

The Justice Sector & the Rule of Law in Namibia



Framework, Selected Legal
Aspects and Cases

Oliver C. Ruppel & Lotta N. Ambunda

The Justice Sector and the Rule of Law in Namibia

Framework, Selected Legal Aspects and Cases

Oliver C. Ruppel & Lotta N. Ambunda

Published by:

Namibia Institute for Democracy
Human Rights and Documentation Centre

Funded by:

Embassy of Finland
Open Society Initiative for Southern Africa

Copyright:

The Authors
The Namibia Institute for Democracy

No part of this publication may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage and retrieval system, without the permission of the publisher

Language Editing:

William Hofmeyr

Design & Layout:

DV8 Saatchi & Saatchi

Printed by:

John Meinert Printing

ISBN:

978 - 99916 - 865 - 7- 8



Embassy of Finland



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

ACERWC	African Committee of Experts on the Rights and the Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CEDAW	Convention on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
CRC–OPAC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
CRC–OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
ESC	Economic Social and Cultural
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
JSC	Judicial Service Commission
LAC	Legal Assistance Centre
MAWRD	Ministry of Agriculture, Water and Rural Development
MGECW	Ministry of Gender Equality and Child Welfare
NGO	non-governmental organisation
NID	Namibia Institute for Democracy
NSHR	National Society for Human Rights
OAU	Organisation of African Unity
SADC	Southern African Development Community
SWAPO	South West African People's Organisation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund

List of Acts and Bills

Administration of Justice Proclamation, No. 21 of 1919
Adoption Validation Act, No. 30 of 1943
Affirmative Action (Employment) Act, No. 29 of 1998
Agricultural (Commercial) Land Reform Act, No. 6 of 1995
Appellate Division Act, No. 12 of 1920
Children's Act, No. 33 of 1960
Children's Status Act, No. 6 of 2006
Combating of Domestic Violence Act, No. 4 of 2003
Combating of Immoral Practices Act, No. 21 of 1980
Combating of Immoral Practices Amendment Act, No. 7 of 2000
Combating of Rape Act, No. 8 of 2000
Communal (Agricultural) Land Reform Act, No. 5 of 2002
Communal Land Reform Act, No. 5 of 2002
Community Courts Act, No. 10 of 2003
Criminal Procedure Act, No. 55 of 1956
Criminal Procedure Act, No. 51 of 1977
Extradition Act, No. 11 of 1996
General Law Amendment Act, No. 32 of 1952
High Court Act, No. 16 of 1990
Judges' Remuneration Act, No. 18 of 1990
Judicial Service Commission Act, No. 18 of 1995
Labour Act, No. 11 of 2007
Labour Act, No. 6 of 1992
Legal Practitioners Act, No. 15 of 1995
Magistrates' Courts Act, No. 32 of 1944
Magistrates' Courts Amendment Act, No. 11 of 1985
Magistrates' Courts Amendment Act, No. 9 of 1997
Maintenance Act, No. 9 of 2003
Marriage Act, No. 25 of 1961
Married Persons Equality Act, No. 1 of 1996
Ombudsman Act, No. 7 of 1990
Prevention of Organised Crime Act, No. 29 of 2004
Prisons Act, No. 8 of 1959
Public Service Act, No. 13 of 1995
State Liability Act, No. 20 of 1957
Supreme Court Act, No. 59 of 1959
Traditional Authorities Act, No. 25 of 2000

Child Care and Protection Bill

Child Justice Bill

Recognition of Customary Law Marriages Bill

About the Authors

Oliver C. Ruppel is Professor of Law at the Faculty of Law of the University of Stellenbosch (South Africa), Adjunct Professor of Law at the Pupkewitz Graduate Business School, Polytechnic of Namibia, and Adjunct Professor at the Institute for Social and Development Studies, Munich School of Philosophy SJ, Germany. He lectures at various academic institutions throughout the world as a visiting Professor, including the Saransk State University (Russia) and the Newman Institute University College, Uppsala (Sweden). Prof. Ruppel is a Trustee of the Legal Research and Development Trust of Namibia, a Regional Resource Person for Sub-Saharan Africa to the World Trade Organisation and Coordinating Lead Author for Africa of the Intergovernmental Panel on Climate Change (IPCC) Working Group II, which is housed at Stanford University (USA). Prof. Ruppel was the Founding World Trade Organisation Chair holder at the Faculty of Law, University of Namibia, where he served as a Senior Lecturer from 2006 to 2010. From 2008 to 2010 he was the Director of the Human Rights and Documentation Centre in Windhoek, where parts of the research for this publication were conducted. He graduated in law after studies at the Universities of Lausanne (Switzerland) and Munich (Germany). “He holds an LLM from the University of Stellenbosch, a doctoral degree in Law from the University of Bratislava (Slovakia), a Master of Mediation (MM) degree from the University of Hagen (Germany), a PG Diploma from the Munich School of Philosophy SJ (Germany) and a PG Diploma in International Human Rights Law from Åbo Academi University, Turku (Finland).

E-mail: ruppel@sun.ac.za / ruppel@mweb.com.na

Lotta N. Ambunda is a legal officer in the Directorate of the Registrar of the Supreme and High Court in Windhoek. She was a student assistant at the Human Rights and Documentation Centre from 2008 to 2010. She holds a B. Juris degree and an LLB from the University of Namibia. Ms Ambunda hails from a small village in Ompundja Constituency in northern Namibia, where she attended elementary school. She completed secondary school at St Joseph's Roman Catholic School in Windhoek. She was responsible for the sections on "The Namibian Justice Sector", "Enforcement of Human Rights under the Constitution", "Racial Discrimination", "Torture" and "The Rome Statute and the International Criminal Court ICC" in this publication. Her latest publications include Ambunda, L.N. & W.T. Mugadza. 2009. "The protection of children's rights in Namibia: Law and policy". In Ruppel, O.C. (Ed.). *Children's Rights in Namibia*. Windhoek: Macmillan Education Namibia, pp. 5–52; and Ambunda, L.N. & S. de Klerk. 2008. "Women and custom in Namibia – A research overview". In Ruppel, O.C. (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?* Windhoek: Macmillan Education Namibia, pp. 43–82.

E-mail: lottanambunda@hotmail.com

Contents

Background to the Series	i	The Namibian Justice Sector	3
Acronyms and Initialisms	ii	The Supreme Court	4
List of Acts and Bills	ii	The High Court	7
About the Authors	iv	The Labour Court	11
Introduction	I	The Lower Courts	12
		The Magistrates' Courts	13
		The Community Courts	16
		The Office of the Ombudsman	18

The Rule of Law in Namibia	25	International Human Rights	54
Separation of Powers	26	Women's Rights	57
The Executive	27	<i>The Children's Status Act</i>	60
The Legislature	38	<i>The Combating of Domestic Violence Act</i>	60
The Judiciary	38	<i>The Maintenance Act</i>	61
Legitimacy of the Law	43	<i>The Combating of Rape Act</i>	62
Sanctions for Executive Violation of the Law	45	<i>The Combating of Immoral Practices Act and the Married Persons Equality Act</i>	63
Judicial Review and Administrative Action	46	<i>The Draft Customary Law Marriages Bill</i>	64
Government Immunities	50	Relevant African Legal Instruments	65
		<i>The OAU, AU and the African Charter for Human and Peoples' Rights</i>	65
		<i>The Protocol on the Rights of Women in Africa</i>	66
		<i>The Promotion of Gender Equality in the SADC</i>	68

International Law	71	Children's Rights	90
<i>The Convention on the Elimination of all Forms of Discrimination against Women</i>	74	<i>Corporal Punishment</i>	94
<i>The Declaration on the Elimination of Violence against Women</i>	75	<i>The Children's Act</i>	100
Women and Customary Law	76	<i>The Children's Status Act</i>	101
<i>Customary Marriages</i>	77	<i>The Maintenance Act</i>	102
<i>Bride Price</i>	80	<i>The Child Care and Protection Bill</i>	103
<i>Polygamy and Polygyny</i>	82	The International Framework	106
<i>Women's Land and Property Rights under Customary Law</i>	84	<i>Convention on the Rights of the Child</i>	108
<i>Customary Succession and Inheritance Law</i>	85	<i>Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography</i>	117
<i>Extramarital Children under Customary Law</i>	87	<i>Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict</i>	118
<i>Are Women's Rights a Threat to Custom and Customary Law?</i>	87	<i>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime</i>	120
		<i>The Beijing Rules</i>	120
		<i>The African Charter on the Rights and Welfare of the Child</i>	122

Enforcement of Human Rights
under the Constitution 125

Racial Discrimination 130

Torture 133

*The Rome Statute and the International
Criminal Court* 140

Bibliography 143

Case Study: 33, 129, 138 & 141.

Introduction

The Republic of Namibia, as the country is known today, was declared a German Protectorate in 1884 and a Crown Colony in 1890; thereafter it became known as *Deutsch-Südwestafrika*, South West Africa and South West Africa / Namibia. The territory had remained a German colony until 1915, when it was occupied by South African forces. From 1920 onwards, the territory was a protectorate, i.e. a mandated territory under the protection of South Africa in terms of the Treaty of Versailles. Significant local and international resistance to South Africa's continued occupation of the country emerged in the late 1950s and early 1960s.¹

In the wake of the substantial repression of an incipient nationalist movement within South West Africa, the South West African People's Organisation (SWAPO), under the leadership of Sam Nujoma, was established in exile in 1960. The organisation committed itself to ongoing efforts to work through international bodies, such as the United Nations (UN), to put pressure on the South African government, and took up an armed struggle against the latter. Political and social unrest within Namibia increased markedly during the 1970s, and was often met with repression at the hands of the colonial administration. In 1978, the UN Security Council passed Resolution 435 and authorised the creation of a Transition Assistance Group to monitor the country's transition to independence. In April 1989, the UN began to supervise this transition process, part of which entailed supervising elections for a Constituent Assembly to be charged with drafting a constitution for the country. After more than a century of domination by other countries and a long struggle on both diplomatic and military fronts, Namibia finally achieved its independence in 1990.²

1 Amoo & Skeffers (2008:17ff).

2 Ibid and Ruppel (2008b:208).

The Constitution of the Republic of Namibia, which was drafted and adopted in 1990, is the fundamental and supreme law of the land.³ The Constitution is hailed by some as being amongst the most liberal and democratic in the world. It enjoys hierarchical primacy amongst the sources of law by virtue of its Article 1(6). It is thematically organised into 21 chapters which contain 148 Articles. Together, they organise the state and outline the rights and freedoms of people in Namibia.⁴

Over the last few years, Namibia has embarked on an ambitious development programme aimed at reducing poverty, creating employment, promoting human rights and economic empowerment, stimulating sustained economic growth, reducing inequalities in income distribution, reducing regional development inequalities, promoting gender equality and equity, enhancing environmental and ecological sustainability, and combating the further spread of HIV/AIDS.⁵ To these ends, the third National Development Plan (NDP3) 2007/08 – 2011/12 and the long-term Vision 2030 are being implemented with the support of international institutions such as the IMF and the World Bank.⁶ Against the background of Namibia's still being a relatively young democracy, President Hifikepunye Pohamba in February 2009 called for a return to the core values of democracy, stressing that Namibians must not only cherish democracy, but ensure its future.⁷ In this context, it is also important to acknowledge that the rule of law binds the government, and that all persons in the society must be treated equally and fairly, without discrimination and with access to the justice system.

3 Cf. Amoo (2008b&c).

4 Ambunda & Mugadza (2009:5ff).

5 These were the objectives in Namibia's second National Development Plan 2001/02 – 2005/06 (NDP2) (National Planning Commission online information; cf. <http://www.npc.gov.na/docs/ndp2info.htm>, last accessed 2 March 2010.)

6 The main theme of NDP3 is "accelerated economic growth and deepening rural development", while under Vision 2030 Namibia aims to become an industrialised/knowledge-based economy (National Planning Commission, 2007).

7 Ruppel & de Klerk (2009:1).

The Namibian Justice Sector

The Namibian court system retains Roman Dutch elements inherited from South Africa along with elements of the African traditional (community) court system. The formal court system comprises the magistrates' courts, the High Court, and the Supreme Court. The Supreme Court serves as the highest court of appeal and also exercises constitutional review of legislation. Prior to the attainment of nationhood in 1990 and the promulgation of the Constitution of the Republic of Namibia, which created an independent judiciary and a Supreme Court for the sovereign nation, the courts of Namibia were an extension of the judiciary system of South Africa.⁸

The Administration of Justice Proclamation⁹ established the High Court of South West Africa, and the Appellate Division Act¹⁰ granted the Appellate Division of the Supreme Court of South Africa jurisdiction to hear appeals against judgments and orders made by the High Court of South West Africa. In terms of the provisions of the Supreme Court Act,¹¹ the judiciary of South West Africa was amalgamated into that of South Africa, resulting in the High Court of South West Africa being constituted as the South West Africa Provincial Division of the Supreme Court of South Africa. The Appellate Division of the Supreme Court of South Africa therefore maintained jurisdiction over the decisions of the South West Africa Provincial Division of the Supreme Court of South Africa to hear and finally determine matters brought before it on appeal, as it did over matters emanating from other provincial or local divisions.¹²

With the promulgation of the Constitution of the Republic of Namibia in 1990, the Supreme Court of Namibia became the highest court of appeal for the country. By virtue of Proclamation 21 of 1919, the Roman Dutch law developed by the South African courts had become the common law of the territory, and was binding on the Namibian courts until independence. This position was affirmed by Article 66(1) of the Constitution, which provides that both the customary law and the common law

8 Amoo (2008b&c).

9 No. 21 of 1919.

10 No. 12 of 1920.

11 No. 59 of 1959.

12 Cf. Amoo & Skeffers (2008:25).

of Namibia in force at the date of independence remain valid to the extent to which such customary law or common law does not conflict with the Constitution or any other law passed by the Namibian Parliament.¹³ Despite the legal influences of the former colonial powers, a large number of Africans still live under indigenous customary law.¹⁴ This makes the Namibian legal system an object of fascination to comparative lawyers, as well as to legal ethnologists and sociologists. The concept of legal pluralism is commonplace in Namibia, reflecting a situation in which two or more types of law or legal tradition operate simultaneously.¹⁵

The Supreme Court

Article 79(1) of the Constitution provides that the Supreme Court should consist of a Chief Justice¹⁶ and such additional judges as the President, acting on recommendation of the Judicial Service Commission (JSC), may determine; while Article 79(2) adds that the Supreme Court is to be presided over by the Chief Justice. It should also be noted that no judge who has heard a case in a lower court may thereafter sit as a judge for that case should it go to a higher court. All appointments of judges to both the Supreme Court and the High Court are to be made by the President on the recommendation of the JSC.

In the case of *S v Zemburuka*,¹⁷ the court ruled that the appointments of acting judges should be subject to the same procedural requirements as their tenured counterparts. All judges thus appointed are to hold office until the age of 65, but the President is entitled to extend the retiring age of any judge until 70. A judge can be removed from office prior to the expiry of his/her tenure, but only by the President acting on the recommendation of the JSC, and only on the grounds of mental incapacity or gross misconduct.

13 Ibid.

14 Hinz (2002); Sippel (2003:69-89).

15 Griffiths (1986:1-55).

16 His Lordship Peter Shivute.

17 (2) 2003 NR 200 (HC) at 204].

