration as a voter can though be appealed against at the respective magistrates.[2527]

§12. The Right to Administrative Justice

I. Introduction

1105. The right to administrative justice can be found in Article 18. It establishes the principles of legality, procedural fairness, and reasonableness for the action of administrative bodies and officials. Administrative actions taken are based on legislation, policies or adjudicative decisions.[2528] Legislative, policy or adjudicative decisions can provide particular bodies, officers or delegates with powers to take certain actions, whereas the degree of discretion left to the body, officer or delegate may vary. In cases where individuals feel their rights are adversely affected by administrative decisions or actions, the nature and the extent of the administration's powers are decisive in order to determine whether the decision or act has been taken according to the law.[2529] Administrative law is thus concerned with the powers and duties of public authorities on the one hand, and judicial control of the exercise of those powers and the performance of those duties on the other hand.[2530]

1106. Before independence, administrative law basically rested on common law. The common-law principles of administrative justice include the principle of legality and the principles of natural justice, in particular the *audi alteram partem* und *nemo judex in causa sua*[2531] rules. Administrative law is still based on this pre-constitutional law but has been extended by relevant provisions of the *Constitution*, new legislation, and case law.

1107. It is of great advantage that these principles have been enshrined as fundamental rights in the *Constitution*.[2532] It grants persons aggrieved by the exercise of administrative acts or decisions the right to challenge such action or decision before a competent court or tribunal. The *Constitution* thus clarifies and improves the situation for persons unsatisfied with administrative action by introducing the right to administrative justice. In Namibia (as well as in South Africa) it was an important step to abandon the injustices of the past and was motivated by a[2533]

2526. Section 13(2) of the Electoral Act.
2527. Section 19.
2528. Hoexter (2012): 54.
2529. *Ibid.:* 7.
2530. *See*: Parker (2019): 8.
2531. This principle which literally means that no one should be a judge in his own cause, is, in contrast to the *audi alteram partem* rule, of limited importance for the judicial control of administrative acts. Cf.: Glinz (2013): 245.
2532. Cf.: Carpenter (1991): 38.
2533. Burns (1998): 134.

deep mistrust of executive and administrative power and the recognition of the need to control administrative power, including discretionary power.

1108. The right to administrative justice not only imposes a positive duty on the public administration to adhere to the principles of legality, fairness, and reasonableness in its actions, but also grants aggrieved persons the right to seek redress before a court or tribunal if the administration acted contrary to those principles.[2534]

1109. Before independence, judicial review was the prevailing principle allowing for the review of administrative acts or decisions with the courts having the sole discretion to decide whether a certain act or decision was reviewable.[2535] This has been changed by the introduction of a constitutional right to review. The right to administrative justice allows for the review of administrative action in general. It has both embraced the common law and broadened the grounds for judicial review.[2536] Beyond the possibility to challenge *ultra vires* action in respect of the specific law the decision is based on, the decision or action can be contested under the principles of administrative justice as outlined in Article 18 of the *Constitution*. According to Article 25(3) all remedies that are "necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms" can be applied by courts. This includes monetary compensation.[2537] Moreover, the courts can declare statutory laws unconstitutional.

1110. Important aspects that the courts discussed are the requirements of *locus standi*[2538] and the nature of administrative action that can be reviewed, i.e., what acts constitute administrative actions and what acts fall under private law. Whether only the legality of a certain act can be reviewed or also the substance of a decision has also been considered by the courts. The procedural requirements that can be derived from Article 18 have been subject of the rulings by the courts, including the principle of *audi alteram partem* and the right to reasons.

1111. There is a great number of empowering legislative acts complementing the right to administrative justice. Individuals can be influenced by administrative acts or decisions in several spheres. Respective legislation has been issued with regard

2534. *Ibid.:* 134.
2535. Baxter; Hoexter (1984): 678.
2536. Parker (2019): 10, with reference to *Frank v. Chairperson of the Immigration Selection Board* 1999 NR 257 (HC) and *Sikunda v. Government of the Republic of Namibia* (3) 2001 NR 181 (HC).
2537. Article 25(5) of the Constitution, *see also* above: Chapter 2 of this part.
2538. In Latin, locus standing literally means a "place to stand". Locus standi (or standing) refers to a party's ability to demonstrate that it has sufficient reasons for the court to hear it on an issue pending before the court.

to the fields where administrative justice is a key principle: citizenship, immigration and asylum,[2539] social security,[2540] local and regional governance,[2541] land rights and restrictions.[2542]

1112. Whether acts by traditional authorities can be qualified as administrative acts and, thus, are reviewable by the courts, is a matter that occupied the High Court on different occasions. The cases before the court were complaints by traditional leaders who were removed from their offices by their supreme leaders. The courts decided that the challenged traditional decisions were administrative acts and, therefore, subject to the rules governing these acts, including the requirements of the right to administrative justice in terms of Article 18 of the Constitution.[2543]

1113. Following the example of South Africa, there have been efforts to transform parts of the administrative law into an act of parliament.[2544] The Namibian administrative law project received promising political backing at the certain point of time. Glinz (who was involved in the administrative law project) refers to the benefits of the consolidation of administrative law in Namibia holding that such consolidation would assist in the strengthening of the inherited administrative law in line with the requirement of the *Constitution*.[2545] However, the project was shelved for unknown reasons.[2546]

II. Scope of Review under Article 18

1114. In *Sebatane v. Mutumba*,[2547] it was emphasized that Article 18 read together with Article 25(2) of the *Constitution* provides a right to have access to a court of law.[2548] The question is though what exactly can be reviewed by the courts. Judicial review under pre-constitutional common law allows courts to review the

2539. *See*, *e.g.*: Act to Further Regulate the Acquisition or Loss of Namibian Citizenship, 1990 (Act No. 65 of 1990), Immigration Control Act, 1993 (Act No. 7 of 1993), Namibia Refugees (Recognition and Control) Act, 1999 (Act No. 2 of 1999).
2540. Social Security Act, 1994 (Act No. 34 of 1994).
2541. Council of Traditional Leaders Act, 1997 (Act No. 13 of 1997), Local Authorities Act, 1992 (Act No. 23 of 1992); Regional Council Act, 1992 (Act No. 22 of 1992); Traditional Authorities Act, 2000 (Act No. 25 of 2000).
2542. Agricultural (Commercial) Land Reform Act, 1995 (Act No. 6 of 1995); Communal Land Reform Act, 2002 (Act No. 5 of 2002).
2543. Cf.: the cases referred to: para. 7 in Chapter 4 of Part IV.
2544. *See* here: Glinz (2013): 134. The process to enact legal rules on administrative justice has been initiated in 2008 by the Law and Reform Commission under the auspices of the Ministry of Justice. – South Africa enacted two relevant laws: the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); and the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).
2545. Glinz (2013): 390.
2546. At least one aspect of administrative law has been compiled as textbook: planning law: *see* here: !Owoses-/Goagoses (2013).
2547. 2013 (1) NR 284 (HC).
2548. *Sebatane v. Mutumba* 2013 (1) NR 284 (HC): 291D.

legality of a decision.[2549] The substance of a decision can only be reviewed in a limited way and in certain circumstances by applying the reasonableness test.[2550] As the *Constitution* establishes the principle of reasonableness explicitly, it can be assumed that the power of the courts of judicial review has been extended to include the review of discretionary powers.

1115. That Article 18 goes further than judicial review under common law applicable before the *Constitution* was enacted was confirmed in *Minister of Health and Social Services v. Lisse*:[2551]

> Any argument that any exercise of administrative action is not reviewable, even if based on the provision of a statute, is without legal substance.[2552]

Article 18 changed common law:[2553]

> The general principle of a duty to act fairly and reasonably, supplements the common law and any relevant statute law, but obviously any common law or statute law in conflict with this provision, will be unconstitutional.

1116. In *Sikunda v. Government of the Republic of Namibia,*[2554] it was found that the exercise of discretionary power is reviewable:[2555]

> It is clear from the aforegoing that the Constitutional development, in our case, art 18 has broadened and widened the ambit of the grounds of judicial review and the Courts are entitled to analyse, examine and probe the factual basis upon which discretionary power has been applied and executed.

The flexible interpretation of judicial review was also recognized in other cases.[2556] That fairness under Article 18 is not restricted to procedural fairness but includes substantial fairness has been stressed in *Minister of Health and Social Services v. Lisse*:[2557]

> Article 18 does not restrict the duty of administrative bodies or administrative officials to act fairly and reasonably only in regard to procedure.
>
> It must be inferred that this requirement also applies to the substance of the decision. This inference is strengthened by the last part of the article, which

2549. Glinz (2013): 225.
2550. *Ibid.:* 303.
2551. 2006 (2) NR 739 (SC).
2552. *Ibid.:* 770F.
2553. *Ibid.:* 773C.
2554. 2001 NR 181 (HC).
2555. *Sikunda v. Government of the Republic of Namibia* (3) 2001 NR 181 (HC): 193B.
2556. *See*, *e.g.*: *Kaulinge v. Minister of Health and Social Services* 2006 (1) NR 377 (HC): 386D; *Minister of Health and Social Services v. Lisse* 2006 (2) NR 739 (SC): 770Fff.
2557. 2006 (2) NR 739 (SC):772B–C.

> provides that persons, *aggrieved by the exercise of such acts and decisions*, shall have the right to seek redress before a competent Court or tribunal.

1117. What requirements exist for an administrative act to be fair and reasonable has been dealt with in *Trustco Insurance Ltd. t/a Legal Shield Namibia v. Deeds Registries Regulation Board*,[2558] where the court established that a person, feeling that his or her right guaranteed to him or her by Article 18 had been infringed,[2559]

> bears the burden of establishing to the satisfaction of the court as to what particular requirement or requirements under article 18 has or have not been complied with by the 'act' of a named administrative body or administrative official and in which respect such act has infringed or threatened and infringement of that person's article 18 right.

The court then outlined three different perspectives that have to be considered when deciding upon the reasonableness of an administrative decision: the question whether a decision is based on a proper foundation, the purpose of, and motive for, the decision, and finally the effect of the decision.[2560]

1118. In the appeal against this case, the Supreme Court[2561] held in regard to the determination of reasonableness of administrative conduct:[2562]

> What will constitute reasonable administrative conduct for the purposes of article 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will be often more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.

1119. The court hence made clear that the courts cannot instruct the administrative body what kind of decision or act it should have taken; however, – and this

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2558. 2010 (2) NR 565 (HC).
2559. *Trustco Insurance Ltd. t/a Legal Shield Namibia v. Deeds Registries Regulation Board* 2010 (2) NR 565 (HC): 578A–B.
2560. *Ibid.:* 579F–H.
2561. *Trustco Ltd t/a Legal Shield Namibia v. Deeds Registries Regulation Board* 2011 (2) NR 726 (SC).
2562. *Ibid.:* 736C–E.

extends the conventional principles as applied in common law – courts can analyse whether a certain conduct has been made in a reasonable way by referring to the nature of administrative action, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. It can thus be concluded that, in application of Article 18, the superior courts of Namibia have not only recognized judicial review, but also review of discretionary decisions in several cases. This includes failure of applying a judgement of discretion, bad faith, consideration of irrelevant considerations and reasons, and unreasonable evaluation of existing facts.[2563] Moreover, it was emphasized that Article 18 protects procedural as well as substantial fairness.

III. Remedies

1120. An applicant seeking to attack administrative action can choose from different remedies including "setting aside an administrative action", a declaratory order as to the unlawfulness and invalidity of the impugned administrative action and an interdict to implement administrative action.[2564]

1121. The right to seek judicial review of the act of an administrative body of official may, though, be suspended or deferred until the complainant has exhausted domestic remedies which might have been created by statute expressly or by necessary implication.[2565] What has to be taken into account for the decision, if internal or domestic remedies have to be exhausted before the courts can be approached, is the wording of the relevant statutory provisions and whether the internal remedy would be sufficient to afford practical relief in the circumstances.[2566] The domestic remedies must provide effective redress in respect of the complaint and the alleged unlawfulness must not relate to the domestic remedies itself. If this is not the case, the judicial review process can exceptionally supplant the normal statutory appeal procedure.[2567]

1122. It generally does not fall within the scope of the courts' powers to take administrative decisions. Therefore, the courts can set aside, declare invalid or interdict administrative action but not substitute its own decision for the attacked administrative decision. There are, however, exceptions to this general rule which is itself founded on the principles of rule of law and separation of powers. Whether there are exceptional circumstances justifying a court to substitute its own decision for that of the administrative authority is "in essence a question of fairness to both

2563. Glinz (2013): 190.
2564. *See* for a detailed discussion of remedies: Parker (2019): 317ff.
2565. *See*, *e.g.*: *Gurirab v. Minister of Home Affairs and Immigration* 2016 (1) NR 37 (HC): 41G.
2566. *Namibian Competition Commission v. Wal-Mart Stores Incorporated* 2012 (1) NR 69 (SC): 84I–85E.
2567. *Viljoen v. Chairperson of the Immigration Selection Board* 2017 (1) NR 132 (HC): 141E–H.

sides".[2568] The courts accepted the principle that where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the courts can substitute their own decision for that of the functionary.[2569] The courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant.[2570] The courts recognized that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.[2571]

1123. It would also seem that the courts are willing to interfere, thereby substituting their own decision for that of a functionary, where the court is in as good a position to make the decision itself.[2572] Of course the mere fact that a court considered itself as qualified to take the decision as the administrator did not per se justify usurping the administrator's powers or functions. In some cases, however, fairness to the applicant might demand that the court takes such a view.[2573]

1124. In *Namibia Airports Co Ltd. v. Fire Tech Systems CC*[2574] the Supreme Court clarified that the decision to set aside an administrative act requires two steps:[2575]

> The procedure where a litigant seeks the reviewing and setting aside of an alleged unlawful administrative act, is twofold. Firstly, a court is required to make a finding of validity or of invalidity. Where a declaration of invalidity is made, the court may proceed to the second stage, where the court considers the effect of the declaration of invalidity on the parties and other stakeholders. It is at this second stage that a court enjoys a discretionary power and must make an order which is just and equitable in the circumstances.

2568. *See* in this regard: *Livestock Meat Industries Control Board v. Garda* 1961 (1) SA 342 (A): 349G; *Jewish Board of Deputies v. Sutherland NO* 2004 (4) SA 368: 390G; *Erf One Six Seven Orchards CC v. Greater Johannesburg Metropolitan Council (Johannesburg Administration)* 1999 (1) SA 104 (SCA): 109C–E.
2569. *See*: *Chairperson of the Immigration Selection Board v. Frank* 2001 NR 107 (SC).
2570. *Ibid.* The same principle exists in comparable jurisdictions such as South Africa. *See*: *University of the Western Cape v. Members of Executive Committee for Health and Social Services* 1998 (3) SA 124 (C): 131D.
2571. *Minister of Education v. Free Namibia Caterers (Pty) Ltd* 2013 (4) NR 1061 (SC): 1083J–1084H; taking authority from *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd. v. Minister of Environment and Tourism* 2010 (1) NR 1 (SC): 31F–G. The principle was derived from *Johannesburg City Council v. The Administrator of the Transvaal* 1969 (2) SA 72 (T): 76D and *University of Western Cape v. Member of the Executive Committee for Health and Social Services* 1998 (3) SA 124 (C): 131D–G. *See also*: Frank case cited above.
2572. *Ibid.*
2573. *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd. v. Minister of Environment & Tourism* 2010 (1) NR 1 (SC).
2574. 2019 (2) NR 541 (SC).
2575. *Ibid.*: 552G–H.

The Supreme Court confirmed the decision of the High Court not to set aside the award of a tender reasoning as follows:[2576]

> The court a quo found that if it were to set aside the award of the tender to the second respondent, it would not only be 'disruptive', but would be 'totally impracticable', which in turn would give rise to a host of problems, inter alia, in respect of the work already performed and the purchase price paid. I agree that it would have been totally impractical in the circumstances (the terms of the contract having been fully complied with) to have set aside the award of the tender to the second respondent. It would similarly be impractical and disruptive if restitution is ordered (though not impossible) with concomitant additional costs implications should appellant decide to re-advertise the tender. The machines are by now second hand machines. It is doubtful whether the second respondent will return the price so tendered and already paid for these machines, whose value had in the interim period been reduced. The second respondent, an innocent party, would be saddled with machines for which it has no use for and this will be to its prejudice.

It was further stressed that a court is only competent to grant orders which were asked for by the litigants. The High Court had ordered that the applicant is granted leave to institute an action for damages against the Namibia Airports Company as a result of that company's infringement of the applicant's right to fair administrative action,[2577] although the applicants had never seeked such relief.

1125. That unlawful administrative action does not automatically give rise to delictual liability was emphasized by the Supreme Court in an earlier case.[2578] In *Free Namibia Cateres CC v. Chairperson of the Tender Board of Namibia*[2579] the Supreme Court clarified the following with regard to the possibility to delictual claims in cases of a violation of Article 18 of the *Constitution*:[2580]

> What the court will consider an appropriate remedy depends on the facts and circumstances of each case. However, it is essential that this point is made at the outset. Ordinarily, a breach of administrative justice attracts public law remedies and not private law remedies. Thus it is only in exceptional cases that private law remedies will be granted to a party for a breach of a right in public law domain.

The court then denied[2581]

2576. *Ibid.*: 553G–554B.
2577. *See*: *ibid.*: 543F–G.
2578. *Lisse v. Minister of Health and Social Services* 2015 (2) NR 381 (SC): 388E–F.
2579. 2017 (3) NR 898 (SC).
2580. *Free Namibia Cateres CC v. Chairperson of the Tender Board of Namibia* 2017 (3) NR 898 (SC): 907B–D.
2581. *Ibid.*: 907D–G.

> the appellant's reliance on delictual or contractual principles of an award of damages and restitution in review proceedings … . The appellant has always approached the courts to review the decisions of the respondents and that is the exact issue this court and the court *a quo* have adjudicated upon in previous proceedings.

IV. The Scope of Administrative Acts and Decisions

1126. With respect to the definition of administrative bodies and officials, the courts so far followed the pre-constitutional common-law approach which basically distinguishes between public and private bodies, whereby only public bodies are subjects of administrative law, but recognizes that private bodies and officials have to adhere to certain standards and principles not essentially differing from those in administrative law, if they exercise authority aimed at individuals.[2582]

1127. In *Mbanderu Traditional Authority and Another v. Kahuure*,[2583] the Supreme Court held in regard to the determination of administrative action:[2584]

> The starting point in determining whether or not an action performed by a body is administrative, and, therefore, reviewable, is to identify the body concerned. In most review cases no problem arises in this regard. The South African Constitutional Court in the SARFU [South African Rugby Football Union] matter[2585] … was correct, however, to caution that 'difficult boundaries may have to be drawn in deciding what should and what should not be characterized as administrative action for the purpose of s 33 of the South African Constitution (of art 18 of the Namibian Constitution) and that this can best be done on a case by case basis. In substance, the provisions of art 18 of the Namibian Constitution are similar to those of s 33 of the South African Constitution.'

