

The Justice Sector & the Rule of Law in Namibia



The Criminal Justice System

John Nakuta, Assisted by Vincia Cloete

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Background to the Series

This publication forms part of the series *The Justice Sector and the Rule of Law in Namibia*, which is jointly published by the Namibia Institute for Democracy (NID) and the Human Rights and Documentation Centre (HRDC), which is based in the Faculty of Law at the University of Namibia (UNAM). The series comprises three publications: *Framework, Selected Legal Aspects and Cases; Management, Personnel and Access*; and *The Criminal Justice System*. It has been published within the scope of a corporate agreement between the NID and the Embassy of Finland, with the overall aim of strengthening the institutional, advocacy and anti-corruption capacity of civil society and selected government institutions.

The series does not claim to be either comprehensive or without some rough edges; after all, the publications are the products of capacity building. Divergent views are reflected with the aim of providing the reader with an overview of the nexus where the rule of law intersects with the administration of justice and with the protection and promotion of human rights in general, and in particular of the rights of those most vulnerable within our society, such as women and children. The publication is intended to be useful for lawyers and non-lawyers alike.

Long-term, sustainable economic and social development is dependent on democratic governance and the rule of law. A framework for the rule of law is essential for the effective regulation of the interactions and co-existence of citizens within a democracy. This series of publications comes at an important time for Namibia, which celebrated 20 years of independent nationhood in 2010. It is intended to describe the institutional arrangements in a constitutional democracy and to reflect on the quality of democracy in Namibia.

The Open Society Initiative for Southern Africa (OSISA) conceptualised, initiated and supported this research project. The NID was assigned by the Africa Governance Monitoring and Advocacy Project, or AFRIMAP, to conduct the research in partnership with the HRDC.

Acronyms and Initialisms

ACHPR	African Charter on Human and People's Rights
ICCPR	International Covenant on Civil and Political Rights
LAC	Legal Assistance Centre
NAMPOL	Namibian Police Force
NPCDU	Namibian Police Complaints and Discipline Unit
NPS	Namibian Prison Service
SESORB	Security Enterprises and Security Officer Regulation Board
SFF	Special Field Force
UDHR	Universal Declaration of Human Rights
WHO	World Health Organisation

List of Acts and Bills

Anti-Corruption Act, No. 8 of 2003
Combating of Domestic Violence Act, No. 4 of 2003
Combating of Rape Act, No. 8 of 2000
Companies Act, No. 61 of 1963
Companies Amendment Act, No. 9 of 2007
Criminal Procedure Act, No. 51 of 1971, as amended by Act No. 25 of 2004
Electoral Act, No. 24 of 1992
Municipal Police Services Regulations, Regulations No. 2833 of 2002
Police Act, No. 19 of 1990
Prevention of Organised Crime Act, No. 29 of 2004
Public Service Act, No. 13 of 1995
Road Traffic Transport Act, Act 22 of 1999
Security Enterprises and Security Officers Act, No. 19 of 1998
State Finance Act, No. 31 of 1991

Community Service Order Bill
Corrections and Conditional Release Bill

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Introduction

A criminal justice system is a set of legal and social institutions for enforcing the criminal law in accordance with a defined set of procedural rules and limitations.¹ Criminal justice systems include several major subsystems, composed of one or more public institutions and their staffs, namely police and other law enforcement agencies; prosecuting authorities; the lower and superior courts, departments of correctional services, etc.² With Namibia being a unitary state, the criminal justice system in the country comprises a composite whole. The legal and social institutions for enforcing the criminal law thus apply uniform rules and procedures in all thirteen political regions of the country in executing their respective mandates.

Significant progress has been made since 1990 in reforming the criminal justice system of Namibia. Before Namibia attained its independence, the police, the justice system and correctional services were the most distrusted of institutions, because they were seen as instruments of oppression. Since independence, the level of acceptance and trust in these institutions has greatly improved. Now the main complaints levelled against these institutions relates to their quality of service delivery. It is safe to state that the Namibian criminal justice system has not as yet produced resources of authority that are respected by society at large.³ The generally held view amongst the public is that the criminal system has failed to suppress crime. Crime has been constantly increasing since 1990, due principally to the level of poverty in Namibia and the fact that the criminal justice system is significantly understaffed. In addition, the training of criminal justice professionals lacks depth and international benchmarking. The Inspector General of the Namibian Police Force, Sebastian Ndeitunga, and the Prosecutor General, Martha Imalwa, seem to acknowledge that the Namibian criminal justice system is dysfunctional and in a state of crisis. In 2005, Inspector General Ndeitunga told the Parliamentary Standing Committee on Constitutional and Legal Affairs, “Ideally, a police officer would have between 20 and 30 cases

1 Criminal Justice System – Structural and Theoretical Components of Criminal Justice Systems, The Systems in Operation, the Importance of Viewing Criminal Justice as a System, retrievable at <http://law.jrank.org/pages/858/Criminal-Justice-System.html>

2 Ibid.

3 Odendaal, A. 2004.

to investigate, but in reality they each had between 300 and 400 cases to investigate.⁴ Regrettably, some five years later, the situation has not improved much. Staff shortages, tardy police investigations and insufficient funds to employ more staff are all still cited as the reasons for the wheels of justice turning ever so slowly in Namibia. The Prosecutor General, for her part, informed the committee that at the time, only 77 of the required 103 prosecution posts were filled, and that her office employed only 54 magistrates to hear the approximately 47 000 cases which had passed through the Magistrates' Courts since the beginning of the that year.⁵ Back then, the Prosecutor-General cautioned that "until we have an effective criminal justice system, we can forget about talking about democracy, the rule of law, investment and peace and stability."⁶ The criminal justice system, as she rightfully pointed out, "is the core to all of this." It is respectfully submitted that this caution should not be taken lightly!

The main objective of this report is to make an honest and objective assessment of the criminal justice system of Namibia. The Namibian Constitution, other enabling legislation and international instruments and standards were used as benchmarks in making such an assessment. The key findings of the assessment are rather gloomy. The Namibian criminal justice system is underperforming. Crime remains the single most prominent social concern. Because of staff shortages, the prosecution service is faced with a large backlog of cases, resulting in long pre-trial detentions. The legal guarantees of a fair trial as enshrined in the Namibian Constitution have to all intents and purposes remained paper rights. Most criminal defendants are denied their right to legal representation because the level of poverty means that that they cannot afford private lawyers, and the state-provided legal aid has limited availability. Prison overcrowding and institutional violence are amongst the most urgent challenges facing criminal justice in Namibia as the prison population has constantly increased and the conditions of detention have deteriorated.

4 Lindsay Dentlinger, "The criminal justice system is overstretched", *The Namibian*, 18 November 2005.

5 *Ibid.*

6 *Ibid.*

The work in the report captures six broad themes: “Protection from crime”; “Policing”; “Fair trial”; “Appropriate remedies and sentencing”; “Amnesties and pardons”; and “Prisons”. Each theme addresses several auxiliary issues. Recommendations have been woven into the sub-themes where applicable.

Protection from Crime

Incidence of Crime

Section 13 of the Police Act⁷ states that it shall be the duty of the Namibian Police Force to preserve the internal security of Namibia, maintain law and order, investigate alleged offences and prevent crime. In furtherance of this mandate, the Namibian Police Force established the Criminal Investigations Directorate to conduct all investigations, and in particular criminal investigations.⁸ The Criminal Investigations Directorate comprises various sub-divisions, including the Commercial Crime Investigation Unit, the Drug Law Enforcement Unit, the International Police Unit, the National Central Bureau, the Motor Vehicle Theft Investigation Unit, the Namibian Police Criminal Records Centre, the Namibian Forensic Science Institute, the Protected Resources Unit, the Scenes of Crime Unit, the Serious Crime Investigation Unit, the Women and Child Protection Unit, and the Crime Statistics Unit.⁹ The Crime Statistics Unit is in the main responsible for collecting and collating crime figures in Namibia. Unfortunately, only limited data are available from the Namibian criminal justice system. Statistical data on crime made available by the Namibian Police Force, the courts and the prison services remain unsophisticated, being mostly in tabulated format, and not scientifically analysed or evaluated.¹⁰ These statistics are primarily used to inform the police's own strategic and operational planning.

To make matters worse, the Namibian Police Force recently announced the discontinuance of their daily crime bulletin as part of their new communications strategy. At a media conference held in January 2010, Deputy Inspector General Vilio Hifindaka announced that the Namibian Police Force would in future only make “selective data” available to the public through the media. According to the Deputy Inspector General, only “authorised information” on “wanted and missing persons, crime prevention education on emerging crimes, tips on how to prevent crimes in specific towns or areas and

7 Act No. 19 of 1990.

8 Namibia Police Force, Directorate and Divisions, retrievable at <http://www.nampol.gov.na/Pages/DirectoratesandDivisions.aspx>

9 Ibid.

10 Criminal Justice Projects (2010), Polytechnic of Namibia, retrievable at [http://www.polytechnic.edu.na/academics/schools/comm_legal_secure/legal/docs/research/CJS%20Programme%20\(Team%20Projects\).pdf](http://www.polytechnic.edu.na/academics/schools/comm_legal_secure/legal/docs/research/CJS%20Programme%20(Team%20Projects).pdf).

how to access various police services”¹¹ would in future be made available to the public. This measure, according to the Deputy Inspector General, was taken to counter the creation of a climate of guilt around persons arrested or suspected of having committed a crime.¹² However, the rationale of this decision is, to say the least, suspect and baffling. Needless to say, crime data provide an overview of criminal activity in any given country. A statistical picture of crime, if used properly, can serve as a powerful tool for creating social policy. Decision makers of many countries at all levels, including legislators, other elected officials and administrators throughout the criminal justice system, rely on crime data to analyse and evaluate existing programmes, and to fashion and design crime control initiatives, new laws and crime control legislation.¹³ This certainly holds true for Namibia, which is currently experiencing an upsurge in crime, and violent crime in particular.

There seems to be a disconnect between the number of reported crimes and the popular view of a runaway crime rate in Namibia. For instance, crime statistics for the reporting year 2007/08 as released by the Ministry of Safety and Security in August 2009 indicated that Namibia experienced only a marginal increase in its overall crime rate during this period. In 2007, a total of 87 675 offences were reported to the police, compared to 92 658 in 2008, an increase of six per cent. This is in stark contrast to the general impression that can be gained from daily and weekly newspaper headlines, articles, commentaries, opinions pieces, letters and editorials. Judging from these sources, armed robberies on businesses countrywide, housebreakings, murder, violent farm attacks, rape, child molestation, corruption and other violent crimes had become the order of the day. The discrepancy between the official crime rate and perceived reality must be addressed. There is a need to establish the extent of underreporting of crime in the country. Research should be undertaken to determine what effect issues such as fear of reprisals by offenders, great distances to police stations, phobias, and delays in the criminal justice system have on the reporting of crime.

11 Beukes, J. “Police clamp down on crime news”, *The Namibian*, 4 November 2009, retrievable at [http://www.namibian.com.na/index.php?id=28&tx_ttnews\[tt_news\]=61408&no_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=61408&no_cache=1)

12 Ibid.

13 *Supra*, note 3.