The Supreme Court is primarily a court of appeal, and its appellate jurisdiction covers appeals emanating from the High Court, including appeals which involve interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder. It is the highest court of appeal in Namibia and its decisions are final. It should also be added, however, that in the exercise of the prerogative of mercy, the President is empowered to pardon or reprieve offenders, either unconditionally or subject to such conditions as he/she may deem fit.¹⁸

The Supreme Court is not bound by any judgment, ruling or order of any court that exercised jurisdiction in Namibia prior to or after independence. The Constitution further vests in Parliament the power to make legislation providing for the appellate jurisdiction of the Supreme Court. Under the relevant provisions of the Supreme Court Act, the Supreme Court is vested with unlimited appellate jurisdiction over appeals against any judgment or order of the High Court; and any party to any such proceedings before the High Court, if dissatisfied with any such judgment or order, has a right of appeal to the Supreme Court. In the exercise of its appellate jurisdiction, the Supreme Court has the power to receive further evidence, either orally or by deposition before a person appointed by the court, or to remit the case for further hearing to the court of first instance or to the court whose judgment is the subject of the appeal, with such instructions relating to the taking of further evidence or any other matter as the Supreme Court may deem necessary. The Supreme Court is also empowered to confirm, amend or set aside the judgment or order that is the subject of the appeal, and to give any judgment or make any other order which the circumstances may require. Records indicate that the Supreme Court's jurisdiction to amend or set aside a judgment or order of a lower court has to date been used sparingly and only on very compelling grounds. As a rule, in determining civil appeals from a decision of the High Court, an appeal should take the form of a rehearing of the record, rather than a retrial. However, if it appears to the court that there was insufficient evidence before the trial judge, a retrial will be ordered.¹⁹

18 Amoo (2008b:72ff.).

19 Ibid.

The Supreme Court has original jurisdiction over matters referred to it for decision by the Attorney-General under the Constitution, and with such other matters as may be authorised by Act of Parliament. In this sense, therefore, it can be concluded that the Supreme Court indeed has original jurisdiction over constitutional matters, but that this original jurisdiction is not exclusive to the Supreme Court because the High Court is also vested with original jurisdiction over constitutional matters. Unlike, for example, in the case of the judicial structure in South Africa, where there is a Constitutional Court, the Namibian Constitution does not create a separate Constitutional Court per se, but the Supreme Court can constitute itself as a Constitutional Court in the cases mentioned above. By virtue of the provisions relating to the original jurisdiction of the Supreme Court under the Supreme Court Act of 1990, whenever any matter is referred for a decision to the Supreme Court by the Attorney-General, the latter is entitled to approach the Supreme Court directly, without first instituting any proceedings in any other court, on application to it, to hear and determine the matter in question.²⁰

In the exercise of its original jurisdiction, as stated above, the Supreme Court has the power to receive evidence either orally or on affidavit or by deposition before a person it appoints, or to direct that the matter be heard by the High Court. The Supreme Court is also empowered to grant or refuse the application or to confirm, amend or set aside the proceedings that are the subject of the hearing, and to give any judgment or make any order which the circumstances may require. The Supreme Court also has review jurisdiction over the proceedings of the High Court or any lower court, or any administrative tribunal or authority established or instituted by or under any law. The Supreme Court may exercise this jurisdiction *ex mero motu* (of the court's own accord) should it come to the notice of the court or any judge of that court that an irregularity has occurred in any proceedings, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court. This review jurisdiction, however, does not confer upon any person any right to institute any such review proceedings in the Supreme Court as a court of first instance. The Supreme Court is obliged to hold

20 Amoo (2008b:3ff).

not less than three sessions during each calendar year. The seat of the court is in Windhoek. A decision of the Supreme Court is binding on all other courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted in conformity with the principles of legislative sovereignty.²¹

The High Court

According to Article 80(1) of the Constitution, the High Court shall consist of the Judge-President²² and such additional judges as the President, acting on recommendation of the JSC, may determine.

The High Court is a superior court of record and its jurisdiction is provided by both the Constitution and the High Court Act. The Constitution vests the High Court with both original and appellate jurisdiction, and all proceedings in the High Court are to be carried in an open court;²³ the court may, however, exclude the press and/or the public from all or any part of the trial for reasons of morals and the public order or national security.²⁴

It is situated permanently in Windhoek, and since 2009 also in Oshakati.²⁵ Other than this, the court goes on circuit to venues including Gobabis, Grootfontein and Swakopmund.²⁶

21 Ibid.

22 His Lordship Petrus Damaseb.

23 Section 13 of the High Court Act.

24 Article 12(1)(a), Namibian Constitution; Amoo (2008b:76).

25 At the official inauguration of the new Oshakati High Court facility, President Hifikepunye Pohamba said the establishment of a High Court at the town, was a concrete reflection of the Government's desire to strengthen the administration of justice in all parts of Namibia. The improved and expanded administration of justice, particularly at the High Court level, is indispensable for the realisation of Human Rights, the Rule of Law and Democracy said Pohamba, adding that these are vital ingredients in building a just and prosperous society. He further said the Namibian Constitution provides for administrative justice and the establishment of a High Court. Hence, he added that the Government is determined to fulfill its constitutional duty enshrined in Chapter 3, Article 18 and Chapter 9 Articles 78 and 80 of the Constitution.

26 Section 4 of the High Court Act provides that the seat of the High Court is to be in Windhoek, but if the Judge-President deems it necessary or expedient in the interest of the administration of justice, he or she may authorise the holding of its sitting elsewhere in Namibia.

Section 16 of the High Court Act states:

The high court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance and shall in addition to any powers of jurisdiction which may be vested in it by law have power –

(a) hear and determine appeals from all lower courts in Namibia;

(b) to review the proceedings of all such courts

[...]

(d) and in its discretion and at the instance of an interested party, to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.²⁷

However, the High Court derives its appellate jurisdiction to hear and adjudicate upon appeals from lower courts primarily from the Constitution.²⁸ One or more judges may constitute the High Court as a court of appeal, but the Judge-President or in his or her absence, an available senior judge, has the discretion to direct that a matter be heard by a larger number of judges. During the appeal process, the court may receive further evidence, either orally or by disposition before a person appointed by the

²⁷ Section 16, High Court Act.

²⁸ Article 80(2), Namibian Constitution.

court, or remit the case to the court of first instance or the court whose judgment is the subject of the appeal, for further hearing, with such instructions relating to the taking of further evidence or any other matter as the High Court may deem it necessary. The court has also the power to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.²⁹

The Constitution is silent on the qualifications for appointment as High Court judges or acting judges, but Section 3 of the High Court Act³⁰ contains detailed provisions relating to such qualifications. As a rule, the judgment of the majority of the judges of the full court constitutes the judgment of the court, but where the judgments of a majority of the judges of any such court are not in agreement, the hearing is adjourned and commenced *de novo* before a new court constituted in such manner as the Judge-President or, in his or her absence, the senior available judge may determine.³¹ If at any stage during the hearing of any matter by a full court or by a court consisting of two or more judges, any judge of such court dies or retires or becomes otherwise incapable of acting or is absent, the hearing is, if the remaining judges constitute a majority of the judges before whom it was commenced, to proceed before such remaining judges, and if such remaining judges do not constitute such a majority, or if only one judge remains, the hearing is to be commenced *de novo*, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of such remaining judges or of such one remaining judge, as the case may be, as the decision of the court.³²

Under the provisions of Sections 32 and 37 of the Legal Practitioners Act,³³ the Court has the power to discipline legal practitioners who have been found guilty of unprofessional, dishonourable or unworthy conduct. Under its original jurisdiction, the court shall have the power to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation,

29 Section 19 of the High Court Act.

30 No. 16 of 1990.

31 Amoo (2008b:72ff.).

32 Ibid.

33 No. 15 of 1995.

implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder, including the power to overrule legislation where legislation is inconsistent with or *ultra vires* either the Constitution or enabling legislation. The inherent jurisdiction to overrule applies also in the case of subsidiary legislation where it is uncertain or unreasonable, or it contains an improper delegation. As a rule, the inherent jurisdiction of the superior courts means that they may do anything that the law does not forbid, in contradistinction to the lower courts, such as Magistrates' Courts, which are creatures of statute in that they cannot claim any authority which cannot be found within the four corners of the Magistrates' Courts Act. With regard to the court's original jurisdiction over cases involving the fundamental rights of the individual, special mention needs to be made of the provisions of Article 18 of the Namibian Constitution and Rule 53 of the High Court Rules that vest in the court the jurisdiction to review administrative action. The importance of this lies in the development of the law relating to administrative justice by the Namibian courts. When the High Court sits as a court of first instance for the hearing of any civil matter, it is to be constituted before a single judge; but the Judge-President or, in his or her absence, an available senior judge may at any time direct that any matter be heard by a full court. However, with criminal appeals from a lower court, the High Court has to be constituted in the manner prescribed in the applicable law relating to procedure in criminal matters.³⁴

The High Court derives its appellate jurisdiction to hear and adjudicate upon appeals from lower courts primarily from the Constitution, but there are other provisions in the High Court Act that also deal with its appellate jurisdiction. One or more judges may constitute the High Court as a court of appeal, but the Judge-President or, in his or her absence, an available senior judge, has the discretion to direct that a matter be heard by a larger number of judges. The High Court has review or supervisory jurisdiction over all proceedings from inferior courts. Under this jurisdiction, the High Court has the power to call

34 Ibid.

for and review the record of any proceedings determined by an inferior court and, if necessary, to revise any judgment or order contained in any such record. As indicated hereunder, the High Court may also either on its own motion, or on application from an interested party, transfer any proceedings pending before any inferior court to another inferior court of competent jurisdiction or to itself for trial and determination, to ensure that the proceedings are determined expeditiously, conveniently, fairly and authoritatively. The grounds of review of the proceedings of lower courts are stated under Section 20 of the High Court Act.³⁵

The Labour Court

The Labour Court, which is one of the superior courts of Namibia, was established under Section 15 of the Labour Act³⁶ and confirmed by Section 115 of the new Labour Act.³⁷ For each district in respect of which a Magistrate's Court has been established, the Act establishes two courts, namely a Labour Court and a District Labour Court. Therefore, within the Namibian judicial hierarchy, district labour courts reside amongst the lower courts. The appellate jurisdiction of the Labour Court is provided for by Section 18 of the old Labour Act of 1992. Accordingly, the court has exclusive jurisdiction to determine appeals from:

- a) *any district labour court;*
- b) *and any appeal noted in terms of Section 54(4), 70(6), 95(4), 100(2) or 114(6).*

The Labour Act of 2007 extends the jurisdiction of the Labour Court under Section 115, which provides that the court has the power to determine appeals from:

35 Ibid.

36 No. 6 of 1992.

37 No. 11 of 2007.

- a) *decisions of the Labour Commissioner made in terms of this Act;*
- b) *arbitration tribunals awards, in terms of Section 89; and*
- c) *compliance orders issued in terms of section 126.*

As stated by Amoo,³⁸ it should be noted that the 2007 Labour Act does not make explicit provision with regard to district Labour Courts; nevertheless, the jurisdiction of the said court can be traced from Section 19 of the 1992 Labour Act. Any party to any proceeding before a Labour Court may, with the leave of the labour court, or, if such leave is refused, with the leave of the Supreme Court of Namibia granted on application by way of petition to the Chief Justice, appeal to a full court of the High Court of Namibia, on an any question of law against any decision or order of the labour court or any judgment or order of the labour court given on appeal from the judgment or order from a district labour court, as if such judgment or order were a judgment or order of the High Court of Namibia.³⁹ Similarly, any party to any proceedings before any district labour court may appeal to the labour court against any judgment or order given by such district labour court, as if such judgment or order were a judgment or order of the Magistrate's Court.⁴⁰

The Lower Courts

The Lower Courts are responsible for administering justice. In terms of Article 78 of the Constitution of the Republic of Namibia, the Lower Courts form part of the judiciary, one of the three branches of the state. Lower courts are established in terms of Section 2(1) of the Magistrates' Courts Act.⁴¹ The bulk of the judiciary's work also takes place in the lower courts. There are thirty-two (32) permanent courts and more than thirty (30) periodical courts in Namibia.⁴² Lower Courts are divided into a Regional

38 Amoo (2008b:81f).

39 Section 21(1) (a) of the Labour Act of 1992.

40 Section 21(1) (b) of the Labour Act of 1992.

41 No. 32 of 1944

42 The Ministry of Justice Annual Report 2006 – 2007, p 15.

Division and five administrative districts, namely Windhoek, Oshakati, Otjiwarongo, Keetmanshoop and Rundu. Each district has a seat for a regional court that presides on all criminal matters except high treason, but has no jurisdiction on civil matters.⁴³

The Magistrates' Courts

Magistrates' courts in Namibia may be classified into regional, district, sub-district division⁴⁴ and periodical courts⁴⁵. Magistrates' Courts are courts of record⁴⁶ and their proceedings in both criminal cases and the trial of all defended civil actions are conducted in an open court.⁴⁷ The jurisdiction of the Magistrates' Courts in respect of causes of action is regulated by Section 29 of the Magistrates' Court Act, as amended.⁴⁸

In short, the Magistrates' Courts have jurisdiction over liquid claims⁴⁹ not exceeding N\$100 000 and illiquid claims not exceeding N\$25 000. The financial jurisdiction of the High Court is limited in terms of minimum in matters of first instance, but there is no ceiling as to the amount that can brought in front of the court. The Magistrates' Courts are presided over by judicial officers, and advocates or attorneys of any division of the Supreme Court may appear in any proceeding in any court. The Act also permits articled clerks to appear instead and on behalf of the attorney to whom s/he has been attached. Under the provisions of Section 19 of the Legal Practitioners Act, a candidate legal practitioner to whom a certificate has been issued by the Justice Training Centre, certifying that such candidate legal practitioner has completed a period of six months' training under a course of postgraduate training,

43 Amoo (2008b:83).

44 Section 2(f) (2) (a)-(iv) of the Magistrates' Courts Act of 1944.

45 Section 26 of the Magistrates' Courts Act of 1944; periodical courts are meant to serve the remote areas of the country, and as the name suggests, they are only held at intervals, when the volume of work in the area requires a court sitting.

46 A court of record can be understood as "a court whose acts and judicial proceedings are written on parchment or in a book for a perpetual memorial which serves as the authentic and official evidence of the proceedings of the court". Cf. Amoo (2008b:83).

47 Section 5 of the Magistrates' Courts Act of 1944.

48 Magistrates' Courts Amendment Act, No. 9 of 1997.

49 A liquid amount is fixed and certain and can – compared to an illiquid amount – be easily determined. *Maritime & General Insurance Co Ltd v Colenbrander 1978 (2) SA 262 (D) at 264F.*

has the right of audience in any lower court in any matter, and in Chambers in any High Court proceedings, but not after the expiration of a period of two years after his or her Board registration as a candidate legal practitioner. All Magistrates' Courts have equal civil and criminal jurisdiction, except the regional Magistrates' Courts, which have only criminal jurisdiction.⁵⁰

The territorial jurisdiction of a Magistrate's Court is the district, sub-district or area for which it is established; a court established for a district has no jurisdiction in a sub-district. Similar provisions apply to the jurisdiction of the periodical courts, except that their territorial jurisdiction is subject to the provision that the court of a district within which the said area or any part thereof is situate retains concurrent jurisdiction with the periodical court within such portions of such area as are situate within such district. Moreover, the Magistrates' Courts have civil jurisdiction over matters in which the state is a party.