1128. In view of the SARFU decision, Parker suggests a determination of administrative actions in two steps because what matters in the end would not be the functionary but the function performed by him or her.[2586]

1129. This was also emphasized in *Makando v. Disciplinary Committee for Legal Practitioners*[2587] where the Supreme Court stressed the need to recognize the fact that in the modern state administrative functions are often conferred to bodies that do not fall within the civil service but that[2588]

2582. Glinz (2013): 227.
2583. 2008 (1) NR 55 (SC).
2584. *Mbanderu Traditional Authority v. Kahuure* 2008 (1) NR 55 (SC): 67H–J.
2585. *President of the Republic of South Africa v. South African Rugby Football Union* 2000 (1) SA 1 (CC).
2586. Parker (2019): 39.
2587. 2016 (4) NR 1127 (SC).
2588. *Ibid.:* 1145B.

> the exercise of those functions affects the rights and interests of members of the public just as they would if members of the civil service had exercised them.

The determination of the administrative character of a task performed by a body or official was stressed to be a case-by-case decision. The court then outlined several characteristics relevant for making such determination:[2589]

> The following is a list of some of those characteristics, but it is not exhaustive. First, the source of the power to perform the task will be an important pointer. For administration is primarily concerned with the implementation of legislation and the tasks and functions of administrative bodies and officials are in most cases provided in statutes. Accordingly, where the source of a task is statutory, it is more likely that the task will be administrative in nature. Secondly, the nature of the task will be important. If the task is one performed in the interest of the public or a section of the public, as opposed to a private interest, it again is more likely that the task will be administrative in character. Some public tasks are not administrative in character. For example, adjudicative tasks carried out by judicial officers in their capacity as such, cannot be administrative tasks, although there may be occasions when judicial officers are empowered to carry out administrative tasks. Furthermore if in performing the task, the relevant agency or body may coerce or compel compliance with its rules by members of the public, then again, the task may be administrative if it is not judicial. A further consideration will be whether the body or agency is funded by public funds to perform the relevant task.

1130. With reference to other judgements of courts in Namibia and South Africa, it was emphasized in *Permanent Secretary of the Ministry of Finance v. Ward*[2590] that "it is clear that the courts are careful not to lay down hard and fast rules and each case must be judged on its own facts and circumstances".[2591] It was, however, also recognized that the *Constitution* has amplified the scope of reviewable action:[2592]

> There is also no doubt that in deciding the issue Courts must have regard to constitutional provisions which, in certain instances, have broadened the scope of reviewable action.

The court also found that the strict application of the principles developed in several decisions to determine the nature of an act might be problematic:[2593]

2589. *Ibid.:* 1145H–1146D.
2590. 2009 (1) NR 314 (SC). This case is also discussed in: Hinz (2014): 48f.
2591. *Permanent Secretary of the Ministry of Finance v. Ward* 2009 (1) NR 314 (SC): 320I.
2592. *Ibid.:* 320I–J.
2593. *Ibid.:* 322G–H.

> The application of these principles … is also not free from difficulty. For instance the source of power acted upon by a functionary can almost always be traced back to some statutory enactment which, in practical terms, and if applied indiscriminately, will mean that every decision or act by a functionary could be classified as administrative action. If that was correct the burden on the State would be tremendous and would put naught to the State's freedom to enter into contracts like any private individual.

The appellant in this case was found not to perform[2594]

> a public duty or implementing legislation when he cancelled the agreement, but was acting in terms of the agreement entered into by the parties and that it could not be said that the first appellant, in doing so, was exercising a public power.

1131. In Open Learning Group Namibia Finance CC v. Permanent Secretary, Ministry of Finance,[2595] the court had to decide[2596]

> in what circumstances will the contractual arrangements entered into by a public authority be immune from administrative law review[.]

Several South African decisions were cited in this respect and the court followed the drift of authority from the leading cases which establish that[2597]

> each case must be approached on its facts in determining whether or not a particular decision of a public authority terminating a contract amounts to administrative action and therefore judicial review should avail.

The classification of a contract as a public or private contract is not determined with view to the source of the power to terminate but on the nature and purpose of the contract.[2598] The court, in the following, stated examples for criteria used to establish the nature of a contract, including the balance of power between parties:[2599]

> Factors such as whether or not there was an element of coercion or prescription; whether there was equality of bargaining power; whether the agreement was required under statute or was intended to carry out legislation – will be

2594. *Ibid.:* 327F–G.
2595. 2006 (1) NR 275 (HC).
2596. *Open Learning Group Namibia Finance CC v. Permanent Secretary, Ministry of Finance* 2006 (1) NR 275 (HC): 279B.
2597. *Ibid.:* 313E.
2598. *Ibid.:* 313F.
2599. *Ibid.:* 313F–314A.

> considerations to be had regard to. They cannot, by any means, be the sole or defining criteria for the intervention of the Court through judicial review. In view of the extraordinary character of this remedy, it is, in my view, just as important a consideration – in deciding whether judicial review should avail – whether the applicant for review could adequately and effectively have protected his rights through the pursuit of private law remedies.

1132. In *Minister of Mines and Energy v. Petroneft International Ltd.*,[2600] the termination of a joint venture agreement between Namcor and Petroneft was challenged by the latter. Whereas the High Court[2601] classified the termination as administrative action, the Supreme Court did not address the nature of the contract but supposed it to fall under administrative action.[2602] It rather tested whether the termination of the contract was fair and reasonable under Article 18.[2603]

1133. In *McLaren NO v. Municipal Council of Windhoek*,[2604] the Supreme Court had to decide whether the Municipality of Windhoek lawfully cancelled a ninety-nine-year lease agreement previously concluded with Ramatex at a nominal once-off rental payment of NAD 1 188. The appeal was brought by the liquidators of Ramatex, a company in liquidation, against the refusal of the High Court to set aside the decision of the municipality to cancel the agreement. It was, inter alia, discussed whether the cancellation of the lease agreement constitutes administrative action. The Supreme Court held:[2605]

> The fact that the lease constitutes a real right cannot change what is essentially a commercial contractual arrangement into an administrative public law relationship in which the contractual arrangements changed to become arrangements of an administrative nature. This is more so where the agreement is a singular one and not one in a series of like worded arrangements by the city with multiple persons or entities. The nature of the city's powers pursuant to the contract is solely contractual and is not overridden or subject to any legislation which can be stated to alter those powers to anything either than contractual powers. The source and nature of the power is contractual. This is simply a case where the 'decision to terminate a contract was not an administrative action, because the organ of state in question has contracted in an equal power relation with a powerful commercial entity without any additional advantage flowing from its public position'.

And the Supreme Court also clarified that even[2606]

2600. 2012 (2) NR 781 (SC).
2601. *Petroneft International v. the Minister of Mines and Energy,* High Court judgement, Case No. A 24/2011 – unreported.
2602. *Minister of Mines and Energy v. Petroneft International Ltd.* 2012 (2) NR 781 (SC): 792B.
2603. *Ibid.:* 792C–795E.
2604. 2018 (1) NR 250 (SC).
2605. *Ibid.:* 254E–G.
2606. *Ibid.*: 255A–B.

> incorrect application of contractual remedies does not transpose the city's action from contractual ones to administrative ones. The city's acts are then reviewed as against its contractual powers per the contract and not as against its residual public powers which plays no role in this context.

1134. In *Rössing Uranium Ltd. v. Former Members of the Rössing Pension Fund,*[2607] the Supreme Court stressed that Article 18 was directed at ensuring administrative justice in the relationship between the state as bureaucracy and its citizens in carrying out the functions of the state.[2608] The fact that the exercise of powers by private actors is in the public interest does not lead to the classification of the function as a public one.[2609] The decision in question was taken by the trustees of a privately funded pension fund and concerned the distribution of surplus in the fund.

1135. What factors need to be considered to distinguish administrative from executive action, has been dealt with in *Minister of Trade and Industry v. Matador Enterprises (Pty) Ltd.*[2610] The appellant had imposed quantitative restrictions of dairy products as directed by the Cabinet in order to protect local dairy producers. The court clarified that while executive action is generally reviewable, it is reviewable only against the standards imposed by the principle of legality and not against the standards imposed by Article 18 of the *Constitution*.[2611] Administration action was referred to as "policy implementation" and executive action as "policy formulation". As most decisions on review had elements of both administrative and executive action, the question was not whether a decision is administrative or executive action but whether the impugned decision leans more towards one of the kinds of action.[2612] Factors to be considered were found to be: source of the power, nature of the power exercised, and the subject matter.[2613] When considering the subject matter, the court stressed that[2614]

> a decision is likely to be more of policy formulation if it is influenced by socio political considerations for which public officials are accountable to the electorate or where the decision is based on considerations of comity or reciprocity between Namibia and foreign states or involving policy considerations regarding foreign affairs, or where the decision involves the balancing of complex factors and sensitive subject matter.

2607. 2017 (3) NR 819 (SC).
2608. *Ibid.*: 834I.
2609. *Ibid.*: 835A–B.
2610. 2020 (2) NR 362 (SC).
2611. *Ibid.*: 377E–F.
2612. *Ibid.*: 378C–379B. This conclusion was basically drawn from the South African decision *President of the Republic of South Africa v. South African Rugby Football Union* 2000 (1) SA 1 (CC).
2613. *Ibid.*: 379C.
2614. *Ibid.*: 380D–E.

Concerning the nature of the power exercised, it was decisive for the classification of administrative action whether the impugned decisions was a typical daily function. Executive authority was the power exercised to formulate policy which happened only at intervals that were relatively far apart.[2615] Moreover, the level of discretion had to be considered:[2616]

> This is largely because, usually a functionary requires a wider discretion to make a policy while a narrower discretion is required when implementing a set policy.

1136. In *Road Fund Administration v. Skorpion Mining Company (Pty) Ltd.*[2617] the Supreme Court clarified that the right to administrative action does not authorize administrative actors to disregard legislative requirements in the interest of fairness. In this case the respondent had instituted action proceedings in the court a quo for the payment of refunds for petroleum levies. The framework and procedural requirements are laid out in a notice issued by the Road Fund Administration according to section 18(4)(f) of the *Road Fund Administration Act*.[2618] The Road Fund Administration had denied paying the refunds because one of the claims for refund by the respondent had not, as required by the notice, included original invoices and the other claim was submitted late. The court a quo came to the conclusion that this strict application of the formal requirements of the subordinate legislative scheme was in breach of Article 18 of the *Constitution*. It further found that the respondent would be entitled to the refunds claimed under Article 25(4) of the *Constitution*.

1137. The Supreme Court found the approach of the High Court to be a misdirection. It stressed that Article 18 of the *Constitution* cannot be used as a cause of action and constitutional damages cannot be granted in respect of what was otherwise a private law action for damages. It held:[2619]

> The Constitution must be the last and not the first resort in the resolution of disputes that come before the courts. In the present case, the exact opposite happened. The High Court preferred to have recourse to the Constitution instead of first considering if the claim and the competing allegations could be resolved applying the common law. Given that the court was faced with two mutually destructive versions in an action proceeding, the dispute was capable of and was one which had to be resolved by the application of tried and tested

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2615. *Ibid*.: 381F–382A.
2616. *Ibid*.: 382C. The Court referred to the judgement in *Minister of Defence and Military Veterans v. Motau* 2014 (5) SA 69 (CC).
2617. 2018 (3) NR 629 (SC).
2618. Act No. 18 of 1999.
2619. *Road Fund Administration v. Skorpion Mining Company (Pty) Ltd.* 2018 (3) NR 629 (SC): 841A–C.

> techniques known to the common law. We have warned in the past that the court must first try to resolve a dispute by the application of ordinary legal principles before resorting to the Constitution.

The Supreme Court further emphasized that administrative actors can only act within the limits of the discretion granted to them by legislation. Legislative requirements such as a required deadline could only be relaxed by an administrative actor if legislation provided for the possibility to relax requirements. Otherwise, the administrative actor would act *ultra vires*. By referring to several South African cases, the court said in this respect:[2620]

> It was never a question about the 'constitutional imperative' of fair and reasonable administrative action being used to read a discretion into the scheme which did not provide for it.

However, affected persons can indeed challenge legislative schemes as being *ultra vires* the *Constitution* or the Act, what the respondents had though failed to do:[2621]

> The obvious difficulty which arises from the way in which Skorpion's litigation was conceived and formulated is that the subordinate legislative scheme creating the claims procedure has not been challenged as being *ultra vires* the Constitution or the Act. Therefore, it remains valid and binding, both on RFA and claimants such as Skorpion.

V. Principle of Legality/ Ultra Vires Doctrine

1138. The principle of legality requires not only that decisions are taken according to the law but also that the decision-maker is authorized to do so and is properly constituted, hence does not act *ultra vires*. Simply speaking, the doctrine means that a functionary has acted outside his or her powers which makes the function performed invalid.[2622] This principle has been recognized as being a valid standard in administrative law by the courts and is based on pre-constitutional common law.[2623] Apart from administrative action, executive action is also reviewable against the standards imposed by the principle of legality which flows from the doctrine of the rule of law as enunciated in Article 1(1) of the *Constitution*. This was stressed in *Minister of Trade and Industry v. Matador Enterprises (Pty) Ltd.* where the court concluded:[2624]

2620. *Ibid.:* 847A–B.
2621. *Ibid.:* 847C–D.
2622. *See*: *Namibian Employers' Federation v. President of the Republic of Namibia*, High Court judgement, Case No. 136/2020 – unreported.
2623. Cf.: Glinz (2013): 223.
2624. 2020 (2) NR 362 (SC), 384 A-B.

> Thus, the principle of legality, as a pathway to reviewing executive action, flows directly from Art 1(1) above. The application of the principle of legality to reviewing executive action entails an inquiry into three main questions, which are: did the holder of public power act within the power lawfully conferred on him or her, did the decision maker properly construe his or her powers and was the power exercised rationally?

1139. In several cases, administrative acts have been declared null and void because the decision-maker had acted *ultra vires*.[2625] In *Sikunda v. Government of the Republic of Namibia (3)*,[2626] for example, a decision made by the Security Commission provided for by Article 114 of the *Constitution* was found to be invalid because there had been four members instead of six members as required by Article 114.[2627] In *RBH Construction v. Windhoek Municipal Council*,[2628] after the establishment but before the proper constitution of the local tender board for the Municipality of Windhoek, the Windhoek Municipal Council invited tenders for rendering of trenching services and concrete works to it, although the Local Tender Board Regulations provide that the tender board has to invite tenders. The court found that the Municipal Council acted *ultra vires* and declared the tender award decision null and void. The following was held:[2629]

> In the realisation of the regulations' objectives … , the administrative role assigned to local tender boards is pivotal. It is to ensure fairness, impartiality, independence and transparency in the tender process contemplated by the regulations, that local tender boards (and none other) are vested with defined powers, duties and obligations. Within the legislative scheme designed to maintain the integrity of the process, those objectives are as important to the invitation of tenders as they are to the consideration and eventual award thereof. The local tender boards' role in soliciting tenders is not merely a passive or 'mechanical' one: … .
>
> All of these functions are entrusted by regulation to the local tender board. The underlying legislative purposes for doing so which we have referred to earlier may well be frustrated if another entity (such as the local authority council) were allowed to invite tenders and require of the local tender board simply to award them.

2625. *See*, *e.g.*: *AFS Group Namibia (Pty) Ltd v. Chairperson of the Tender Board of Namibia*, High Court judgement, Case No. A 55/2011 - unreported; *Skeleton Coast Safaris (Pty) Ltd v. Namibia Tender Board* 1993 NR 288 (HC), *RBH Construction v. Windhoek Municipal Council* 2002 NR 443 (HC), *Sikunda v. Government of the Republic of Namibia* (3) 2001 NR 181 (HC).
2626. 2001 NR 181 (HC).
2627. This was confirmed on appeal in *Government of the Republic of Namibia v. Sikunda* 2002 NR 203 (SC).
2628. 2002 NR 443 (HC).
2629. *RBH Construction v. Windhoek Municipal Council* 2002 NR 443 (HC): 448E–F, 448J–449A.

1140. In *AFS Group Namibia (Pty) Ltd. v. Chairperson of the Tender Board of Namibia*,[2630] another tender case, the court admitted that the applicant had, prima facie, shown that the tender board abdicated its powers to the Ministerial Tender Committee and that the Ministerial Tender Committee acted *ultra vires* its functions and stated with reference to the *RBH Construction* case and two South African cases:[2631]

> In public law, the perpetrator of an act in question must be legally empowered to perform the act. It is for the administration to justify its acts by reference to the authority of a statute whenever the existence of its powers or the validity of their exercise is in question. In the absence of such power, the act in question would be *ultra vires* and void.

1141. In *Anhui Foreign Economic Construction (Group) Corp Ltd. v. Minister of Works and Transport,*[2632] the Minister of Works and Transport decision to issue a directive to the Namibia Airports Company to discontinue all activities relating to the upgrade and expansion of the airport was found to contravene the principle of legality. The minister had simply issued the directive because he was instructed to do so by the president and thereby failed to exercise his own discretion what the law required him to do. The High Court stressed:[2633]

> It is an accepted principle of our public law that a discretionary power vested in one official may not be usurped by another, whether the former is a subordinate to the latter or not. If a person in whom the power is vested does not exercise the power vested in him or her the failure to exercise the power constitutes unlawful abdication.

1142. In respect of requirements for administrative action to be valid, the High Court, in *Open Learning Group Namibia Finance CC v. Permanent Secretary, Ministry of Finance*,[2634] found that it must be clear and not "vague and uncertain".[2635] The effect of non-compliance with mandatory procedures prescribed by law was found to render the action *ultra vires* and therefore unlawful.[2636]

2630. *AFS Group Namibia (Pty) Ltd v. Chairperson of the Tender Board of Namibia*, High Court judgement, Case No. A 55/2011 – unreported.
2631. *Ibid.* The South African cases referred to were: *Oudekraal Estates (Pty) Ltd v. City of Cape Town* 2010 (1) SA 333 (SCA): 354 and *Vereeniging City Council v. Rema Bible Church Walkerville* 1989 (2) SA 142 (T): 149E.
2632. 2016 (4) NR 1087 (HC).
2633. *Ibid.*: 1100E.
2634. 2006 (1) NR 275 (HC).
2635. *Open Learning Group Namibia Finance CC v. Permanent Secretary, Ministry of Finance* 2006 (1) NR 275 (HC): 303D.
2636. *Ibid.:* 300C–D.

VI. (Procedural) Fairness

1143. The scope of protection of Article 18 includes procedural fairness. In this regard, in *Aonin Fishing v. Minister of Fisheries and Marine Resources*,[2637] the court held:[2638]

> There can be no doubt that article 18 of the Constitution of Namibia pertaining to administrative justice requires not only reasonable and fair decisions based on reasonable grounds, but fair procedures which are transparent.