Arrest, Prosecution and Punishment

There are no readily available data or statistics on the percentage of reported crimes that are actually prosecuted or the percentage of convictions in relation to prosecutions. Most of the data, as mentioned earlier, are made available in tabulated format and are not scientifically analysed or evaluated. Bureaucratic red tape further influences the availability of statistical data. In compiling this work, the researchers found that even to obtain a copy of the police's annual report, one needs to write a letter to the Inspector General requesting the same. This situation is most certainly at odds with the right to access to information. This right, although not directly enshrined in the Namibian Constitution, is of relevance and enforceable in Namibia through a purposive reading of Article 144. Namibia is a State Party to the African Charter on Human and People's Rights (ACHPR), the International Covenant on Civil and Political Rights (ICCPR), and the Universal Declaration of Human Rights (UDHR), all of which provide for the right to access to information. For instance, Article 9 of the ACHPR provides that "every individual shall have the right to receive information". Article 19(2) of the ICCPR and Article 19 of the UDHR similarly guarantee the right to access to information held by the state. Article 144 of the Namibian Constitution cures the deficiency relating to the right to access to information in Namibia by stating that the general rules of public international law and international agreements binding upon Namibia shall form part of the law of Namibia. Disclosure of information can rightfully be restricted in instances where such a disclosure would be contrary to the public interest. However, the current attitude regarding all criminal justice information as privileged is glaringly inconsistent with Namibia's international legal obligations. It is most certainly also incompatible with the obligation imposed by Article 18 of the Namibian Constitution, which places a positive duty on all organs of the state to act "reasonably"¹⁴ in all circumstances when performing their administrative duties and functions. The public, as alluded to earlier, have a right to have easy access to criminal justice information held by the state. The struggle the researchers had to endure to obtain relevant criminal justice information to compile this report highlights the need for the Namibian Parliament to promulgate legislation on

14 See Article 18 of the Namibian Constitution on the right to administrative justice.

access to information. Some of Namibia's neighbours, notably South Africa¹⁵ and Zimbabwe,¹⁶ have long passed such legislation, and Namibia would be well advised to follow suit.

During 2009, 99 128 crimes were reported to the Namibian Police Force. In addition, some 137 015 others were brought forward from previous years. The Namibian Police Force thus dealt with 236 143 cases in 2009; only 90 597 of these cases could be cleared.¹⁷ Of these, 94 210 (including those brought forward from previous years) were prosecuted in magistrate courts, with 13 351 resulting in convictions. This means that prosecutions outnumbered arrests (because of cases brought forward), but only 14 per cent of prosecutions resulted in convictions.

These figures suggest that most arrests are based on evidence that is insufficient to justify prosecution, or that there is a large backlog in prosecutions. Judge President Petrus Damaseb recently seemed to confirm the latter, when during a media conference he expressed the opinion that “the system for justice delivery remains congenitally slow and woefully expensive”. According to him, the situation is what it is “because the procedures ... [used] to deliver justice have not kept pace with change.”¹⁸ The net effect of this can be witnessed in “case backlogs”, which inevitably feed the “generally held belief amongst the public that justice is not speedily dispensed in Namibia.”¹⁹

15 See the Promotion of Access to Information Act (No. 2 of 2000) of South Africa, retrievable at http://www.saha.org.za/interests_and_links/access_to_information.htm.

16 See the Access to Information and Protection of Privacy Act of 2002 of Zimbabwe.

17 2010/11 Motivational Budget Vote 6: Namibian Police Force, retrievable at <http://www.scribd.com/doc/31248883/Motivational-Budget-vote-6-Namibian-Police-Force>.

18 Damaseb, P. Press Release, Report: “Promoting access to justice in the High Court of Namibia; First report, the case for judicial case management”, September 16, 2010, Windhoek, p.2.

19 Ibid, p.3.

Seen from a different angle, the low conviction rate may also be seen to be indicative of a weak and ineffectual corps of state prosecutors having to deal with formidable defence counsels. Further research is required to determine the precise reasons why most people who are arrested are not prosecuted, and why the conviction rate amongst those that are prosecuted is so high. Such research would inform policy aimed at, amongst other things, improving the quality of criminal investigations and evaluating the quality of the defence in criminal prosecutions. In 2009, regional courts dealt with 3 071 cases, of which 2 229 were not finalised; 550 accused persons were convicted and 98 were acquitted (the remaining cases resulted in either withdrawals or discharges).

The length of time it takes to prosecute suspected criminals continues to raise eyebrows and irk many people who have fallen victim to crime in Namibia. For instance, commercial farmers, one section of the population specifically targeted by criminals, have recently voiced their concerns and frustrations concerning the long time it takes to arrest, prosecute and convict alleged criminals. In this regard, the Otavi Farmers' Association expressed their displeasure with the long time it took to resolve crimes committed against its members, as well as the low conviction rate achieved in these cases. The Association reported that five of its members had been murdered since 2001. During the past nine years (2001 – 2010) only two of the alleged criminals were convicted, and only two cases were finalised, one of which took over five years.

Policing

Legal Framework

The primary responsibility for public safety and public order is vested in the Namibian Police Force, which was established by the Constitution and is regulated by the Police Act. The Constitution provides the basis and foundational values for police work in Namibia and propagates a rights-based approach to policing. To this end, the Constitution prohibits torture and other cruel, inhuman or degrading treatment or punishment,²⁰ as well as arbitrary arrest and detention. It also provides that arrested persons must be brought before a court of law within 48 hours²¹ and affords individuals whose rights have been violated the opportunity to seek redress.²² The Constitution further establishes a number of police accountability mechanisms, including the Security Commission, the Ombudsman, the Prosecutor-General, and the Auditor-General.

The Police Act is the single most important piece of legislation governing the Police Force. The Act deals with various aspects related to policing, including the functions of the police, the structure and conditions of service, misconduct, complaints and offences. The Namibian Police Force is headed by the Inspector-General, who is appointed by the President and is answerable to the Minister of Safety and Security. Other legislation related to policing includes the Criminal Procedure Act,²³ The Anti-Corruption Act,²⁴ the Security Enterprises and Security Officers Act,²⁵ the Road Traffic Transport Act,²⁶ the Prevention of Organised Crime Act²⁷ and the Municipal Police Services Regulations.²⁸

The Namibian Police Force's Crime Investigation Division deals with crime administration and also has a number of specialised units, including the Drug Law Enforcement Unit; the Crime Information Unit; the Commercial Crime Investigation Unit; the Serious Crime Investigation Unit;

20 Article 8(2)(b).

21 Article 11.

22 Article 25.

23 Act No. 51 of 1977, as amended by Act 25 of 2004.

24 Act No. 8 of 2003.

25 Act No. 19 of 1998.

26 Act 22 of 1999.

27 Act No. 29 of 2004.

28 Regulations No. 2833 of 2002.

the Women and Child Protection Unit; and the Motor Vehicle Theft Unit. In terms of the Police Act, read together with the Criminal Procedure Act, the police can employ a number of investigative techniques to detect, investigate or uncover the commission of a crime, such as undercover operations, controlled delivery, use of informers, electronic surveillance, and interception and monitoring of telecommunications. They also have the power to search for and seize property suspected of being used in the commission of a crime.

Qualification, Remuneration and Training

The Police Force has approximately 12 000 men and women serving in the various units mentioned above. The entry-level qualification for the Police Force is rather low: applicants are required to have passed at least Grade 10. Applicants are further required to be fluent in English, be of good character and be Namibian citizens. The applicant may also not have a criminal record. These requirements have been relaxed for members of the Special Field Force (SFF), a Namibian paramilitary police unit created in 1995. The SFF is primarily made up of ex-combatants from the former People's Liberation Army of Namibia (PLAN). It was created as one of the employment strategies of the government in reaction to sustained public demonstrations by the demobilised ex-combatants. The primary responsibilities of the SFF include crime prevention, law and order, specifically the suppression of illegal civil disobedience, and border protection. The SFF is involved in protecting all Namibia's borders, and also with general crime prevention. A Special Reserve Field Force mostly concentrates on public order, strikes and special operations, though its members are also involved in general crime prevention. The general view held by members of the public is that the SFF are the less educated and more brutal wing of the Namibian Police Force. They have been implicated in the intimidation,

reported beating and torture, and even murder of civilians. This was especially the case during the unsuccessful secessionist uprising in Caprivi Region in 1998 – 1999.

All applicants meeting the requirements noted above are thereafter registered to sit for various tests, including aptitude tests, interviews, physical tests and medical tests. Applicants who are found to be physically fit and are selected are then sent on a basic police training course, which covers competencies in basic policing, crime investigation, drug law enforcement and stock theft investigation. Human rights training, it should be noted, does not form part of the official police training curriculum. Human rights training is provided on an ad hoc basis by institutions such as the Law Faculty of the University of Namibia and NGOs such as the Legal Assistance Centre (LAC).

Staffing and resources for the Namibian Police have always been a national concern. For instance, in 2006 Member of Parliament Barkias Namwandi informed the National Council that police officers in Hardap Region have to conduct their work on foot because of a shortage of vehicles and fuel. Similarly, in Karas Region, which has a population of 69 329 people and covers an area of 161 215 km², there are only 342 police officers.²⁹ It is safe to state that the situation in Karas Region and Hardap Region are typical of those in all thirteen regions.

The terms and conditions of service of members of the Police Force are the prerogative of the Inspector-General, who must consult with the Service Commission in this regard. Any improvements arising from such consultations are subject to the approval of the Treasury.³⁰ Salary levels for police rank and file officers are generally low.³¹ Benefits payable to members of the police force, like all others civil servants, include pensions, medical aid, social security and a housing subsidy or allowance. Inadequate remuneration is generally cited as the main reason for resignations. For instance, many police

29 Shigwedha, A. "MPs want more resources allocated to Police", *The Namibian*, 17 May 2006, retrievable at [http://www.namibian.com.na/index.php?id=28&tx_ttnews\[tt_news\]=61408&no_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=61408&no_cache=1).

30 See Section 25(2) of the Police Act.

31 Several attempts to get copies of the official salary scales for members of the Police Force proved futile.

officers have resigned to take up employment with the Windhoek City Police, the Anti- Corruption Commission and private security firms, amongst others.

No collective bargaining currently occurs within the Namibian Police Force structures. This is so because no trade union is currently organising amongst its members. There seems to be a general misunderstanding that police personnel are not allowed to belong to a trade union. There is, however, no legal basis for such a view under current legal provisions. The Namibian Constitution unequivocally guarantees everyone the right to belong to or form a trade union.³² This right can only be limited or restricted in terms of a law of general application.³³ In the absence of any such law, the practice of not allowing trade unions in the Police Force would thus be unconstitutional. Trade unions are best placed to bargain for better terms and conditions for their members. Many countries allow their police force members to belong to trade unions, although prohibitions on strikes and lock-outs within the police service may be in place. Namibia would be well advised to follow best practices in this regard.

Municipal Police Agencies

Municipal police agencies are a relatively recent phenomenon in Namibia. The mandate of these agencies includes crime prevention, traffic control and by-law enforcement. Thus far, such agencies have been established in Windhoek and Walvis Bay. The Windhoek City Police, in particular, have been accused of being trigger-happy and overzealous in their attempts to combat crime. For instance, in 2006 the LAC instituted a claim for damages of N\$1 million against the Windhoek City Police on behalf of a certain Hofeni Shooya after he was shot by the City Police. Mr. Shooya's leg had to be amputated as a result of the shooting. The incident happened while he was job seeking, and was caught in the crossfire when the City Police were chasing a suspect.³⁴ The City Police, and indeed all law enforcement agencies,

32 See article 21... of the Namibian Constitution.

33 See article 22 of the Namibian Constitution.

34 Shoot to kill: City Police accused of reckless gun use, retrievable at <http://www.lac.org.na/news/inthenews/arcive/2008/news-200808.html>, accessed on January 13, 2010

need to bear in mind that the Namibian Constitution places a high premium on human life. The right to life, in terms of Article 6 of the Constitution, is inalienable.

The selfsame Article also abolishes the death penalty in Namibia, which can therefore never be reinstated. While it may be true that crime levels in the country are unacceptably high, this does not mean that the police have carte blanche to take the law into their own hands. The police and all other law enforcement agencies are subject to the law, and should respect the rights of all people, including alleged criminals. The Ministry of Safety and Security, the Windhoek City Council and all agencies responsible for policing should invest in the training of their staff members. Such training should particularly aim at educating police officers on adopting a rights-based approach to policing. Parliament should also take immediate steps to repeal Section 49 of the Criminal Procedure Act,³⁵ which is patently unconstitutional in that it grants unconstrained permission to police officers to use lethal force to effect an arrest. This Section, a legacy of Namibia's colonial past, was declared unconstitutional by the Constitutional Court of South Africa in 2002.