Under Section 74 of the Magistrates' Courts Act, where a judgment has been obtained for the payment of money and the judgment debtor is unable to pay the amount forthwith, or where a debtor is unable to liquidate his liabilities and has not sufficient assets capable of attachment to satisfy such liabilities or a judgment which has been obtained against him, the court may upon the application of the judgment debtor or the debtor make an order on such terms with regard to security, preservation or disposal of assets, realisation of movables subject to hypothec or otherwise as it thinks fit, providing for the administration of his estate, and for the payment of his debts by instalments or otherwise. Under Section 50 of the Magistrates' Courts Act, as amended by Section 3 of the Magistrates' Courts

50 Amoo (2008b:84ff.).

Amendment Act,⁵¹ any action in which the amount of the claim exceeds N\$5 000, exclusive of interest and costs, may, upon application to the court by the defendant, or if there is more than one defendant, by any defendant, be removed to the High Court.

All magistrates have criminal jurisdiction, but this is subject to certain limitations in respect of the seriousness of the offence, the nature of punishment, and territorial jurisdiction. As stated earlier, Magistrates' Courts are the creation of a statute and, therefore, can only exercise powers and impose punishments provided for by the Act. Any exercise of jurisdiction outside the Act will be null and void. (Contrast this with the inherent jurisdiction of the superior courts.)⁵²

All Magistrates' Courts, other than the court of a regional division, have jurisdiction over all offences except treason, murder and rape. The court of a regional division has jurisdiction over all offences except treason and murder. The jurisdiction of the court is limited with respect to the punishment it may impose. Under Section 92 of the principal Act, as amended by Section 6 of the Magistrates' Courts Amendment Act, the court may impose a sentence of imprisonment for a period not exceeding five years where the court is not the court of a regional division, or not exceeding 20 years, where the court is a court of a regional division. In the case of fines, the court may impose a fine not exceeding N\$20 000, where the court is not a court of a regional division, or not exceeding N\$100 000, where the court is the court of the regional division. Apart from these general provisions relating to the jurisdiction of the court in respect of punishment, a magistrate's jurisdiction is sometimes increased or reduced by particular legislation. A particular statute that creates and prohibits a certain offence may also impose the sentence for the statutory offence. In this case, a magistrate may impose any fine or any sentence as it is prescribed so long as it is not beyond the prescribed penalty in the Act. As a rule, certain enactments provide for a mandatory minimum sentence, in which case any convicted person is obliged to receive that minimum sentence irrespective of the peculiar circumstances of the case,

51 No. 9 of 1997

52 Amoo (2008b:87).

including any mitigating circumstances. The High Court has both express and inherent review jurisdiction over the proceedings of the Magistrates' Courts. Consequently, if a magistrate in a certain matter is of the opinion that the peculiar circumstances of the case are such that a punishment beyond jurisdiction is warranted, the court may either impose such punishment and transfer to the High Court (as indicated above) or a regional court, as the case may be, for confirmation or to the superior court for sentencing. The local limits of jurisdiction or the territorial jurisdiction of the Magistrates' Courts are provided for under Section 90 of the principal Act, as amended by the Magistrates' Courts Amendment Act.⁵³

The Community Courts

Magistrates' Courts have the jurisdiction to hear and determine any appeal against any order or decision of a Community Court. Community courts are a creation of statute, the Community Courts Act,⁵⁴ which also provided detailed procedures and requirements for the establishment and recognition of Community Courts in particular traditional communities.⁵⁵ The Act was drafted to give legislative recognition to and formalise the jurisdiction of the traditional courts that render essential judicial services to members of traditional communities who subject themselves to their jurisdiction and the application of customary law. Formal recognition also brings the proceedings of the erstwhile traditional courts within the mainstream of the judiciary in Namibia, and subjects their proceedings to formal evaluation and review by the superior courts.⁵⁶

Therefore, any party to any proceeding in a Community Court who is aggrieved by an order or decision of that court may appeal to the Magistrate's Court. The Community Courts Act has, however, not yet been implemented. The office of the Ministry of Justice has pointed out that the delay in the promulgation of the Act may be associated with a lack of funds for implementing the sary infrastructures

53 No. 11 of 1985. Cf. Amoo (2008b:87f).

54 No. 10 of 2003.

55 For more details see Hinz (2008b:149-176).

56 Amoo (2008b:90).

as well as the lack of trained staff in the area of customary law. Another issue in the Act is whether or not the Community Courts shall be vested with both criminal and civil jurisdiction.

The Community Courts, being part of the judicial structure of Namibia, shall cater for all forms of proceedings exercised under customary law. This constitutes an effective step taken by the government in protecting and enforcing human rights under the Constitution and preventing all forms of human rights violations under customary practices, as distinct from the pre-independent judicial structure.

The legal dynamics in a traditional community differ substantially from those in urban areas. The Community Courts Act caters for this by providing for the establishment of Community Courts. These courts immediately lift the burden of costs for potential litigants in traditional communities. Aggrieved persons can now institute legal proceedings in their communities, under the laws that they trust, and can be awarded the remedies that they perceive as justified. According to Section 13 of this Act, the law applicable in litigation is the customary law of the community concerned; but if the litigants are connected with different systems of customary laws, the court *a quo* is obliged to apply the customary law which it considers just and fair. It is clear that Community Courts have an administrative role; thus, in line with Article 18 of the Constitution, they are obliged to act fairly and reasonably, and to comply with the requirements imposed on them by common law and any other relevant legislation. Therefore, any person who is aggrieved by the exercise of a Community Court's powers has the right to seek redress before a competent court. In such cases, in terms of Section 26 of the Act, this would be a Magistrate's Court.⁵⁷

During the 11th meeting of the Council of Traditional Leaders held from 10 to 14 November 2008, President Hifikepunye Pohamba, when mentioning the Community Courts Act,⁵⁸ expressed his appreciation for the Ascertainment of Customary Law Project. Especially in view of the Act's

⁵⁷ For more details see Hinz (2008b:149-176).

⁵⁸ No. 10 of 2003.

implementation, it will be difficult – if not impossible – for Namibia’s courts to operate without written laws.⁵⁹ Comprehensive research was therefore conducted in order to collect the various communities’ customary laws. Through the ascertainment process, contraventions of constitutional provisions could be identified so that the communities could consider making changes. In line with Article 66(1) of the Namibian Constitution, customary law has to comply with and cannot derogate from Chapter 3, which contains fundamental human rights and freedoms. Phase 1 of the Namibian Ascertainment of Customary Law Project covers the 17 communities in the central and north-eastern parts of Namibia, i.e. the eight Oshiwambo-speaking communities, the five communities in the Kavango Region, and the four in the Caprivi Region.⁶⁰ The remaining 32 communities in the north-western, central and southern parts of the country will be covered under Phase 2 of the Project. Phase 2 will be initiated immediately after the completion of Phase 1. For Phase 2, it is envisaged that a similar approach as described for Phase 1 will be applied, namely to divide the communities into five different clusters, such as the Damara, the Ovaherero and Ovambanderu, the Nama, the San, the Batswana ba Namibia and the Bakgalakgadi.⁶¹

The Office of the Ombudsman

The legal foundations of the institution of the Ombudsman in Namibia are to be found in Chapter 10 of the Namibian Constitution.⁶² Another provision relating to the institution of the Ombudsman is laid down in Chapter 3 of the Constitution, namely the Bill of Rights, which provides for the enforcement of fundamental human rights and freedoms. Article 25(2) reads as follows:

Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or

59 See Hinz (2006:203.).

60 Hinz (2009:109.).

61 Ruppel (2010a:iii-vi).

62 See Ruppel-Schlichting (2008); Ruppel & Ruppel-Schlichting (2010).

advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

In addition to the constitutional provisions, the Ombudsman Act⁶³ defines and prescribes the powers, duties and functions of the Ombudsman, and provides for matters incidental thereto. The institution of the Ombudsman in Namibia intends to be characterised as independent, impartial, fair, and acting confidentially in terms of the investigation process.⁶⁴ Negotiation and compromise between the parties concerned are the main objectives when handling complaints.⁶⁵ Through investigating and resolving complaints, the institution of the Ombudsman in Namibia promotes and protects human rights, and fair and effective public administration; it combats corrupt practices; and it protects the environment and natural resources. In order to effectively fulfil all these functions, the Ombudsman has to be impartial, fair and independent.

Complaints may be submitted to the Office of the Ombudsman by any person free of charge and without specific form requirements. The Office cannot investigate complaints regarding court decisions, however. Neither can it assist complainants financially or represent a complainant in criminal or civil proceedings. Authorities that may be complained about include government institutions,⁶⁶ parastatals,⁶⁷ local authorities, and – in case of the violation of human rights or freedoms – private institutions and persons.⁶⁸

63 No. 7 of 1990.

64 Gottcher & Hostina (1998).

65 Article 91(e) of the Constitution and Section 5(1) of the Ombudsman Act.

66 These include all offices, ministries and agencies; the National Assembly; the National Planning Commission; and the Attorney-General.

67 These include NamPower, Telecom, NamWater, NamPost, and the Namibian Broadcasting Corporation.

68 Gawanas (2002:104.).

The Office of the Ombudsman is intended to ensure that citizens have an avenue open to them, free of red tape, and free of political interference.⁶⁹ The Ombudsman has relatively broad mandates and corresponding powers. According to Article 91 of the Namibian Constitution, the mandates of the Ombudsman mainly relate to four broad categories: human rights, administrative practices, corruption,⁷⁰ and the environment. At this stage, an imbalance as to complaints by specific mandates can clearly be pointed out.⁷¹ Although the categories of maladministration and human-rights-related issues play the most important role in the Office's work,⁷² the other categories deserve equal attention.

In 2006, a total of 2 060 complaints were brought to the Office of the Ombudsman.⁷³ A statistical breakdown of complaints by mandates⁷⁴ shows that out of this total, 1 286 related to the mandate of maladministration, 177 to human-rights-related issues, 39 to the mandate of corruption, and only two referred to environmental matters. The remaining 556 complaints covered miscellaneous issues. The respective statistics for 2005 reflect a similar picture. It is hoped that the positive effect of the Office's laudable efforts with regard to the more popular mandates such as maladministration and human rights can in future be extended to those mandates that have so far attained little attention in terms of complaints. This was also recently highlighted by the United Nations Committee on the Elimination of Racial Discrimination (CERD).⁷⁵ In its concluding observations,⁷⁶ CERD commended Namibia for its plan to increase the financial and human resources of the Office of the Ombudsman.

69 Tjitendero (1996:10).

70 According to a press release by the National Society of Human Rights (NSHR) dated 15 July 2008, it was the intention of the Cabinet to amend the Constitution with regard to the functions of the Ombudsman to the effect that the word "corruption" (Article 91 of the Constitution) be removed from the list of the functions of the Ombudsman; see also Secret Cabinet Action Letter featuring Cabinet Decision No. 19/06.11.07/002 as well as the Namibian Constitution Second Amendment Bill. All corruption-related complaints are to be directed to the Anti-corruption Commission, which was established by the Anti-corruption Act, No. 8 of 2003, and inaugurated in early 2006.

71 Cf. Office of the Ombudsman (2007:37).

72 Walters (2008:121ff.).

73 Office of the Ombudsman (2007:4).

74 Ibid:37.

75 Cf. *infra*.

76 See the concluding observations by CERD dated 19 August 2008, as well as a list of issues and Namibia's written responses, at <http://www2.ohchr.org/english/bodies/cerd/cerds73.htm>; last accessed 20 September 2008.

However, concern was expressed as to the small number of complaints received with regard to racial discrimination, presumably due to victims' lack of information about their rights and about access to legal remedies. CERD therefore encouraged Namibia to sensitise the general public about such rights and remedies for victims of racial discrimination.⁷⁷

Article 91(a) and (d) of the Constitution and Section 3(1)(a) of the Ombudsman Act refer to the Ombudsman's mandate with regard to human rights in particular. According to Article 91(a), the functions of the Ombudsman include:

... the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of Government (whether central or local), manifest injustice, or corruption or conduct by such official which would properly be regarded as unlawful, oppressive or unfair in a democratic society; ...

and, according to Article 91(d):

... the duty to investigate complaints concerning practices and actions by persons, enterprises and other private institutions where such complaints allege that violations of fundamental rights and freedoms under this Constitution have taken place[.]

Therefore, the Ombudsman has a mandate to investigate alleged breaches of fundamental rights and freedoms as set out in the Namibian Bill of Rights. By enforcing this Bill of Rights, the Ombudsman supplements the work of the courts. The Ombudsman can, in this context, investigate complaints against public officials as well as private persons, private enterprises or any other private institutions.

⁷⁷ The Office is currently active in giving substance to CERD's recommendations by, *inter alia*, conducting racial discrimination hearings throughout the country.

In dealing with its human rights mandate, the Ombudsman has a number of optional approaches.⁷⁸ For example, if the Office receives a complaint from an aggrieved person, the complaint will be investigated. Where a fundamental right or freedom has been violated, the Ombudsman may provide suitable remedies, including those provided for in the Ombudsman Act as well as in Article 25(2) of the Constitution. Where a fundamental right or freedom has been infringed, the Ombudsman will offer legal assistance or advice, or take appropriate action such as negotiating a compromise between the parties concerned, referring the matter to the Prosecutor-General, or bringing proceedings before a competent court.⁷⁹

In 2006, 177 complaints related to violations of basic human rights were received by the Office of the Ombudsman. Amongst other things, these dealt with wrongful arrest and detention, assaults, ill-treatment in prisons, and undue delays in finalising appeals to the High Court.⁸⁰

Besides the investigation approach, the Office of the Ombudsman provides for outreach and specific human rights education programmes in order to enhance public knowledge about human rights and their enforcement.⁸¹ These programmes are conducted in collaboration with non-governmental organisations (NGOs), community leaders, local authorities, etc. In addition, several awareness campaigns have been and are being run by the Office of the Ombudsman. Such campaigns take the form of public lectures, community meetings, or the distribution of newsletters and brochures, to name but a few. Furthermore, during April 2006, in collaboration with NGOs, civil society organisations and the Council of Churches of Namibia, the Office established the Ombudsman Human Rights Advisory Committee. The Committee consists of 20 members of the aforementioned institutions, and offers a forum for exchanging dialogue on all areas of human rights. And finally, in order to improve the protection of human rights, in select cases the Office of the Ombudsman undertakes special activities and drafts special reports for submission to Parliament.⁸²

78 Walters (2008:122.).

79 Article 91(c) of the Constitution.

80 Walters (2008:122.); Office of the Ombudsman (2008).

81 Walters (2008:122, 128f.).

82 In 2006, for instance, the Office of the Ombudsman visited police cells throughout the country and drafted a special report on the horrendous conditions that prevailed there. For details, see Walters (2006; 2008); Ruppel & Groenewaldt (2008).

Public administration has become so comprehensive and the power of the bureaucracy so immense that the legal status of the individual needs adequate protection. Mechanisms available within the formal justice system may not be sufficient to cope with grievances; this is where the institution of the Ombudsman in Namibia offers supplementary protection. Article 18 of the Constitution, which deals with administrative justice, enjoins administrative bodies and officials to act fairly and reasonably when carrying out their functions, and empowers individuals to seek redress from courts and other tribunals in the event that their right to administrative justice has been violated. In addition to this provision, Article 91(b) of the Constitution⁸³ includes the following as a function of the Ombudsman:

... the duty to investigate complaints concerning the functioning of the Public Service Commission, administrative organs of the State, the Defence Force, the Police Force and the prison service in so far as such complaints relate to the failure to achieve a balanced structuring of such services or equal access by all to the recruitment of such services or fair administration in relation to such services[.]