1144. Procedural fairness requires administrative bodies to act in a transparent way. This includes an obligation to give reasons and to adhere to the *audi alteram partem* rule. As a principle of legality, these rules have their origin in pre-constitutional common law and were stressed and confined in several decisions of which a few will be outlined in the following. However, an obligation to give reasons does not generally exist in common law, but has only been accepted within certain limitations,[2639] and it is up to the courts whether Article 18 follows this restricted scope of protection by sticking to the conventional common-law interpretation or apply an innovative approach widening the scope of protection.

1145. Procedures are only fair in the absence of institutional bias. To determine whether a legal provision inscribes institutional bias in procedures, it is decisive if an informed observer, viewing the matter realistically and practically, would have a reasonable apprehension of bias in relation to the proceedings in a substantial number of cases.[2640]

1146. Although the right to be given reasons is not explicitly constitutionally established as in South Africa,[2641] it can – to a certain extent – be derived from case law.[2642] In *Kersten t/a Witvlei Transport v. National Transport Commission*,[2643] the court – with reference to Article 18 – held that a body which is required to act fairly and reasonably can in most instances only do so if those affected by its decisions

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2637. 1998 NR 147 (HC).
2638. *Aonin Fishing v. Minister of Fisheries and Marine Resources* 1998 NR 147 (HC): 159G.
2639. *See*: Glinz (2013): 266ff.
2640. This test derived from a decision of the Canadian Supreme Court (*Attorney General, Quebec v. Quebec Inc.* [1996] 3 SCR 919 (SCC)) was applied in: *Makando v. Disciplinary Committee for Legal Practitioners* 2016 (4) NR 1127 (SC), 1147F–1151D.
2641. *See*: Section 33(2) of the South African Constitution.
2642. *See*, *e.g.*: *Government of the Republic of Namibia v. Sikunda* 2002 NR 203 (SC); *Chairperson of the Immigration Selection Board v. Frank* 2001 NR 107 (SC), *Kersten t/a Witvlei Transport v. National Transport Commission* 1991 NR 234 (HC); *S v. Luboya* 2007 (1) NR 96 (SC); *AFS Group Namibia (Pty) Ltd. v. Chairperson of the Tender Board of Namibia,* High Court judgement, Case No. A 55/2011 – unreported.
2643. 1991 NR 234 (HC).

are apprised in a rational manner as to why that body made the decision in question.[2644] In other words, giving reasons is implicit in the requirements of Article 18 of the *Constitution* and the failure would militate against the principle of transparency embodied in the *Constitution*.

1147. In *Aonin Fishing v. Minister of Fisheries and Marine Resources*,[2645] the court found, regarding the right to reasons, that the duty to provide reasons for a decision is clearly implied from the provisions of Articles 12 and 18 of the *Constitution*, even if the statutory provision does not expressly make it mandatory for the decision-maker to provide reasons.[2646]

1148. Regarding the right to reasons, the High Court, in *AFS Group Namibia (Pty) Ltd. v. Chairperson of the Tender Board of Namibia*, clearly argued for the existence of a requirement for giving reasons under Article 18 by referring to previous cases:[2647]

> The failure of the Tender Board to give reasons to the applicant based on what it terms to be a legal interpretation of section 16 of the Tender Board also in my view constitutes prima facie an unfair and administrative action and an infringement of the applicant's rights under article 18 of the Constitution. The giving of reasons is fundamental to fair and administrative decision-making. … The giving of reasons is implicit in the requirements of article 18 of the Constitution and the failure would militate against the principle of transparency embodied in the Constitution.

In this case, the tender board failed to give reasons to a tenderer who had not been shortlisted for consideration in the tender process. The unsuccessful tenderer made a written request for reasons for the decision that it had not been shortlisted. The tender board, however, argued that the tender had neither been submitted to the tender board for award and as a result the tender board was not required to, nor could it provide the reasons as yet. Section 16(1)(b) of the *Tender Board of Namibia Act*[2648] requires the tender board, on the written request of a tenderer, to give reasons for the acceptance or rejection of his or her tender. The reading of the right to reasons into Article 18 of the *Constitution* seems to be a great step towards the acknowledgement of a (constitutional) right to reasons. Nevertheless, there is not yet a general obligation to directly give reasons for a decision.[2649]

1149. In *Chairperson of the Immigration Selection Board v. Frank*,[2650] the court argued for an implication of the right to reasons in Article 18:[2651]

2644. *Kersten t/a Witvlei Transport v. National Transport Commission* 1991 NR 234 (HC): 239H.
2645. 1998 NR 147 (HC).
2646. *Aonin Fishing v. Minister of Fisheries and Marine Resources* 1998 NR 147 (HC): 151D–F.
2647. High Court judgement, Case No. A 55/2011 – unreported.
2648. Act No. 16 of 1996.
2649. Glinz (2013): 180ff.
2650. 2001 NR 107 (SC).
2651. *Ibid.*: 174H–175C.

> Furthermore, it seems to me that it is implicit in the provisions of article 18 of the Constitution that an administrative organ exercising a discretion is obliged to give reasons for its decision. There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The article requires administrative bodies and officials to act fairly and reasonably. Whether these requirements were complied with can, more often than not, only be determined once reasons have been provided. … There is … no basis to interpret the article in such a way that those who want to redress administrative unfairness and unreasonableness should start off on an unfair basis because the administrative organ refuses to divulge reasons for its decision. Where there is a legitimate reason for refusing, such as State security, that option would still be open.

1150. In *S v. Luboya*, "the refusal to grant legal aid was made without the appellants even knowing that their fate regarding access to such aid was being considered to their detriment".[2652] No reasons for the decision were disclosed to them.[2653] This was found not to fulfil the requirements of the common law and be against the transparency requirement in Article 18 which would encapsulate the application of the *audi alteram partem* rule.[2654] The court concluded:[2655]

> It is my considered view that the Director failed to comply with the requirements of article 18 of the Constitution. In particular, he failed to abide by the requirement to hear the appellants before deciding to deny them legal aid. Better still, and although he was not obliged under the law to do so, he should have given reasons for not granting them legal aid.

The argument brought by the appellants that they were denied legal aid because they were foreigners led the court to emphasize that Article 18 applies to all persons in Namibia and not only Namibian nationals.[2656]

1151. That the right to reasons inherent in Article 18 cannot be equated with the right to access to information was stressed in *Chairperson of the Tender Board v. Pamo Trading Enterprises CC*.[2657] While the right to reasons would be universally accepted as "fundamental human right", the right to access to information would rather be directed at promoting good governance.[2658] The court found legislature would be better suited than the courts to delineate the parameters of the right of access to information and in setting the requirements for exercising that right.[2659] It

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2652. *S v. Luboya* 2007 (1) NR 96 (SC): 103A–B.
2653. *Ibid.:* 103B.
2654. *Ibid.*
2655. *Ibid.:* 103C–D.
2656. *Ibid.:* 103D–E.
2657. 2017 (1) NR 1 (SC).
2658. *Ibid.:* 13I.
2659. *Ibid.:* 14G–H.

was however stressed that the decision not to grant a tenderer access to the minutes of a meeting of the tender board in this case[2660]

> does not mean that Art 18 cannot found a claim for documentation relevant to administrative action taken by a body or official where the refusal to provide documentation infringes on the right to fair and reasonable administrative action. It would depend upon the facts and circumstances.

1152. The view that administrative justice under Article 18 requires adherence to the *audi alteram partem* rule was stressed in *Chairperson of the Immigration Selection Board v. Frank.*[2661] It was though emphasized that[2662]

> [t]his rule embodies various principles, the application of which is flexible depending on the circumstances of each case and the statutory requirements for the exercise of a particular discretion.

1153. In *Aonin Fishing v. Minister of Fisheries and Marine Resources*,[2663] the *audi alteram partem* rule was found to apply despite the respective legislation does not entitle a person to a public hearing:[2664]

> [T]he requirement of a fair hearing before an independent, impartial and competent Court or Tribunal established by law, appears to be applicable, mutatis mutandis and at least in principle.

1154. The requirement to adhere to the *audi alteram partem* rule was confirmed in Waterberg Big Game Hunting Lodge v. Minister of Environment and Tourism:[2665]

> Although neither article 18 nor the decisions of the High and Supreme Court of Namibia require the application of the audi alteram partem rule in every case of the numerous routine administrative decisions that must be taken by officials from day to day, the rule must be applied to ensure administrative justice where for example facts adverse to an applicant are relied on by the decision-maker not known to the applicant and where the doctrine of 'reasonable expectation' applies.

2660. *Ibid.*: 15D–E.
2661. *Chairperson of the Immigration Selection Board v. Frank* 2001 NR 107 (SC): 174C.
2662. *Ibid.:* 174D. This was later restated by referring to South African and English case law in: *Nelumubu v. Hikumwah* 2017 (2) NR 433 (SC): 445F–446F.
2663. 1998 NR 147 (HC).
2664. *Aonin Fishing v. Minister of Fisheries and Marine Resources* 1998 NR 147 (HC): 150I–151A.
2665. 2010 (1) NR 1 (SC): 12B–C.

The implicit requirement of the *audi alteram partem* rule under Article 18 has been qualified in this decision. The doctrine of "reasonable or legitimate expectation" as known in common law had been applicable before the *Constitution* was enacted, and its applicability has been confirmed not only in the *Waterberg* case but also in other cases, such as *Westair Aviation (Pty) Ltd. v. Namibia Airports Co Ltd.*[2666] A legitimate expectation arises either from an expressed promise on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.[2667] It is a question of procedural fairness if a hearing is required before a decision is taken, whereby the circumstances of each individual case are decisive.[2668]

§13. The Right to Culture

1155. Article 19 of the *Constitution*: the right to culture, protects the enjoyment, practice, profession, maintenance and promotion of any culture, language, tradition or religion if it is not in conflict with the *Constitution* and does not impinge upon the rights of others or the national interest. As Naldi emphasizes, "[t]his qualification is important because the right to cultural life and traditions, given that many traditional cultural values are based on sex discrimination, potentially could clash with other Constitutional rights on non-discrimination and women's rights".[2669] Indeed, as much as the recognition and the socio-political acceptance of traditions, customs and more so customary law has its constitutional foundation in Article 19, the provision that all this enjoys constitutional protection if not in conflict with the *Constitution* is an important challenge as it opens the doors to tests before the courts.

1156. The right to culture corresponds to the responsibility of the state to protect the inherited culture. The protection and conservation of places and objects of heritage significance is the task of the National Heritage Council established by the *National Heritage Act*.[2670] The right to culture is also important with regard to the protection of minority rights.[2671]

2666. 2001 NR 245 (HC).
2667. Cited by the Supreme Court in: *Free Namibia Caterers CC v. Chairperson of the Tender Board of Namibia* 2017 (3) NR 898: 908G from *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All ER 935 (HL). *See also*: *Minister of Mines and Energy v. Petroneft International Ltd.* 2012 (2) NR 781 (SC): 794E–F.
2668. *See*: *Uffindell t/a Aloe Hunting Safaris v. Government of Namibia* 2009 (2) NR 670 (HC): 693C–H, where the court referred to *President of the Republic of South Africa v. South African Rugby Football Union* 2000 (1) SA 1 (CC).
2669. Naldi (1995): 96f. – *See* on this the already referred discussion on the practice of Olufuku in § 9.3 of this chapter.
2670. Sections 3ff. of the Act (Act No. 27 of 2004).
2671. *See* on this below: Chapter 5 of this part.

§14. The Right to Education

1157. Article 20 of the *Constitution* is a social fundamental right and guarantees the right to education for everyone. It should be noted that this article is the only second-generation right in the *Constitution*.[2672] It renders primary school education compulsory and free of charge.[2673] School attendance applies to all children until they have completed primary education or have attained the age of 16, except where an act of parliament provides otherwise on grounds of health or other considerations pertaining to the public interest.[2674] Sub-Article 4 entails the right to establish and to maintain private schools, colleges or other institutions of tertiary education if certain requirements are met. The requirement to contribute to the school development funds has long constituted a hindrance for children with a poor background to exercise their right to education. For this reason, free universal primary education was introduced in 2013.[2675]

1158. Obstacles for children exercising their right to education can still be observed in the rural context and have economic, cultural as well as social reasons. Children must often help their families with cultivating their communal farms and herding livestock. Many San children do very often not attend school on a regular basis. While in the lower-primary grades (grades 1–3) the majority of San children attends school; there is a sharp decline in the enrolment of marginalized children in the upper-primary and secondary school grades.[2676] To grant the children of the Ovahimba and Ovazemba community in Kunene Region access to education without uprooting their traditional way of nomadic life, the Ministry of Education, Arts and Culture introduced mobile school units in the region.[2677] Another challenge is teenage pregnancies causing many girls to drop out of school before completing primary education.[2678]

1159. In 2020, the *Basic Education Act*[2679] was enacted to further promote and protect the right of learners to education. The Act contains provisions promoting and regulating free and compulsory basic education. It, inter alia, establishes guiding principles, including the best interest of the child, and norms and standards for basic education. Any form of discrimination and violence against learners is prohibited. Provisions are made for public and private schools. The Act further establishes national and regional institutions such as the National Advisory Council on Education and regional education forums.

2672. *See* on this above: Chapter 2, § 2 of this part.
2673. Article 20(2) of the Constitution.
2674. Article 20(3).
2675. Recently, the fees for junior and secondary examinations were also abolished. Cf.: https://howafrica.com/namibia-removes-exam-fees-for-junior-and-senior-secondary-schools/ (accessed 21 Jun. 2022).
2676. Ministry of Gender Equality and Child Welfare (2020): 45.
2677. *Ibid.*: 46.
2678. Gender Research & Advocacy Project (2008).
2679. Act No. 3 of 2020.

Chapter 4. Fundamental Freedoms

1160. Article 21 outlines a list of fundamental freedoms, including freedom of speech and expression, freedom of thought, conscience and belief, freedom to practise any religion and to manifest such practice, freedom of association, right to withhold their labour without being exposed to criminal penalties, right to move freely throughout Namibia, right to reside and settle in any part in Namibia, right to leave and return to Namibia, and the right to practise any profession, or carry on any occupation, trade or business.

§1. Freedom of Speech

I. Case Law with Respect to Freedom of Speech

1161. The importance of freedom of speech in the Namibian context was explained in *Kauesa v. Minister of Home Affairs*:[2680]

> In the context of Namibia freedom of speech is essential to the evolutionary process set up at the time of independence in order to rid the country of apartheid and its attendant consequences. In order to live in and maintain a democratic state the citizens must be free to speak, criticise and praise where praise is due. Muted silence is not an ingredient of democracy because the exchange of ideas is essential to the development of democracy.

The Supreme Court in *Kauesa* concluded that a regulation making unfavourable public comments by members of the police force against the administration of the force or any other government department an offence violated the freedom of speech. Although the court acknowledged the objective of the regulation to maintain discipline in the force, which would indeed be needed to carry out its duties efficiently, it emphasized that "police officers have as much right to freedom of speech and expression as the citizenry".[2681] It further held:[2682]

> They, like any other citizens, should not be relegated to a watered down version of the right to freedom of speech and expression. Their right to enter into debate in which, as in the instant case, matters of great concern to Namibia and the Namibian public are discussed is as valid as the right of other citizens.

Regarding the limitation of the freedom of speech, the court emphasized that Article 21(2) of the *Constitution*[2683]

2680. 1995 NR 175 (SC): 193A–B.
2681. *Ibid.:* 194J–195A.
2682. *Ibid.:* 195A.
2683. *Ibid.:* 190J–191A.

> creates a restriction purposely enacted to soothe the relationships between those exercising their constitutionally protected rights and those who also have their own rights to enjoy.

1162. In *Trustco Group International v. Shikongo*,[2684] the Supreme Court dealt with an appeal against a High Court decision in which the former major of Windhoek Shikongo successfully sued the owner, editor, and printer of a weekly newspaper for defamation in relation to an article published in the newspaper and was awarded damages. In this judgement, the role of the media in a democratic society was discussed and it was noted:[2685]

> Freedom of speech is thus central to a vibrant and stable democracy. The media play a key role in disseminating information and ideas in a democracy, which is why, no doubt, the Constitution specifically entrenches the freedom of the media and the press in section 21(1)(a). One of the important tasks of the media is to hold a democratic government to account by ensuring that citizens are aware of the conduct of government officials and politicians. In performing this task, however, the media need to be aware of their own power, and the obligation to wield that power responsibly and with integrity.

The onus of proof that a statement was not defamatory was found not to rest on the person alleging defamation, but the publisher of the statement has to establish that the publication was reasonable, in the public interest and not negligent:[2686]

> The defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals. In so doing, the defence creates a balance between the important constitutional rights of freedom of speech and the media and the constitutional precept of dignity.

According to Horn,[2687] the

> Shikongo case is an important development in Namibia's common law in the light of the Constitution. It also clarifies the manner in which competing rights ought to be dealt with: the one right should not be applied in such a way that the other disappears. Cognisance also need to be given to both rights and their relationship to each other or to the situation.

2684. 2010 (2) NR 377 (SC).
2685. *Trustco Group International v. Shikongo* 2010 (2) NR 377 (SC): 389D–E.
2686. *Ibid.:* 396C–D.
2687. Horn (2014): 52.

1163. In *Muheto v. Namibian Broadcasting Corporation*,[2688] the importance of freedom of speech was reaffirmed. By referring to the South African case of *National Media Ltd. v. Bogoshi*,[2689] it was held that the publication of a defamatory matter in the public media would be regarded as lawful if, in all circumstances of the case, publication was reasonable. Reasonableness could be determined by looking if the matter is of public interest and if the journalist had reasonable grounds for believing the words were true and took proper steps to verify the accuracy of the material. It would also be of importance whether the concerned person was given an opportunity to respond to the defamatory allegation. An application which was brought to prevent the Namibian Broadcasting Corporation from publishing information that was allegedly defamatory of the applicant was dismissed.[2690] It was argued that the publication was in the public interest and that the applicant could always have an action for damages if the publication was indeed defamatory. On the contrary, if the publication was prevented, this would be likely to be the end of the matter of the Namibian Broadcasting Corporation.[2691]

1164. In *Director-General of the Namibian Central Intelligence Service v. Haufiku*[2692] the Supreme Court upheld the decision of the High Court to dismiss an urgent application for an interdict restraining the respondents from publishing an article on alleged corrupt activities and transgression of the *State Finance Act*[2693] in the Namibia Central Intelligence Service. The Director of the Namibian Central Intelligence had argued that the publication of the information would be contrary to the *Namibia Central Intelligence Service Act*[2694] and the *Protection of Information Act*.[2695] Those acts prohibit, inter alia, the possession or disclosure of certain security and sensitive matters with respect to the Namibian Intelligence Service and, as the High Court remarked, constitute reasonable restrictions on the exercise of the fundamental freedoms conferred by Article 21(1)(a) of the *Constitution*.