Non-state Action Against Crime

The private security industry in Namibia has expanded rapidly over the past two decades. This is generally attributed to the high crime rate, especially in urban centres. The private security industry in Namibia is regulated by the Security Enterprises and Security Officers Act. This Act makes provision for the creation of a Security Enterprises and Security Officer Regulation Board (SESORB) with which security enterprises have to register. The Act outlines registration procedures and provides for a code of conduct to be compiled by the Minister of Home Affairs, with input from SESORB. All security companies are required to register with SESORB and must submit their employees' fingerprints and an application fee. SESORB is mandated to uphold standards within

35 Act No. 51 of 1977.

the industry and regulate security industry practices, as well as to provide advice on the training of security officers. Its tasks are to exercise control over security enterprises and the occupation of security officers; and to maintain, promote and protect the status of security enterprises and security officers. The private security industry has also been associated with abuses of power and human rights violations. It is suggested that they too should undergo human rights training so as to educate them on how to provide their services from a rights-based perspective.

Police Abuses

Prior to independence, the police had been one of the main organs used by the apartheid colonial regime to enforce its repressive laws, and they were regularly implicated in torture, summary executions and other abuses. Although the situation has improved considerably since the attainment of independence, allegations of misconduct by police officials have continued. These include the use of excessive force, detention that resulted in death or injury, arbitrary arrest and the imposition of lengthy pre-trial detention periods.³⁶ Accusations of torture and abuse of police powers were particularly rife in 1999, when the police, assisted by members of the Namibian Defence Force, rounded up and tortured members of the Caprivi Liberation Army during the failed secessionist uprising. The actions of the police and army were widely condemned by both national and international human rights organisations, notably the LAC, the National Society for Human Rights and Amnesty International. Namibia is a State Party to the ICCPR, the ACHPR, and the United Nations Convention Against Torture, the principle international legal instruments prohibiting torture and cruel, inhuman or degrading treatment. The prohibition of such conduct is thus binding upon Namibia; the Namibian Constitution is also clear in this regard.³⁷ The prohibition of torture or cruel, inhuman or degrading treatment is further insulated as a non-derogable right under Article 24(3) of the Constitution. Torture is, however, still prosecutable in Namibia as a lesser common law crime. Namibia, as a State Party to the Convention Against Torture,

36 US Department of State, Country Reports on Human Rights Practices 2005: Namibia, retrievable at <http://www.state.gov/g/drl/rls/hrrpt/2005/61584.htm> (accessed 9 April 2009); and National Society for Human Rights: 2006 Namibia Human Rights Report 2006, retrievable at <http://www.nshr.org.na/downloadfiles/reports/ANNUSUM2006.pdf> (accessed 9 April 2009).

37 See Article 8 of the Namibian Constitution.

is required to enact legislation to prevent acts of torture and to prosecute such acts as may take place. In 1997, the Committee against Torture, the committee charged with supervising the implementation of the Convention, recommended that Namibia should enact a law defining the crime of torture in terms of Article 1 of the Convention. The Committee also recommended that Namibia integrate this definition into the Namibian substantive and procedural criminal law system.³⁸ To date, Namibia has still to comply with this recommendation. Cabinet is reminded of Namibia's obligations under both municipal and international law. Cabinet is also specifically reminded that Namibia is well over a decade in default regarding this recommendation. The Namibian Cabinet is thus urged forthwith to mandate the Law Reform Commission to commence with work in developing torture legislation for Namibia.

Arbitrary Arrest and Detention

The Namibian Constitution prohibits arbitrary arrest or detention.³⁹ In this regard it provides that all arrested persons must be informed of the reason for their arrest. Arrested persons must be brought before a magistrate within 48 hours of their arrest. However, these provisions are not always respected in practice. For instance, immigration officials at Hosea Kutako International Airport arrested 14-year-old Nadine Coleman on charges of being an illegal immigrant, despite the fact that Coleman had both her Namibian passport and her birth certificate in her possession. Coleman was held without access to counsel or her family for a week.⁴⁰

38 See Concluding Observations of the Committee against Torture: Namibia. 06/05/97, A/52/44, par. 241, retrievable at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.52.44,paras.227-252](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.52.44,paras.227-252).

39 Article 11(1) and (3).

40 Werner Menges, "Child thrown into jail for 'not looking Namibian'", *The Namibian*, 28 January 2005.

A report on the human rights of sex workers in Botswana, Namibia and South Africa, released in Windhoek in September 2009, also accused members of the Namibian Police Force together with their Botswanan and South African counterparts of abusing sex workers and subjecting them to arbitrary detention. Police in the three countries allegedly also misuse their positions and power by extorting money and sex from sex workers, and also subjecting them to degrading treatment, illegal detention or other sorts of human rights abuses.⁴¹ The Afrobarometer 2006 Household Survey also revealed that many Namibians perceive the police to be corrupt. Newspapers have also published reports of police officers standing trial for, amongst other things, bribery, forgery, fraud, extortion and looting goods and cash from dead bodies.

Independent Oversight of Policing

Oversight over the conduct of the Namibian Police Force is primarily conducted by the Namibian Police Complaints and Discipline Unit (NPCDU), which is a unit within the police command structure.

This effectively means that Namibia does not have an independent complaints mechanism to investigate complaints of misconduct levelled at members of the police by the public. The NPCDU's mandate includes the investigation of deaths in police custody, and as a result, of police action and complaints against the police. Not much is known about the work and effectiveness of the NPCDU, but the suspicion exists that camaraderie amongst police officials might compromise rigorous investigation of their peers. This is by no means far-fetched, and the rationale for incorporating this

41 Open Society of Southern Africa, *Rights Not Rescue: A Report on Female, Trans-, and Male Sex Workers' Human Rights in Botswana, Namibia, and South Africa*, Executive Summary, 2008, retrievable at http://www.soros.org/initiatives/health/focus/sharp/articles_publications/publications/rights_20081114/summary_20081114.pdf.

important unit within the formal structures of the police clearly needs to be reviewed. International experience shows that independent civilian oversight of the police is of the utmost importance for ensuring effective performance.

The NPCDU is supported by a range of other agencies and institutions with varying degrees of oversight over the police, including the Ombudsman, the Anti-Corruption Commission, the Auditor-General, the Prosecutor-General, the courts and parliamentary standing committees. However, this range of institutions raises the problem of the absence of a central complaints register, the absence of which makes it difficult to track cases or to ascertain the extent to which abuse is being reported. Another drawback is that in practice, most reported cases of abuse are referred back to the Namibian Police Force for investigation and/or action.

Despite their limitations, the institutions referred to above have been able to bring police officers who have been found to have abused their powers to account. For instance, the High Court has awarded damages to victims of police abuse who have sued the police for assault, negligence and unlawful imprisonment. In this regard, in the *Shaanika Case*,⁴² the High Court awarded delictual damages to a dependant of a deceased breadwinner who committed suicide while in police custody as a result of police negligence. (The police had failed to secure a firearm which was then used by the deceased breadwinner to take his own life whilst in police custody.)

⁴² See *Fransina Yoleni Shaanika & Another Versus The Minister of Safety And Security* Case No.: (P) I 155/2007.

However, the seriousness with which the police have taken police abuse is open to question, because in assessing criminal liability and/or compensation, they have treated such cases as if the perpetrators were ordinary citizens and not officers of the law. One such case involves the seven police officers attached to the Serious Crime Unit in Keetmanshoop, who were convicted of charges of culpable homicide, assault with intent to do grievous bodily harm and defeating or obstructing the ends of justice. In April 2010, the presiding judge decided not to send the officers to prison but instead sentenced them to pay fines totalling N\$66 000 on the culpable homicide charge, while they were sentenced to wholly suspended jail terms on the charges of assault and defeating or obstructing the ends of justice.⁴³ There are also other cases where delictual claims against the police were dismissed based on mere technical grounds.⁴⁴

The Ombudsman's role in investigating complaints against the police should be strengthened. Alternatively, a statutory complaints body that is more independent, accountable and entitled to insist on the cooperation of the Namibian Police Force should be set up. Such a body should issue annual reports and present analysis of trends of police indiscipline, and of actions taken to curtail such activities.

43 Werner Menges, "Keetmanshoop police evade jail sentence", *The Namibian*, April 26, 10.

44 See *Tutalife and Another v Minister of Home Affairs and Another* (1 588/2008, 1 589/2008) [2010] NAHC 58 (29 July 2010); See also *McNaband Others v Minister of Home Affairs NO and Others* (12852/05) [2007] NAHC 50 (12 July 2007).

Fair Trial

Article 12 of the Namibian Constitution provides for the right to a fair trial. In terms of this provision, the right to a fair trial includes the right to a speedy trial, the right to be presumed innocent until proven guilty, the right to call witnesses and to adduce evidence, and the right to choose one's legal counsel.

Delays in Bringing Cases to Trial

In terms of the Constitution, an arrested person has the right to be brought before a court as soon as is reasonably possible, but not later than 48 hours after the arrest (excluding days which are not ordinary courts days).⁴⁵ However, the Namibian criminal justice system is characterised by lengthy pre-trial detentions. The lack of qualified magistrates and other court officials, coupled with the high cost of legal representation, results in a serious backlog of criminal cases. The upshot is that delays of up to a year or more between arrest and trial are not uncommon, which clearly contravenes constitutional provisions for the right to a speedy trial. Some awaiting-trial prisoners have been incarcerated in the same conditions as those of convicted criminals. Human rights organisations have criticised lengthy pre-trial detentions.

Statistics from the Ministry of Justice indicate that criminal cases are amongst those that keep on lagging for years. The high-profile Avid case also involved lengthy postponements. In this case, seven people, including a former Deputy Minister, stand accused of perjury and defrauding the Social Security Commission of N\$30 million. This case has been dragging on since 2005, following a judicial inquiry under the Companies Act.⁴⁶ The case was recently postponed until June 2011. The case of Romeo Schiefer, a young man accused of the double murder of his parents in 2006, has also been postponed until 2011. Another high-profile case which is endlessly dragging on in the Namibian

⁴⁵ Article 12(1)(d).

⁴⁶ Act No. 61 of 1963.

court system involves the alleged contract mass murder carried out on the farm Kareeboomvloer in March 2005. In this matter, a young man is accused of having contracted two unemployed brothers to murder his parents. The brothers are alleged to have duly carried out their assignment, but also to have murdered other farm labourers in order to destroy crucial evidence against them. Similarly, the fraud case of Mr. Gerry Munyama, the former Director General of the Namibian Broadcasting Corporation, was on the court rolls from 2005 till 30 September 2010, when it concluded with his conviction and sentencing to an effective seven years imprisonment and an order to repay the misappropriated money to the NBC by March 2011. The extradition request for the Israeli millionaire, Mr. Kobi Alexander, who is sought by the United State of America, to answer to fraud charges in that country is also a case of delayed justice. This matter has been in and out of court since 2006.

The situation as sketched above is undoubtedly inexcusable and glaringly in violation of the right to a speedy trial, as guaranteed by the Namibian Constitution. Needless to say, judicial reform to address the chronic court delays and postponements must be considered as a matter of paramount urgency. One such reform, according to the Judge President, may involve the introduction of judicial case management, a system whereby control of court processes is removed from litigants and placed under the control of the court. Judicial case management, according to the Judge President, recognises it as a legitimate public interest that once commenced, litigation must progress with due expedition so that a matter is finalised, thereby freeing up the court for other cases.⁴⁷ The introduction of judicial case management would bring about progressive and long-awaited judicial reforms. It would, if successfully implemented, go a long way to restoring the public's confidence in the judicial system, and for this reason, it deserves support.

⁴⁷ *Supra* note 11, p.4.

Right to Representation

The right to legal counsel of one's choice is entrenched in Article 12(1)(e) of the Constitution:

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.