There is a general expectation that government officials are fair, polite and sensitive towards a member of the public. In specific case, however, it does happen that officials depart from the expected standards – and the general public needs protection against such departures. Unfortunately, maladministration or arbitrary actions by the executive are phenomena that occur from time to time. Maladministration can be considered in cases where an institution does not follow its own rules and procedures or the law, takes too long to do something, gives out incorrect information, or does not make a decision in the appropriate way.

As courts and tribunals are frequently overloaded with work relating to civil, criminal and constitutional matters, the judicial system often turns out to be slow, lengthy and expensive. Therefore, a complaint brought to the Office of the Ombudsman is a potent alternative in cases of personal grievances arising

83 Section 3(1)(b) of the Ombudsman Act contains the identical wording.

out of maladministration or arbitrary actions by government agencies, for it is relatively speedy and inexpensive, and has a higher potential to lead to an amicable resolution of the conflict.

The Ombudsman has a duty to offer the necessary protection against cases of maladministration. He or she will carry out an investigation and, thereafter, propose suitable remedies. Negotiation or mediation between the parties may amount to such a remedy, as may making recommendations to the relevant respondent institutions to take action against an officer or to have the offending practices stopped. Furthermore, the Ombudsman can approach the High Court by way of an application to obtain an interdict for the enforcement of its recommendation to have the offending actions stopped, or to have its recommendation implemented.

The Rule of Law in Namibia

One of the key requirements of the rule of law is that the courts and the state prosecution services be independent and free of political interference from the executive or any other source.⁸⁴ Although the doctrine of separation of powers is well entrenched in the Namibian Constitution and recognised by the courts, the true measure of the independence of the judiciary and the state prosecution services lies in the way these institutions relate to the executive and other organs of state in practice. In terms of the provisions of Article 1-7 of the African Charter on Human and Peoples' Rights, respect for the rule of law is central to the renewed commitments for good governance undertaken by member states of the African Union. In the Memorandum of Understanding of the Conference on Security, Stability, Development and Cooperation in Africa, states committed themselves to uphold the principles of constitutionalism.⁸⁵

Article 12 of the Constitution contains the provisions for a fair trial. The principle of the rule of law runs throughout the constitutional regime.⁸⁶ The Constitution explicitly states that Namibia is established as:⁸⁷

a democratic and unitary state founded on the principles of democracy, the rule of law and justice for all.

The fact that power is stated to vest in the people who exercise their sovereignty through the democratic institutions of the state in turn reinforces the concept of legitimacy.⁸⁸ Central to the notion of democracy is access to information and public participation. Government has the duty to make available information to ensure that citizens know what it is doing on their behalf, something without which truth would languish and people's participation in government would remain fragmented. Only when government business is conducted in a transparent manner in which scrutiny by an informed public is

84 Cf. Horn & Bösl (2008a&b).

85 <http://www.au2002.gov.za/docs/background/cssdca.htm#mou>; last accessed on 13 June 2009.

86 Hinz (2003b:273.).

87 Article 1(1), Namibian Constitution.

88 Article 1(2), Namibian Constitution.

allowed can the independence of courts be guaranteed. After all, the people of Namibia are the ones to confer power to the executive through democratic elections. If they are made aware of irregularities on the part of the government they voted into power, they are able to alter the situation through the ballot box.

The rule of law, apart from concepts such as separation of powers and limited government, is another factor that contributes to democracy. Constitutional theories were written about the rule of law centuries before the concept of constitutionalism gained momentum. What is noteworthy is that constitutionalism is related to both democracy and the rule of law. Indeed, the doctrine of the rule of law and constitutionalism both deal with the limits on the exercise of the powers of government. They rest on three premises:⁸⁹

- The absence of arbitrary power: No person is above the law and no person is punishable except for a distinct breach of the law established in the ordinary manner before the ordinary courts;
- Equality before the law: Every person is subject to the ordinary law and the jurisdiction of the ordinary courts; and
- Judicial decisions confirming the common law.

Separation of Powers

In Namibia, the three organs of state exercise their constitutional functions independently from each other,⁹⁰ meaning that one branch should not interfere with the functions of another organ of state.⁹¹ In order to guarantee and protect the fundamental rights of the individual and to prevent dictatorship and tyranny, established mechanisms need to be put in place to place constitutional and legal restraints on the powers of government and the various organs of state.⁹² The need for checks and balances on

89 Dickey (1965:15ff.).

90 The following section is largely taken from Ruppel (2008b.).

91 Bradley & Ewing (1997:79ff.).

92 On the concept of Constitutionalism in Namibia see Amoo (2008a:313ff.).

the powers of the separate branches of government is central to a constitutional state, because these measures avoid the concentration of power in one particular branch of government and so prevent dictatorship and arbitrariness in government.⁹³

In Namibia, the separation of legislative and executive powers from those of the independent judiciary is constitutionally guaranteed. Various mechanisms are put in place to ensure that each branch of government remains independent of the other through a system of checks and balances.⁹⁴ According to Article 1(3) of the Constitution, there are three main organs of state: the executive, the legislature, and the judiciary. With respect to the judiciary, both the powers granted to the institution and the protections that it enjoys are quite substantial. Included in the Constitution is an extensive and fully justiciable Bill of Rights, which specifically requires that administrative agencies act fairly and reasonably towards citizens. This gives citizens the right to take executive agencies to court, and the judiciary the authority to adjudicate such matters. Beyond this, the rights of standing (concerning who may bring matters before the court) are relatively broad, thus increasing the prospects that courts will be called upon to adjudicate the actions of the executive and legislative branches.

The Executive

Chapters 5 and 6 of the Constitution indicate that the executive comprises the President and Cabinet.⁹⁵ Their working relationship is consultative, and their paramount function is policy-making. Cabinet members are required to attend sessions of the National Assembly to answer questions pertaining to the legitimacy, wisdom, effectiveness and direction of government policies. According to Article 35(1),

93 Ibid.

94 Diescho (1994:70ff).

95 Article 27(2), Namibian Constitution; see also Naldi (1995:15–17).

the Cabinet consists, *inter alia*, of the President, the Prime Minister, and other members to be nominated for the purposes of administering and executing the functions of the government. Besides policy-making, the executive is responsible for negotiating and signing international agreements, which, according to Article 144 of the Constitution, form part of the law of Namibia.⁹⁶

The Constitution explicitly incorporates international law and makes it part of the law of the country. Public international law is part of the law of Namibia.⁹⁷ No transformation or subsequent legislative act is needed.⁹⁸ However, international law has to conform with the provisions of the Constitution in order to apply domestically. In case a treaty provision or other rule of international law is inconsistent with the Constitution, the latter will prevail. A treaty will be binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and Constitutional requirements have been met.⁹⁹

The conclusion of or accession to international agreements is governed by Articles 32(3)(e), 40(i) and 63(2)(e) of the Constitution. The executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required that the National Assembly agrees to the ratification of or accession to international agreements. The Constitution does not require a promulgation of international agreements in order for them to become part of the law of the country.¹⁰⁰

The primary function of the executive is to provide political leadership.¹⁰¹ Thus, the leadership is entrusted with the power to manage the nation's collective affairs.¹⁰² Because the Constitution creates

96 Ruppel (2008b:211).

97 See Tshosa (2001:79ff.).

98 Erasmus (1991:94ff.).

99 Ibid.

100 Ibid.

101 Mbahuurua (2002:42.).

102 Ibid.

the system of executive presidency, the President, as the head¹⁰³ of the executive, chairs Cabinet meetings.¹⁰⁴ These responsibilities place him or her in a position with considerable influence over policies and bills to be tabled before Parliament.¹⁰⁵ As stated in Article 32(4)(a)(aa) of the Constitution, the President is responsible for, *inter alia*, the appointment of the Chief Justice, the Judge President, and the judges of the High and Supreme Courts, on the recommendation of the JSC.

Before Namibia's independence, judges were appointed by the President of the Republic of South Africa on the recommendation of the Minister of Justice in that country, a position that applied to the mandated territory Namibia as well. In this respect, the executive historically exercised a great measure of control over the judiciary. In this premise of history, it is evident that, still today, the President is vested with a great deal of power and responsibility, which, if employed in accordance with the rule of law, can contribute greatly to the attainment of the independence of the judiciary in Namibia. Moreover, Article 32(1) subjects the exercise of presidential executive functions to the overriding terms of the Constitution, the laws of Namibia, and the rule of law, and obliges the President to uphold, protect and defend the Constitution as the supreme law.¹⁰⁶

It is a Constitutional obligation upon the executive to safeguard the independence of the judiciary, which is unconditionally proclaimed in Article 78 of the Namibian Constitution.¹⁰⁷ By way of Article 78(3) of the Constitution, members of the executive are prohibited from interfering with the functions of the judiciary. The obligation to safeguard this independence arises from the second part of Article 78(3): the safeguard does not end at independence, but includes dignity and effectiveness, which also have to be protected subject only to the Constitution or any other law. Interestingly, instead of ending at prohibiting interference, the Constitution obliges the same people who threaten the independence of the judiciary to grant the desired independence. In this light, the prohibited interference should be

103 Article 32(3), Namibian Constitution.

104 Article 40, Namibian Constitution sets out the duties and functions of the Cabinet.

105 See Article 32, Namibian Constitution.

106 See also Article 5, which generally obliges all branches of government as well as private individuals to respect and uphold the Bill of Rights. This effectively demonstrates that the Bill of Rights has both vertical and horizontal application.

107 See Ruppel (2008b:217).

understood as negative interference, otherwise the Constitutional mandate to protect and safeguard the judiciary's independence would be futile; indeed, it would be superfluous to prohibit the executive from taking positive Constitutional and protective action.

Furthermore, safeguarding such independence is not left to the whims of political will: the obligation is legally imposed. However, the independence of the judiciary cannot be protected if it is so insulated that access to it becomes difficult and the efficient administration of justice is hampered. On the contrary, the Constitutional mandate encourages an environment of mutual coexistence and interdependence. It aims at the judicialisation of politics rather than the politicisation of the judiciary. Now the question arises: how is this constitutional mandate respected, and how does the judiciary confront the danger of interference? No politician can afford to be seen to defy the orders of a judiciary perceived by the people to be scrupulously independent and honest in the defence of the constitutional values bonding a nation. Therein lies the real source of the strength of the judiciary and its legitimacy in seeking to execute its potentially awesome powers. Therein also lies the secret of its capacity to defend and protect the Constitution of a nation. A judiciary which is independent and which is perceived to be independent within the community protects both itself and the freedoms enshrined in the Constitution from invasion and corrosion. A judiciary that is not impairs both.¹⁰⁸

The negative duty placed on the executive is the duty to refrain from interfering with the functions of the judiciary. This duty was interpreted in the case of *S v Heita and Another*¹⁰⁹, where, after an imposition of a sentence in one treason trial, judges were accused of being racist and disloyal, which accusation was coupled with demands for their posts as judges to be revoked with immediate effect. *In casu*, the court held that the members of the legislature and the executive were expressly prohibited from interfering with judges or judicial officers, and that:¹¹⁰

108 Ibid.

109 1992 (3) SA 785 (NmHC).

110 Ibid.

... such interference is not allowed at any stage, be it before, during or after a verdict in a particular trial.

This duty of non-interference was also reiterated in the case of *Ex parte: Attorney-General of Namibia. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*,¹¹¹ where the Attorney-General brought a matter ex parte in terms of Article 79(3) of the Constitution, requiring the court among other things to decide the extent of the Attorney-General's final authority over the office of the Prosecutor-General. The court took cognisance of the fact that the office of the Attorney-General was an executive one, while the office of the Prosecutor-General was at the very least quasi-judicial. From this premise the court found that it would be militating against the independence of the office of the Prosecutor-General to put the final responsibility of its affairs in the hands of a political appointee. Therefore, in line with the duty of non-interference, the court found that the Prosecutor-General only needed to report to the Attorney-General on issues of public interest. Only to this extent was the Attorney-General similarly authorised to involve him-/herself with the office of the Prosecutor-General. Thus, the Attorney-General was prohibited from interfering with the process of prosecution, for this would be in conflict with the Constitutional guarantee of the judiciary's independence.¹¹²

In the case of *Sikunda v Government of the Republic of Namibia*¹¹³, the court was confronted with a situation in which the Minister of Home Affairs failed to comply with a court order that directed him to release a certain detainee. It was contended by the court that the principle of the independence of the judiciary was entwined in its own right to the effectiveness of the court; therefore:

... the court must not only be independent but also effective: non-compliance with Court orders, even by State officials, diminished that effectiveness and could lead to collapse of the legal system.

111 1995 (8) BCLR 1070 (NmSC).

112 Indongo (2008:99ff).

113 (2) 2001 NR 86 (HC).

From the foregoing it is clear that the duty as regards non-interference cannot be overstated. It forms the basis of the effectiveness of the judiciary, which is dependent upon the people's respect for such office. In *Sikunda v Government of the Republic of Namibia and Another*,¹¹⁴ the Judge-President recused himself from the case in light of attacks that had been made on his office in the newspapers and other public fora. He found that, against this background, any ruling he would make would lack credibility and legitimacy and that:¹¹⁵

... these attacks affected his independence, dignity and integrity as a Judge.

The general rule is that the executive should not interfere with the functions of the judiciary. An exception to this rule, however, exists in order to facilitate the achievement of the mandate of the judiciary. The exception is that the executive is only permitted to descend into the arena of the judiciary in order to protect the latter from attacks by the public, the legislature, or any other body. The second leg of Article 78(3) provides that:

... all organs of State shall accord such assistance as the Courts may require to protect their independence and effectiveness, subject only to the terms of this Constitution or any other law.

As noted by Judge O'Linn, this places a positive duty on all organs of state to protect the courts (*S v Heita and Another*¹¹⁶). It follows that failure to interfere where the court is under attack would be an evasion of their constitutional duty. This was stated in *S v Heita and Another*, where the High Court stated the following:

114 (1) 2001 NR 67 (HC).

115 Although this case involved the attacks made by the Society of Advocates and the leading newspapers, it is contended that the effect of the attacks was to render the decision doubtful in the eyes of the public as it would not be free of potential bias.

116 1992 (3) SA 785 (NmHC).

It is ... an evasion and abrogation of their legal duties if the aforesaid organs say we cannot interfere because the Judiciary is independent but then indicate that the public is free to interfere Such an attitude means in effect that these organs and their members also cannot interfere with such purported rights of the citizen. It is obvious that such an attitude is an open invitation to the disgruntled ...

The executive is legally obliged to protect the judiciary to ensure the effectiveness of the court.¹¹⁷ The judges depend on the protection of their independence, dignity and effectiveness, which is a pillar without which the Constitution would not survive.¹¹⁸ Unlike Parliament or the executive, courts do not have the power of the purse of the army or the police to execute their will. The courts would be impotent to protect the Constitution if the agencies of the state refused to command resources to enforce the orders of the courts. Otherwise courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship (*Sikunda*, supra).