1165. After emphasizing the important role of the media in reporting corruptive activities,[2696] the High Court stressed that the Namibia Intelligence Service is as public institution subject to judicial oversight. It held in this respect:[2697]

> The NCIS operates in the context of a democratic state founded on the rule of law which rule subjects all public officials and all those exercising public functions, whether openly or covertly, in the interest of the state, to judicial

2688. 2000 NR 178 (HC).
2689. 1998 (4) SA 1196 (SCA).
2690. *Muheto v. Namibian Broadcasting Corporation* 2000 NR 178 (HC): 184H–I.
2691. *Ibid.:* 185E–F.
2692. 2019 (2) NR 556 (SC).
2693. Act No. 31 of 1991.
2694. Act No. 10 of 1997.
2695. Act No. 84 of 1982.
2696. *Director, General Namibia Central Intelligence Service and Another v. Haufiku* 2018 (3) NR 757 (HC): 787A–F.
2697. *Ibid.*: 793J–794B.

> scrutiny, this would include all operatives and functionaries of the NCIS. The agency has been established to serve that state and thus remain accountable to the judiciary.

As a consequence, the Namibia Central Intelligence Service cannot simply recite legislative provisions prohibiting the possession and disclosure of certain information relating to the service, but must provide evidence to the court that the relevant information fall into the scope of that legislation. The High Court even expressed that it appears that the Namibian Central Intelligence Service was[2698]

> essentially utilizing the statutory provisions of the Protection of Information Act 1982 and the Namibia Central Intelligence Service Act 1997 to prevent the publication of a newspaper article aimed at exposing certain alleged corrupt activity and unauthorised expenditure and the misuse of public funds.

The High Court concluded:[2699]

> Thus the applicants cannot, in the circumstances, be heard to complain to suffer an injury to their rights through activity possibly not countenanced by the law. By the same token they cannot be heard to complain that there will be a threat of the breach of the statutes relied on or that they can have a reasonable apprehension of such injury should the intended article be published, as this would be tantamount to a criminal approaching the courts for assistance to cover up illegal activity or to prevent the exposure of possible illegal activity.

1166. On appeal the Supreme Court elaborated:[2700]

> It needs to be made clear as a preliminary matter that we do not agree with the Government's refrain, repeatedly pressed with great force in the written heads of argument, that once the Executive invoked secrecy and national security, the court is rendered powerless and must, without more, suppress publication by way of interdict.
>
> The notion that matters of national security are beyond curial scrutiny is not consonant with the values of an open and democratic society based on the rule of law and legality. That is not to suggest that secrecy has no place in the affairs of a democratic State. If a proper case is made out for protection of secret governmental information, the courts will be duty bound to suppress publication.
>
> The Government had to establish the jurisdictional facts contemplated in the PIA [Protection of Information Act] and the NCISA [Namibia Central Intelligence Service Act] in order to obtain an interdict to suppress publication of the information which the respondents possessed. A mere recitation of the sections of the legislation would for that purpose not suffice. Sufficient evidence must

2698. *Ibid*.: 780E–F.
2699. *Ibid*.: 797B–D.
2700. *Director-General of the Namibian Central Intelligence Service v. Haufiku* 2019 (2) NR 556 (SC): 573C–G.

> be placed before court which will enable the court to make an assessment whether the information whose publication is sought to be suppressed came within the scope of the statutory provision(s) relied upon. It is a legitimate concern though that if such information were ventilated through the publicly accessible e-justice process, its secrecy might be compromised.

This would also not be in conflict with the legitimate concern for secrecy in court proceedings as the courts can safeguard that sensitive information are not disclosed to the public by different means. The court could be approached in camera until finalization of the proceedings and the state could take the court in confidence and, thus, place sufficient material before court to justify why publication had to be prohibited.[2701]

1167. Or as the High Court had put it:[2702]

> In this regard, they [the courts] could, for instance, exercise their inherent powers to regulate a preliminary in camera procedure, if required, for purposes of establishing whether any information required in judicial proceedings should be kept secret contrary to the open justice principle in the interests of national security or whether or not such information could be placed in the public domain.

1168. In *State v. Smith NO*,[2703] four accused charged with contravening section 11(1)(a-c) of the *Racial Discrimination Prohibition (Amendment) Act*[2704] sought to annul charges against them on the basis that these sections would be in conflict with the right to freedom of speech and expression and of thought, conscience, and belief. The accused had placed an advertisement in a Windhoek newspaper congratulating the Nazi Rudolph Hess on his birthday. Although, in this specific case, the heroic treatment of a Nazi war criminal by means of the advertisement was found to constitute an insult to the Jewish people and their sensitivities, the charges against the accused were quashed because section 11(1) was found to be unconstitutional. Section 11(1) of the Act prohibits the making of expressions that can threaten, ridicule or insult a person or persons belonging to a particular racial group, that incite disharmony between different racial groups and that disseminate ideas based on racial superiority.

1169. Despite the court stressed that[2705]

2701. *Ibid.*: 571G–H.
2702. *Director, General Namibia Central Intelligence Service v. Haufiku* 2018 (3) NR 757 (HC): 794B–C.
2703. 1996 NR 367 (HC).
2704. Act No. 26 of 1991.
2705. *S v. Smith NO* 1996 NR 367 (HC): 371C. This case is discussed in more detail in: Horn (2014): 44ff.

> the prevention of a recurrence of the type of racism and its concomitant practices which prevailed prior to independence in this country is a 'sufficiently significant objective' to warrant a limitation on the rights enshrined in article 21(1) under consideration …

The definition of "racial group" was found to go far beyond what was required.[2706] The section was found not to impose reasonable restrictions as contemplated in Article 21(2) of the *Constitution* because it was not "carefully designed to achieve the objective in question" as it did not impair as little as possible the right in question. It would further be disproportionate stifling and inhibiting public debates on issues which are important in Namibia such as affirmative action and historical assessments.[2707] It was held that[2708]

> s 11(1) is overbroad in that it embraces communications which may be prohibited as well as communications which are protected under article 21(1) of the Constitution. Because the section cannot be saved by the mere excising of words or phrases but will have to be reconsidered and amended it cannot be down-read.

Therefore, section 11(1) of the Act was found to be unconstitutional; the court granted parliament six months to amend it.

1170. Although the objective to upheld and strengthen freedom of speech and expression might generally be positive, this judgement has a negative connotation as becomes clear when considering the facts of the case involving the advertisement in a Windhoek newspaper congratulating the Nazi Rudolph Hess in his birthday. It is questionable if the glorification of a Nazi war criminal, who took part in killing millions of people during World War II, should be protected by freedom of speech and expression. The court argued that the objective of the act is the prevention of a recurrence of the type of racism and its concomitant practices that prevailed before independence.[2709] This means that the insult to the Jewish people who were not a subject of suppression and discrimination in the past in Namibia did not justify the derogation from Article 21(1) of the *Constitution*. This argument is similar to the argument brought in the case of *Müller v. President of the Republic of Namibia*[2710] and leads not only to the assumption that the court neglected the spirit of the *Constitution* but also that it lacked the sensitivity to consider as indecent any glorifications of people who took part in the most severe forms of discrimination. It would have not been devious to draw parallels between the historic discrimination of Jews by the Nazis and of black and coloured people during the apartheid system

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2706. *Ibid.:* 371E.
2707. *Ibid.:* 373C–E.
2708. *Ibid.*
2709. *Ibid.:* 371C.
2710. 1999 NR 190 (SC): 202I–203A. Here the court stated suffering from patterns of disadvantage in the past as indicator for the determination whether discrimination is unfair.

and, thus, allow Jews the same protection under the *Racial Discrimination Prohibition Act*. Horn argues on the interpretation of the Act by the court as follows:[2711]

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

1171. In *Fantasy Enterprises CC t/a Hustler the Shop v. Minister of Home Affairs; Nasilowski v. Minister of Justice*,[2712] the High Court, by referring to several foreign judgements,[2713] specified the scope of protection of the freedom of speech and said:[2714]

> [T]he concept of 'speech and expression' extends also to 'non-political' discourse; includes graphic expressions; contemplates not only the act of imparting but also of receiving information and ideas and is not limited in content to that which can be regarded as pleasing, inoffensive or indifferent, but extends also to that which disturb, offends or shocks … .

What happened in the case was that the police seized and removed most of the applicants' stock which had been found to be indecent or obscene photographic matter under section 1 of the *Indecent and Obscene Photographic Matter Act*[2715] or was intended for use in performing "unnatural" acts of sex under section 17(1) of the *Combating of Immoral Practices Act*.[2716] The applicants argued that section 2(1) of the first-mentioned Act and section 17(1) of the second were unconstitutional because they imposed[2717]

> an unreasonable and unjustifiable restriction on their right to freedom of speech, expression and to carry on any trade as guaranteed by paras (a) and (j) of article 21(1) of the Constitution.

2711. Horn (2013a): 189.
2712. 1998 NR 96 (HC).
2713. *The Sunday Times v. The United Kingdom (No 2)* (1992) 14 EHRR 229: 241 para. 50; *Martim v. City of Struthers* 319 US 141: 143; *Stanley v. Georgia* 394 US 357: 364; *Case v. Minister of Safety and Security*; *Curtis v. Minister of Safety and Security* 1996 (3) SA 617 (CC): 629 A.
2714. *Fantasy Enterprises CC t/a Hustler the Shop v. Minister of Home Affairs*; *Nasilowski v. Minister of Justice* 1998 NR 96 (HC): 101B–D.
2715. Act No. 37 of 1967.
2716. Act No. 21 of 1980.
2717. *Fantasy Enterprises CC t/a Hustler the Shop v. Minister of Home Affairs*; *Nasilowski v. Minister of Justice* 1998 NR 96 (HC): 98F–G.

The court referred to the guidelines established in the *Kauesa* case when deciding whether the respective section passes "the constitutional muster" of Article 21(2) and came to the following conclusion:[2718]

> In determining whether a legislative provision passes the constitutional muster of article 21(2), the court needs to identify the legislative objective of the Act; examine the means employed by the Legislature to achieve that end and satisfy itself that the one is rationally and reasonably connected to the other by applying the values and principles of a democratic society.

Both sections were declared unconstitutional. Section 2(1) of the 1967 Act was found to be formulated in an overly broad manner, and section 17(1) of the 1980 Act was found to be too vague in its scope and application.[2719]

II. Freedom of the Press

1172. Shortly after independence the UNESCO held a seminar "Promoting an Independent and Pluralistic African Press" in Windhoek from 29 April to 3 May 1991.[2720] The seminar resulted in the adoption of a statement of press freedom principles by African newspaper journalist: the *Windhoek Declaration for the Development of a Free, Independent and Pluralistic Press*.[2721] The 3 May, the anniversary of the Declaration of Windhoek, has been proclaimed by the UN General Assembly as World Press Freedom Day in December 1993.[2722] The document has been viewed as a benchmark for ensuring press freedom around the world and inspired similar declarations around the world[2723] and as a crucial affirmation of the international community's commitment to freedom of the press.[2724] Exactly thirty years after the

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2718. *Ibid.:* 102B–C.
2719. *Ibid.:* 106G–I and 109A–B.
2720. 30th Anniversary of the Windhoek Declaration, Article on the UNESCO website, 18 Feb. 2021; available at https://en.unesco.org/news/30th-anniversary-windhoek-declaration (accessed 5 Apr. 2022).
2721. Programme and Meeting Document of the Seminar on Promoting an Independent and Pluralistic African Press, Windhoek, 1991. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000090759?posInSet=2&queryId=3aebea3e-fcd3-4925-8e14-af9b9f4ec10d (accessed 5 Apr. 2022).
2722. *See*: 30th Anniversary of the Windhoek Declaration, Article on the UNESCO website, 18 Feb. 2021 and also Website of the UN, World Press Freedom Day 2 May; available at https://www.un.org/en/observances/press-freedom-day (accessed 5 Apr. 2022).
2723. Including the Alma Ata Declaration of 1992 (Declaration of Alma Ata on promoting independent and pluralistic Asian Media, 1992 (available at: www.unesco.kz/_files/37_Declaration%20of%20Alma%20Ata.pdf - accessed 18 Jul. 2022), the Santiago Declaration of 1994 (available at: https://media.sipiapa.org/adjuntos/186/documentos/001/791/0001791598.pdf - accessed 18 Jul. 2022), the Sana'a Declaration on the Arab media of 1996 (available at: https://al-bab.com/documents-reference-section/sanaa-declaration-arab-media accessed 18 Jul. 2022) and the Sofia Declaration of 1997 (available at: https://unesdoc.unesco.org/ark:/48223/pf0000109559 – accessed 18 Jul. 2022.
2724. *See*: 30th Anniversary of the Windhoek Declaration, Article on the UNESCO website, 18 Feb. 2021 and also Website of the UN, World Press Freedom Day 2 May; available at https://www.un.org/en/observances/press-freedom-day (accessed 5 Apr. 2022).

Windhoek seminar, UNESCO and the Government of Namibia hosted the World Press Freedom Day 2021 Global Conference taking place from 29 April to 3 May in Windhoek. The Global Conference is organized annually since 1993 to provide an opportunity to journalists, civil society representatives, national authorities, academics, and the broader public to discuss emerging challenges to press freedom and journalists' safety, and to work together on identifying solutions.[2725]

1173. In response to the passing of the Windhoek declaration, the Media Institute of Southern Africa (MISA) was established in September 1992 as a non-governmental organization with the objective to promote freedom of speech and freedom of the press. MISA's head office is located in Windhoek, the capital of Namibia.[2726]

1174. Another key institution regarding media freedom is the Editor's Forum of Namibia (EFN). The EFN had been operating in a provisional capacity with a steering committee since November 2003 and was finally established as non-governmental organization in 2007.[2727] The EFN is affiliated to the Southern African Editors' Forum.[2728] It has issued a *Code of Ethics* requiring its members to uphold a high standard of media ethics, integrity, and professional services.[2729] It furthermore conducts regular media education and training programmes and appoints a media ombudsman in order to establish a self-regulatory mechanism that allows the public to file their complaints to a Media Complaints Committee in line with international best practices and as recommended in ratified AU and SADC protocols and instruments.[2730]

1175. The freedom of the press and the right to assembly have generally been respected by the government and have, hence, enabled a democratic environment.[2731] It must though be indicated that there have been attempts to curtail critical media coverage in the past.[2732] Former President Sam Nujoma banned government ministries not only from buying, but also from placing advertisements in the newspaper "The Namibian".[2733] This ban was only lifted in 2011 during Pohamba's second term of office.[2734] Since then, political interference with the

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2725. *Ibid*.
2726. *See*: Website of MISA; available at: https://misa.org/who-we-are/ (accessed 5 Apr. 2022).
2727. *See*: Website of the EFN; available at: https://www.efnamibia.org/about-efn (accessed 5 Apr. 2022). *See also*: The Namibian of 29 Jun. 2007.
2728. *See*: Consolidated Constitution of the EFN, 2017; available at: https://www.efnamibia.org/media/2 (accessed 5 Apr. 2022).
2729. The Code of Ethics is available at: https://www.efnamibia.org/media/1 (accessed 5 Apr. 2022).
2730. Website of the EFN; available at: https://www.efnamibia.org/about-efn (accessed 5 Apr. 2022).
2731. *See*, *e.g.*,: Website of the organisation Reporters Without Borders: https://rsf.org/en/namibia (accessed 5 Apr. 2022).
2732. This is discussed in more detail in: Cooper (2016): 5f.
2733. *See*, *e.g.*: MISA (2001).
2734. *See*, *e.g.*: MISA (2011).

media has diminished and Namibia has been Africa's best-ranked country in the RSP's World Press Freedom Index since 2019. For 2020 Namibia was on rank 23 in the index.[2735]

§2. The Right to Assembly

1176. The right to assembly as provided in Article 21(1)(d) of the *Constitution* has been dealt with in *Africa Personnel Services v. Shipunda.*[2736] It was found to be foundational to the exercise of democratic rights, including in the context of hard won workers' rights.[2737] Several workers who had staged a demonstration at the premises of their employer during lunch hours claimed they were unfairly dismissed. The court emphasized that the fundamental freedom to assemble was not unfettered or absolute. Limitations are possible, if the requisites of Article 21(2) are met.[2738] The right to property enjoyed by others, including employers, was one such limitation. Hence, there would be a need for section 65 of the *Labour Act*[2739] which required a trade union to seek permission from employers to hold meetings on their premises and that employers must not unreasonably withhold such permission for.[2740] Arguing that the respondents had no further right to be on the premises when demonstrating and were also guilty of gross insubordination, the Labour Court held that the arbitrators had been incorrect in their finding that the respondents' dismissal had been unfair.

1177. In *Kapika v. Government of the Republic of Namibia*,[2741] the court stated that prior police permission was not required for holding public meetings. Such a requirement – so the court – would unconstitutionally restrict the rights to freedoms of assembly and speech.[2742]

§3. Freedom to Withhold Labour Without Being Exposed to Criminal Penalties

1178. The freedom to withhold labour without being exposed to criminal penalties has not been dealt with by the Namibian courts yet. The reference to Article

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2735. *See*: Website of the organisation Reporters Without Borders: https://rsf.org/en/namibia (accessed 5 Apr. 2022).
2736. 2012 (2) NR 718 (LC).
2737. *Africa Personnel Services v. Shipunda* 2012 (2) NR 718 (LC): 739E.
2738. *Ibid.:* 739G.
2739. Act No. 11 of 2007.
2740. *Africa Personnel Services v. Shipunda* 2012 (2) NR 718 (LC): 739G–H.
2741. High Court judgement, Case No. unknown – unreported. This was an urgent application made in 1997 in the High Court, which handed down a final order against the government and the police. *See*: Legal Assistance Centre, Constitutional and Human Rights Unit, Key Cases in 1999/2000, available at: https://www.lac.org.na/projects/sjp/Pdf/1999-2000.pdf (accessed 27 Jun. 2022).
2742. *Ibid.*

21(1)(f) in *Namibia Insurance Association v. Government of Namibia*[2743] must be read as reference to the right to do business stated in Article 21(1)(j) of the *Constitution*.

§4. The Right to Do Business

1179. An infringement of the freedom to practise any profession or carry on any occupation trade or business as entrenched in Article 21(1)(j) of the *Constitution* was established in *Minister of Health and Social Services v. Lisse*,[2744] where the minister refused an authorization to practise at a state hospital. This refusal was held to violate Article 21(1)(j):[2745]

> The refusal by the Minister obviously does not completely prevent Dr Lisse from practising his profession, but it severely restricts him in the exercise of his profession and unless there are sound reasons for so restricting him, a Minister refusing his application under section 17, violates the aforesaid article 21(1)(j) of the Namibian Constitution.