This Article does not expressly provide for the right to legal aid. The issue of legal aid is construed as a principle of State policy under Article 95 read together with Article 101 of the Constitution. As a stated principle of State policy, free legal aid is to be provided in defined cases with due regard to the resources of the State. However, this provision is subject to Article 101, which states that the principles of State policy are not legally enforceable by the courts. In the Caprivi treason trial case,⁴⁸ the Supreme Court was asked to determine the binding effect of Article 95(h), and specifically whether the 128 accused persons had a right to legal aid, as they asserted. The Supreme Court held that:

if the trial of an indigent accused is rendered unfair because he or she cannot afford legal representation, there would be an obligation on the [State] to provide such legal aid. This obligation does not arise as a result of the provisions of Article 95(h) but because of the duty upon the [State] to uphold the rights and freedoms contained in Chapter 3 of the Constitution.

⁴⁸ *Government of the Republic of Namibia & Others v Mwilima & all other accused in the Caprivi treason trial* 2002 NR 235 (SC).

The Supreme Court found that:

[i]t cannot be said that Article 95(b) in any way qualifies or limits the right to a fair hearing contained in Article 12, as was contended by counsel for the [State]. There is nothing contained in the wording of either Article, which would support such an interpretation, nor would one expect that a policy statement would have such far reaching effect as to limit a fundamental right unless it is clearly and unambiguously spelled out.

This judgment contributed greatly to the granting of legal aid for indigent litigants. However, it is safe to state that very many people find themselves in court without adequate legal counsel.⁴⁹

⁴⁹ Global Integrity Report, Namibia: Integrity Indicators Scorecard, 2007 Assessment, retrievable at <http://report.globalintegrity.org/Namibia/2007/scorecard/101>.

Appropriate Remedies & Sentencing

There is a widespread feeling that an appropriate response to the high crime rate in Namibia is urgently needed, and that there should be an end to impunity for violent crimes, in particular. On the one hand, however, many people – and particularly those working in the justice sector – recognise that longer prison sentences would be unlikely to have the effect of reducing crime. The Department of Prisons in the Ministry of Safety and Security is currently piloting an initiative to divert offenders from prisons in selected regions. It is too early to assess the impact of this initiative.

Women's rights organisations, in particular, have pointed out the inadequacy of existing responses to sexual and domestic violence. Advocacy by these organisations has led to the passing of the Combating of Domestic Violence Act⁵⁰ and the Combating of Rape Act.⁵¹ The Domestic Violence Act applies to a range of familial and domestic relationships. Regrettably, however, it does not apply to same-sex relationships. Under the Act, a victim of domestic violence may apply for a protection order to stop the abuse and to prevent the abuser from entering the mutual home, the victim's residence or the victim's place of employment. The court may place other conditions on the order, including seizing any weapons, evicting the abuser from the house, and forcing him/her to pay rent and/or emergency maintenance to the victim. The court also has the power to limit the abuser's custody rights to children. Despite such progressive statutory provisions, however, violence against women remains a serious problem in Namibia. In 2007, the Committee on the Elimination of Discrimination Against Women expressed its concern in this regard. The Committee specifically called on Namibia:⁵²

to take steps to fully implement and enforce laws on violence against women and to ensure that women victims of violence are able to benefit from the existing legislative framework. It also calls upon [Namibia] to ensure that all violence against women is effectively prosecuted and adequately punished. It requests [Namibia] put in place an effective data collection system on all forms of violence against women.... It further calls upon [Namibia] to establish a monitoring and evaluation mechanism in

50 Act No. 4 of 2003.

51 Act No. 8 of 2000.

52 Committee on the Elimination of Discrimination against Women, Concluding Comments of the Committee on the Elimination of Discrimination against Women: Namibia, 15 January – 2 February 2007, par. 18-19.

order to regularly assess the impact and effectiveness of relevant laws, their enforcement, as well as of programmes aimed at preventing and redressing violence against women.

In terms of Namibia's penal laws, sentences may be handed down to offenders under the common law and the statutes creating specific crimes. Sentences may include imprisonment, fines, warnings, partially or fully suspended sentences, discharge and compensation. In responding to widespread public demands for harsher action against criminals, Parliament passed legislation introducing minimum sentences ranging from 10 to 45 years. The constitutionality of the minimum sentences for stock theft, as noted earlier, is currently being challenged. While the impact of minimum sentencing is difficult to quantify, no substantive claims have been made that it results in a reduction in crime. This holds true particularly for the crimes of rape and stock theft in Namibia. These crimes have seen a drastic increase in recent years despite the harsh sentences imposed by courts. The minimum sentencing rules have also not achieved one of their primary aims, namely greater consistency in sentencing. A comprehensive sentencing reform initiative should be a priority.

Some people, including lawyers, complain that the courts are not able to dispense adequate remedies for victims, as prosecution emphasises punishment of perpetrators. Courts also remain uncreative in their sentencing. Imprisonment and prison-related sentences are still the standard imposed on most offenders. Incarceration is frequently ineffective and even counter-productive in preventing recidivism, suggesting that rehabilitation programmes within the prison system, or the prison sentences themselves, are not effective. Researchers have found that resorting to sentencing options other than imprisonment enhances rehabilitation and reduces the likelihood of recidivism.⁵³ The Department of Prisons is currently piloting community service orders as a measure to divert people from prisons. The pilot projects are run in selected regions (see next section for more detail).

53 Lala Camerer, Crime, violence and punishment – Putting victims on the agenda, African Security Review, Vol. 6, No. 3, The Institute for Security Studies, 1997

Case Study:

Namibia's unemployment rate stands at a staggering 51.2 per cent. This state of affairs has led many to engage in all kinds of self employment initiatives in order to survive. One such initiative is the practice of car washing by unemployed men in almost all urban centres in the country. Many car owners support this practice because of the social benefit attached to it. However, it seems that whatever social benefit that might be derived from such a practice is unimportant to the Windhoek City Police and the courts.

Jan Markus, a hardworking, homeless and unemployed resident of Windhoek, was one such person eking out a living for himself and his family by washing cars in the Windhoek city centre. However, not everyone was happy with Jan's honest way of trying to make a living. The Windhoek City Police, in particular, were irked by what Jan and his likes were doing. Jan and six other homeless car washers were eventually arrested for plying their trade. Car washing, in the City Police's view, was destroying the road and in contravention of the law. According to Abraham Kanime, the City Police Chief, "tarmacs [in Windhoek] need sun ... [and] once there is permanent water, plus the detergents used in the water, the tarmac is damaged." According to Mr. Kanime, anyone that sees this matter differently or who supports the car washers is "preaching lawlessness".

On Friday 17 September 2010, Jan was found guilty of contravening the applicable by-law and fined N\$300 or three months' imprisonment. Since Jan was unable to afford the N\$300 fine, he was immediately sent to the Windhoek Central Prison to serve his prison term.

The public was in unison in condemning the sentence meted out to Jan. A proverbial good Samaritan that read about Jan's fate, who incidentally works at the City of Windhoek, paid Jan's fine.

Public responses to the Jan Markus case included the following:

- “That’s persecution, not prosecution.” (a magistrate at the Windhoek Magistrate’s Court)
- “The City Police are spending valuable time on persecuting men making an honest living, while the real criminals get away.” (a magistrate at the Windhoek Magistrate’s Court)
- “These men have accepted that they are homeless and now they are trying to make an honest living. It sustains them.” (a pastor of the Methodist Church, who has supported the car washers for many years and praised their efforts to make an honest living)
- “Justice not served by jailing car washers.” (Jan-Mari Smith)
- “This is ridiculous. I understand they have to implement the law, but there are so many worse things that take place.” (a man from Swakopmund)
- “That person chose to make money. Jailing these people will not solve the high unemployment rate in the country. The City of Windhoek must just put up a structure for these people to wash cars. People should not be jailed without providing alternatives.” (Isak Katali, Minister of Mines and Energy)

Sources:

Smith, J. M. “Car washers fined N\$300”⁵⁴

Smith, J.M. “Justice is not served by jailing car washer”⁵⁵

Nakale, A. “Katali condemns jailing of car washer”⁵⁶

Other judgments which evoked public anger were those in the case of former Supreme Court Judge Pio Teek, the election challenge case brought by the Rally for Democracy Party and other opposition parties, and the recent sentencing of businessman Lazarus Shaduka.

54 *The Namibian*, 21 September 2010, retrievable at [http://www.namibian.com.na/index.php?id=28&tx_ttnews \[tt_news\]=67003 &no_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=67003&no_cache=1).

55 *Ibid.*

56 *New Era*, 23 September 2010, retrievable at <http://www.newera.com.na/article.php?articleid=13173>.

Former Judge Pio Teek stood accused of having abducted and sexually molested two pre-teenage girls on his farm outside Windhoek. After a drawn-out court battle that was punctuated by delays and technicalities, the former judge was eventually acquitted. The initial attempts of the State to appeal against the decision failed. However, through some true judicial ingenuity, valid reasons were found to allow the state to appeal against Mr. Teek's acquittal. The appeal is currently ongoing.

Towards the end of 2009, the Rally for Democracy and eight other opposition parties joined forces to challenge the outcome of the 2009 National Assembly election results. The opposition parties alleged voter rigging and substantial non-compliance with the Electoral Act.⁵⁷ The Electoral Commission of Namibia was ordered by the High Court to provide the applicants with the relevant election materials to allow them to gather evidence to build their case as provided for by the Act. The Electoral Commission took several days to comply with this court order. The applicants eventually succeeded in submitting their election challenge applications within the prescribed timeframe (30 days after the announcement of the election results). However, they did so 30 minutes outside the cut-off time as set by the rules of the High Court. This technicality caused the two judges assigned to hear the case to dismiss the matter and to strike the case from the court roll without considering the merits of the case. In so doing, the High Court missed an opportunity to circumvent the archaic and legalistic approach to legal disputes in pursuance of a greater social good. The applicants in this matter appealed the judgment. In September 2010 the Supreme Court delivered what may be termed a watershed judgement, curing the overly legalistic and flawed decision of the High Court. The Supreme Court, in a well reasoned and articulated judgment, found that the High Court erred in having over-emphasised the 30 minutes by which the submission was late, and found that the interests at stake warranted a condonation of the application. It thus nullified the decision of the High Court and ruled that the matter be returned to the court of first instance (the High Court) for the consideration of the merits thereof.

⁵⁷ Act No. 24 of 1992.

On 23 August 2010, the High Court convicted businessman Lazarus Shaduka of culpable homicide for the death of his wife, as well as of attempting to defeat or obstruct the course of justice. The presiding judge in the matter ordered Shaduka to pay a fine of N\$25 000 or serve a one-year jail term on the charge of culpable homicide. On the count of attempting to defeat or obstruct the course of justice, Shaduka was sentenced to a fine of N\$2 000 or two months' imprisonment. The sentence drew heavy criticism from a broad spectrum of the general public, including the executive branch of the State. Human rights NGOs, in particular, criticised the sentence for being too lenient and failing to take full account of the gravity of gender-based violence. The Minister of Justice, Pendukeni Iivula-Ithana, for her part described the judgment as "unbelievable". Public opinion was unanimous in viewing the sentence as devaluing human life and wholly inadequate, considering the far stiffer sentences imposed for stealing livestock. For instance, the prescribed sentence for a first time offender upon conviction for stealing livestock worth more than N\$500 is a minimum sentence of 20 years imprisonment, without the option of a fine.⁵⁸ Parliament would be well advised to enact legislation with the aim of defining murder and culpable homicide as statutory crimes, rather than common law crimes. Such a move would greatly reduce the court's sentencing discretion when it comes to these offences and would also dispel the notion that property crimes deserve harsher punishment than crimes against life.

58 See the Stock Theft Amendment Act (No. 19 of 2004).

Amnesties and Pardons

Namibia does not have legislation allowing for general amnesty. Article 32(3)(d) of the Namibian Constitution gives the President the power to pardon or reprieve offenders, either unconditionally or subject to such conditions as he or she may deem fit. There is no specific piece of legislation that deals specifically with pardons or amnesties in Namibia, but Section XII (Remission of sentence and release of prisoners) of the Prisons Act⁵⁹ deals with immunity from prosecution. Amongst other things, prisoners may be released on medical grounds,⁶⁰ on parole or probation,⁶¹ or through a Presidential pardon or reprieve.⁶² The pardoning of prisoners is the prerogative of the President in terms of the Namibian Constitution. In exercising these powers, the President may call upon the Minister of Prisons and Correctional Services to recommend to him or her any offenders for such pardon or reprieve, and may invite the comments of the Minister of Justice thereon. In terms of Section 93(2), the Minister shall give notice in the Gazette of the names of every offender pardoned or reprieved under Article 32(3)(d) of the Constitution.