Case Study: ¹¹⁹

In *S v Heita and Another*, the court identified several offices as falling under the legal duty to protect the independence of the judiciary. These included the President, the Attorney-General, the Prosecutor-General, the Ombudsman, the Police Force, and the Defence Force. In *Heita* (supra), the Minister of Justice issued a statement that reiterated the state's commitment to uphold the independence of the judiciary. It was stated that, while an honest and temperate expression of shock would not constitute contempt of court:¹²⁰

117 Ibid.

118 Ibid.

119 Ruppel (2008b:220).

120 Ibid.

[I]t is inadmissible and patently unconstitutional to bring or attempt to bring political pressure to bear on a judicial officer by for example, calling for his dismissal simply because he or she handed down a verdict which a person or group do not agree with. Once this is allowed a fundamental pillar of our Constitutional democracy, namely the independence of the Judiciary is totally threatened and with it, the rule of law and our Constitutional democracy.

In Namibia, the executive cannot initiate the removal of judges from office. The executive makes sure, through respect for the Constitution, that judges feel secure in their positions and will only pay allegiance to the Constitution and the law, according to their oaths. There is only one incident of a judge who resigned on dubious grounds, and returned to private practice in January 1997. The reasons for his resignation were not disclosed, but there was no objection from the executive; the Chief Justice at the time only stated that there had been concerns on the bench itself.¹²¹ In the case where a judge was accused of rape and was arrested by the police and charged, the JSC requested the accused to show cause why he should not be dismissed from the bench as stipulated in the Constitution.¹²² When it came to the issue of trial, it was clear that using the same judges who were his colleagues would infringe upon the independence of the judiciary and would discredit the result of the proceedings, thus bringing the integrity of the justice system into question in the eyes of the public. This led the executive to step in, and upon the JSC's recommendation, they appointed a judge from South Africa to try the accused. The case shows that, like everyone else, judges are not above the law. However, their position as judges in a democratic state requires that they be – and be seen to be – independent and not subject to direct or indirect pressure from the executive. Thus, any investigation of criminal charges against them needs to be conducted with sensitivity to their status, their role in society, and their relationship with the

121 Bukurura (2002:299ff).

122 Case unreported. Following the judge's arrest, he was suspended from his position as the Supreme Court Judge of Appeal at the time, before he retired from that position in October 2005. The trial ended on 28 July 2006, acquitting the accused at the close of the state's case on all charges. In his judgment, which was severely critical of the police's handling of the investigation of the case, South African Judge Ronnie Bosielo ruled that the evidence was so poor, contradictory and tainted by shortcomings in the police investigation that it was not necessary for the former Supreme Court Judge of Appeal and High Court Judge-President to even present the case in his defence to the court before a verdict was to be delivered. See *The Namibian*, 22 July 2008.

executive. Procedures should be followed to avoid as far as possible any suggestion that a particular judge was being victimised by the executive for his/her views or decisions. Such procedures ordinarily involve the holding of an independent enquiry into whether or not the judge should be impeached. If the allegations are then found to have substance, and the judge is subsequently impeached, a criminal prosecution may follow.¹²³

The executive should be exemplary in its respect for court judgments. This principle was reflected by a judgment delivered on 28 January 2003 (*Mostert v Minister of Justice*).¹²⁴ The judgement held that the Permanent Secretary of Justice had no jurisdiction to appoint, transfer or terminate the services of a magistrate, and, more specifically, that Section 23(2) of the Public Service Act,¹²⁵ which authorised such transfers, did not apply to magistrates. The court put it thus:

*For as long as magistrates remain subject to the provisions of the Public Service Act, which virtually designates them as employees of the Government and which requires of them prompt execution of Government policy and directives, their independence will be under threat and, what is just as important, is that magistrates would not be perceived by the public as independent and as a separate arm of Government. I therefore agree with the order of the Court a quo that sec. 23(2) did not apply to magistrates.*¹²⁶

The message the court sent here was that Magistrates' Courts were courts like any other, and should therefore not be under executive control. The executive took heed and established the Magistrates

Commission, which is now in charge of all appointments and transfers of magistrates. In this example, the executive played an important role in executing its mandate to protect and assure the independence of Magistrates' and other courts.

123 Ruppel (2008b:221.).

124 (SA3/02; SA3/02) [2003] NASC 4.

125 No. 13 of 1995.

126 Ibid.

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide cases before them. No outsider – be it government, a pressure group, an individual or even another judge – is permitted to interfere or even attempt to interfere with the way in which a judge conducts a case and reaches a decision. In the *Heita* case,¹²⁷ the High Court decided that it would not bow to political pressure – even from the ruling SWAPO Party. After all, it is duty-bound to ensure that the appointment of judges is not partisan, since this would jeopardise the independence of the judiciary.¹²⁸

In *Mostert v Magistrates' Commission*,¹²⁹ the court said that there was a need to guard against intrusion into the independence of the judiciary. It is the primary duty of the Namibian government to promote unity in a culturally diverse environment. In ensuring unity in diversity, the executive will be ensuring the institutional independence of the judiciary. The executive has a role to play in making sure that the bench is well constituted and represented, since it is relatively deeply involved in the appointment of judges in terms of the Constitution.

By way of summary, it must be submitted that the government has never really developed a major interest in controlling the courts. As a result, the judiciary in Namibia ultimately enjoys high levels of autonomy. This has remained true despite power having been concentrated in the hands of the ruling party since independence, and despite the courts having shown no inclination to defer to government in the rulings that come before them. Judges are supported by elements of civil society that rally to the defence of the courts in the wake of public comments about the bench.¹³⁰

The executive power of the country is vested in the President and the Cabinet,¹³¹ and the former is obliged to act in consultation with the latter. In exercising their duties, they must protect and defend

127 *Supra*.

128 See also *Viveca* (1997:37).

129 PI1857/04 [2005] NAHC 25.

130 *Ruppel* (2008b:222).

131 Article 27(2), Namibian Constitution.

as the Constitution as the supreme law of the land and faithfully obey, execute and administer the laws of the Republic of Namibia. Members of the Cabinet are therefore obliged to carry out functions as are assigned to them by law¹³² or to take any such steps as are authorised by law.¹³³ Therefore, in the strict sense, all the administrative actions and decisions taken by the executive should be in accordance with the Constitution and any other laws or directives that are in place. Anything done outside the parameters of the Constitution or against the underlying principles contained therein will accordingly be invalidated.

One example of an action taken by the executive was the intention to amend the Constitution for a third presidential term. When the first and Founding President of the Republic of Namibia, Sam Nujoma, had already served two terms, in terms of Article 29(3)¹³⁴ of the Constitution, he was no longer eligible to stand for presidential office. This instance triggered a debate on whether or not to change the Constitution so that President Nujoma could serve five more years, even though the Constitution clearly stipulated that a person who becomes president in Namibia cannot hold that position for more than two terms, or more than 10 years. At the time it was pointed out that the problem regarding the amendment did not revolve around whether or not people were in favour of Sam Nujoma being President, but about what the implications were for Constitutional democracy.¹³⁵

President Nujoma's third term was a once-only provision; no precedent was set. Technically speaking, his first term was merely transitional. He was elected not directly by the people, as the Constitution requires, but by a Constituent Assembly. The restrictive clause in the Constitution which limits the presidential incumbency of an individual to two five-year-terms therefore never came into play. Instead, the transitional clause was amended to state that the Founding President was to be elected by

132 Article 40(d), Namibian Constitution.

133 Article 40(f), Namibian Constitution.

134 Article 29(3), Namibian Constitution reads: A person shall hold office as president for not more than two terms.

135 Diescho (1998).

a Constituent Assembly and could serve for three five-year terms. So this was specific to Sam Nujoma. The amendment did not automatically make Sam Nujoma President for a third term. He still needed to stand for election, and he was again democratically elected.

The Legislature

The legislature as outlined in Chapters 7 and 8 of the Constitution is made up of the National Assembly and the National Council.¹³⁶ The legislative power of Namibia is vested in the National Assembly, subject to the assent of the President and the power of review of the National Council, where applicable. As the principal legislative authority in the country, the National Assembly has the power to make and repeal laws. According to Articles 74 and 75 of the Constitution, the National Council has the power to consider and review legislation passed by the National Assembly. Without playing a judicial or quasi-judicial role, with a view to Article 32(9) it can be submitted that the executive branch is accountable to the legislative branch.¹³⁷

The Judiciary

Chapter 9 of the Constitution deals with the administration of justice. Article 78 of the Constitution refers to the judicial powers that are vested in the Supreme Court, the High Court, and the lower courts of Namibia. Article 78(2) explicitly states that the courts are to be independent and subject only to the Constitution and the law. It is a requirement that the administration of justice be independent from the other organs of state. The inviolable nature of this value was expressed by the Supreme Court (*Ex*

136 Ruppel (2008b:213).

137 Mbahuurua (2002:50).

Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General) 1995.¹³⁸ The Supreme Court is the highest national forum of appeal. It has inherent jurisdiction over all legal matters in Namibia and, according to Article 79 of the Constitution, it adjudicates appeals emanating from the High Court, including appeals that involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed therein. The Supreme Court also hears matters referred to it by the Attorney-General or authorised by an Act of Parliament (e.g. *Ex Parte: Attorney-General. In re: Corporal Punishment by Organs of State*,¹³⁹ and *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*).¹⁴⁰

Namibia applies the *stare decisis* system, which means that all decisions emanating from the Supreme Court are binding on all other courts unless they are reversed by an Act of Parliament or the Supreme Court itself.¹⁴¹ Unlike the Supreme Court, the High Court exercises original jurisdiction. As set forth by Article 80 of the Constitution, the High Court can act as both a court of appeal and a court of first instance over civil and criminal prosecutions and in cases concerning the interpretation, implementation and preservation of the Constitution.¹⁴² There are several lower courts in Namibia. They are the Magistrates' Courts, the Labour Courts, and the customary (community) courts.¹⁴³

The judiciary is considered as the watchdog of the fundamental rights and freedoms of individuals. For instance, as provided for by Article 25 of the Constitution, every individual who is of the opinion that his or her fundamental rights have been violated or threatened is entitled to approach a competent court to protect such right or freedom (*Kauesa v Minister of Home Affairs and Another*,¹⁴⁴ and *S v Sipula*¹⁴⁵).

138 (8) BCLR 1070 (NmSC).

139 1991 (3) SA 76.

140 To date, only two cases have been referred to the Supreme Court by the Attorney-General.

141 Article 81, Namibian Constitution.

142 Decisions of the High Court, which bind the lower courts, are recorded both in Namibian and South African law reports.

143 Ruppel (2008b:213f.).

144 1995 NR 175.

145 1994 NR 41.

In addition, the judiciary has the duty to check that the other branches of government do not abuse their powers. However, in order to effectively fulfil these functions, it is essential that the legislature and executive do not interfere with the work of the courts. Article 25 further gives a court of competent jurisdiction the power to declare an Act of Parliament inconsistent with the provisions of the Bill of Rights. What must be noted is that, as an alternative to declaring the Act of Parliament invalid, the court also has the discretion to refer it to the National Assembly for the defect in the impugned law to be corrected (*Ex Parte: Attorney-General. In re: Corporal Punishment by Organs of State supra, Kauesa v Minister of Home Affairs and Another*,¹⁴⁶ and *Frank and Another v Chairperson of the Immigration Selection Board*¹⁴⁷). Furthermore, Article 25 read with Article 18 also subjects executive powers to judicial review. In terms of these two articles, the courts may declare invalid any executive action which abolishes or abridges the fundamental rights and freedom of individuals, and the courts may review any administrative functions. Thus, it can be stated that relative sovereignty is limited by the supremacy of the Constitution.¹⁴⁸

In a democratic society governed by fundamental principles such as the rule of law and respect for human rights, the judiciary might be subject to criticism. However, Judge-President Petrus Damaseb put it as follows in a speech delivered at the 2008 commemoration of the International Day of Democracy in Windhoek:¹⁴⁹

... attacks against the judiciary undermine the independence of the judiciary and erode public confidence in the administration of justice. Criticisms against the judiciary should be informed and properly investigated before publication and should not impute improper motives against a judge.

146 1995 NR 175.

147 1999 NR 257 (HC); 2001 NR 107 (SC).

148 Ruppel (2008b:220ff.).

149 Damaseb (2008).

The institutions of justice must themselves project and nurture the good reputation of the judiciary in respect of their independence and integrity, by:

- providing adequate domestic mechanisms to correct erroneous or unjust decisions;
- making access to the courts friendly and comfortable; and
- demystifying anything in the language of the law that makes it unintelligible.¹⁵⁰

Judges are clearly entitled to demand and to expect fidelity to these truths from the society that sustains them, but that society is also entitled to demand from judges fidelity to the many and subtle qualities in the judicial temper that legitimise the exercise of judicial power. Conspicuous among these qualities are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate but arguably even more crucial to that temper is wisdom – enriched as it must be by a substantial measure of humility, an instinctive moral ability to distinguish right from wrong, and sometimes the more agonising ability to weigh two rights or two wrongs against each other.

The JSC plays an important role in ensuring the independence of the judiciary. The JSC, regulated in Article 85 of the Constitution, consists of the Chief Justice, a judge appointed by the President, the Attorney-General, and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation or organisations representing the interests of the legal profession in Namibia. The JSC is entitled to make such rules and regulations for the purposes of regulating its procedures and functions as are not inconsistent with the Constitution or any other law.

¹⁵⁰ Ruppel (2008b215f).

The JSC makes recommendations to the President when it comes to the appointment (Article 82) or removal (Article 84) of judges. In the case of removal, the JSC investigates whether or not a judge should be removed from office on the given grounds, and if it decides in favour of the removal, it informs the President of its recommendation. During such investigations the judge in question is suspended from office. It is submitted that, except where the President is empowered to extend a judge's retiring age, the modes of appointment and removal effectively insulate the judiciary from the executive. For this purpose, the Judicial Service Commission Act¹⁵¹ regulates, *inter alia*, the representation, tenure of office, and functions of the JSC and its members.¹⁵² Section 5 of the Act points out the need for a balanced structuring of judicial offices.

The Minister of Justice, in consultation with the Ministry of Finance, sets and publishes judges' salaries in the *Government Gazette*. Thus, an executive legislative power determines what judges should earn. Judges' salaries are charged to the Consolidated Revenue Fund so that Parliament cannot seek to exert influence on judges via the annual discussion of the state budget. This measure adds to ensuring the independence of the judiciary.¹⁵³

The Judges' Remuneration Act¹⁵⁴ provides, *inter alia*, for the remuneration of judges and the granting of additional benefits to them. Section 3(1) of the Act makes provision for amendments to the First Schedule, which contains the annual salaries associated with designated offices. Here it says the following:

The President, acting on recommendation of the Judicial Service Commission, may by proclamation in the Gazette amend the second column of the First Schedule so as to increase the rates specified therein.

151 No. 18 of 1995.

152 Mbahuurua (2002).

153 Madhuku (2002:232–245).

154 No. 18 of 1990.

Again, the influence of the executive is noticeable in the above statutory context: the executive is clearly able to exercise a degree of control over the judiciary by holding its purse strings. A restricted budget can create inefficiency and, consequently, a lack of public confidence – eventually leading to a situation where the executive can manipulate a weak and unpopular judiciary. The executive has a significant hand on further important aspects of judicial independence, being the independence in administration, covering not only the operation of the courts, but also the appointment and supervision of supporting staff and of the various supporting services such as the library and law reports.¹⁵⁵

Finally, reliance on “acting and expatriate judges” has been harshly criticised.¹⁵⁶

Without the security of long tenure, there may be a perception that such judges are more likely not to have independence in the execution of their functions on the bench.