1180. In *Namibia Insurance Association v. Government of Namibia*,[2746] the Namibian Insurance Association claimed that the effect of Part V of the *National Reinsurance Corporation Act*[2747] would take away the capacity and possibility from insurers to build up reserves so as to lessen the burden of reinsurance and that Part V and section 45 of the Act would therefore violate their right to do business, their rights to property (Article 16) and to equality (Article 10). The court, however, clearly set out that the right in Article 21(1)(j)[2748] was not a right to practise a trade or business free from regulation[2749] and dismissed the application. That "the freedom protected by art 21(1)(j) does not imply that persons may carry on their trades or businesses free from regulation … " was also stressed in *Africa Personnel Services v. Government of Namibia,*[2750] where the prohibition of labour hire by virtue of section 128 of the *Labour Act*[2751] was declared unconstitutional because it would unreasonably and in an overly broad manner restrict the right to freedom to engage in commercial activities as protected by Article 21(1)(j) of the *Constitution*.[2752]

2743. 2001 NR 1 (HC).
2744. 2006 (2) NR 739 (SC).
2745. *Minister of Health and Social Services v. Lisse* 2006 (2) NR 739 (SC): 758C–D.
2746. 2001 NR 1 (HC).
2747. Act No. 22 of 1998.
2748. The court mistakenly referred to Article 21(1)(f) as the right to do business.
2749. *Namibia Insurance Association v. Government of Namibia* 2001 NR 1 (HC): 18C.
2750. 2009 (2) NR 596 (SC): 657A–F.
2751. Act No. 11 of 2007.
2752. *Africa Personnel Services v. Government of Namibia* 2009 (2) NR 596 (SC): 652G–H.

1181. In *Ex parte in re: Kamwi v. Law Society of Namibia*,[2753] the regulation of the legal profession by the *Legal Practitioners Act*[2754] was found not to violate Article 21(1)(j) of the *Constitution* because Article 21(2) provided that such freedom was subject to reasonable restrictions.[2755] Regulations governing professions would be necessary to protect the public. By referring to one of the statements made by the applicant, the court elaborated the following:[2756]

> One only needs to imagine Mr. Kamwi advising a lay client along such lines to see the real danger to the public posed by an unadmitted person purporting to act as a legal practitioner. It is from such dangers that the Law Society is duty bound to protect the public. In her founding affidavit Ms. Steinmann referred to other professions which prescribe qualifications to be acquired before a person can be authorized to practice, and regulations governing the practice of such professions. The legal profession is not an exception.

1182. The approach to determine whether a regulation constituting a material barrier to the right to practice is permissible under Article 21(2) has been summarized by the Supreme Court in *Trustco Ltd t/a Legal Shield Namibia v. Deeds Registries Regulation Board*[2757] with reference to *Africa Personnel Services (Pty) Ltd. v. Government of the Republic of Namibia*:[2758]

> The approach … has three steps: the first is to determine whether the challenged law constitutes a rational regulation of the right to practice; if it does, then the next question arises which is whether even though it is rational, it is nevertheless so invasive of the right to practise that it constitutes a material barrier to the practice of a profession, trade or business. If it does constitute a material barrier to the practice of a trade or profession, occupation or business, then the government will have to establish that it is nevertheless a form of regulation that falls within the ambit of art 21(2).[2759]

1183. In *Medical Association of Namibia v. Minister of Health and Social Services,*[2760] the Supreme Court accepted the view that a difference must be made between regulation and restriction. The court referred to and cited from literature,[2761] which describes "regulation" as simply regulating the manner of exercise of a fundamental right as to its time and place without affecting its content and

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2753. 2009 (2) NR 569 (SC).
2754. Act No. 15 of 1995.
2755. This was also stressed in *Africa Personnel Services v. Government of Namibia* 2009 (2) NR 596 (SC) where the court held at 657A–F "that the freedom protected by art 21(1)(*j*) does not imply that persons may carry on their trades or businesses free from regulation."
2756. *Ex parte in re: Kamwi v. Law Society of Namibia* 2009 (2) NR 569 (SC): 575C–D.
2757. 2011 (2) NR 726 (SC): 735 D–F.
2758. 2009 (2) NR 596 (SC): 640E–644B.
2759. *Trustco Ltd t/a Legal Shield Namibia v. Deeds Registries Regulation Board* 2011 (2) NR 726 (SC): 735D–F.
2760. 2017 (2) NR 544 (SC).
2761. Das Basu (2008): 373–377.

"restriction" as putting a curb or limitation on the ambit of the right.[2762] A licensing scheme – which came into force in 2008 (in particular Sec 31(3) of the *Medicines and Related Substances Control Act*[2763]) and required medical practitioners to first obtain a licence before being allowed to sell medicine to their patients – was found to be a restriction rather than a regulation of profession and thus requiring to pass muster under Articles 21(2) and 22 of the *Constitution*:[2764]

> In my view, the measure does not involve merely prescribing hours of selling medicine or the frequency with which it can be done. Without a license a doctor can't sell. The present is therefore not the sort of case where the legislature merely sets minimum requirements for the pursuit of a profession. It involves placing restrictions on an activity that had been carried on for a considerable length of time by, in the first place, criminalising its pursuit without a license and, secondly, requiring that a person who had previously not needed it to apply for a license which has a limited duration of one year.
>
> I come to the conclusion that the effect of s 31(3), viewed objectively, limits the doctor's right to sell medicines to patients. To survive, the licensing scheme must pass muster under Arts 21(2) and 22. In view of my conclusion below that the licencing scheme is void for vagueness, I do not find it necessary to decide whether the scheme passes the test of proportionality under Art 21(2).

2762. *Medical Association of Namibia v. Minister of Health and Social Services* 2017(2) NR 544 (SC): 562B–H.
2763. Act No. 13 of 2003.
2764. *Ibid.:* 563A–C.

1184–1187

Chapter 5. Rights of Groups and Minorities

§1. Background

1184. Although the diversity of ethnic groups is acknowledged and respected, the emphasis of the *Constitution* is on equal rights for all people.[2765] Minority rights are only protected to a very limited extent. The disparity of wealth is high, and there is still a great number of people that can be classified as poor, including certain minority groups.[2766] According to the Minority Rights Group International, "Namibia's minority and indigenous communities continue to struggle with the legacy of colonialism, including genocide, land loss, and decades of apartheid rule."[2767]

§2. Constitutional Protection of Minority Groups

1185. Article 19 of the *Constitution* comes closest to constitutionally protecting minority rights, as it protects rights that are traditionally identified with minorities.[2768] It reads as follows:

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

1186. Article 3(2) of the *Constitution* allows for the use of other languages than the official language (English) as a medium of instruction in private or public schools. Moreover, Article 3(3) permits parliament to issue legislation allowing the use of a language "for legislative, administrative, and judicial purposes in regions or areas where such other language or languages are spoken by a substantial component of the population". These provisions can be seen in combination with the protection of language in Article 19 of the *Constitution*.[2769]

1187. Article 10 of the *Constitution*, the provision on equality is[2770]

2765. The preamble of the Constitution refers to "the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status". Articles 10 and 19 are also indicators for the respect and acknowledgment for ethnic diversity in Namibia.
2766. Suzmann (2002): 13.
2767. Cf.: World Directory of Minorities - Namibia: http://www.minorityrights.org/?lid=4177 (accessed 18 Jul. 2022).
2768. Naldi (1997): 54.
2769. *See* on this: Kießwetter (1993): 174.
2770. Carpenter (1991): 33.

> the closest that the Namibian Constitution gets to the recognition of group or minority rights; the persons protected by the provision may all be said to belong to a certain group, whether a natural group or one formed by choice.

Article 10 protects the individual rather than identifying the group's separate identity.[2771] It can be regarded as "negative" protection, since it does not confer special privileges by virtue of membership of a group but only prohibits discrimination.[2772]

1188. Affirmative action in terms of Article 23 of the *Constitution* does not particularly advance the interests of minority groups. As most minority groups belong to previously disadvantaged persons, Article 23 could potentially be used to confer certain privileges to minority groups.[2773]

1189. Namibia is a party to several instruments prohibiting discrimination and including provisions protecting minority groups, such as the *Covenant on Economic, Social and Cultural Rights*[2774] and the *Convention on the Elimination of Racial Discrimination*.[2775] It is a member of the ILO but is neither party to the *ILO Indigenous and Tribal Populations Convention*[2776] nor to the *ILO Indigenous and Tribal Peoples Convention*[2777] which is the only international legally binding convention dealing with indigenous rights.[2778] However, Namibia has approved the *United Nations Declaration on the Rights of Indigenous Peoples*, which establishes a universal framework of minimum standards for the survival, dignity, well-being, and rights of the indigenous peoples.[2779]

1190. The situation of the San is of particular interest when one looks at the position of minorities in Namibia. Most of the San in Southern Africa – the current population is estimated at between 30 000 and 33 000[2780] – lost the land they had traditionally occupied.[2781] Outside the former Bushmanland (now Tsumkwe Districts West and East in the Otjozondjupa Region), many San are dependent on the goodwill of other traditional authorities to be granted rights to land.[2782] High illiteracy and language barriers affect the possibility to invoke the constitutional rights

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2771. *Ibid.*
2772. *Ibid.*
2773. Cf.: Carpenter (1991): 34.
2774. Date of Accession: 28 Nov. 1994.
2775. Acceded by the UN Council for Namibia on 11 Nov. 1982.
2776. ILO Convention No. 107, 1957.
2777. ILO Convention No. 169, 1989.
2778. Cf.: Suzman (2002): 11.
2779. Adopted on 13 Sep. 2007. For an assessment of the situation of indigenous peoples in Namibia, *see* several articles in: Hitchock; Vinding (2004) and the report of the special rapporteur of the Human Rights Council on the rights of indigenous peoples, James Anaya from June 2013 (Human Rights Council (2013)).
2780. Suzman (2001): 4.
2781. *Ibid.:* 11.
2782. *Ibid.:* 83.

in favour of the members of the San communities. This concerns in particular access to the state system of justice, securing property rights, education and political participation.[2783]

1191. Since 2015, there is a special office in the government to deal with what is called marginalized people. A member of the Ju/'hoan was appointed Deputy Minister of Marginalised People in the Ministry of Presidential Affairs.

1192. The situation of San, Ovahimba, Ovazemba, Ovatjimba, and Ovatue have received attention by the United Nations Special Rapporteur on the rights of indigenous peoples in his report of 2013.[2784] The rapporteur notes positive developments towards the mentioned indigenous population. One of the positive steps is the granting of a tourism concession to the Hai//om in the Etosha National Park. At the Gaboab water hole, the Hai//om run exclusively tourism operations. Gaboab is culturally important to the Hai//om, being the place where many of their ancestors were born.[2785]

1193. However, still a lot has to be done to empower the marginalized groups, because[2786]

> [i]ndigenous peoples in Naminia express a sense of exclusion from decision-making processes, at both the local and national levels, because of their ethnic identities.

Apart from the need to recognize the traditional authorities of marginalized groups and land rights, mother-tongue and culturally appropriate education should be increased.[2787]

1194. The claim of the Hai//om San on the Etosha National Park, which used to be their land until they were expelled from this area to give way for the park in the fifties of the last century will, although dismissed by the court,[2788] most probably remain on the social and political agenda.

2783. Cf.: Thornberry; Viljoen (2009): 39.
2784. Human Rights Council (2013).
2785. *Ibid.* 12.
2786. *Ibid.*: 2.
2787. *Ibid.:* 2. – With respect to the recognition of the traditional authorities of marginalized people, the rapporteur refers to non-recognised groups in the Kunene Region and the non-recognized Khwe in the Kavango East and Zambesi Region. (*Ibid.*: 13). As to land and natural resources, the report mentions still existing deficits but also the running of two conservancies by San groups as flagship projects. (*Ibid.*: 7ff.).
2788. *See* on this above: para. 10.7 in Chapter 3 of Part V.

Chapter 6. Legal Positions of Aliens

§1. Introduction

1195. Whereas the situation of citizens has been discussed above, the situation of aliens, who also have fundamental rights and become subject of constitutional law when in the country, still needs to be outlined. Hence, in this chapter, the situation of aliens is assessed, with a special emphasis on economic, social, and political participation.

§2. The Constitution and the Statutory Laws

1196. The fundamental rights and freedoms of the *Constitution* are generally conferred to "all persons" except where it is explicitly mentioned that only citizens bear the right. In *S v. Luboya*,[2789] the court for example emphasized that Article 18 of the *Constitution* is applicable to all persons in Namibia and not only Namibian nationals. In contrast, Article 17 of the *Constitution*, the right to political activity, including the right to vote and to be elected for a public office, exclusively applies to Namibian citizens. Another direct constitutional reference to the limitation of a fundamental right in respect of foreigners is the right to property in terms of Article 16 of the *Constitution*. Article 11 of the *Constitution*, providing rights for persons arrested or detained in Namibia excludes illegal immigrants from the application of the forty-eight-hours rule. A special protection for aliens can be found in Articles 97 and 99 of the *Constitution*. Article 99 protects foreign investment. Article 97 grants certain aliens the right to asylum. It reads as follows:

> The State shall, where it is reasonable to do so, grant asylum to persons who reasonably fear persecution on the ground of their political beliefs, race, religion or membership of a particular social group.

1197. Namibia is a party to several international conventions or documents protecting the status of aliens. Namibia has accessed the *Convention relating to the Status of Refugees* of 1951[2790] and the *Convention Governing Specific Aspects of Refugee Problems in Africa of the African Union* of 1969.[2791] Namibia has also ratified the *Convention against Transnational Organised Crime* of 2009[2792] and signed the *SADC Protocol on the Facilitation of Movement of Persons* of 2005,[2793] which is not in force yet.

2789. 2007 (1) NR 96 (SC).
2790. Accession: 17 Feb. 1995.
2791. Accession: 2 Sep. 1994.
2792. Ratified: 16 Aug. 2002.
2793. Signed: 18 Aug. 2005 but not ratified.

1198. The statutory laws applicable to aliens theoretically also include the *Aliens Act* of 1937[2794] which has not been repealed in its entity but is practically non-applicable as the *Namibian Citizenship Act*[2795] repealed nearly all of the amending acts and replaced most of its provisions.

1199. The *Immigration Control Act*[2796] regulates the entry of persons into Namibia and their residence in the country. It further includes provisions in regard to the removal of certain immigrants from Namibia. Certain groups of persons are specifically excluded from the scope of the Act. These include Namibian citizens, persons domiciled in Namibia and their spouses and dependent children (who have not been classified as prohibited immigrants), diplomats and their staff, persons entering Namibia for the purpose of employment, for example, under a convention or agreement with the government of another state, and crew members of public ships, aircraft and other public vehicles while in Namibia.[2797] Once a person has entered legally under the *Immigration Control Act*, he or she is treated according to the laws of Namibia and is subject to the fundamental human rights and freedoms under the *Constitution*.

1200. Immigration control is an executive function carried out by the chief of immigration and immigration officers appointed by the Minister of Home Affairs.[2798] Moreover, the *Immigration Control Act* establishes an Immigration Selection Board which decides upon applications for permanent residence and employment permits.[2799] Between five and seven members serve on the Board of whom all are appointed by the Minister.[2800]

1201. All persons with a passport can enter Namibia if the passport of a person includes an endorsement or the person is in possession of a document issued by an immigration officer permitting entrance to Namibia.[2801] Foreigners permitted to Namibia can only be in Namibia for "such purposes and during such period and subject to such conditions as may be stated in that endorsement or document".[2802] In order to enter Namibia, persons under the Act are required to have a permanent residence or temporary residence permit, an employment or study permit, or a visitor's entry permit.[2803] Every person seeking to enter Namibia has to present him- or herself to an immigration officer at a port of entry in order that it can be made sure that such person is not a prohibited immigrant and is entitled to enter and to be in Namibia.[2804] Persons entering in Namibia without permission or after having been

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2794. Act No. 1 of 1937, as amended.
2795. Act No. 14 of 1990.
2796. Act No. 7 of 1993.
2797. Section 2(1)(a–h) of the Immigration Control Act, 1993 (Act No. 7 of 1993).
2798. Cf.: Section 3 of the Act.
2799. Section 25.
2800. Section 25(3).
2801. Section 6(1).
2802. Section 6(1)(b).
2803. Section 24.
2804. Section 7.

refused permission are guilty of an offence and, on conviction, liable to a fine not exceeding NAD 20 000 and/or to imprisonment for a period not exceeding five years and can be dealt with as a prohibited immigrant.[2805] Persons with an endorsement in their passports or a document permitting entrance to Namibia, who fail to satisfy the immigration officer that they are not prohibited immigrants, can be permitted entrance for a period not exceeding two months subject to conditions imposed by the immigration officer.[2806]

1202. Section 39(2) of the *Immigration Control Act* provides a list of persons who are classified as prohibited immigrants if entering or having entered Namibia, including persons that have been removed from Namibia under the provisions of the *Immigration Control Act*, persons who are likely to become a public charge for certain reasons, persons infected or afflicted with a contagious disease, and persons convicted of certain offences. Prohibited immigrants can be arrested without a warrant and detained for a certain period of time pending investigations.[2807] As the *Constitution* emphasizes, the forty-eight hours period in which an arrested or detained person has to be brought before a magistrate or other judicial officer is not applicable in cases of illegal immigrants.[2808] However, the deportation of illegal immigrants requires authorization by the competent tribunal. Sub-Article 5 of Article 11 of the *Constitution* further prohibits the denial of the rights of persons – held in custody as illegal immigrants – to consult a legal practitioner except if it is in accordance with the law and necessary in the interest of national security or for public safety. In contrast to the forty-eight hours, a person arrested and detained as an illegal immigrant can be kept in custody for up to fourteen days.[2809] Section 42(2)(b) of the *Immigration Control Act* additionally requires the immigration officer to notify the arrested person and his or her legal representative in writing of the grounds for the detention and the place where the person is detained.

1203. The statute regulating the recognition and control of refugees in Namibia is the *Namibia Refugees (Recognition and Control) Act*.[2810] Although in Namibia, international conventions are not required to be implemented in national law in order to be applicable,[2811] the *Namibia Refugees (Recognition and Control) Act* explicitly states that the *United Nations Convention relating to the Status of Refugees* of 28 July 1951[2812] and the *Convention Governing Specific Aspects of Refugee Problems in Africa* by the Organization of African Unity of 10 September 1969 have the force and effect of law in Namibia.[2813] The *Namibia Refugees (Recognition and Control) Act* complements the provisions of the conventions and establishes the office of the Commissioner for Refugees and the Namibia Refugees Committee.

2805. Section 10(3).
2806. Section 11(1).
2807. Section 42(1)(a)(i, ii).
2808. Article 11(3) of the Constitution.
2809. Section 42(1)(a)(ii) of the Immigration Control Act.
2810. Act No. 2 of 1999.
2811. Article 144 of the Constitution and above at Chapter 1 of Part II.
2812. As amended by the Protocol Relating to the Status of Refugees of 31 Jan. 1967.
2813. Section 2(1) of the Namibia Refugees (Recognition and Control), 1999 (Act No. 2 of 1999).