No in-depth research has as yet been undertaken to determine the effectiveness or possible abuse of the system. The Allan Boesak and Schabir Shaik sagas in South Africa revealed that the pardoning and granting of amnesties to prisoners can potentially be abused. Namibian scholars and researchers would be well advised to extend their work into this area.

59 See Section 2 of the Prison Act (No. 17 of 1998).

60 Article 94, Namibian Constitution.

61 Article 95, Namibian Constitution.

62 Article 93, Namibian Constitution.

Prisons

Legal Framework

The Namibian Prison Service (NPS) is constitutionally established under Article 121 of the Namibian Constitution. The NPS operates as an integral part of the justice system, with the ultimate goal of contributing to the protection of society by providing reasonable, safe, secure and humane custody for offenders in accordance with universally acceptable standards, while assisting them in their rehabilitation, reformation and social reintegration as law abiding citizens.⁶³ The NPS has a mandate to ensure the effective management, administration and control of all prisons in the country and to ensure the security of every prisoner until lawfully discharged from prison.⁶⁴ The NPS is headed by the Commissioner of Prisons,⁶⁵ who is appointed the President⁶⁶ on the recommendation of the Security Commission.⁶⁷

The administration of prisons previously resorted under the jurisdiction of the Ministry of Justice and the Ministry of Home Affairs. In 1995, however, the former President, H.E. Dr. Sam Nujoma, considered it necessary and expedient to establish a separate Ministry of Prisons and Correctional Services. Upon taking office in 2005, H.E. President Hifikepunye Pohamba reincorporated and combined the police and prison services into the Ministry of Safety and Security. The NPS and the Police Force thus currently operate as two distinct departments of the same ministry.

63 See the website of the Namibian Correctional Service at <http://www.mpcs.gov.na/about.htm> accessed on 10 March 2009

64 See section 3 of the Prison Act (No. 17 of 1998).

65 See Article 122 of the Namibian Constitution.

66 See Article 122 (1) of the Namibian Constitution.

67 See Article 32(4)(c)(cc) of the Namibian Constitution.

The re-amalgamation of the Police and the NPS is not in line with international trends. In many countries, the administration of the police falls under the Ministry of the Interior, whilst that of prisons falls under the Ministry of Justice.⁶⁸ This is one way of ensuring the separation of powers and underlining the close link that should exist between the judicial authority and the prison system.⁶⁹ In view of the upcoming Presidential and National Assembly elections later this year (2010), it is hoped that the incoming President will bear this in mind when exercising his/her presidential prerogative to establish government departments and ministries which he or she may consider to be necessary or expedient for the good governance of Namibia.

The NPS is governed by the Prisons Act. The Act covers a broad range of issues incidental to prison administration and regulates matters affecting both staff and inmates.

The Prisons Act is supplemented by an elaborate body of Regulations which have been promulgated for the administration and control of the NPS in terms of Section 124 of the Act. These Regulations constitute the pivot of prison administration in the country. Careful scrutiny reveals that the Regulations conform to a great extent with the Standard Minimum Rules for the Treatment of Prisoners, as adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Geneva in 1955. In addition to the Act and the Regulations, the NPS further operates within the framework of the Namibian Prison Service Charter, a Code of Conduct, a Grievance Procedure Manual, a Training Policy, a Recruitment Policy, and a policy governing outside employment. Other Acts of Parliament which apply to the NPS include the Public Service Act,⁷⁰ the State Finance Act,⁷¹ the Criminal Procedure Act and Treasury Instructions. The website of the

68 Coyle, A. 2002. *A Human Rights Approach to Prison Management – A Handbook for Prison Staff*, International Centre for Prison Studies, London, p. 18.

69 Ibid.

70 Act No. 13 of 1995.

71 Act No. 31 of 1991.

Ministry further lists as its governing documents and source of mandate the various UN instruments that deal specifically with prisoners and conditions of detention. The NPS Strategic Plan (2003 – 2007) further lists the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and People's Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the UN Declaration on the Elimination of Violence against Women, and the Declaration on the Protection of All Persons from Enforced Disappearances, amongst the international instruments from which it derives its mandate and standards for the treatment of people deprived of their liberty in Namibia.⁷² This stance is highly commendable, since Namibia has ratified these treaties and they are thus legally binding on the country. Furthermore, these treaties became part of the corpus of law of Namibia on the respective dates they entered into force for Namibia in terms of the provisos of Article 144 of the Namibian Constitution. This Article expressly provides that the general rules of public international law and international agreements binding upon Namibia shall form part of the law of the country unless the Constitution or an Act of Parliament provides otherwise. The construction of Article 144 therefore presupposes that the provisos and entitlements of the covenants and treaties in question have direct and immediate application within the Namibian legal system.⁷³

Namibia currently has a total of thirteen prison institutions, divided broadly into eight maximum and five minimum security prisons. The daily "Incident and Unlock" report of the Department of Prisons for 14 April 2009 indicates that as of this date, Namibia harboured a total prison population of 4 348 in its thirteen prison institutions. This figure included sentenced and not-sentenced offenders. Data regarding the prison population for sentenced offenders as of 14 April 2009 are given in Table 1.

72 Ministry of Safety and Security, Namibian Prison Service Strategic Plan (2003 – 2007), 2003, <http://www.mpcs.gov.na/Prison%20Strategic%20Plan.pdf>, accessed on 13 March 2009.

73 Nakuta, J. "The justiciability of social, economic, and cultural rights in Namibia and the role of non-governmental organizations," in Horn, N. and Bösl, A. (Eds.), *Human Rights and the Rule of Law in Namibia*, Macmillan Namibia, Windhoek, 2008, p. 97.

Table 1 **Namibia's Sentenced Prison Population as of 14 April 2009**

Description	Total	Percentage of total prison population
Number of establishments/institutions	13	N/A
Total sentenced prison population	3 938	91%
Prison population rate (per 100,000 of national population)	194	N/A
Female offenders	128	3%
Juveniles	71	2%
Foreign offenders	170 ⁷⁴	4%
Hospital	13	0.3%

Source: Daily Incident and Unlock report of the Department of Prisons for 14 April 2009

⁷⁴ This figure includes nine (9) female offenders.

Table 2 below shows data regarding non-sentenced offenders in Namibian prison centres as of 14 April 2009.

Table 2 Namibian Non-sentenced Prison Population as of 14 April 2009

Description	Total	Percentage of total prison population
Number of establishments/institutions	13	N/A
Total sentenced prison population	382	9%
Prison population rate (per 100,000 of national population)	194	N/A
Female offenders	7	0.2%
Juveniles	4	0.1%
Foreign offenders	28 ⁷⁵	0.6%
Hospital	0	0%

Source: Daily Incident and Unlock report of the Department of Prisons for 14 April 2009

Namibia, as can be seen from the Tables 1 and 2, currently has 194 per 100 000⁷⁶ of the general population serving sentences in prisons or in pre-trial detention. This per capita rate of imprisonment

75 This figure includes four (4) female offenders.

Namibia, as can be seen from the Tables 1 and 2, currently has 194 per 100 000⁷⁶ of the general population serving sentences in prisons or in pre-trial detention. This per capita rate of imprisonment places Namibia in the ten highest in Africa,⁷⁷ and in the 64th position globally.⁷⁸ There has been a steady increase in the prison population since independence.

Namibia does not have any private prisons. Judging from an interview conducted with the Deputy Commissioner of Prisoners, Mr. Angula, the privatisation of this public service is not currently on the Ministry's agenda.⁷⁹ According to the Deputy Commissioner, the privatisation of prisons would not result in any savings, but would rather increase the costs of prison administration. Mr. Angula reiterated his Ministry's commitment to the public provision of this service and stressed that in Namibia, the delegation of the state's responsibility is not contemplated. The Ministry's commitment not to delegate this vital State responsibility to the free market is highly commendable.

Law Reform

Amongst the major law reform initiatives currently underway within the Namibian prison regime are the proposed repeal of the Prisons Act and the introduction of the so-called "community service orders". This initiative has been initiated by the Department of Prisons of the Ministry of Safety and Security as a measure intended to divert people from prison.

Corrections and Conditional Release Bill

In 2007, the Corrections and Conditional Release Bill was introduced in Parliament. The Bill, if passed by Parliament, will replace the current Prisons Act. The Bill does not constitute a significant break from

76 Based on an estimated national population of 2.1 million at end of 2007 (from United Nations figures).

77 International Centre For Prison Studies, *Prison Brief - Highest to Lowest Rates Africa*, King's College London, 2007, retrievable at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wp_stats.php?area=africa&category=wb_poprate (accessed on 22 April 2009).

78 Ibid.

79 Interview, Deputy Commissioner Angula, 30 April 2009, Windhoek.

the current system and is thus not groundbreaking in any way. Most of the proposed changes to the Bill may also be regarded as cosmetic and relate more to structural and layout issues, with a view to making the Bill more reader-friendly. Amongst the main changes introduced by the Bill are:

- the name change of “Namibian Prison Service” to “Namibian Correctional Service”; and
- the replacement of the word “prisoner” with that of “offender”/“inmate”.

The Bill provides for the appointment of a fulltime Correctional Inspector by the Minister. The mandate of the Correctional Inspector would be to conduct investigations into the problems and complaints of offenders related to decisions, recommendations, acts or omissions of the Commissioner, a correctional officer or any other person under the control and management of, or performing services for or on behalf of, the Commissioner that affect offenders either individually or as a group.⁸⁰ However, the Correctional Inspector will be precluded from investigating any decision, recommendation, act or omission of the National Parole Board or any matter that was, or is being, or is going to be investigated by the Ombudsman.⁸¹ In the execution of his/her functions, the Correctional Inspector will be assisted by staff members drawn from the public service. The Bill is not clear as to whether or not the Correctional Inspector and his/her team would be part of the Ministry of Safety and Security, and whether or not they would perform their important functions in addition to their existing duties.

It is respectfully submitted that this complaint unit ought to be housed in another ministry (preferably the Ministry of Justice) so as to reduce the chances of intimidation and victimisation of complainants taking place. The establishment of an extra ministerial oversight body may be inferred from the spirit and purport of the Bill, as espoused in Part XIV thereof. It is further recommended that staff members of the said inspectorate should ideally not be burdened with other public service duties, and that their sole mandate should be confined to this important task so as to achieve the objectives of the proposed

80 Corrections and Conditional Release Bill, 2008, Section 121(1).

81 Ibid, Section 121(2).

Act. Furthermore, given the important task that the Correctional Inspector is supposed to perform, it goes without saying that his/her appointment must be made contingent upon his/her having a sound understanding of human rights, and being an independent and fearless person.

Community Service Orders

Namibia, like most developing countries, has very few alternatives to prison.⁸² This is so despite the fact that provision for community service to replace prison sentences has been on the statute books since 1953. The reality is that it has never been used, ostensibly due to the lack of mechanisms to enforce such sentences.⁸³ This lax attitude may be singled out as probably the prime cause of the overcrowding in some of Namibia's prisons. With a view to addressing this anomaly, Value 3 of the NPS' Strategic Plan (2003 – 2007) declares that “the majority of offenders can be dealt with effectively in the community by means of non-custodial correctional programmes [and that] imprisonment should be used with restraint”.⁸⁴ Value 3 of the NPS' Strategic Plan is underscored by the Principle that “imprisonment should be reserved for those who cannot otherwise be treated in the community, those who pose a serious danger to the community, and those who wilfully refuse to comply with a non-prison sentence”.⁸⁵ In line with the Strategic Plan and inspired by the Zambian experience in community service, the Ministry resolved to pilot community service orders in the Namibian prison regime in order to reduce prison congestion and the cost of maintaining inmates.⁸⁶ Community service orders are currently being piloted in four regions, namely Caprivi, Okavango, Oshana and Kunene.