Legitimacy of the Law

Parliament is a neutral place where legislators meet to discuss and consult frankly with each other on political, social and economic issues and their legal implications for society. It consists of elected and nominated representatives responsible for making and changing the laws of the country. Namibia has passed from an era in which the law-making processes were communal and endured colonial rule where laws and administrative decision-making were totally in the hands of the colonising countries. In contrast to colonial times, the Parliament of the Republic of Namibia is now the principal legislative authority in and over Namibia. It is empowered by the Constitution to make and change laws, to maintain law and

155 Ruppel (2008b:220ff.).

156 Tjombe (2008:241.).

order, and to ensure good governance of the country in the best interests of the Namibian people. The country went through a struggle for liberation which culminated in the attainment of independence in 1990, when a Parliament that is truly representative of the Namibian people was established, based on the results of general elections. However, the traditional law-making process that was suppressed during the colonial period survived, and the result of this historical development is the coexistence of two legal systems in Namibia today, namely customary and statutory law.¹⁵⁷

In terms of the Constitution, the members of the National Assembly shall be representative of all the people and shall in the performance of their duties be guided by the objectives of the Constitution, by the public interest and by their conscience.¹⁵⁸ In order to acquire the status of an Act of Parliament, any Bill must be passed by two thirds of all members of the National Assembly and confirmed by the majority of the members of the National Council,¹⁵⁹ and the President must assent to and sign it, and it must be published in the Government Gazette.¹⁶⁰ In accordance with the Constitution, Parliament or any subordinate legislative authority shall not make any law which abolishes or abridges the fundamental rights and freedoms, and any law or action in contravention thereof shall to the extent of the contravention be invalid.¹⁶¹ Any law that should be passed, especially those limiting upon the fundamental rights and freedoms, must be of general application and shall not be aimed at a particular individual.¹⁶²

As soon as the Bill is signed by the President, it becomes law and operational from the said date. Therefore, laws do not have retroactive effect i.e. they do not apply to actions and states of affairs prior to the date of their becoming operational.

157 <http://www.parliament.gov.na>; last accessed 18 May 2009.

158 Article 45, Namibian Constitution.

159 Article 56(2), Namibian Constitution.

160 Article 56(1), Namibian Constitution.

161 Article 25, Namibian Constitution.

162 Article 22, Namibian Constitution.

Since common law forms part of our legal system, the principle of legality assures that no one can be tried for an offence or felony which did not exist or had not yet been pronounced as such at the time of commission.

Sanctions for Executive Violation of the Law

Constitutionalism entails a government with limited power; or put differently, it is about government according to the rule of law. Restraining the executive branch of government is one of the most effective ways of limiting the power of the government. Of the three branches of government, the executive has a greater impact on the daily lives of its citizens. It is referred to as the spring of government and the symbol of the state, even in the most pluralistic systems. In limiting the power of the executive, the supreme law of the land, the Namibian Constitution, is the primary tool, since the framers of the Constitution, mindful of the history of self-aggrandisement by the executive branches of government in most of post-colonial Africa, sought to design mechanisms that would weed out actions aimed at self-promotion by the executive branch. In modern democracies, the most effective check on the executive is the persuasive force of legal judgments by the courts, whose perceived independence from the executive and the legislature distances judges from partisanship and transitory political motives. If separation of powers is intended to create checks and balances – competencies and mechanism by which one branch of government legitimately interferes with the activities of another – then democratic accountability and transparency are norms intended to hold the rulers answerable to the people. Accountability and transparency are therefore so important for control that it can be argued that without accountability and transparency, there could be no control. Thus the Constitution provides for a strong and effective judiciary¹⁶³ with the power not only to interpret the laws of the land but also to determine the nature and the scope of the Constitutional powers of the other branches of government.¹⁶⁴

163 Article 78, Namibian Constitution.

164 Mbahuurua (2002:57).

Having the Constitution as the supreme law of the land against which all other laws are measured, courts are empowered to invalidate any state actions that are inconsistent with the Constitution. This undoubtedly places the judiciary in a very favourable position to exercise effective control over the executive branch of government. Article 25 reads as follows:

Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate authority shall not make any law, and the executive and the agencies of government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid ...

Therefore, once an action or law has been pronounced by the Supreme Court as being a violation of the Constitution, such action or law will be invalidated or may be referred back to the concerned bodied in order to correct the defect in that specified law.¹⁶⁵ This also reflects the judicial practice in Namibia.

Judicial Review and Administrative Action

The whole process of reviewing government action is done through the doctrine of *judicial review of administrative actions*. Under the common law principles of administrative law, the exercise of administrative discretion is subject to judicial review and extra-judicial adjudication. This principle enjoins administrative officials and bodies to comply with certain legal rules in the exercise of administrative discretion granted by law. Under the principles of judicial review of administrative actions, an individual aggrieved by the exercise of administrative discretion or administrative action has the right to judicial redress. This makes the right justiciable under the common law: the courts have the jurisdiction to review that administrative discretion or action and make an appropriate order.¹⁶⁶

165 Article 25(1)(a), Namibian Constitution.

166 Ruppel (2010d:337E).

In Namibia, this common law right to judicial review and extra judicial adjudication granted to the individual has been elevated to a fundamental human right protected by the Constitution. Article 18 provides that administrative bodies and officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation.¹⁶⁷ The application of this Article is limited to acts by administrative bodies and officials who have been exhaustively defined to include the Executive, regional and local government, the public service, the parastatals and their employees.¹⁶⁸ The provisions of the Article enjoin them, *inter alia*, to act fairly, reasonably and lawfully (complying with both the statutory and common law requirements). In the English case of *Board of Education v Rice*,¹⁶⁹ the concept of fairness was interpreted to mean that the interpreter must comply with the principles of natural justice. In the Namibian case of *Frank & Another v Chairperson of the Immigration Selection Board*¹⁷⁰ it was held that the Article does not draw a distinction between quasi-judicial and administrative acts; and that administrative justice, whether quasi-judicial or administrative in nature, requires not only reasonable and fair decisions, based on reasonable grounds; and that fair and transparent procedures are also inherent in that requirement. The common law rule that the principles of natural justice are to be applied where an administrator acts in judicial or quasi-judicial capacity has been replaced by this Constitutional requirement which enjoins administrators in the exercise of their discretion to apply the principles of natural justice. Lack of compliance with the principles of natural justice will justify the intervention of the courts by nullifying and setting aside the decision, as was stated in the *Frank* case.

The Article also requires that administrative bodies and officials act "reasonably". In contrast to the requirements of natural justice, which are concerned with procedural constraints on administrative action, this requirement that an administrative body or an administrative official should act reasonably is concerned with the substance of the discretion or the act itself. Thus the courts, in reviewing the administrative decision, should go beyond procedural requirements and examine the nature of

167 Amoo (2008a:318.).

168 See further Article 93, Namibian Constitution on the definition of an "official".

169 1911 AC 179.

170 1999 NR 257 (HC); 2001 NR 107 (SC).

the decision or act, even where the administrative authority purportedly acted in pursuance of a discretionary power. The requirement of reasonableness for all administrative action taken by an administrative decision maker has been stressed in numerous judgments, including in the *Sikunda* and *Frank* cases, to mention but two. In *Günther Kessl v Ministry of Lands and Resettlement and Two Others*¹⁷¹ the High Court of Namibia pointed out that the right to administrative justice also extends to foreign absentee landlords, and that the discretionary powers of government officials to expropriate land (in terms of Article 16) for resettlement purposes are thus to be exercised within the purview of Article 18. The *Kessl* judgement strengthens the role of administrative justice as a fundamental right in Namibia. Under the provisions of Article 18, *any* person aggrieved by the decision(s) of an administrative decision maker or body can bring an action for the review of such decision or administrative action for any of the remedies, i.e. certiorari (a writ seeking a judicial review), prohibition or interdict, mandamus (a writ issued by a higher court to a lower court) or habeas corpus (a writ to produce a person before court).¹⁷²

Acting Judge Levy made it clear in the *Frank* case¹⁷³ that far from repealing the common law, Article 18 in fact it embraces it. Indeed, Article 18 expresses the interest of the Constitution makers to secure legal certainty and stability in the post-independence legal order by providing for the continuation of the legal dispensation as it was in place before the enactment of the Constitution. The same interest is also articulated in Article 140 of the Constitution for all laws in force immediately before the date of independence and in Article 66 for the respective common and customary law. In other words, even if we did not have Article 18, the common-law-grounded administrative law of Namibia would not be different from what we find today by virtue of Article 18.¹⁷⁴

Although one will certainly accept that Article 18 entails more than the Constitutional confirmation of the inherited administrative common law, as it also offers space for the further development of this law in the spirit of the Constitution. Article 5 reaches beyond Article 18: the yardstick of Article 18

171 27/2006 and 266/266.

172 Amoo (2008:323).

173 Supra.

174 Cf. Baxter (1984:475ff, 535ff).

to measure the Constitutional validity of administrative law is rather general and primarily procedural (*Kauesa v Minister of Home Affairs and Others*¹⁷⁵); the yardsticks of Article 5 are the fundamental rights and freedoms. Article 5 requires substantial compliance by confronting administrative actions and the law authorising such actions with a comprehensive catalogue of human rights.

A recent initiative of the Ministry of Justice and its Law Reform and Development Commission opened the debate on the question of whether or not Namibia should follow the approach adopted by other countries and introduce a statutory framework to give meaning and content to the right to administrative justice espoused in Article 18 of the Namibian Constitution. The initiative was the result of joint efforts by the Namibian Ministry of Justice and the *Rule of Law Programme for Sub-Saharan Africa* of the German Konrad Adenauer Foundation,¹⁷⁶ and it led to an international conference on *Promoting Administrative Justice in Namibia*. The conference was held in Windhoek from 18 to 21 August 2008 and attended by international experts in administrative law from South Africa, Zimbabwe and Germany. Namibia was represented by government officials, judges, legal practitioners and staff members of the Faculty of Law of the University of Namibia. The almost unanimous opinion of the conference, which took note of the socio-economic conditions of the country, was that Namibia should indeed pursue the possibility of introducing such an administrative law statute. On 25 March 2009, the Committee on Promotion of Administrative Law and Justice in Namibia was officially constituted; so far a memorandum of understanding between the Ministry of Justice and the Konrad Adenauer Foundation Rule of Law Programme in Sub-Saharan Africa has been processed.¹⁷⁷

175 1995 NR 175 (NmSC).

176 The Rule of Law Programme for Sub-Saharan Africa of the Konrad Adenauer Foundation has its seat in Nairobi, Kenya, and is under the direction of Prof. Christian Roschmann. See <http://www.kas.de/proj/home/links/104/2/index.html>; last accessed 28 August 2009.

177 The work of the project is guided and directed by a Working Committee of Professionals familiar with the field of administrative law and practice.

Government Immunities

Since independence in 1990, the Namibian government has embraced the notion that good democratic governance can only be maintained through an intricate system of public sector accountability. This includes making all institutions of government accountable – the executive, legislature, judiciary, regional and local government units, parastatals etc. Thus, all servants of the state within these institutions, whether appointed or elected to office, need to be accountable. Article 5 of the Constitution provides that:

The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforced by the Courts in the manner hereinafter prescribed.

This section is the gateway to the Bill of Rights that is entrenched in the Constitution, and as such shows how the framers aimed at upholding human rights and above all the respect for the rule of law. Article 5 read together with Article 25 would therefore mean that government officials are clothed with the responsibility to respect the rule of law, and that any actions which fail to do so or are in conflict with Constitutional provisions, any statute or even common law will be invalidated by a “competent court”. The term “competent court” is used to distinguish between the powers and competence of the various courts in Namibia when invalidating or reviewing governmental actions. The lower courts (the Magistrates’, Labour and Community Courts) are statutory creatures and only operate within the four

corners of the relevant statutes.¹⁷⁸ The Constitution further provides that the lower courts shall have jurisdiction regarding and adopt the procedures prescribed by such Acts and regulations made thereunder.¹⁷⁹ On the other hand, the superior courts (the High Court and the Supreme Court) have inherent jurisdiction as expressly provided under Articles 79(2) and 80(2) of the Constitution. Accordingly, they have the jurisdiction to adjudicate upon cases and appeals which involve the interpretation, implementation and upholding of the Constitution. It is common practice now that any suit that, strictly speaking, involves a violation of a certain Constitutional provision will normally be tried by the superior courts as the upper guardian of the Constitution, and perhaps also relying on the inherent jurisdiction conferred upon them as such. However, in most cases, the lower courts also do adjudicate upon cases which involve violations of a Constitutional provision, for example regarding discrimination or unlawful detention. Lack of an express provision in the Constitution with regard to the competency of the lower courts to interpret the Constitution has to a certain extent allowed for the practice. This position is justified by various arguments that the Constitution does not merely need the skills used in interpreting ordinary statutes, but that the interpreter should rather adopt a “purposive interpretation” when interpreting a Constitution, as the mirror reflecting the nation’s souls. In many cases, presiding officers in lower courts do not have sufficient experience in the area of constitutional law. However, the position in this regard is changing as more training sessions are being offered to the magistrates across the country in all legal spheres, including constitutional law.

In general, actions by the executive and its members in the course of their official duties have always been subject to scrutiny by the courts. The State Liability Act¹⁸⁰ provides that a wrongdoing by a “servant of the state” in principle will give rise to a claim in contract or delict against the state, as long as he or she was acting within the scope of his or her employment. However, where a specific action is authorised by a statute, it cannot be wrongful, and this may prevent a successful claim in delict, since wrongfulness is an element of delictual liability. Thus the common law principle of absolute immunity does not

178 Magistrates courts by the Magistrates’ Courts Act, No. 32 of 1944; the Labour Courts by the Labour Act, No. 11 of 2007; and the Community Courts by the Community Courts Act, No. 10 of 2003.

179 Article 83, Namibian Constitution.

180 Act No. 20 of 1957.

strictly apply any longer in Namibia, as it has been replaced by that of relative immunity. Therefore an administrative body does not have immunity from liability simply because the damage was caused in the course of implementing a general policy, and governmental organs will be accountable to any aggrieved person in the exercise of any prejudicial decisions to the latter.

Article 31 of the Constitution states that:

- (1) *No person holding the office of President or performing the functions of President may be sued in any civil proceedings save where such proceedings concern an act done in his or her official capacity as President.*
- (2) *No person holding the office of President shall be charged with any criminal offence or be amenable to the criminal jurisdiction of any Court in respect of any act allegedly performed, or any omission to perform any act, during his or her tenure of office as President.*
- (3) *After a President has vacated that office:*
 - (a) *no Court may entertain any action against him or her in any civil proceedings in respect of any act done in his or her official capacity as President;*
 - (b) *a civil or criminal Court shall only have jurisdiction to entertain proceedings against him or her, in respect of acts of commission or omission alleged to have been perpetrated in his or her personal capacity whilst holding office as President, if Parliament by resolution has removed the President on the grounds specified in this Constitution and if a resolution is adopted by Parliament resolving that any such proceedings are justified in the public interest notwithstanding any damage such proceedings might cause to the dignity of the office of President.*

This means that the President may not individually be sued in either a civil action or a criminal suit in respect of any action committed during his/her tenure as President.

These constitutional immunities are, however, limited by Article 31(3)(b), which gives power to the courts to entertain proceedings against the individual concerned, in respect of acts of commission or omission alleged to have been perpetrated in his/her personal capacity whilst holding such office. This section is further subjected to the Parliament, by resolution, has removed the president on the grounds specified in this Constitution and if a resolution is adopted by parliament resolving that any such proceeding are justifiable in the public interest notwithstanding any damage such proceedings might cause to the dignity of the Office of the President.¹⁸¹

Article 42(2) of the Constitution guards against any misuse and abuse of such privileges and immunities by stating that no members of the Cabinet shall use their position as such or use information entrusted to them confidentially as members of the Cabinet, directly or indirectly to enrich themselves.