With the exception of Article 26 of the former convention, the right to freedom of movement, all provisions of the convention are effective without restrictions. Section 19 of the *Namibia Refugees (Recognition and Control) Act* allows the Minister of Home Affairs to establish reception areas, and section 20 of the Act gives the minister the power to require refugees to reside in such areas. A violation of this requirement constitutes an offence and can be sanctioned with imprisonment for up to ninety days.[2814]

1204. In *S v. Isaac*,[2815] the accused – a refugee authorized to reside at the Osire Camp – left the camp, although he had been served with a notice to remain in the camp. The accused pleaded guilty but the court emphasized that it has a duty to ascertain whether such refugee has been served with an order in terms of section 20(1) of the *Namibia Refugees (Recognition and Control) Act* and, if so, what conditions are contained therein. In this case, the magistrate had failed to elicit this procedural requirement from the accused and therefore the court set aside the conviction and sentence.[2816] The case reveals that the Namibian authorities use their statutory powers to restrict the freedom of movement of refugees, but it also shows that "the courts have adopted a procedurally strict approach to the determination of the guilt of the individual".[2817]

1205. The Commissioner decides upon applications for refugee status by considering the recommendation by the Committee.[2818] Section 27 of the *Namibia Refugees (Recognition and Control) Act* establishes a right of appeal to all persons aggrieved by a decision of the Commissioner. Refugees or protected persons cannot be detained without a warrant, but only following a request by the minister, the consideration of such request for detainment of the Committee and a subsequent decision by the Commissioner. Section 24 of the Act grants recognized refugees and protected persons several procedural rights as the right to be notified of the request by the minister to be detained or expulsed, the right to be given reasons for the intended detention or expulsion, the right to make oral or written presentations in regard to the intended detention or expulsion, and in case of oral representation[2819]

> the right to be personally present at the inquiry, to be assisted or represented by a legal practitioner or any other person of his or her choice and to give or submit oral or documentary evidence; and to have an interpreter assigned to him or her by the Committee, if the inquiry is conducted in a language that he or she does not understand.

1206. Whether homosexuals seeking asylum will be granted asylum became a matter of debate after a Ugandan man facing persecution for homosexuality in his

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2814. Section 21(b) of the Act.
2815. 2004 NR 122 (HC).
2816. *Ibid.:* 124A–B.
2817. De Jager (2010): 12.
2818. Sections 6 and 10 of the Namibia Refugees (Recognition and Control) Act.
2819. Section 24(4)(a, b) of the Act.

home country had been declared an illegal immigrant to Namibia facing deportation. After the rejection of his application, he lodged an application in the High Court, asking for the setting aside of the decision by the Namibia Immigration Selection Board and the Commissioner for Refugees.[2820] In August 2013, the man obtained an urgent injunction from the High Court to stop his deportation until his application to be granted refugee status in Namibia has been dealt with. Nevertheless, the man left Namibia in November 2014 under unclear circumstances. While the then Minister of Home Affairs and Immigration Pendukeni Iivula-Ithana said he had left on his own accord, his lawyer claimed that he had been deported to Uganda despite the High Court interdict prohibiting deportation.[2821] The Commissioner for Refugees had in this case argued that the Namibian "domestic refugee law does not have a provision granting refugee status for being gay".[2822] This view is, though, not in line with the United Nations Refugee Agency according to which homosexuals belong to a particular social group entitled to protection under domestic refugee laws and the *Convention relating to the Status of Refugees*.[2823]

1207. In 2019, a Supreme Court judgement[2824] brought clarification on the interpretation of domicile and the role of the *Immigration Control Act* in restricting immigration. A German couple and a South African man had each challenged the decisions by the Immigration Selection Board to deport them, claiming that – having severed their ties to their homelands, having formed the intent to make Namibia their new home and making financial investments here – they had acquired domicile in Namibia in terms of s 22(1)(d) of the *Immigration Control Act*. The High Court had granted them a declaration to that effect which was appealed against by the respondents. The Supreme Court then decided that the common law requirements for domicile, being physical presence and the intention to remain indefinitely, have been overruled by section 22(1)(d) read together with section 22(2) of the *Immigration Control Act*.[2825] Meaning that, if an immigrant resides in Namibia only on the strength of a work permit, he or she cannot acquire domicile in Namibia. An immigrant entering Namibia on a work permit and making significant financial investments in Namibia with the intent to settle, thus, does not automatically acquire domicile under the *Immigration Control Act*. Such generous approach was rejected by the court and found to be in contradiction with the purpose and the regulatory scheme of the *Immigration Control Act*. Domicile could not depend on the subjective choice of an immigrant, namely its intention to settle, and in that way bind "the State in a way that infringes its sovereign choice concerning which immigrants to admit or not" which would have "no basis either under international law or the Namibian Constitution".[2826] The court emphasized that permanent residence status can only be acquired according to the principles outlined in section 26 of the *Immigration Control Act* and stressed that according to the requirements, an immigrant

2820. Cf.: The Sun of 15 May 2015.
2821. The Namibian of 11 Dec. 2014.
2822. The Namibian of 12 Aug. 2014.
2823. *Ibid.*
2824. *Minister of Home Affairs and Immigration v. Holtmann* 2020 (2) NR 303 (SC).
2825. *Ibid.*: 314F–315J.
2826. *Ibid.*: 315F.

desiring to be admitted to permanent residence in Namibia must apply for it whilst outside the country.[2827] Therefore, it is not possible to enter Namibia on a work permit with view to settle in Namibia and then apply for a permanent residence permit. The court further clarified that the right to regulate immigration was an essential part of the principle of state sovereignty which is part of international law and explicitly mentioned in Article 1(1) of the *Constitution*.[2828]

1208. In *Castañeda v. Minister of Home Affairs and Immigration*,[2829] the approach set out in the *Holtmann* case was found to be undoubtedly correct and hardly requiring any amplification. *Holtmann* would represent "a jurisprudential paradigm shift on how domicile is acquired in Namibia."[2830] Castañeda, a Mexican national married in a same-sex marriage to a Namibian national, had applied for a certificate of identity under section 38 of the *Immigration Control Act*. He was informed about the rejection of his application when traveling to the Victoria Falls with his sister. Because he was not allowed to re-enter Namibia, he travelled over Botswana to South Africa from where he filed his application to the High Court. The High Court refused to declare that the appellant had acquired domicile and also dismissed an application for the review and setting aside the respondent's decision to reject his application for a certificate of identity. The appeal succeeded in so far as the application for condonation and reinstatement was granted. The effective expelling at the border when still waiting for the outcome of his certificate of identity application was found to violate Article 18 of the *Constitution*, in particular the right to be informed of a decision:[2831]

> The need to inform the appellant of the decision is part of the constitutional obligation imposed on administrative bodies and officials to act fairly and reasonably towards persons aggrieved by the exercise of such decision.

The court further emphasized that the handling of a certificate application must follow a certain process respecting the applicant's rights:[2832]

> Even if the s 38 certificate application was reasonably and lawfully made, there is a process that the respondents must follow to deport the appellant. They could not simply resort to self-help. The respondents say that the appellant was given a choice: to leave the country or be detained as a prohibited immigrant. This command is hardly a choice. There is no lesser evil between them. There can be no doubt that the appellant was treated appallingly and in a most undignified manner. He had to make an unplanned exit out of the country, leaving behind his companions, including his visiting sister. It is an inhumane and degrading treatment that has no place in a society based on the rule of law and other values of inherent dignity as well as justice for all espoused in the

2827. *Ibid*.: 312I–314E.
2828. *Ibid*.: 316B–317I.
2829. 2022 (2) NR 313 (SC).
2830. *Ibid*.: 321J.
2831. *Ibid*.: 322H.
2832. *Ibid*.: 322I–323B.

Namibian Constitution. For all these reasons, the decision of the respondents rejecting the appellant's application for a s 38 certificate has to be reviewed and set aside. The matter must be referred back to them to consider the application afresh.

1209–1210

Chapter 7. Principles of State Policy

§1. Introduction

1209. In contrast to the *South African Constitution*,[2833] the *Constitution of Namibia* does not include second-generation rights in the bill of rights except for the right to education. Some second- and third-generation rights, however, have been integrated into the *Constitution* as principles of state policy in Chapter 11. Article 95 of the *Constitution* requires the state to "actively promote and maintain the welfare of the people" by adopting specific policies. Chapter 11 contains in its Articles 96–100 principles with regard to foreign relations, asylum, the economic order, foreign investments, and the sovereign ownership of natural resources. As measured by the minimum standards of economic, social, and cultural international rights expectations,[2834] it must be noted that Article 95 does not mention a general right to healthcare and that there is no specific reference to shelter.[2835] Moreover, the application of some of the policies stipulated in Article 95 is made dependent on the availability of resources of the state.[2836]

1210. Article 101 of the *Constitution* clarifies that the principles of state policy are not justiciable in terms of the *Constitution* but guide the government in making and applying laws giving effect to the objectives of the principles of state policy. This protects the state against litigation.[2837] The principles can though be referred to by the courts when interpreting any laws based on those principles. The policies serve as guidance to executive, legislative, and judiciary in the passing and interpretation of legislation.[2838] In contrast to second- and third-generation rights recognized as fundamental rights, this approach leaves the implementation of socio-economic matters to the discretion of politics.[2839] However, although the state policies are not justiciable, internationally recognized second and third-generation rights are binding in Namibia and can be enforced by the Namibian courts.[2840] Article 144, recognizing international agreements binding on upon Namibia as part of the law of Namibia, "thus potentially opens the door for Namibian citizens to appreciate the importance of the world beyond their own country in the definition and enforcement of human rights".[2841] As the formulation and implementation of

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2833. Second-generation rights in the South African Constitution of 1996 are the right to housing (section 25), the right to healthcare, food, and water (section 26), particularly children's rights (section 27) and the right to education (section 28).
2834. The most important international treaty with this respect is the International Covenant on Economic, Social and Cultural Rights (ICESCR).
2835. *See*: Horn (2014): 31.
2836. Articles 95(g) and (h) require the state to provide social benefits and amenities to certain groups of society as well as legal aid "with due regard to the resources of the State". *See also*: Horn (2014): 31.
2837. Horn (2014): 32.
2838. Cf.: Watz (2004):186.
2839. Cf. here: Nakuta (2008); Bangamwabo (2013); Horn (2014).
2840. *See* on this: Part 2, Chapter 2.
2841. Nakuta (2008): 97.

state policies is left to policymakers and can take a great variety of forms in different areas, this chapter is confined to the introduction of the different state policies as outlined in the Constitution and elucidating specific implementation measures by way of examples.

§2. Policies Stipulated by Article 95

I. Equality for Women

1211. Article 95(a) of the *Constitution* expects the enactment of legislation to ensure equality of opportunity for women. In response to this, particular challenges for women in the sphere of employment relations and the family set-up, the problem of violence against women and access to land have been addressed systematically by government in the past decades.[2842] This includes the removal of discrimination against married women in the income tax laws.[2843] The *Labour Act* prohibits discrimination in any aspect of employment on the basis of sex, marital status, and family responsibilities and forbids harassment on the same grounds.[2844] A woman who has been employed for at least six months by the same employer has a right to not less than twelve weeks of maternity leave.[2845] The *Social Security Act* provides for the payment of maternity leave benefits (80% of full pay up to a ceiling of NAD 3 000) to employees granted out of the Maternity Leave, Sick Leave, and Death Benefit Fund financed by matching employer and employee contributions.[2846]

II. Labour Rights and Working Conditions

1212. The policies mentioned in Sub-Articles b–d of Article 95 of the *Constitution* concern labour rights and working conditions. Article 95(b) requires the state to enact legislation to ensure that the health and strength of workers and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength. According to Sub-Article c, the state shall encourage the formation of independent trade unions and promote sound labour relations and fair employment practices. The adoption of membership of the International Labour Organization and the duty to adhere to and act in accordance with the organizations' conventions and recommendations where possible is suggested by Article 95(d). Several measures have been taken by the state to live up to its obligations under the aforementioned articles.

2842. Namiseb (2017): 108f.
2843. The Income Tax Act, 1981 (Act No. 24 of 1981) was amended by Act No. 12 of 1991 and Act No. 25 of 1992.
2844. Section 5(2)(b) of the Labour Act, 2007 (Act No. 11 of 2007).
2845. Section 26 of the Act.
2846. Act No. 34 of 1994. Section 3(1) of the Act establishes the Social Security Commission as an administering and executing authority.

1213. The *Labour Act* of 2007[2847] entrenches fundamental labour rights and protection including the prohibition and restriction of child labour and the prohibition of forced labour. It further regulates basic terms and conditions of employment such as hours of work. It includes provisions to ensure the health, safety, and welfare of employees and protects employees from unfair labour practices. The *Labour Act* further contains several provisions aiming at sound labour relations and fair employment practices, including termination of employments prohibiting, for example, unfair dismissals, rights and duties of employers and employees, and unfair labour practices. Chapter 6 of the *Labour Act* regulates the establishment, winding up and registration of trade unions and employers' organizations, the recognition and organizational rights of registered trade unions and collective agreements and thereby enables a legislative environment encouraging the formation of independent trade unions to protect workers' rights and interests.

1214. Namibia, being a member of the ILO, ratified the eight core conventions of the ILO.[2848] In addition, it also ratified the *Tripartite Consultation (International Labour Standards) Convention*,[2849] the *Labour Administration Convention,*[2850] the *Termination of Employment Convention*,[2851] the *Labour Inspection Convention*,[2852] the *Employment Policy Convention*,[2853] the *Work in Fishing Convention*,[2854] the *Labour Relations (Public Service) Convention,*[2855] the *Domestic Workers Convention*,[2856] the *Violence and Harassment Convention.*[2857] Namibia has thus shown its commitment to uphold and protect international labour standards as required by Article 95(d).

III. Access to Public Facilities

1215. Fair and reasonable access to public facilities and services in accordance shall be ensured by the state under Article 95(e) of the *Constitution*. Public facilities and services can be broadly interpreted as designated to fulfil supportive functions related to the health and well-being of the citizens of a modern society, including

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2847. Act No. 11 of 2007.
2848. Forced Labour Convention, No. 29 of 1930, ratified on 15 Nov. 2000; Freedom of Association and Protection of the Right to Organise Convention, No. 87 of 1948, ratified on 3 Jan. 1995; Right to Organise and Collective Bargaining Convention, No. 98 of 1949, ratified on 3 Jan. 1995; Equal Remuneration Convention, No. 100 of 1951, ratified on 6 Apr. 2010; Abolition of Forced Labour Convention, No. 105 of 1957, ratified on 15 Nov. 2000; Discrimination (Employment and Occupation) Convention, No. 111 of 1958, ratified on 13 Nov. 2001; Minimum Age Convention, No. 138 of 1973, ratified on 15 Nov. 2000; Worst Forms of Child Labour Convention, No. 182 of 1999, ratified on 15 Nov. 2000.
2849. No. 144 of 1976, ratified on 3 Jan. 1995.
2850. No. 150 of 1978, ratified on 28 Jun. 1996.
2851. No. 158 of 1982, ratified on 28 Jun. 1996.
2852. No. 81 of 1947, ratified on 20 Sep. 2018.
2853. No. 122 of 1964, ratified on 20 Sep. 2018.
2854. No. 188 of 2007, ratified on 20 Sep. 2018.
2855. No. 151 of 1978, ratified on 20 Sep. 2018.
2856. No. 189 of 2011, ratified on 9 Dec. 2020.
2857. No. 190 of 2019, ratified on 9 Dec. 2020.

all kinds of infrastructure as the supply of electricity, gas, water, education, emergency services, healthcare, postal service, public transportation, and waste management. While Namibia strives towards improving the living conditions of its population, infrastructural development has been enormous. Nevertheless, in the rural areas, the access of the population to public facilities and services is still very limited. Moreover, many people cannot afford the fees for public services. In 2009, the Legal Assistance Centre intended to take legal action against the municipality of Otavi for the failure to provide adequate water and sanitization facilities to the community.[2858] Such failure would not only violate the people's right to dignity and the right to safety and security but also the right to non-discrimination, based on socio-economic status.[2859] The case was however dropped after an extrajudicial settlement. In line with the submission made to court, the courts would have had to consider the concerns of certain secondary human rights, such as the right to water and adequate sanitation, by broadly interpreting the right to life and the right to dignity, guaranteed as enforceable constitutional rights.[2860]

IV. Adequate Standards For Senior Citizens

1216. Article 95(f) requires the state to ensure regular, adequate pensions for its senior citizens, enabling them to maintain a decent standard of living and the enjoyment of social and cultural opportunities. The main piece of legislation enacted for these purposes is the *National Pensions Act*[2861] which provides for national pensions to be paid to aged, blind, and disabled persons. Moreover, the *Social Security Act*[2862] provides for the payment of pension benefits to retired employees and establishes for that purpose the National Pension Fund.[2863] Financial and other assistance to eligible veterans and dependants of veterans to enable their reintegration into the social and economic mainstream of society are regulated in the *Veterans Act*.[2864] The basic state pension is paid as a lump sum that is non-contributory and non-taxable and payable regardless of other income.[2865] The pension is payable to all Namibian citizens ordinary resident in Namibia and persons having permanent residence and living for a certain period in Namibia above the age of 60.[2866] The payment including the maximum amount to be paid, the method of payment, and other regulations are left to the discretion of the Minister of Health and Social Security.

2858. "LAC to Fight for Right to Adequate Sanitisation, Water". Online article on the website of the Legal Assistance Centre, 30 Nov. 2009; available at https://www.lac.org.na/news/pressreleases/pressr-09otavi.pdf#:~:text=LAC%20to%20Fight%20for%20Right%20to%20Adequate%20Sanitisation%2C,adequate%20water%20and%20sanitisation%20facilities%20to%20the%20community (accessed 5 Apr. 2022).
2859. *Ibid.*
2860. *See* here: Mungunda (2011).
2861. Act No. 10 of 1992.
2862. Act No. 34 of 1994.
2863. Sections 34–36 of the Social Security Act, 1994 (Act No. 34 of 1994).
2864. Act No. 2 of 2008.
2865. Cf.: Schleberger (2002).
2866. Section 3(2)(b and (c) read in connection with section 1(1) of the Social Security Act.