The Community Service Orders Pilot Programme, which is funded by the Finish Government, was initiated in June 2005 in four regions. A “community service order” is defined by the Community Service Bill as a court order that requires an offender to perform public work within the community

82 *Namibia Community Service Orders Pilot Project, Pilot Regions: Caprivi, Okavango, Oshana, Kunene*, NSC Pilot Project, Windhoek, 2005, p. 6.

83 Ibid.

84 Namibian Prison Service Strategic Plan (2003 – 2007), p.7.

85 Ibid.

86 *Namibia Community Service Orders Pilot Project*, p.7.

for a specified period of time. Such an order would give an offender an opportunity to compensate society for the wrong he or she has committed by performing unpaid public work for the benefit of the community, instead of going to prison.⁸⁷

As a general rule, the Bill provides that those offenders convicted of an offence punishable with imprisonment not exceeding three years, with or without the option of a fine, shall be eligible to perform a community service order.⁸⁸ However, where an offender has been sentenced to an imprisonment term exceeding three years, the court still has the discretion to make an order that the offender shall serve a portion of such a sentence in the form of community service.⁸⁹

Legislation regarding community service orders and their consolidation as an alternative to imprisonment hold huge potential benefits not only to the NPS, but also to Namibian society at large. Amongst the benefits which may be anticipated are the saving of public funds, the decongestion of prisons, the ongoing ability of breadwinners convicted of less serious offences to continue to support their households, and the achievement of a sense of restorative justice amongst the offender, the victim and society. It is thus imperative that community service orders be rolled-out to all regions.

The passage and promulgation of the Community Service Order Bill of 2003 is long overdue, and Parliament is called upon to speedily pass this important piece of legislation. The NPS is called upon to educate and sensitise the Namibian public, so that the need and rationale for community service orders is understood and accepted. The success of the scheme is dependent on the collaboration of all stakeholders. In this regard, it is important to single out the role of prosecutors, in view of the findings in the 2005 Progress Report on the Community Service Orders Pilot Project. According to this report, most prosecutors perceive “Community Service Orders schemes essentially and exclusively [as] ‘bench

87 National Steering Committee of the Community Service Orders, *Tidbits on Community Orders as an Alternative to Imprisonment*, Windhoek, p.1. Such public work, according to the Bill, may amongst others include: construction or maintenance of public roads or roads of access; forestation work; maintenance work in public schools, hospitals and other public social service amenities; and work of any nature in a foster home or orphanage (Community Service Order Bill, Section 1).

88 Ibid, Section 2(1)(a).

89 Ibid, Section 2(1)(b).

schemes' where they have no part to play, no input and no representation".⁹⁰ Prosecutors allegedly also view the planned scheme as being for "prosecutors who serve at the regional level"⁹¹ only. This unfortunate perception, as rightfully pointed out by the report, has the potential to derail the implementation of the programme and deprive the country of the substantial gains it holds for the Namibian criminal justice system. The importance of a cooperative relationship between the prosecution and the court cannot not be overemphasised. This extends from the pre-trial stages to the pronouncement of the sentence, where the prosecutor is expected to dedicate him/herself to the achievement of justice. It is in this context that prosecutors should understand their important role in the sentencing process, in particular as it relates to community service orders as a sentencing option.⁹² The Community Service Orders Programme is doomed to fail if it is not given the unstinting support and cooperation of all parties involved in the administration of criminal justice. It is imperative that the Ministry of Justice embark on intensive training and education programmes to prepare, educate and train prosecutors and magistrate on the respective roles they will play in the application and implementation of community service orders.

90 *Namibia Community Service Orders Pilot Project*, p.24.

91 *Ibid.*

92 *Ibid.*, p.25.

Rehabilitation of Offenders

According to the Prisons Act, the main functions of prisons are:⁹³

to ensure that offenders' safety is secured in custody until lawfully discharged or removed; to apply such treatment to convicted offenders for their reformation and rehabilitation; and to train them in habits of labour and industry ... ”

It is debatable whether the statutory obligation to rehabilitate offenders is honoured in Namibian prisons. This was the main finding of a performance audit carried out by the office of the Auditor General that was submitted to the Speaker of the National Assembly in 2008. The audit specifically found that therapeutic rehabilitation programmes are currently only conducted in maximum security prisons. The Auditor General found that the Ministry of Safety and Security currently has an acute shortage of professional staff to provide this kind of service, which inevitably adversely affects the design, development and implementation of the correctional programmes as well as the evaluation and monitoring of offenders on the programmes.⁹⁴ Needless to say, offenders convicted of serious crimes such as murder and rape are thus not effectively rehabilitated due to a lack of services.⁹⁵

93 Prisons Act, No. 17 of 1998 (Section 3).

94 Auditor General, *Report of the Auditor General on the Ministry of Safety and security – Overcrowding of Prisons for the Financial Years 2002 – 2005*, Windhoek, 2008, p.29.

95 Ibid.

Table 3 below indicates the shortage of specialised staff employed at prison institutions countrywide.

Table 3 Social Workers and Psychologists at Namibian Prisons

	Social Workers			Clinical Psychologists		
	No. of posts	Filled	Vacant	No. of posts	Filled	Vacant
Head Office	1	1	0	1	1	0
Maximum security prisons						
Windhoek Prison	4	3	1	1	0	1
Hardap Prison	4	2	2	1	0	1
Walvis Bay Prison	2	2	0	0	0	0
Oluno Prison	3	1	2	0	0	0
Elizabeth Nepemba Juvenile Centre Prison	2	1	1	1	0	1
Tsumeb Farm Scott Prison	2	1	1	0	0	0
Divundu Rehabilitation Centre	2	1	1	0	0	0

Source: Report of the Auditor General on the Ministry of Safety and Security, 2008

There are no posts for either social workers or clinical psychologists at any of the minimum security prisons (Lüderitz, Grootfontein, Gobabis, Omaruru, Swakopmund and Keetmanshoop).

No prison institution in the country has a qualified psychologist listed as a staff member. It is thus not farfetched to conclude that very little or no therapeutic rehabilitation takes place within Namibian prisons and detention institutions. The 2008 findings of the Ombudsman in this regard are worth noting. In his follow-up report to Parliament on conditions in police holding cells, the Ombudsman lamented that at some police stations, offenders with mental disabilities “have waited more than a year to be sent to Windhoek for psychiatric evaluations”.⁹⁶ The current work/skill rehabilitation programme for offenders also leaves much to be desired. Whether or not an offender joins such a programme is determined by the length of his/her sentence. This practice, as revealed by the audit, in practical terms means that a high number of short-term offenders are not being allocated to work/skill rehabilitation programmes.⁹⁷ This practice is highly questionable and arguably defeats the rehabilitative objective of the Act, which sets as an objective the rehabilitation and training of all offenders in habits of labour and industry, irrespective of their length of sentence. It is doubtful whether this practice meets the requirements that administrative action be lawful and reasonable, as enumerated under Article 18 of the Constitution. In order to meet the stated rehabilitative object of the Act, the recommendation of the Auditor General in this regard is worth repeating in full: ⁹⁸

- *the Ministry should ensure that all offenders entrusted in their care should have an equal chance to get rehabilitation by providing the necessary assistance to reform the offenders into law abiding citizens;*
- *the Ministry should also introduce measures on how to deal with the rehabilitation of offenders having pending cases, short sentences, and those lacking interest;*
- *the Ministry should implement rehabilitation programmes at all the prisons;*

96 Walters, J. 2008. *Follow-up report on conditions prevailing at police cells in Namibia*, Office of the Ombudsman, Windhoek, p. 3.

97 *Ibid.*, p.26.

98 *Ibid.*, pp.43-44.

- *the work/skill programmes should be accompanied by appropriate effective intervention programmes in the rehabilitation of offenders since such programmes alone cannot change the offender's criminal behaviour;*
- *the Ministry should attract skilled professional staff by providing a conducive working environment and competitive salaries so as to realize its goals of rehabilitations and effective reintegration of offenders into society.*

Overcrowding

Of the 13 prisons in the country, six are overcrowded. Overcrowding is especially grave at the prisons in Omaruru (85%), Grootfontein (73%), Oluno (59%) and Windhoek (38%) respectively (approximate figures). However, the national overcrowding rate in Namibian prisons is only 0.02%, because overcrowding has a regional bias and varies widely from prison to prison.⁹⁹ Table 4 below shows the degree of overcrowding experienced in prisons throughout the country.

Table 4 Overcrowding in Namibian Prisons (14 April 2009)

Prison	Designed Capacity	Actual Occupancy	Overcrowding (%)
Windhoek	912	1 258	37.94
Hardap	941	716	-23.91
Oluno	557	888	59.43
Walvis	300	327	9
Omaruru	59	109	84.75
Grootfontein	70	121	72.86
Swakop	88	99	12.50
Keetmanshoop	110	94	-14.55

⁹⁹ It should be noted, however, that this is an overall figure; the fact that some prisons have fewer inmates than the number for which they were designed therefore masks the extent of overcrowding in other prisons.

Lüderitz	290	67	-76.90
Gobabis	220	137	-37.73
Elizabeth Nepemba	320	75	-76.56
Divivundu	480	370	-76.56
Farm Scott		87	0
Total	4 347	4 348	0.02

Source: Daily Incident and Unlock report of the Department of Prisons for 14 April 2009

The figures regarding the occupancy rates of prisons ought to serve as pointers for strategic intervention. At the moment, however, it seems to be a mere administrative exercise that is not linked to any concrete plan of action.

Many commentators have observed that amongst the many factors influencing the increase in the prison population are unnecessary arrests made by the police, unaffordable bail, and unnecessary postponements of cases. It may also be ascribed to the lack of a non-custodial sentencing option, even for petty crimes, in the Namibian criminal justice system.

The chronic postponement of cases unleashed the wrath of Judge President Petrus Damaseb in 2009. The Judge President took issue with the endless number of criminal cases that are postponed for further investigation and bemoaned the effect thereof on pre-trial detention centres in particular. According to the Judge President, magistrates allow the State too much latitude regarding requests for postponements for further investigation.¹⁰⁰ The recommendations made by the Judge President, if acted upon, will go a long way to addressing the problem of overcrowding in prisons, and therefore deserve wholehearted support. The courts should put more pressure on the State to be ready with the charge sheet and to make the accused plead as soon as possible. There should be greater scrutiny of requests for postponements.

100 Denver Isaacs, "Police in firing line over cell overcrowding", *The Namibian*, Windhoek, 1 June 2009.

Magistrates need to treat requests for postponement as an application, in which case the applicant would need to convince the court that there are valid reasons why the matter must be postponed. Only in exceptional cases should a matter be postponed for longer than 14 days.¹⁰¹

A number of those languishing in prisons or in pre-trial detention centres are there because they cannot afford to pay their bails, even though in some cases this has been set as low as N\$50. It is hard to understand the rationale for continuing to detain a person who has been granted bail of only N\$50 or N\$100 by the court and but who cannot afford to pay. As eloquently observed by the Special Rapporteur on Prisons and Conditions of Detention in Africa,¹⁰² by granting a low bail amount, the court seems to be suggesting that the offence committed is not serious, and that the offender is probably not harmful and can without risk be released on his/her own recognizance. Keeping such people in detention unnecessarily disrupts their social lives – learners stop going to school and employees risk losing their jobs. Moreover, family bonds are shaken and risk disintegration.¹⁰³ In instances where the bail fees are small, prison authorities should show ingenuity and approach the court seeking the release, on their own recognizance, of such detainees if they genuinely cannot pay.

Conditions of Detention and Imprisonment

Coyle asserts that in democratic societies, the law underpins and protects the fundamental values of society. The most important of these is the inherent dignity of all human beings, irrespective of their personal or social status.¹⁰⁴ In this regard, the test for respect for the human dignity of offenders was eloquently captured by Nelson Mandela, the former President of South Africa, when he stated: ¹⁰⁵

101 Ibid.

102 The Special Rapporteur on Prisons and Conditions of Detention in Africa undertook a similar mission to Namibia. Officials from the Department of Prisons acknowledged this fact but the report of the said mission was not made available to the author despite several attempts to obtain it.