181 The same principles apply to the legislative immunities in Namibia.

International Human Rights

Namibia's legal and institutional landscape has changed remarkably since independence in 1990. The Constitution contains a comprehensive Bill of Rights and Namibia is party to various international human rights treaties, conventions and protocols and is, therefore, obliged to conform to their objectives and obligations.¹⁸² As to the application of international law, after independence, a new approach was formulated, as embodied in Article 144 of the Namibian Constitution:

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

Thus, the Constitution explicitly incorporates international law and makes it part of the law of the country. Public international law is part of the law of Namibia,¹⁸³ with no need for any transformation or subsequent legislative act.¹⁸⁴ However, international law has to be in conformity with the provisions of the Constitution in order to apply domestically. In the event of a treaty provision or other rule of international law being inconsistent with the Namibian Constitution, the latter will prevail. Article 144 of the Namibian Constitution mentions two sources of international law which will be applicable in Namibia: general rules of public international law, and international agreements binding upon Namibia.

A treaty will be binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and constitutional requirements have been met. A treaty has to have entered into force in terms of the law of treaties, and the constitutional requirements need to have been met. International agreements will, therefore, become Namibian law from the time that they come into force for Namibia.¹⁸⁵ The conclusion of or accession to international agreements is governed by Articles 32(3) (e), 40(i) and 63(2)(e) of Namibia's Constitution. The executive is responsible for conducting Namibia's

182 Ruppel (2010d:323ff.).

183 Tshosa (2001:79ff.).

184 Erasmus (1991:94.).

185 Ibid:102f.

international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required that the National Assembly agrees to the ratification of or accession to international agreements. A promulgation of international agreements in order for them to become part of the law of the land is, however, not required by the Constitution.¹⁸⁶

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), together with the Universal Declaration of Human Rights (UDHR), are often referred to as the International Bill of Rights. Namibia acceded to both the ICCPR and the ICESCR on 28 November 1994 and the First Optional Protocol to the ICCPR. A historic milestone was achieved when, on 10 Dec 2008, the UN General Assembly adopted, by consensus, the Optional Protocol to the ICESCR. The Optional Protocol provides a mechanism through which persons can petition the UN Committee on Economic, Social and Cultural Rights about violations of their rights guaranteed in the ICCPR. This Protocol was opened for signing on 24 September 2009. It is hoped that Namibia will become a party to this Protocol and by so doing give additional protection and recognition to economic social and cultural (ESC) rights in the country. These international instruments are incorporated into the Namibian legal system by Article 144 of the Namibian Constitution. This article expressly states that international agreements binding upon Namibia form part of Namibian law, and that the rights and freedoms provided therein are enforceable within the country by either its judicial or quasi-judicial bodies.¹⁸⁷

Both the ICCPR and the ICESCR call on State Parties to take steps (legislative or other measures) to give effect to the rights contained therein. Most of the rights and freedoms recognised in the ICCPR are also entrenched in Chapter 3 of the Namibian Constitution. This includes, amongst others, the right to life, the right to legal representation, the guarantee against torture and other cruel or inhuman

186 Ibid.

187 Article 25, Namibian Constitution.

treatment or punishments, the protection against discrimination on any ground, and the right to a fair trial by a competent court and impartial tribunal. These rights and freedoms may be restricted, provided that such restrictions are reasonable in a democratic society and are required in the interest of public policy or the sovereignty and integrity of Namibia (*Kauesa v Minister of Home Affairs and Others*). Additionally, Article 18 of the Constitution states that in upholding the Constitution, particularly the Bill of Rights, administrative bodies and officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and that persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent court or tribunal (*Public Service Union of Namibia and Another v Prime Minister of Namibia and Others*¹⁸⁸). The test of procedurally fair administrative action is whether principles and procedures were followed which, in a particular situation, were lawful, just and fair.

Regrettably, most of the ESC rights as embodied in the ICESCR are not entrenched as fundamental rights in the Namibian Constitution, but are rather couched as principles of state policy under Article 95. This thus arguably renders ESC rights non-justiciable/enforceable in Namibia in view of the restrictive formulation of Article 101 of the Namibian Constitution.¹⁸⁹ This situation is untenable given the acute levels of poverty and conspicuous income disparities prevailing in the country, and calls for urgent and innovative action by all stakeholders and anti-poverty campaigners in the struggle for a better life for all. The Basic Income Grant (BIG) is one such initiative option. BIG is a universal monthly cash grant advocated by a consortium of NGOs (The Basic Income Grant Coalition) to be paid to every Namibian citizen from birth until the age of sixty. The expenditure on people not in need thereof would be recuperated through the tax system.¹⁹⁰

Namibia is a party to the First Optional Protocol to the ICCPR, creating a right to individual petition to the Human Rights Committee established under Article 28 of the covenant. An individual can file

188 2000 NR 82 (HC).

189 See Article 101 of the Namibian Constitution.

190 Haarman (2009).

a complaint to the committee after exhausting all local remedies and in the event that the committee believes that human rights abuses have occurred, it transmits its view and recommendations to the concerned State Party or orders that the victim be awarded remedies. However, the decisions of the committee are not binding on State Parties but are rather mere recommendations on how to improve the implementation and realisation of rights and freedom recognised under the covenant. Under Article 40 of the ICCPR, State Parties are legally obliged to submit reports on measures they have adopted so as to give effect to and realise rights recognised in the ICCPR. Namibia submitted its initial report in terms of Article 40 to the Human Rights Committee in 2004, after a delay of over eight years.¹⁹¹

Women's Rights

Since independence in 1990, the government of Namibia has made various efforts to strengthen women's rights, initially by according gender equality the status of a constitutionally guaranteed fundamental right and subsequently by passing progressive laws aimed at achieving gender equality.¹⁹² Moreover, the Ministry of Gender Equality and Child Welfare (MGECW) was established in 2000 with the objective of ensuring the equal empowerment of women, men and children, and equality between men and women as prerequisites for full participation in political, legal, social, cultural and economic development. In September 2000, the United Nations Millennium Declaration was adopted. This stated that gender equality and the empowerment of women should be promoted as effective ways to combat poverty, hunger and disease, and of stimulating truly sustainable development.

Nevertheless, women living in traditional settings, in particular – and indeed, the vast majority of women in Namibia live in such settings – continue to face challenges in achieving equal treatment with their male counterparts. In many spheres of life, and especially under customary law, women are still subject to unequal treatment due to traditional attitudes and gender stereotyping. Tradition, customary

191 CCPR/C/NAM/2003/1.

192 The following passages are largely based on Ruppel (2008c & 2010c).

law and certain cultural practices are frequently cited to justify patriarchy and men's discriminatory attitudes. This is still a major barrier to women's rights and gender equality. The challenge is, however, not to vitiate, but to find common ground between gender equality and customary law in Namibia.

The Namibian Constitution takes up the issue of gender equality in several Articles. Article 10, which is the most recognisable of the Constitution's provisions that unequivocally guarantees gender equality, states the following:

- (1) *All persons shall be equal before the law.*
- (2) *No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*

Respect for human dignity, as well as equality and freedom from discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status, are recognised within Chapter 3 as fundamental rights to be respected and upheld by the executive, legislature and judiciary and all organs of the government, as well as by all natural and legal persons in Namibia (Articles 5, 8 and 10, respectively). Within this Chapter dealing with fundamental rights and freedoms, there are further provisions specifically relevant to the rights of women.¹⁹³ The family, as the natural and fundamental group unit of society, is accorded special protection in Article 14. This Article also bars child marriages and states that men and women have equal rights regarding getting married, during marriage and at the marriage's dissolution. The Constitution also gives special emphasis to women in the provision which authorises affirmative action.¹⁹⁴ It puts men and women in an identical position with respect to citizenship,¹⁹⁵ including the acquisition of citizenship by marriage.

One provision aimed specifically at enhancing women's rights is contained in Article 95, according

193 Visser & Ruppel-Schlichting (2008:158f).

194 Article 23(3), Namibian Constitution.

195 Article 4, Namibian Constitution.

to which, the state is called to actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society. Specific emphasis is put on the implementation of the principle of non-discrimination in the remuneration of men and women. To this end, many gender-related statutory provisions have been enacted on the basis of the National Gender Policy of November 1997. Taking the Constitution as a foundation, the policy:¹⁹⁶

... outlines the framework and sets out principles for the implementation, coordination and monitoring of gender sensitive issues which shall enhance effectiveness in the continued management and planning of the developmental processes in the different cultural, social and economic sectors of the Namibian Nation.

Recognising *inter alia* that due to traditional attitudes and gender stereotyping, women continue to be under-represented, the policy addresses various areas of concern, such as gender, poverty and rural development; gender and reproductive health; and violence against women and children, to name but a few. With regard to women and custom, the Policy in the context of providing strategies to address issues related to women and health calls on the government to enact legislation to combat and protect women against socio-cultural practices that render them susceptible to HIV/AIDS and contribute to the spread of HIV/AIDS (Section 5.8.15 of the Policy). Reference to traditional practices harmful to women is furthermore made within the Policy's chapter on violence against women and children: The Policy states that:¹⁹⁷

violence against women and girls originates essentially from cultural and traditional patterns and harmful practices, language or religion that perpetuates the lower status accorded to women ...

196 Section 2.1, National Gender Policy (RoN 1997).

197 Section 6.6, National Gender Policy (ibid.).

Several statutory laws have been enacted and existing laws have been amended on the basis of the 1997 National Gender Policy, with the aim of eliminating discrimination against women and promoting gender equality. Indeed, some of the existing laws relating to gender-sensitive issues were enacted even prior to the National Gender Policy coming into being. Enactments that are in one way or another relevant when it comes to the protection of women's rights include the following:

The Children's Status Act

The Children's Status Act¹⁹⁸ provides, *inter alia*, for children born outside marriage to receive the same treatment before the law as those born inside marriage. The Act also provides for matters relating to custody, access, guardianship and inheritance in relation to children born outside marriage. Specific reference to customary law is made in the context of inheritance, either intestate or by testamentary disposition. In this specific regard, a person born outside marriage is to be treated in the same manner as a person born inside marriage, notwithstanding anything to the contrary contained in any statute, common law or customary law.¹⁹⁹

The Combating of Domestic Violence Act

The Combating of Domestic Violence Act²⁰⁰ provides for protection measures in domestic violence cases. The Act defines the terms *domestic violence* and *domestic relationship*. Various types of relationships are covered, including customary and religious marriages. Whether or not specific traditional practices fall under the definition of *violence* in terms of Section 2 of the Act has to be determined on a case-by-case basis. The definition was intentionally kept broad by qualifying acts of physical, sexual, economic, emotional, verbal or psychological abuse, as well as acts of intimidation and harassment, as domestic violence.

198 No. 6 of 2006.

199 For more information on children's rights in Namibia, cf. Ruppel (2009c).

200 No. 4 of 2003.

The Maintenance Act

The Maintenance Act²⁰¹ confers equal rights and obligations on spouses with respect to the support of their children. The Act specifically states that both of a child's parents are liable to maintain that child, regardless of whether the parents are subject to any system of customary law which does not recognise both parents' liability to maintain the child. In the context of customary law, it might be even more complicated to determine whether a person is legally liable to maintain another person. Thus, the Maintenance Act provides that a maintenance court is to have due regard for specific principles – such as the principle that husbands and wives are primarily responsible for each other's maintenance – notwithstanding anything to the contrary in customary law. Furthermore, the petitioning parent can be granted an order to be paid maintenance in kind (goats or cattle) where the father is not employed but owns livestock.

The Maintenance Act was passed by Parliament as a result of the difficulty women continued to experience in securing maintenance from the fathers of their children, as well as in the inefficient operation of maintenance courts. The Act aims at implementing more effective mechanisms for securing maintenance in order to avoid or at least minimise the high number of women facing traditional approaches to maintenance under customary law. Section 3 of the Act states that both parents of a child are liable to maintain that child. This applies regardless of whether the child in question is born inside or outside the marriage of the parents or born of a first, current or subsequent marriage, and regardless of whether the parents are subject to any system of customary law which does not recognise both parents' liability to maintain a child.

201 No. 9 of 2003.

Also in terms of the Maintenance Act, single women can legally claim maintenance for their children or for themselves.²⁰² It is a crime to disobey a maintenance order. In terms of Section 39(1), a guilty party will be liable to a monetary fine not exceeding N\$4 000²⁰³ or imprisonment for a period not exceeding 12 months, or such periodical imprisonment as set out in Section 285 of the Criminal Procedure Act.²⁰⁴

The Combating of Rape Act

The Combating of Rape Act²⁰⁵ provides protection to victims of rape and sexual abuse and prescribes stiffer sentences for perpetrators. The offence of rape is committed if a person intentionally under coercive circumstances – including physical force, threats of force, or other circumstances where the victim is intimidated – commits or continues to commit a sexual act with another person or causes another person to commit a sexual act with the perpetrator or with a third person.²⁰⁶

Even though the customary laws of many communities include explicit rules for the handling of rape cases and stipulate payments for the crime of rape, the perception that marriage is to be seen as justification for rape is still predominant, especially in rural communities. The Act makes it very clear that marital rape is illegal, however, by stating that no marriage or other relationship constitutes a defence to a charge of rape.²⁰⁷

202 Section 3(2)(a).

203 N\$ 4.000 is equivalent to approximately € 390.

204 No. 51 of 1977.

205 No. 8 of 2000.

206 Section 2, Combating of Rape Act.

207 Section 2(3), Combating of Rape Act.

The Combating of Immoral Practices Act and the Married Persons Equality Act

The Combating of Immoral Practices Act²⁰⁸ has been subject to amendments by the Married Persons Equality Act²⁰⁹ as well as by the Combating of Immoral Practices Amendment Act.²¹⁰ The Combating of Immoral Practices Act provides for the combating of brothels, prostitution and other immoral practices and for matters connected with them.

One statutory enactment of specific relevance when it comes to conflicts involving customary law and gender is the Married Persons Equality Act. The intention behind this legal instrument includes the abolition of the marital power of the husband over the person and the property of his wife, which power was previously applied in civil marriages, and the amendment of the matrimonial property law of marriages in community of property. Taking into account the Convention on the Elimination of Discrimination against Women (CEDAW) Committee's concluding comments with regard to Namibia's report to the Committee, it has to be stated that many provisions of the Act are well suited to enhancing gender equality, even with regard to customary law marriages. Article 14, which gives wives and husbands equal power of guardianship in respect of children, notwithstanding anything to the contrary contained in any law or the common law, can be cited as such an example. One further positive effect of the Act is that it fixes the legal age of marriage at 18 years for both boys and girls.²¹¹ The abolition of the husband's marital power²¹² can in fact be regarded as fundamental with regard to gender equality. For this reason, the exception to this provision – which reads that the provisions regarding the abolition of marital power and the consequences thereof are not applicable to marriages by customary law – is observed with great concern.

208 No. 21 of 1980.

209 No. 1 of 1996.

210 No. 7 of 2000.

211 This is provided for by section 24 of the Married Persons Equality Act, which amends section 26 of the Marriages Act, 1961 (No. 25 of 1961), as substituted by section 6 of the Marriages, Births and Deaths Amendment Act, 1987 (No. 5 of 1987).