V. Legal Aid

1217. Article 95(h) concerns the provision of free legal aid in defined cases. Given the money needed to pursue a case in the courts, legal aid is important as without such aid the "right to a fair and public hearing"[2867] may run empty. It was therefore already in 1990 that the *Legal Aid Act* was enacted,[2868] with view "to provide for the granting of legal aid in civil and criminal matters to persons whose means are inadequate to enable them to engage practitioners to assist and represent them". Until 2000, according to section 8(1) of the *Legal Aid Act*, a High Court bench could issue legal aid certificates to an unrepresented accused if there was sufficient reason why the accused should be granted legal aid. Such certificate compelled the Director of Legal Aid to grant legal aid to the accused. This led to a situation where "certificates were issued indiscriminately by the judges without due regard to available funds with the result that during successive years the funds allocated for legal aid were exceeded".[2869] In order to restrict the generous issuance of legal aid, the respective provision of the *Legal Aid Act* was deleted leaving it solely to the discretion of the Director of Legal Aid to grant legal aid to an accused according to section 8(1) of the *Legal Aid Act.*[2870] This had the effect that "the granting of legal aid in terms of the related Act was taken from the High Court and placed solely in the hands of the bureaucratic structures of the Ministry of Justice."[2871]

1218. While Article 95(h) of the *Constitution* and its implementing legislative provision in the *Legal Aid Act* ("statutory legal aid") only provide for a limited right to legal aid which, inter alia, depends on the availability of resources, section 14(3) of the ICCPR and Article 12 of the *Constitution* require a court to instruct the state to provide legal aid, in cases where the interests of justice so require and the denial of legal aid would lead to a violation of the right to a fair trial.[2872]

VI. Living Wage

1219. According to Article 95(i) of the *Constitution*, the state shall adopt policies to ensure that workers are paid a living wage adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities. There is no general minimum wage in Namibia, but the government gives recommendations concerning the payable wage in different sections. The Minister for Labour has the power to issue wage orders to decide the remuneration and working

2867. Article 12(1)(a) of the Constitution.
2868. Act 29 of 1990, as amended, *see also*: Legal Aid Regulations: Legal Aid Act, 1990 (GN. No. 303 of 2018).
2869. *Government of the Republic of Namibia v. Mwilima and all other accused in the Caprivi treason trial* 2002 NR 235 (SC): 250I–J.
2870. As amended by the Legal Amendment Act, 2000 (Act No. 17 of 2000).
2871. Horn (2014): 35.
2872. *Government of the Republic of Namibia v. Mwilima and all other accused in the Caprivi treason trial* 2002 NR 235 (SC): 258E. *See* on this above: Part II, Chapter 2, § 4; Part V, Chapter 3, § 7.4.

conditions for employees in a particular industry or area after considering the recommendations of the Wage Commission.[2873] In 2014, a first step has been taken by the Namibian government to ensure the objectives mentioned in Article 95(i) by issuing a wage order for setting minimum wage and supplementary minimum conditions of employment for domestic workers.[2874] So far this remained the only area regulated by a wage order. Otherwise, minimum salaries can be determined by collective agreements between trade unions and employers.[2875] The *Labour Act*[2876] contains a provision allowing the minister to extend such agreement to employers and employees who are not members of the parties to the agreement and are in the industry to which such agreement relates if asked to do so by the parties and certain requirements are met.[2877] This has been done e.g., for the agricultural industry,[2878] the security industry,[2879] and the construction industry.[2880]

VII. Standard of Living

1220. To raise and maintain an acceptable level of nutrition and standard of living and to improve health shall be achieved through consistent planning by the state under Article 95(j) of the *Constitution*. Several policies have been enacted by the Namibian government in this context. The institution responsible for carrying out this mandate is the Ministry of Health and Social Services. Several policies have been adopted which can be regarded as serving the objectives in Article 95(j), including, e.g., the Strategic Plan for Nutrition 2011–2015, the National Health Policy Framework "Take control of your health" of 2010, National Coordination Framework for HIV and AIDS Response in Namibia of 2010, the National Policy on Infant and Young Child Feeding of 2003, and the National Food and Nutrition Policy of 1995. Furthermore, several Acts such as the *Social Security Act*,[2881] the *Water Resource Management Act,*[2882] and the *Tobacco Products Control Act*[2883] have been enacted in Namibia with view to achieve the objectives outlined in Article 95(j).

2873. Section 13 of the Labour Act, 2007 (Act No. 11 of 2007).
2874. Issued by the Minister of Labour and Social Welfare under section 13 of the Labour Act, 2007 (GG No. 5638 of 2014). *See*: Government Notice No. 258 of 2017.
2875. The Labour Act, 2007 entails several provisions on collective agreements: sections 70–73.
2876. Act No. 11 of 2007.
2877. Section 71 of the Labour Act, 2007.
2878. Declaration of extension of collective agreement: Agricultural Industry: Labour Act, 2007 (GN No. 237 of 2009)
2879. Declaration of extension of collective agreement: Security Industry: Labour Act, 2007 (GN No. 239 of 2017).
2880. Declaration of extension of collective agreement: Construction Industry: Labour Act, 2007 (GN No. 72 of 2020); Extension of collective agreement on minimum wages and conditions of employment: Construction Industry: Labour Act, 2007 (GN No. 241 of 2021.
2881. Act No. 34 of 1994.
2882. Act No. 24 of 2004 contains important provisions regarding water supply.
2883. Act No. 1 of 2010 provides for the reduction of demand for and supply of tobacco products and the protection from exposure to tobacco smoke.

1221. The governmental obligation to ensure a decent standard of living has to be seen in light of the high poverty levels and income inequality in Namibia.[2884] In 2002, the Namibian Tax Consortium, a government-appointed commission, proposed the introduction of a Basic Income Grant[2885] in Namibia to overcome poverty and inequality. In 2005, a coalition consisting of the Council of Churches, the National Union of Namibian Workers, the umbrella body of the NGOs, the umbrella body of the AIDS organizations, the National Youth Service, the Church Alliance for Orphans, the LAC and the Labour Resource and Research Institute was founded with the objective to achieve the introduction of a Basic Income Grant in Namibia.[2886] The proposal was centred on a basic income grant of NAD 100 being paid unconditionally to every Namibian until he or she becomes eligible for a government pension at 60 years. The costs should be recovered through a combination of progressively designed tax reforms. The suggestions were practically tested from 2008 to 2009 in a pilot project in the village of Otjivero which led the coalition arrive at the conclusion that a Basic Income Grant would have wide-ranging benefits in addressing poverty.[2887] The study was however criticized as having several shortcomings such as the small sample size and the non-representability of the sample.[2888] The prospects for the introduction of a basic income grant have risen under the previous government with Zephania Kameeta as then Minister of Poverty Eradication and Social Welfare who initiated a social protection policy with a preproposal on how to implement the Basic Income Grant.[2889] President Hage Geingob though finally rejected the idea of a Basic Income Grant and called it "entirely misplaced". Instead, to alleviate poverty and improve living conditions, a focus would lay on the provision of shelter, the investment in the social sector including public health, education, and social welfare as well as the payment of social grants.[2890]

1222. The state further has the obligation to enact legislation to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged are accorded social benefits and amenities that are just and adequate with due regard to the resources of the state. Blind and disabled persons can, as the aged persons, apply for government pensions and the blind persons' or respectively disability pension under the *National Pensions Act*.[2891] While employees injured as a result of an accident arising out of and in the course of their employments can be granted benefits under the *Employee's Compensation Act*,[2892] there is so far no financial assistance for unemployed persons.

2884. Poverty and income inequality have only been slightly reduced in the recent years, although government has repeatedly stressed to address these issues. *See* on this, for example: Bertelsmann Foundation (2020): 13.
2885. For a detailed discussion of the economic, legal, philosophical, and political aspects of basic income grants, *see*: Osterkamp (2015).
2886. *See*: Basic Income Grant Coalition (2005).
2887. Haarmann et al. (2009): 96.
2888. Kaufmann (2010): 44f.
2889. *See* on this: The Namibian of 14 Feb. 2020, but also New Era of 20 Oct. 2020.
2890. New Era of 16 Apr. 2021.
2891. Section 2 of the National Pensions Act, 1992 (Act No. 10 of 1992).
2892. Act No. 30 of 1941, as amended.

VIII. Encouragement to Political Debates

1223. Article 95(k) of the *Constitution* stipulates that the government shall adopt policies aiming at the encouragement of the mass of the population through education and other activities and through other organizations taking part in political debates. The government has so far not adopted any specific policies to achieve these objectives.

IX. Maintaining the Ecosystem

1224. Measures to maintain the ecosystems, essential ecological processes, and biological diversity and to utilize living natural resources on a sustainable basis for the benefit of all Namibians are required to be adopted by the state in Article 95(l) of the Constitution.[2893] Particularly called for in this article are measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory. Such measures have not been developed. However, so far, no case of dumping or recycling of foreign nuclear toxic has been reported.

1225. Several environmentally relevant policies were developed, international treaties taken over, and national acts adopted.[2894] The efforts of Namibia to implement the United Nations *Framework Convention on Climate Change*[2895] are noteworthy. Namibia was the first developing country that has submitted its climate change report under the *Convention*.[2896]

1226. From the nationally developed acts, the *Environmental Management Act* of 2007 is of special importance.[2897] The objectives of the Act are defined in section 2 of the Act and include the prevention and mitigation of

> the significant effects of activities on the environment by
>
> (a) ensuring that the significant effects of activities on the environment are considered in time and carefully;
> (b) ensuring that there are opportunities of timeous participation of interested and affected parties throughout the assessment process; and
> (c) ensuring that the findings of an assessment are taken into account before any decision is made in respect of activities.

2893. *See* here: Greeff (2012) and generally various articles in: Ruppel; Ruppel-Schlichting (2022).
2894. Cf. the various articles: *ibid*., but also: Ruppel; Roschmann; Ruppel-Schlichting (2013a and b). – *See also*, above: where relevant international treaties and national statutes are mentioned.
2895. The Convention became effective in 1994.
2896. Cf.: https://www.unep.org/news-and-stories/press-release/namibia-first-developing-country-submit-report-mitigation-measures (accessed 18 Jul. 2022).
2897. Act No. 7 of 2007, as amended, in force since Feb. 2012 (GN No. 28 of 2012) – *see also*: Environmental Impact Assessment Regulations: Environmental Management Act, 2007 (GN No. 30 of 2012); List of activities that may not be undertaken without Environmental Clearance Certificate; Environmental Management Act, 2077 (GN No. 30 of 2012) and: Ministry of Environment and Tourism (2008).

1227. Section 3(2) of the Act contains a long list of principles applicable in the management of the environment: Renewable resources are to be used on a sustainable basis; the community is to be involved in the management; all interested and affected parties must participate and "the decisions must take into account the interest, need and values of interested and affected parties" – to name but a few.

1228. While the responsible minister has primarily coordinating and monitoring functions (including with respect to environmental policies, plans, programmes, and decisions of the various state organs),[2898] the main executive organ is the Environmental Commissioner.[2899] The Commissioner decides on necessary environmental assessments and also issues environmental clearance certificates. Decisions of the Commissioner can be appealed to the responsible Minister, the decision of the Minister to the High Court.[2900]

1229. The Sustainable Development Advisory Council has the task to promote cooperation and coordination between all "organs of state" and "non-governmental organisations" and to advise the minister in all environmental matters.[2901] As much as the broad scope of agencies to be included in the expected cooperation and coordination is welcome, the definition of who belongs to the governmental entities could have been more precise with respect to one important agency responsible for environmental matters. The *Environmental Management Act* defines organ of state in section 1 to be "any office, ministry or agency of State or administration in the local or regional sphere of government" or "any other functionary or institution … exercising a public power or performing a public function …". Why did the Act not employ a language stating that organs of state include also traditional authorities? Should the lawmaker have forgotten what is said in the *Traditional Authorities Act*[2902]? Section 3(2)(c) requires a member of a traditional authority to

> ensure that the members of his or her traditional community use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystem for the benefit of all persons in Namibia … .

1230. One interesting test case could emerge out of what is currently going on in the Kavango West Region where test drilling for oil has started and where different interested parties have raised ecological concerns.[2903] Apart from a possible contradiction between economic and environmental interests, reports on the project

2898. Sections 4 and 23ff. of the Act.
2899. Sections 16ff.
2900. Sections 50 and 51.
2901. Sections 6ff.
2902. Act No. 25 of 2000.
2903. Cf. here: Barbee; Neme (2021) and Legal Assistance Centre (2020b).

indicate also the rights existing on the land concerned may not have been respected and dealt with as the law on communal land would require.[2904]

1231. Given the growing awareness of the general public in the environment and sustainable development, it can be expected that environmental concerns will occupy the administration and most probably also the courts. From what is known in other parts of the world, one can anticipate that members of the public and non-governmental organizations will call for being heard on environmental risks emanating from planned projects. According to section 44 of the *Environmental Management Act*, the responsible Minister or the Environmental Commissioner must consult "organs of state whose area of responsibility may be affected", but, with respect to other interested or affected person the Minister or Commissioner only "may consult". Whether this "may" will stand against the calls for a general obligation to be consulted, will, at least, become a political matter.[2905]

§3. International Cooperation

I. Introduction

1232. The principles of state policy with respect to foreign relations in Article 96 of the *Constitution* include non-alignment, international cooperation, peace and security, just and mutually beneficial relations, respect for international and treaty obligations, and the peaceful settlement of international means.

1233. The non-alignment principle derives its inspiration from pre-independence times when SWAPO has advocated for non-alignment in international relations and was involved in the Non-aligned Movement which was established by several developing countries during the Cold War in 1961.[2906] In essence, this principle requires Namibia to stand "above conflict and intense disagreement among states within the international political system".[2907] The significant change in the global environment since the end of the Cold War requires a reinterpretaton of the non-alignment principle to fit the contemporary world.[2908] With respect to Namibia, it has been criticized that "the principle of non-alignment

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2904. The Namibian of 25 May reported that a Kavango farmer has approached the High Court alleging that the prospectors violated his land rights by clearing land for drilling. *See also*: The Namibian of 21 May 2021, but also *Namibian Marine Phosphate (Proprietary) Limited v. Minister of Environment and Tourism*, High Court judgement, Case No.: CA 119/2016 – unreported.

2905. In arguing this matter, one has to consider, e.g., the rules on participation led down in the Aarhus Convention of 1998 (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, United Nations, Treaty Series, Vol. 2161: 447) – which Namibia is not a party to. Some problems in the implementation of the Act were identified by the responsible minister and could lead to an amendment to the Act, *see*: Ministry of Environment, Forestry and Tourism (2019/2020): 62f.

2906. *See*: Shangala (2014): 324; du Pisani (2014): 369; Mushelenga (2014): 62.

2907. Mushelenga (2014): 63.

2908. Brown et al. (2016): 1.

has sometimes been used somewhat interchangeably with non-intervention to justify inaction as on the Human Rights Council for example."[2909] However, there have been positive effects as well since "due to this policy Namibia has developed cordial relations with states of various backgrounds and across ideological divides."[2910]

1234. The matter of foreign affairs comprises a wide range of issues, from vital matters of national interest to matters of a routine nature. The former includes issues such as peace and security and other questions vital to the welfare of the state, its interests, and people. The latter refers to issues such as crime, the environment, and migration.[2911] The vital interests of the state are handled by the executive (head of state) and are subject to parliamentary approval by the National Assembly. Officers directly involved in the handling of foreign affairs, including ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls, and consular officers are appointed by the president.[2912]

II. Functions and Powers with Regard to Foreign Affairs

1235. The power to negotiate and sign international agreements vests in the president who is also authorized to delegate such power.[2913] The Cabinet has merely an assistant function. It has the function to assist the president with the determination what international agreements are to be concluded. It furthermore shall report to the National Assembly in regard to this matter.[2914] The decision-making power about the ratification or accession to international agreements rests with the National Assembly.[2915] It can furthermore decide about the succession to international agreements entered into before independence.[2916] The assistant function of the Cabinet to the National Assembly in regard to foreign affairs also includes the formulation, explanation and analysis of the goals of the Namibian foreign policy and its relations with other states[2917] and of the directions and the content of foreign trade policy.[2918]

1236. The central position of the president in matters of foreign policy became obvious in 1998 when the then president notified the public about his decision to deploy about 300 members of the Namibian defence force in support of the "Democratic Republic of Congo" government.[2919] This decision was taken without prior

2909. *Ibid*.: 1f.
2910. *Ibid*.: 2.
2911. *See*: du Pisani (2010a): 299.
2912. Article 32(3)(c) of the Constitution.
2913. Article 32(3)(e).
2914. Article 20(i).
2915. Article 63(2)(e).
2916. Article 63(2)(d).
2917. Article 40(g).
2918. Article 40(h).
2919. *See*: du Pisani (2010a): 306.

discussion at Cabinet level and without involving parliament.[2920] According to du Pisani, this renunciation of unitary decision-making in vital matters of foreign policy disclosed the pivotal position of the Namibian head of state and the possibility to bypass parliamentary approval of key decisions under the *Constitution*.[2921]

1237. The Ministry of Foreign Affairs was renamed to Ministry of International Relations and Cooperation in 2015. Since independence the size and scope of Namibia's foreign ministry as well as the capacity of its diplomatic missions have increased substantially.[2922] While soon after independence Namibia had seventeen embassies and high commissions, in early 2021 Namibia had thirty-four embassies and high commissions abroad.[2923] Windhoek hosts thirty-two embassies and high commissions, and in addition there are fourteen consulates and one other representation in Namibia.

1238. Basic principles and objectives with view to foreign policy have been outlined by the responsible Ministry in different policy papers including the 2004 White Paper on "Namibia's Foreign Policy and Diplomatic Management", the Strategic Action Plan 2013–2017 and the Strategic Plan 2017–2022.

III. International Integration

1239. From 14 September 1999 to 5 September 2000 Theo-Ben Gurirab, then Minister of Foreign Affairs, presided over the United Nations General Assembly's fifty-fourth session.[2924] In his function as a president of the General Assembly, Gurirab led the preparations for the Millennium Summit which took place at the headquarters of the United Nations. Sam Nujoma co-chaired the Millennium Summit as president of Namibia with the president of Finland Tarja Halonen.[2925]

1240. The commitment of Namibia to contribute to the promotion of peace on the regional as well as international level was already confirmed by President Sam Nujoma in the First Session of Parliament on 15 May 1990:[2926]

> Namibia, in foreign policy, would play a constructive role to reduce tensions in the conflict zones of the world and to promote international cooperation and dialogue.

2920. *Ibid.*
2921. Cf.: *ibid.:* 310.
2922. Brown et al. (2016): 1.
2923. *See*: Website of the Ministry of International Relations and Cooperation which lists all diplomatic missions: https://mirco.gov.na/namibian-missions (accessed 5 Apr. 2022).
2924. Website of the UN, Past Presidents; available at https://www.un.org/en/ga/president/54/ (accessed 5 Apr. 2022).
2925. Nujoma (2000).
2926. As quoted in du Pisani (2010a): 301.

1241. Namibia has participated in various peacekeeping missions across the world by contributing forces and other forms of assistance.[2927] Namibia was part of the United Nations Transitional Authority in Cambodia, participated in the Angola Verification Mission of the United Nations and the missions in Liberia (UNMIL) and Ethiopia and Eritrea (UNMEE). Namibia further provided military observers to Burundi, Ivory Coast, Kosovo, Sierra Leone, Sudan, and East-Timor.

1242. In a discussion paper by the Institute for Public Policy Research and the Namibia Media Trust it is criticized that in Namibia's foreign policy there would be "an obvious tension between being a 'friend to all' and identifying with oppressed peoples":[2928]

> There is a danger that expressions of global friendship will be meaningless unless Namibia takes clear positions on certain situations such as gross human rights violations. Keeping quiet in the name of friendship, whether such ties are historic or recent, is not really an option in 21st century diplomacy. Choosing not to take a stand can make situations worse and have the effect of rendering Namibia as irrelevant on the world stage. By the same token, referring to 'quiet diplomacy' when asked about crises in neighbouring countries – is not adequate.