103 Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa – Mission to the Republic of South Africa, 14 – 30 June 2004, retrievable at http://www.achpr.org/english/Mission_reports/South%20Africa/Special%20Rap_Prison_South%20Africa.pdf (accessed on 1 May 2009).

104 Coyle, A. A Human Rights Approach to Prison Management, p.15.

105 Mandela, N. Long Walk to Freedom.

It is said that no one truly knows a nation until one has been inside the jails. One cannot judge a nation by how it treats its most illustrious citizens, but by the treatment it metes out to its most marginalised – its prisoners.

Against this standard, the conditions prevailing in Namibian prisons and pre-trial detention centres are an indictment of Namibia's human rights record. Reports compiled by a variety of institutions and bodies have on numerous occasions highlighted the plight prevailing at some of Namibia's prisons and detention centres. For instance, in 2002 the Parliamentary Standing Committee on Security found that most of the prisons they visited had a serious overcrowding problem. They further observed that many prisons were in a state of disrepair, with stagnant water and insufficient ablution facilities causing health risks to inmates.¹⁰⁶ The 2002 – 2005 performance audit by the Auditor General referred to above similarly found that overcrowding was still a problem at some prisons. The audit also pointed out that some offenders did not have mattresses to sleep on, and were sleeping on steel beds. The audit listed the lack of maintenance in prisons as a major problem and observed that the combined effect of leaking roofs, the lack of renovation, broken cell windows, and the overall lack of hygiene at prisons constitute serious human rights infractions.¹⁰⁷ On the other hand, an official attached to the Office of the Ombudsman recently pointed out that although conditions in Namibian prisons are not ideal, they do to a large extent meet with minimum international standards. In her opinion, however, what is of concern is the worrying situation prevailing in almost all the police holding cells throughout the country.¹⁰⁸ The conditions in police holding cells are indeed so bad that in one reported case, they prompted a detainee to escape from custody so as to go to prison instead.¹⁰⁹

106 Parliamentary Standing Committee on Security.

107 Auditor General, *Overcrowding of Prisons*, p.24.

108 Office of the Ombudsman.

109 See Article in 'The Namibian' of 7 June 2004.

A warning was sounded regarding the conditions in prisons and detention centres in Namibia by magistrate Christie Mostert, who in May 2006 stopped the proceedings of a trial he was presiding over to conduct an in loco inspection of the conditions at the Wanaheda police cells that the accused had complained about. He found that the conditions under which detainees were kept at the detention site were “shocking and horrendous”. Furthermore, the cells within which the awaiting-trial prisoners were held were “totally overcrowded and totally unhygienic” and constituted a flagrant contravention of the Constitution’s express prohibition of cruel, inhuman or degrading treatment.¹¹⁰ What he observed at the Wanaheda police cells persuaded him to release the accused on bail.

Magistrate Mostert’s findings and observations regarding police cell conditions (at Wanaheda) acted as a spur to further investigation and research work into this area. Subsequent to the Mostert findings, valuable work in this area was done, amongst others, by the Ombudsman, the Human Rights and Documentation Centre of the University of Namibia, and the AIDS Law Unit of the LAC, to mentioned but a few. Shortly after the Mostert findings, the Ombudsman launched a national investigation into the conditions prevailing at police cells. In his report submitted to Parliament in November 2006, the Ombudsman expressly pointed out that his decision to investigate police holding cell conditions was prompted by, amongst other things, the Mostert findings alluded to above.¹¹¹ A total of forty-two police holding cells were visited in 11 of Namibia’s 13 regions. The investigation by and large confirmed the Mostert findings in respect of the appalling conditions prevailing at most police holding cells in the country. For example, it revealed that at most stations, food is served in used ice-cream buckets. Inmates also complained to the investigation team about the quality and quantity of food, and the lack of food diversity. The diet at most cells, according to the report, consisted of porridge and soup, all year round. In respect of cleaning material and toiletries, the report highlights that most of the stations visited did not have basic cleaning equipment such as brooms and mops with which to clean the “dirty and unhygienic cell floors”. It was further found that at most stations detainees had to go without body soap for days or, in some cases, even months. furthermore, at Outjo, Karibib and other

110 Menges, W. “Conditions in police cells leave magistrate shocked”, *The Namibian*, Windhoek, 9 May 2006.

111 Walters, J. Report on conditions prevailing at police cells throughout Namibia, Office of the Ombudsman, Windhoek, 2006, p. 2.

unnamed stations, detainees were using newspapers, magazines and cartons to attend to calls of nature, as there was no toilet paper. The Ombudsman expressed the view that conditions in more than 80% of the police stations visited were unacceptable. In this regard he pointed out that:¹¹²

at all stations toilets are located inside the sleeping quarters with no partitioning for privacy. The same applies for showers at some stations. At some stations, detainees use old blankets to partition the ablution facilities in order to have some privacy and dignity. Not all toilets at all the stations are in working condition. Some do not flush and buckets of water have to be used to flush them; others have broken down beyond repair and could not be used at all.

The “horrendous” conditions at the infamous Wanaheda police holding cells caused the Ombudsman to instruct that all female detainees held there be transferred to the Windhoek Central Prison with immediate effect. He also made a number of other specific recommendations, including:¹¹³

- the closure of the Grootfontein police holdings cells;
- a call on the Ministry of Safety and Security to devise innovative measures to reduce the number of detainees as a matter of urgency;
- closer and better cooperation between the Ministry of Safety and Security and the Ministry of Health and Social Services, to attend to the health needs of detainees;
- the appointment of cooks and cleaners at police holding cells;
- the release of detainees held for petty crimes and for preventative purposes as well as of juveniles held because their families prefer them to rather remain in detention in such centres; and
- a call for an urgent assessment to be conducted by the Ministry of Works, Transport and Communications in order to produce a priority plan for the “renovation/abolition/rebuilding” of police holding cells.

112 Ibid.

113 Ibid, pp. 9 – 10.

In August 2008 the Office of the Ombudsman undertook follow-up visits to the police stations which were identified as the worst cases in the 2006 report. Twenty such stations were visited. A follow-up report revealed that the problems and issues highlighted in the 2006 report had generally remained unchanged.¹¹⁴ Some of the positive aspects, according to the report, included improvement in the provision of body soap and toilet paper for detainees; and the introduction of a standard diet at all except two stations visited (as pointed by the Ombudsman, however, this improvement is compromised by the non-payment of supplier's invoices resulting in the non-delivery of food supplies.) The "standard diet", according to a recently released ex-detainee, comprises two slices of bread and coffee for breakfast, and porridge and soup for lunch and dinner. A piece of meat, according to this ex-detainee, is a "delicacy which is only served on Wednesdays and sometimes on Sundays, but otherwise it's just porridge as usual".

The follow-up report further highlights that the shortage of police investigators remains a serious stumbling block in the investigation of criminal cases. Overcrowding, according to the follow-up report, persists at most holding cells countrywide. Whereas the situation improved at some stations, at others it deteriorated to even worse levels than in 2006. The congestion experienced at police cells may also be attributed to a lack of cooperation and the poor relationship between the police and prosecutors and/or magistrates. This relationship, according to the Ombudsman, is a major contributing factor to the overcrowding problem in police holding cells throughout the country.¹¹⁵

Police authorities and all those having a say in this matter are reminded that police holding cells are only intended for short detention periods. It is critical that the 48-hour rule be observed at all times. Whether police holding cells should be renovated, modernised or rebuilt is a secondary consideration. This, as rightfully pointed out by the Ombudsman, will not address the root causes of the problem.¹¹⁶ Such an approach would cloak the flagrant disregard for the constitutionally entrenched right to a

114 Walters, J. 2008 Follow-up report, p. 2.

115 Ibid, pp. 2 – 3.

116 Walters, J. Report on police cell conditions in Namibia, p. 9.

speedy trial in the outward appearance of legitimacy.¹¹⁷ Efforts should rather be focused on determining the causes and manifestations of and possible solutions to the overcrowding and the large number of alleged (non-sentenced) offenders. To this end, the government is urged to explore the setting up of courts for petty crimes and small claims courts (so that victims of petty crimes would be able to claim for their damages from convicted offenders, thereby addressing both overcrowding and compensation for victims). Alternative sentences to incarceration, such as the piloted community service orders, should be encouraged and rolled-out countrywide as a matter of urgency. The building of new prisons and/or police holding cells may reduce the problem of overcrowding. However, without simultaneous initiatives aimed at dealing with the causes of crime, modernising the sentencing regime and engendering community support, overcrowding in prisons and police holding cells is likely to persist.¹¹⁸

Case Study:

In 2005, six people instituted a claim against the Ministry of Home Affairs (the branch thereof which is now the Ministry of Safety and Security) for damages on the grounds that they were arrested without a warrant and detained at the Windhoek Police Station from the 3rd to the 10th of April, 2003. They also averred that the conditions under which they were held violated their right to human dignity. Each plaintiff claimed an amount of N\$200 000 as compensation for these infractions.

The following interview was conducted with Mr. Aloysius Yon, one of the plaintiffs, to gain an insider's view of the conditions prevailing in police holding cells in the country.

John Nakuta: In 2005 you were detained for about a week at the Windhoek Police Station. Could you elaborate on the conditions under which you were held?

117 See Articles 11(3) and 12(1) (b) of the Namibian Constitution.

118 Special Rapporteur on Prisons and Conditions of Detention in Africa – Mission to the Republic of South Africa, p. 64.

Aloysius Yon: The conditions were atrocious. We were held in a small, overcrowded and poorly ventilated cell filled with about 36 people. Some people were even sleeping in the toilet, which meant that one had to relieve oneself in full view of other detainees. The cell was filthy, and had an ever-present disgusting stench. I fell sick from that stench and had to receive medical treatment from my doctor, which they initially refused. The place was infested with cockroaches and lice. We had to ask our families to buy some disinfection products (15 cans of “Doom” and some Chinese chalk) to kill some of the pests. The food was served in a big rubbish-bin with no plates and it mainly consisted out of *mielie pap* (porridge); only the older detainees (those incarcerated for longer than two weeks) had plates. I refused to eat. The mere sight of the “food” made me nauseous. In short, the conditions in police holding cells are dehumanising and a gross violation of every detainee’s fundamental human rights, particularly the rights to human dignity, privacy and administrative justice (i.e. the right to complain).

John Nakuta: What did your group want to achieve or show with this class action?

Aloysius Yon: The conditions in the police cells reminded us of the horrible conditions some of us, and our very leaders, were held under during colonial times. It was not right then and it is certainly not right now! No person, no matter what offence he or she has committed, deserves to be subjected to such inhumane conditions. So, the object was to tell the powers-that-be that an arrested person does not lose his/her rights when he or she enters a detention centre and to remind them of their constitutional obligation to respect and uphold all the fundamental rights and freedoms enshrined in the Namibian Constitution, as provided for in Article 5. If Charles Taylor can be punished for the role he allegedly played in the civil war in Sierra Leone, those who condone (whether directly or indirectly) the inhumane and degrading treatment of detainees in detention centres in Namibia must equally be brought to book and made to face the music. That was our aim, i.e. to hold those in positions of authority accountable for their actions.

John Nakuta: The Judge found in your favour, yet ruled against you. What do you think of the verdict?

Aloysius Yon: I need to be careful here. I don't want to be charged with contempt of court. But I find it is difficult to accept that a case as important as the one we brought can be lost on mere technical grounds. The Judge agreed with us that the conditions of which we complained of were inhuman, degrading and unlawful and as such violated our constitutional right to human dignity. However, because our lawyer apparently did not specifically and properly plead our cause of action (whatever that means) our claim was dismissed with costs. I regard this, with all due respect, as a travesty of justice. A layperson like me will never understand why justice must sometimes play second fiddle to all sorts of other things. This is one of the reasons why many ordinary people have lost their trust in the system and think it is something only for the rich and well-connected.

John Nakuta: Do you think the judgment advanced or comprised the struggle for the recognition of human rights in the country?

Aloysius Yon: Justice and human rights, in my opinion, came second in this case. How can police officers not be held liable for the degrading and inhuman conditions prevailing in the holding cells? Are police officers not organs of the state? I know that even private employers are at times held responsible for the unlawful acts of their employees – why not the Ministry of Safety and Security (the then Ministry of Home Affairs) as the employer of police officers? I also fail to understand the logic of not granting the claim so as to prevent the Ministry from being bombarded with similar claims in future. Does this not constitute a compromise of human rights standards with which police holding cells are supposed to comply? I respectfully submit that it is indeed the case. I don't think the judgment gave those in authority any incentive to change or to improve

the conditions in police holding cells. That's the reason why three years after our case, many people, including the Ombudsman, are still complaining about the horrible conditions in police holding cells.

John Nakuta: Do you have any other comment?

Aloysius Yon: Police holding cells in their current state should be closed down. The government must build proper holding cells where detained persons can be kept in humane conditions. One's right to human dignity cannot be compromised for any thing, not even for a lack of funds, as seemed to be suggested by the judgment as given in our case.

John Nakuta: Thank you very much, Mr. Yon, for sharing your experience with us. It is much appreciated.

Source: Interview conducted by John Nakuta with Mr. Aloysius Yon on 15 July 2009

Independent Oversight over Prison Conditions

The Prisons Act confers Visiting Justice status on Members of Parliament, judicial officers and Regional Governors. A Visiting Justice is empowered, *inter alia*, to:¹¹⁹

- inspect every part of the prison and visit every prisoner in solitary confinement;
- inspect and test the quality and quantity of food ordinarily served to prisoners;
- inquire into any complaint or request made by a prisoner; and
- ascertain whether standing orders and administrative directives are observed.

119 See Prison Act, Sections 112 and 113.

The Ombudsperson and the Auditor-General have similar statutory powers in terms of their enabling Acts and respective mandates. The in loco investigation and the resultant findings of Magistrate Mostert and the reports of the Ombudsman and Auditor General extensively quoted above were in fulfilment of their oversight mandates.

As noted earlier, the African Union Special Rapporteur on Prisons and Conditions of Detention in Africa visited Namibian prisons in 2004. Such visits are usually arranged to “draw the attention of prison officials to the numerous lapses in the criminal justice system in general and the treatment of persons deprived of their liberty in particular, and to advance appropriate measures for redress”.¹²⁰ It is therefore most unfortunate to point out that the Special Rapporteur’s report has either been misplaced and/or is regarded as classified and is thus not available for public scrutiny. A delegation from the International Red Cross Society also visited Namibian prisons. The Red Cross report was also not made available to this researcher, ostensibly to allow the Minister and the Commissioner time to thoroughly acquaint themselves with the findings and recommendations of the delegation. The Minister, the Commissioner of Prisons and all other officials in charge of prisons in the country are reminded that secrecy breeds suspicion, and has the effect of “cutting off information about even the most egregious prison abuses”.¹²¹ Reluctance to release such vital information may be construed as an effort on the part of prison officials aimed at hiding substandard conditions from critical scrutiny.

The government may want to consider the introduction and implementation of a well-structured prison visiting system. For example, judges and/or magistrates (where applicable) should be empowered to *suo motu* review the cases of offenders, and where they deem it necessary, order the release persons being held.¹²²

120 Special Rapporteur on Prisons and Conditions of Detention in Africa – Mission to the Republic of South Africa, p. 4.

121 Ibid, p.24.

122 The Open Society Initiative for West Africa, Ghana Justice Sector and the Rule of Law, Johannesburg, 2007, p. 114.

Strategies for the Reintegration of Offenders upon Release from Prison

The Prisons Act provides for compulsory after-care orders for every offender released from prison.¹²³ The aim of these orders is to ease the offender's transition and reintegration into society. However, staff interviewed for the Auditor General's audit referred to above indicated that this provision has never been implemented.¹²⁴ The Corrections and Conditional Release Bill regrettably also makes no provision for such orders. There seems to be general consensus on the need for and utility of such orders, but this seems to have fallen victim to the lack of a collaborative system between the Ministry and the after-care service providers.¹²⁵ Effective integration of offenders is therefore not achieved, which translates into offenders, even after long periods of incarceration, being released into the society with no certainty that they have the means to cope in society, for example in the form of employment and accommodation to enable them to avoid recidivism.¹²⁶

According to the Auditor-General, the National Release Board ordinarily refers the released offenders to Windhoek-based organisations such as NAMEC (Namibian Men for Change), CRIS (Criminals Returning to Society), the Prison Fellowship and Bridge (based in Mariental, Hardap Region), which are half-way houses that provide rehabilitation services and assist with job seeking and accommodation for the released offenders. However, such referrals are allegedly not followed up on by the Ministry.¹²⁷

It is regrettable that such an important statutory provision is not complied with. The non-compliance with this provision is manifestly unlawful and amounts to a dereliction of duties. The Department of Prisons is thus urged to:¹²⁸

123 See Section 102 of the Prisons Act.

124 Auditor General, *Overcrowding of Prisons for the Financial Years 2002 – 2005*, p. 39 – 40.

125 *Ibid.*

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*, p. 44.

- implement and give full effect to the compulsory after-care orders, as required by law;
- establish a smart partnership with after-care service providers; and
- encourage the establishment of such institutions in other regions for the benefit of released offenders who need their support.

HIV/AIDS and the Prison Population in Namibia

According to Vision 2030, HIV/AIDS is one of the most serious threats facing Namibia, and there is an urgent need to streamline HIV programmes to effectively meet the developmental challenges that the HIV pandemic poses. The grim reality is that nearly twenty per cent of Namibians are HIV-positive.¹²⁹ Although no reliable statistics are available, the percentage of HIV-positive prison inmates is likely to be higher. Around the world, prisoners have long been identified as being particularly vulnerable to HIV and other serious diseases, and Namibia is no exception in this regard. A joint research report on HIV/AIDS in Namibian prisons conducted by the AIDS Law Unit of the Legal Assistance Centre and the University of Wyoming Law College in 2008 found that detention facilities in the country constitute a serious risk to defendants' health and safety, and are potential infection points for diseases, including HIV/AIDS and tuberculosis.¹³⁰ The researchers assert that while the government is to be applauded for implementing a comprehensive HIV testing, counselling, prevention and treatment programme for the benefit of the public, a comprehensive and standardised approach to controlling HIV in the prison system is lacking.¹³¹

129 Ministry of Health and Social Services, United Nation General Assembly Special Session (UNGASS) Country Report, Reporting Period April 2006 – March 2007, retrievable at http://data.unaids.org/pub/Report/2008/Namibia_country_progress_report_en.pdf, accessed on 5 May 2009.

130 AIDS Law Unit and University of Wyoming Law College, *Struggle to Survive – A Report on HIV/AIDS and Prisoners' Rights in Namibia*, Legal Assistance Centre, Windhoek, p.6.

131 *Ibid*, p. 5.

With regard to HIV-related health issues in prisons and detention centres, the researchers made the following disturbing discoveries:¹³²

- testing and counselling procedures are not readily accessible to inmates;
- some wardens are indifferent and even openly hostile towards HIV-positive inmates;
- some inmates forego testing to avoid stigmatisation and discrimination by other inmates and wardens;
- accessing anti-retroviral medication or seeing a doctor could take days, weeks or even months;
- inmates requiring care or HIV treatment must request, often repeatedly, to see a physician at an outside hospital, since prisons do not have doctors on-site; and
- nurses and counsellors, who typically work in prisons on a part-time basis, often do not work over weekends or evenings.

The report singles out the government's refusal to distribute condoms in prisons as another significant impediment to controlling HIV transmission in prisons. The government's main refusal to distribute condoms in prisons appears to be directly related to the anti-sodomy provisions contained in Section 256 of the Criminal Procedure Act and the common law prohibition of sodomy, which is characterised as an "unnatural sex crime". Notwithstanding official denials or insistence that man-to-man sex does not take place in prisons, there is incontrovertible evidence that this practice is widespread in prisons, and will therefore inevitably spread HIV.¹³³ The prohibition on condom distribution in prisons is also an outright case of discrimination. The illegality of sodomy and the social taboo surrounding homosexuality affect non-prisoners and prisoners alike. Neither the National Aids Policy nor any other policy provides that non-prisoners who engage in man-to-man sex should not have access to condoms. The selective prohibition, applying only to prison inmates, calls for some serious introspection on the part of the authorities.¹³⁴ Indeed, it most definitely runs counter to the spirit, purport and objectives of the Namibian Bill of Rights (Chapter 3 of the Constitution) and Namibia's international obligations

132 Ibid, p. 6.

133 Odunsi 2007, p.18.

134 Ibid, p.27.

under the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and the African Charter on Human and Peoples' Rights, to mention but a few. Most relevant in this regard, because of their specific focus on HIV/AIDS in prisons, are the World Health Organisation (WHO) Guidelines and the International Guidelines on HIV/AIDS and Human Rights. The latter states:¹³⁵

Prison authorities should take all necessary measures, including adequate staffing, effective surveillance and appropriate disciplinary measures, to protect prisoners from rape, sexual violence and coercion. Prison authorities should also provide prisoners (and prison staff, as appropriate), with access to HIV-related prevention information, education, voluntary testing and counselling, means of prevention (condoms, bleach and clean injection equipment), treatment and care and voluntary participation in HIV-related clinical trials, as well as ensure confidentiality, and should prohibit mandatory testing, segregation and denial of access to prison facilities, privileges and release programmes for HIV-positive prisoners. Compassionate early release of prisoners living with AIDS should be considered.

The WHO Guidelines unequivocally state that all prisoners “have the right to receive health care, including preventative measures equivalent to those available in the community without discrimination”.¹³⁶ Regarding the distribution and use of condoms in prisons, the Guidelines are equally unambiguous:¹³⁷

the use of condoms in preventing HIV transmission must be explained. Since penetrative sexual intercourse occurs, in prison, even when prohibited, condoms should be made available to prisoners throughout their period of detention. They should also be made available prior to any form of leave or release.

135 International Guidelines on HIV/AIDS and Human Rights: 2006 Consolidated Version, Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, pp. 30 – 31, retrievable at http://www2.ohchr.org/english/issues/hiv/docs/consolidated_guidelines.pdf (accessed on 16 May 2010).

136 WHO Guidelines on HIV Infection and AIDS in Prisons, WHO Global Programme on AIDS, General Principle A.1, retrievable at data.unaids.org/Publications/IRC-pub01/JC277-WHO-Guidel-Prisons_en.pdf (accessed on 16 May 2009).

137 Ibid, Principle C.20.

It should be clear, then, that it is crucial that Namibia looks beyond the existing measures in the quest to curtail the spread of HIV and AIDS in prisons. It is suggested that pragmatic measures that would have direct bearing on the main identified causes of HIV/AIDS in Namibian prisons be adopted. In this context, the recommendations made by the team of researchers of the LAC and the University of Wyoming, mentioned above, are worth paraphrasing:¹³⁸

- To the National Assembly and the National Council:
 - pass the Community Service Order Bill as a matter of urgency so as to decongest prisons and police holding cells; and
 - repeal the sodomy provisions in the Criminal Procedure Act (the criminalisation of male-to-male sex is a major impediment to the distribution of condoms in prisons and legitimises discrimination against those exercising their inalienable right to choice regarding their sex partners).

- To the Ministry of Safety and Security:
 - increase HIV/AIDS education for prisoners and prison officials;
 - ensure that victims of rape, assaults and other at-risk inmates have access to post exposure prophylaxis in prison;
 - provide free access to condoms (sex is an undeniable reality of prison life; condom distribution is essential to combat the spread of HIV, AIDS and other sexually transmitted diseases); and
 - consider and introduce conjugal visits to offenders.

138 AIDS Law Unit and University of Wyoming Law College, *Struggle to Survive*, pp. 9-11.

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