Good examples confirming this point of view are Namibia's position regarding different UN Security Resolutions on North Korea which was strongly influenced by historical ties[2929] and its strong condemnation of the International Criminal Court because an alleged selective targeting of leaders on the African continent.[2930] More recently, the governments' silence on the crisis in Zimbabwe has been severely criticized as putting leadership solidarity over human rights violations.[2931] On the other hand, the Namibian government has clearly stated its support for the independence and self-determination of the Palestinian territories and the self-determination and decolonization of Western Sahara.[2932]

1243. Within Africa, the African Union (AU) is the highest organizational level, and Namibia has supported the strengthening of the AU in fulfilling its mandate.[2933]

2927. *See*: du Pisani (2014): 374; Egge (2014); Mushelenga (2014): 67.
2928. Brown et al. (2016): 4; *see also*: Bertelsmann Foundation (2020): 28.
2929. Brown et al. (2016): 4; Bertelsmann Foundation (2020): 28. *See also*: The Patriot of 17 Oct. 2017.
2930. This issue is discussed in detail in the special edition of the NLJ on the ICC (Vol. 09 – Issue 01, December 2017). Namibia's stance towards the ICC is, in particular, discussed by: Mushelenga (2017).
2931. *See*, *e.g.*: Office of the Leader of Official Opposition, Press Statement, PDM Condemns SWAPO's flagrant abuse of parliamentary democracy, 17 Sep. 2020; available at https://www.zimdaily.com/namibiapdp-speaks-out-on-zim-crisis/ (accessed April 2021).
2932. *See*: Declaration on the SADC Solidarity Conference with Western Sahara, done on 26th Mar. 2019, Pretoria, Republic of South Africa; "Namibia, South Africa Continue Provocative Actions Against Morocco"s Territorial Integrity", Morocco World News, February 2019; available at https://www.moroccoworldnews.com/2019/02/265929/namibia-south-africa-morocco-western-sahara/ (accessed April 2021). *See also*: Brown et al. (2016): 5.
2933. Gawanas (2014): 253ff.

IV. Crime Prevention on the International Level

1244. In addition to what has been referred to above, the field of crime prevention and securing consequences to criminal act as well the combatting of terrorism deserves special attention with respect to international cooperation. With respect to the first-mentioned aspect, the *Prevention of Organized Crime Act*[2934] and the *International Co-operation in Criminal Matters Act*[2935] must be quoted. The latter aims to facilitate the execution of sentences, the confiscation of assets obtained through criminal acts and the transfer of these assets.

1245. As regards terrorism, the *Prevention and Combating of Terrorist and Proliferation Activities Act* was enacted in 2014.[2936] Part 2 of the Act elaborates offences related to terrorism and determines penalties. Section 2(1) of the Act provides in general terms that

> a person who, in or outside Namibia, directly or indirectly engages in any terrorist activity commits the offence of terrorism and is liable to life imprisonment.

What consists of a terrorist activity is defined in the definition section of the Act. Terrorist activity means

> any act committed by a person with the intention of instilling terror and which is a violation of the criminal law of Namibia and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, or group of persons or which causes or may cause damage to public or private property, natural resources, the environment of cultural heritage and is calculated or intended to
> (i) intimidate, instill fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or to abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles,
> (ii) disrupt any public service, the delivery of any essential service to the public orc to create a public emergency;
> (iii) create general insurrection in a State; …

In addition to this terrorist activities are also acts committed in violation of rules in various international treaties stipulating special terrorism-related behaviour.[2937]

2934. Act 29 of 2004.
2935. Act 9 of 2000, as amended.
2936. Act 4 of 2014. The Act repealed Prevention and Combating of Terrorist Activities Act, 2012 (Act No. 12 of 2012) - *See also*: Regulation Relating on Implementation of Security Council Decisions: Prevention and Combating of Terrorist and Proliferation Activities, 2014, GN No. 183 of 2014.
2937. The Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 (United Nations, Treaty Series, Vol. 860, 105) and International Convention for the Suppression of Acts of Nuclear Terrorism of 2005 (United Nations, Treaty Series, Vol. 2445, 89) are just two examples.

1246. According to Part 3 of the Act, the responsible minister has to publish the lists of sanctions enacted by the Security Council of the United Nations or relevant Sanction Committees in the Government Gazette. The minister is bound to involve the Security Commission established under Article 114 of the *Constitution* in executing certain tasks under the Act.

1247. The Act (as well as the way it was handled in parliament) received critical comments. Part of the comments was that the Act contains the risk that

> legitimate activity that normally take place in a democracy such as peaceful protests, labour strikes, freedom of expression on social media, and journalism, in particular investigative journalism …

be affected by measures under the Act.[2938] However, so far no case of interfering into the "normality of democracy" has been reported.

§4. Regional Cooperation

1248. Regional cooperation is of utmost importance for Namibia, given its economic needs. Apart from being in a monetary union with South Africa, Lesoto and Eswatini, Namibia is member of the Southern African Customs Union (SACU) and of the Southern African Development Community (SADC).

I. SADC

1249. SADC is an organization of sixteen Southern African states established in 1992.[2939] Its objectives are to promote sustainable and equitable economic growth and socio-economic development through efficient productive systems, deeper cooperation and integration, good governance, and durable peace and security.[2940] Relevant legally binding documents include the *SADC Treaty* and its protocols.[2941]

2938. Hopwood (2015): 10.

2939. Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia and Zimbabwe.

2940. Cf.: Article 5 of the SADC Treaty (signed 17 Aug. 1992 in Windhoek). The treaty is available at: http://www.sadc.int/documents-publications/show/865 (accessed 1 Apr. 2021).

2941. *See*: Article 22 of the SADC Treaty. Protocols are to be, if necessary, concluded in each area of cooperation and spell out the objectives and scope of cooperation and integration as well as institutional mechanisms required to achieve those objectives. The following protocols have been concluded: Protocol Against Corruption 2001, Protocol on Combating Illicit Drug Trafficking 1996, Protocol on the Control of firearms Ammunition and other Related Materials 2001, Protocol on Culture, Information and Sport 2001, Protocol on Education and Training 1997, Protocol on Energy 1996, Protocol on Extradition 2002, Protocol on the Facilitation and Movement of Persons 2005, Protocol on Finance and Investment 2006, Protocol on Fisheries 2001, Protocol on Forestry 2002, Protocol on Gender and Development 2008, Protocol on Health 1999, Protocol to the Treaty Establishing SADC on Immunities and Privileges 1992, Protocol on Legal Affairs 2000,

1250. The membership of Namibia and its role in SADC reflects the constitutional obligation to promote international cooperation and peace. The objectives of SADC include regional integration in order to achieve development and economic growth, alleviate poverty, improve living standards and quality, and support socially disadvantaged. Its Member States envisage harmonization of economic, political, social values and complementarity of national and regional strategies and programmes. Another objective is the promotion and defence of peace and security. Furthermore, the promotion and maximization of productive employment and utilization or resources in the region and the achievement of sustainable utilization of resources and effective protection of the environment are stated as objectives of SADC. Last but not least, SADC aims at strengthening and consolidating the historical, social and cultural affinities and links among the peoples of the region.[2942]

1251. President Geingob became chairperson of SADC on 17 August 2018 during the thirty-eighth SADC Summit of Heads of States and Government that was held in Windhoek. As chairperson from 2018 to 2019, President Geingob was active in regional and continental meetings, discussing among other things the conflict in the Democratic Republic of Congo.[2943]

1252. To ensure the enforcement of SADC law, the *SADC Treaty* provides for the constitution of a tribunal with the mandate to[2944]

> ensure adherence to and proper interpretation of the SADC Treaty and its subsidiary instruments and to adjudicate upon such disputes as may be referred to it …

and to

> give advisory opinions on such matters as the SADC Summit or the SADC Council may refer to it.

1253. The powers, functions, procedures, and other related matters are to be prescribed in a protocol.[2945] According to Article 15 of the *Protocol on Tribunal and*

Protocol on Mutual Legal Assistance in Criminal Matters 2002, Protocol on Mining 1997, Protocol on Politics, Defence and Security Cooperation 2001, Protocol on Science, Technology and Innovation 2008, Protocol on Shared Watercourses 2000, Protocol on the Development of Tourism 1998, Protocol on Trade 1996, Protocol on Trade in Services 2012, Protocol on Transport, Communications and Meteorology 1996, Protocol on Tribunal and Rules Thereof 2000, Protocol on Wildlife Conservation and Law Enforcement 1999, Revised Protocol on Shared Watercourses 2000.

2942. Article 5(1) of the SADC Treaty, 1992. – The SADC Treaty established the Summit of Head of State or Government, the Council of Minister, Commissions, the Standing Committee of Officials, the Secretariat and the Tribunal. (Article 9(1)) The SADC Parliamentary Forum was created under Article 9(2) of the Treaty.

2943. *See*, *e.g.*: Geingob (2018b). *See also*: Bertelsmann Foundation (2020): 29.

2944. Article 16(1) and (4) of the SADC Treaty.

2945. Article 16(3) of the SADC Treaty.

Rules of Procedure, the tribunal was conferred the exclusive jurisdiction over all disputes between Member States, and also between natural or legal persons and Member States.

1254. The SADC Tribunal could, as supranational body, play an important role in enforcing international law and in complementing the jurisdiction of national courts. The tribunal had though been only operational from 2005 to 2010 when the SADC Heads of State and Government ordered a review of the tribunal's role, functions and terms of reference.[2946] This followed a complaint by the Government of Zimbabwe that the tribunal was not properly constituted as its protocol had not been ratified.[2947] Although the SADC Committee of Ministers of Justice/Attorneys General dismissed Zimbabwe's contention that the tribunal was not legally constituted and recommended to reappoint or replace the members of the tribunal, the SADC heads of state and government decided to upheld an moratorium on the tribunal until the *Protocol on the Tribunal* had been reviewed and approved.[2948] The SADC summit of 2014 adopted a new *Protocol on the Tribunal*, which has not come into force yet.[2949] Even if the *protocol* was signed and ratified by the necessary majority, the practical effect would be minimal as its nature as individual rights mechanism has been discarded. According to Article 33 of the new *protocol*, the tribunals' jurisdiction includes disputes between Member States only.[2950] The disbanding of the tribunal shows not only that human rights have remained a sensitive and neglected issue but also the fear of losing sovereignty by accepting that the decisions of regional courts could take priority over national courts.[2951]

2946. Communiqué of the 30th Jubilee Summit of SADC Heads of State And Government, Windhoek, 17 Aug. 2010.
2947. The tribunal had found in *Mike Campbell (Pty) Ltd. v. Republic of Zimbabwe*, SADC Tribunal, Case No. 2/2007 (28 Nov. 2008) that the Republic or Zimbabwe had violated the SADC treaty and ruled in favour of the farmers who had claimed that the country's land reform programme was discriminatory and that they had been denied justice. *See* on this case above in the chapter on land.
2948. *See*: Communiqué of the Extraordinary Summit of SADC Heads of State and Government, Windhoek, 20 May 2011. *See also*: Mbuende (2014): 243. Nevertheless, there is still hope for a return to the SADC Tribunal's original mandate as there have been two decisions by national courts in the region (South Africa and Tanzania) declaring that the signing of the protocol that suspended the tribunal was unlawful: *Law Society of South Africa and Others v. President of the Republic of South Africa* 2019 (3) SA 30 (CC); *Tanganyika Law Society v. Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and the Attorney General of the United Republic of Tanzania*, High Court of Tanzania judgement, Case No. 23 of 2014 - unreported. Both challenges were initiated by the national law societies and followed a decision by the SADC Lawyers' Association to urge its member bars across the region to challenge the legitimacy of their respective governments' assent to the disbanding of the tribunal. *See also*: Erasmus (2019) and Rickard (2019).
2949. Cf.: Asmelash (2020); Erasmus (2015). The protocol has been signed by nine out of fifteen Member States and the enforcement is dependent on the ratification by two-thirds of the Member States who have signed the protocol. *See*: Articles 52 and 53 of the Protocol on Tribunal in Southern African Development Community.
2950. This issue is discussed in detail in: Zaire; Schneider (2013).
2951. Swart, Mia: A house of justice for Africa: Resurrecting the SADC Tribunal, 2 Apr. 2018, Brookings: https://www.brookings.edu/blog/africa-in-focus/2018/04/02/a-house-of-justice-for-africa-resurrecting-the-sadc-tribunal/ (accessed 18 Jul. 2022).

II. SACU

1255. Namibia is a member of the Southern African Custom Union (SACU), the oldest customs union in the world.[2952] After independence, Namibia joined SACU as its fifth member. The other members of SACU are South Africa, Botswana, Lesotho, and Swaziland. All SACU members, except of Botswana, are part of the Common Monetary Union (CMU). While Namibia, Lesotho, and Swaziland issue their own currencies, the South African Rand is legal tender in the three states.

1256. The SACU states have signed trade agreements, inter alia, with Mercosur,[2953] the European Free Trade Association (EFTA),[2954] and the European Union.[2955] In 2018, all African Union nations except Eritrea founded the African Continental Free Trade Area (AfCFTA).[2956] Trade under the agreement commenced as of 1 January 2021.[2957] The agreement's objective is the creation of a single market in Africa. It requires its Member States to remove tariffs from 90% of goods, allowing free access to commodities, goods, and services across the continent.[2958] As a member of the African, Caribbean and Pacific Group of States (ACP), Namibia is party to the Cotonou Agreement[2959] which has been adopted in 2000 and is soon to be replaced by the post-Cotonou Agreement.[2960] Namibia qualifies for benefits under the (US) African Growth and Opportunity Act (AGOA),[2961] a unilateral and

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2952. Erasmus (2014): 213. *See also*: WTO Trade Policy Review: Southern African Customs Union, 'Continued economic reforms would attract more foreign investment', Press Release (PRESS/TPRB/213), 25 Apr. 2003, available at https://www.wto.org/English/tratop_e/tpr_e/tp213_e.htm (accessed on 8 Jul. 2015).
2953. Available at: https://www.sacu.int/docs/agreements/2016/mercosur-and-sacu-trade-agreement.pdf (accessed 18 Jul. 2022). The agreement came into force on 1 Apr. 2016. The agreement can be downloaded on the SACU Website, Agreements, available at: https://www.sacu.int/list.php?type=Agreements (accessed 18 Jul. 2022).
2954. The Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation are members of the European Free Trade Association. *See*: Free Trade Agreement between the EFTA States and the SACU States. The agreement came into force on 01 May 2018. The agreement can be downloaded on the SACU Website (*ibid*.).
2955. *See*: Economic Partnership Agreement between the SADC EPA States, of one part, and the European Union and its Members States, of the other Part, Proclamation No. 2 of 2017.
2956. *See*: Website of AfCFTA, available at: https://afcfta.au.int/en/about (accessed 5 Apr. 2022).
2957. 'Africa's free trade agreement: great expectations, tough questions', Institute for Security Studies (Africa), available at: https://issafrica.org/iss-today/africas-free-trade-agreement-great-expectations-tough-questions (accessed April 2021); 'The African Continental Free Trade Agreement (AfCTA): what has South Africa actually offered Africa?', available at: https://www.tralac.org/publications/article/15221-the-african-continental-free-trade-agreement-afcfta-what-has-south-africa-actually-offered-africa.html (accessed Apr. 2021).
2958. *See*: Website of AfCFTA, available at: https://afcfta.au.int/en/about (accessed 5 Apr. 2022).
2959. The agreement can be downloaded at the following website: https://www.consilium.europa.eu/en/policies/cotonou-agreement/#:~:text=%20Cotonou%20Agreement%20%201%20A%20new%20EU-OACPS,the%20supreme%20institution%20of%20the%20ACP-EU...%20More%20 (accessed 5 Apr. 2022).
2960. *Ibid.*
2961. Title I, Trade and Development Act of 2000; P.L. 106 – 200.

non-reciprocal programme that provides African countries with duty-free and quota-free access to United States markets for certain products that originate from eligible beneficiary Sub-Saharan African (SSA) countries.[2962]

§5. Principles of Economic Order and the Encouragement of Foreign Investments

1257. Article 98 of the *Constitution* lays down the principles of the economic order of Namibia. It is classified as a mixed economy balancing the objective of securing economic growth and prosperity and the life of human dignity for all Namibians. Sub-Article b recognizes different forms of ownership, including public, private, joint public-private, cooperative, co-ownership, and small-scale family.

1258. The encouragement of foreign investments – prescribed by Article 99 of the *Constitution* – is part of the principles of state policies. Foreign investment is regarded as critical for the stimulation of Namibia's economy.[2963] Namibia has, moreover, signed several bilateral trade agreements.[2964] Statutory laws of specific relevance in this sphere are the *Foreign Investments Act*[2965] and the *Economic Processing Zones Act*;[2966] the latter providing for the creation of EPZs to serve as a vehicle for industrial investments and ensure the increase of manufacturing exports.[2967]

1259. The key piece of legislation enacted in this regard is the *Foreign Investment Act*[2968] containing provisions to promote foreign direct investment. The Namibia Investment Centre which has been established under section 2 of the Act serves as Namibia's official investment promotion and facilitation office. The *Foreign Investment Act* is currently under review with the view to balancing the promotion of domestic and the attraction for foreign investors.[2969] In August 2016, Namibia promulgated and gazetted the *Namibia Investment Promotion Act*.[2970] The enforcement of the said Act was however halted due to a number of legal drafting issues. After the revision of the act, the draft *Namibia Investment Promotion and Facilitation Bill* was tabled in parliament in November 2021 but then temporarily withdrawn by the Minister of Industrialisation and Trade in the National Assembly

2962. *See*: Website of the Namibian Trade Directory, available at: http://namibiatradedirectory.com/ (accessed 5 Apr. 2022).
2963. Shangala (2014): 326.
2964. Namibia has bilateral agreements with Angola, Tunisia, Zimbabwe, Cuba, Ghana, India, Malaysia, and Russia (https://www.trade.gov/country-commercial-guides/namibia-trade-agreements#:~:text=Namibia%20also%20has%20bilateral%20agreements%20with%20Angola%2C%20Tunisia%2C,contact%3A%20The%20Ministry%20of%20Industrialization%20and%20Trade%20%28MTI%29 – accessed 18 Jul. 2022).
2965. Act No. 27 of 1990.
2966. Act No. 9 of 1995.
2967. Section 3 of the Economic Processing Zones Act.
2968. Act No. 27 of 1990.
2969. The Villager of 29 Sep. 2014.
2970. Act No. 9 of 2016.

after a series of articles notably in Namibian newspapers, which "castigated the draft Bill for the perceived 'Super minister' powers it accords" and expected to be re-tabled in 2022.[2971]

2971. New Era of 3 Dec. 2021 and of 18 Jan. 2022.

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The cases are, where possible, quoted from the published law reports. Many other judgements of the Namibian and South African courts are only electronically accessible.[2972] *These judgements are quoted as unreported and identified with the case numbers given to them by the respective administration. While the following list also indicates when several parties were parties to the case, "and Another", "Others" etc. are omitted in the quotations in the text. As this study is on Namibia and its law, the references to judgements of Namibian courts do not mention Namibia as the name of the country to which the court belongs. Country names are only indicated with respect to non-Namibian courts.*

2972. *See* on this: para. 3 in Chapter 6 of Part II.

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2973. *See* on this Chapter 6, Part II.

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