212 Section 2, Married Persons Equality Act.

The Draft Customary Law Marriages Bill

A noteworthy draft legal instrument that will have a substantial effect on women and custom in Namibia if it comes into force is the draft of the Recognition of Customary Law Marriages Bill. The draft of the Bill was proposed by the Law Reform and Development Commission,²¹³ but it has not yet been submitted to Parliament. It provides, *inter alia*, for the full legal recognition of marriages concluded under customary law. The draft of the Bill specifies requirements for and the registration of customary law marriages, as well as for the matrimonial property consequences of customary law marriages. According to the draft, customary law marriages will have full legal recognition – as do civil marriages. The minimum requirements for a customary marriage under the proposed Act are as follows:

- full age (unless consent from both parents as well as from the government is obtained);
- consent of both intending spouses;
- the lack of relationship to each other by affinity or blood to such a degree that their marriage would not be valid in terms of applicable customary law; and
- neither prospective spouse being party to an existing customary law marriage or a marriage under the common law.

Thus, bigamy (and polygamy) will be outlawed once the proposed Act comes into force. The Married Persons Equality Act will subsequently be amended to the effect that the provisions of the Act (including the abolition of marital power) apply to all marriages, whether by customary law or contracted under the Marriage Act.²¹⁴

213 See Namiseb (2008:107ff.).

214 No. 25 of 1961.

Relevant African Legal Instruments

Several legal instruments on gender-related issues and women's rights have been adopted in Africa, which are also most relevant for Namibia. These emanate from African institutions such as the African Union (AU) and the Southern African Development Community (SADC).²¹⁵

The OAU, AU and the African Charter for Human and Peoples' Rights

Various human rights instruments had already been adopted during the existence of the Organisation of African Unity (OAU), which was established in 1963. While the OAU played a significant role in the decolonisation and freedom of countries and peoples, it did not expressly uphold the values and standards associated with a culture of human rights, as they relate to individuals and groups. Furthermore, because it had adopted an unconditional position on non-interference, the OAU became ineffective in the promotion and protection of human rights in a decolonised and free Africa.²¹⁶

Two important developments extended and deepened Africa's commitment to human rights, democracy, governance and development. The first was the adoption in 2000 by the AU of its Constitutive Act, which reaffirms Africa's commitment to promote and protect human rights. The second was the New Partnership for Africa's Development, which also places human rights at the centre of development. Both aim to reinforce social, economic and cultural rights, as well as the right to development.

The establishment of the AU was hailed as a welcome opportunity to put human rights firmly on the African agenda. The AU's Constitutive Act marks a major departure from the OAU Charter in the following respects:

- moving from non-interference to non-indifference, including the right of the AU to intervene in any member state's affairs;
- explicit recognition of human rights;
- promotion of social, economic and cultural development; and

215 Visser & Ruppel-Schlichting (2008:155).

216 Gawanas (2009:135ff.).

- an approach based on human- centred development and gender equality.²¹⁷

The African Charter for Human and Peoples' Rights was adopted in Nairobi, Kenya, in 1981 and came into force in October 1986. Namibia ratified the Charter in 1992. The Charter contains a large number of civil, political, social and cultural rights. The principle of non-discrimination is recognised by Article 2, while Articles 3 and 4 grant the rights to equality and to bodily integrity, and the right to life, respectively. The family is accorded special protection through Article 18, which in sub-Section 3 reads:

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

A special feature of the Charter is that it explicitly imposes duties upon every individual and the community. Every individual has duties towards his or her family and society. Therefore, the rights and freedoms of each individual have to be exercised with due regard for the rights of others, collective security, morality and the common interest (Article 27). A duty is imposed upon the individual to respect and consider his/her fellow beings without discrimination (Article 28), and the community is called upon, inter alia, to respect the family (Article 29).

The Protocol on the Rights of Women in Africa

Although the African Charter on Human and Peoples' Rights provides for the general protection of the rights of women and the principle of non-discrimination on the grounds of sex, it was considered that these provisions did not sufficiently protect women's rights in Africa. Thus, the Protocol on the Rights of Women in Africa was drafted as the first human rights treaty under the African Union to provide specifically for a range of women's rights. It was adopted in 2003 and came into force in November 2005. Namibia ratified the Protocol in 2004. The Protocol's Preamble states that:

217 Ibid.

... despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.

Traditional cultural practices are considered to be a major impediment to the advancement of women's rights in Africa, as can be seen in the CEDAW Committee's concluding observations on the periodic reports of many African countries.²¹⁸ The Protocol intends to improve this situation by covering a broad spectrum of women's rights, such as the right to life, dignity, integrity and security; protection from violence; the prohibition of harmful practices; and marriage and marriage-related rights. With its broad list of rights, the Protocol goes beyond the scope of other gender-related instruments such as CEDAW. On the other hand, the Protocol takes less restrictive positions, e.g. on polygamous marriages, which according to the UN Human Rights Committee (HRC) as well as to the CEDAW Committee, are incompatible with the principle of equality of treatment and should therefore be seen as unacceptable discrimination against women and abolished wherever they continue to exist. In its Article 6(c), the Protocol only states that:

... monogamy is encouraged as the preferred form of marriage and ... the rights of women in marriage and family, including in polygamous marital relationships[,] are promoted and protected.

It is for obvious reasons that the wording of the AU Protocol is less restrictive than required by the HRC or the CEDAW Committee, as polygamy is permissible under the customary laws of many African states, as well as under Islamic personal law, which applies in many African countries. It has to be noted that the AU Protocol does not establish a specific body to promote, protect and monitor its effective implementation. This apparently falls within the mandate of the African Commission

218 See e.g. CEDAW (2006, 2007b).

on Human Rights, established under Part II of the African Charter on Human and Peoples' Rights. This is the body to which periodic reports have to be submitted (Article 26 of the AU Protocol) and to which individual communications alleging a breach of the Protocol's provisions have to be lodged (Article 55 of the African Charter on Human and Peoples' Rights).

The Promotion of Gender Equality in the SADC

The Southern African Development Community (SADC)²¹⁹ was established in Windhoek in 1992 as the successor organisation to the Southern African Development Coordination Conference, which had been founded in 1980. The SADC was established by signature of its constitutive legal instrument, the SADC Treaty. The SADC envisages:²²⁰

... a common future, a future in a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa.

The SADC currently counts 15 states amongst its members, namely Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles,²²¹ South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Besides the Treaty establishing the SADC, which characterises human rights, democracy and the rule of law as fundamental principles, the Charter on Fundamental and Social Rights is one of the basic documents related to human rights within the SADC. Even though this document is of a more general nature, Article 6 refers to equal treatment for men and women and calls upon member states to ensure gender equity, i.e. equal treatment and opportunities for men and women.²²²

219 For more details on the SADC with further references, see Ruppel (2009b, 2010b).

220 Ibid.

221 The Seychelles was a member of SADC from 1997 to 2004; it rejoined the SADC in 2008.

222 Ruppel (2009b).

The 1997 SADC Declaration on Gender and Development accepts that gender equality is a fundamental human right, and demands the equal representation of women and men in decision-making structures at all levels, as well as women's full access to and control of productive resources such as land, livestock, credit, modern technology and formal employment. However, even though the Declaration has been signed by all SADC member states, it is not a legally binding instrument.

Considering the increasing levels of various forms of violence against women and children in SADC member states, the SADC Summit signed an Addendum to the 1997 SADC Declaration on Gender and Development known as the 1998 Addendum on the Prevention and Eradication of Violence against Women and Children. In the Addendum, the Summit resolved to ensure the adoption of specific measures by SADC governments, which include the enactment of legislation, public education, training, the raising of awareness, and the provision of services. Like the Declaration on Gender and Development, the Addendum has been signed by all member states but is not legally binding.

The SADC Gender Unit, established in 1996, is responsible for monitoring and evaluation of all gender-related issues within the SADC. In 2003, the SADC Charter on Fundamental and Social Rights was introduced. Besides the aforementioned provisions and objectives, the SADC legal system offers human rights protection in many legal instruments other than the SADC Treaty. One category of legal documents constitutes the SADC Protocols. The Protocols are instruments by means of which the SADC Treaty is implemented; they have the same legal force as the Treaty itself. A Protocol comes into force after two thirds of SADC member states have ratified it. A Protocol legally binds its signatories after ratification.²²³

223 Ibid.

Of specific relevance in terms of gender-related instruments within the SADC legal framework is the Protocol on Gender and Development, which was signed during the 28th SADC Summit in August 2008.²²⁴ Recognising that the integration and mainstreaming of gender issues into the SADC legal framework is key to the sustainable development of the SADC region, and taking into account globalisation, human trafficking of women and children, the feminisation of poverty, and violence against women, amongst other things, the Protocol in its 25 Articles expressly addresses issues such as affirmative action, access to justice, marriage and family rights, gender-based violence, health, HIV and AIDS, and peace-building and conflict resolution. The Protocol provides that, by 2015, member states are obliged to enshrine gender equality in their respective constitutions, in such a manner that their constitutions state that the provisions enshrining gender equality take precedence over their customary, religious and other laws.²²⁵

The implementation of the Protocol's provisions is the responsibility of the various SADC member states,²²⁶ and specific provisions regarding monitoring and evaluation are laid down in the Protocol.²²⁷ The SADC Tribunal is the judicial body that has jurisdiction over disputes relating to this Protocol.²²⁸ The SADC Tribunal was established under Article 9 of the SADC Treaty in 1992. The Tribunal is seated in Windhoek, Republic of Namibia.²²⁹

224 See Section 16, Final Communiqué of the 28th Summit of SADC Heads of State and Government held in Sandton, South Africa, 16 to 17 August 2008.

225 Article 4, SADC Protocol on Gender and Development.

226 Article 14, SADC Protocol.

227 Article 17, SADC Protocol.

228 Article 18, SADC Protocol.

229 For a detailed discussion on the SADC Tribunal and its legal foundations, see Ruppel & Bangamwabo (2009a:191ff); Ruppel (2009b, c and f).

International Law

The UDHR is a basic international statement of the inalienable and inviolable rights of all members of the human family. The Declaration is intended to serve as the common standard of achievement for all peoples and all nations in the global effort to secure universal and effective recognition of the rights and freedoms it lists. The right to equality can be seen as the golden thread of the Declaration. *Inter alia*, it is laid down that:

- all human beings are born free and equal in dignity and rights (Article 1);
- everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2);
- everyone has the right to life, liberty and security of person (Article 3); and
- all are equal before the law and are entitled without any discrimination to equal protection before the law (Article 7).

One further provision of specific relevance in terms of specific cultural practices is Article 16, which provides that men and women of full age have the right to marry and found a family; that men and women are entitled to equal rights regarding getting marriage, during marriage, and at its dissolution; and that marriage should be entered into only with the free and full consent of the intending spouses. Although the Declaration implicitly recognises that its rights and freedoms may be subject to limitations, such limitations are obliged to be determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others. Furthermore, any such limitations have to meet the just requirements of morality, public order and general welfare in a democratic society.²³⁰

The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), ratified by Namibia in 1995, provide internal protection for specific rights and freedoms. Both Covenants recognise the right of peoples to

230 Visser & Ruppel-Schlichting (2008:151ff).

self-determination; both have provisions which prohibit all forms of discrimination in the exercise of human rights; and both have the force of law for the countries which have ratified them.

Like the UDHR, the ICESCR and the ICCPR bar all forms of discrimination. As to gender-related human rights, specific attention has to be given to those provisions that relate to family and marriage. These are of particular relevance when it comes to specific cultural practices that potentially violate women's rights. Article 3 of the ICESCR encourages States Parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights as set forth by the Covenant. The protection of the family as the natural and fundamental group unit of society is accorded special protection in Article 10, which – like the UDHR and the ICCPR – states that marriage should only be entered into with the free consent of the intending spouses. Specific rights pertinent to non-discrimination are also contained in the ICCPR, and Article 23 in particular takes up the issue of family and marriages. Of equal importance with regard to women and customary practices are the rights to self-determination (Article 1), to be free from torture or cruel, inhuman or degrading treatment (Article 7), and to equality before the law (Article 26).

The 1967 Declaration on the Elimination of Discrimination against Women, issued by the United Nation's General Assembly four decades ago, was a crucial step in the process of drafting international gender-specific legal instruments. The Declaration, which is not binding, states that discrimination against women is fundamentally unjust and constitutes an offence against human dignity (Article 1). The Declaration also calls for the abolition of laws and customs which discriminate against women, for equality under the law to be recognised, and for states to ratify and implement existing UN human rights instruments against discrimination (Article 2). The rights to education, to vote and to enjoy full equality in civil law, particularly in respect of marriage and divorce, are emphasised in the Declaration, while it also calls for child marriages to be outlawed (Article 6).²³¹

231 Ibid.

The Convention on the Elimination of All Forms of Discrimination against Women

CEDAW was adopted in 1979, and came into force in 1981. CEDAW has to be seen as a milestone in gender-related legislation as it is the first legally binding instrument relating specifically to women's rights. As of August 2008, the Convention had 185 members, including Namibia, which ratified the Convention in 1992. CEDAW provides the foundation for realising equality between women and men. States Parties are obliged to take all appropriate measures, including legislation and temporary special measures, to ensure that women enjoy all their human rights and fundamental freedoms. One of the Convention's mainstays is the definition of the term discrimination against women, which according to Article 1 is:

... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

States Parties are required to enshrine gender equality into their domestic legislation, repeal all discriminatory provisions in their laws, and enact new provisions to guard against discrimination against women. They are also obliged to establish tribunals and public institutions to guarantee women effective protection against discrimination, as well as to take steps to eliminate all forms of discrimination practised against women by individuals, organisations and enterprises (Article 2). One provision specifically relevant for women and custom is Article 5, which states that measures have to be taken to:

... modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

It has to be noted that CEDAW permits ratification subject to certain reservations, provided that such reservations are not incompatible with the object and purpose of the Convention. A number of states enter reservations to particular Articles on the grounds that national law, tradition, religion or culture are not congruent with the principles of the Convention, and purport to justify the reservation on that basis. Namibia has not reserved any such right under CEDAW. One specific feature of CEDAW is that each State Party has to submit periodic reports on measures they have taken to comply with their obligations under CEDAW. These reports are examined and commented on by the Committee on the Elimination of Discrimination against Women, established under CEDAW.

In its concluding comments on Namibia's combined second and third periodic reports submitted in accordance with Article 18 of CEDAW²³² with regard to women and custom in Namibia, the Committee expressed its concern about, *inter alia*, the persistence of strong patriarchal attitudes and stereotypes in regard to the roles and responsibilities of women and men in the family and society. Furthermore, the Committee was concerned that the Traditional Authorities Act,²³³ which gives traditional authorities the right to supervise and ensure the observance of customary law, may have a negative impact on women in cases where such laws perpetuate the use of customs and cultural and traditional practices that are harmful to and discriminate against women. The Committee, therefore, called on Namibia to study the impact of the implementation of the Traditional Authorities Act as well as the Community Courts Act so as to ensure that customs and cultural and traditional practices that were in fact harmful to and discriminated against women were discontinued.

The Optional Protocol to CEDAW adopted by the United Nations General Assembly in 1999 entered into force in December 2000, and was signed and ratified by Namibia in May 2000. Members to the Optional Protocol recognise the competence of the Convention's monitoring body, the Committee on the Elimination of Discrimination against Women, to receive and consider complaints from individuals or groups within its jurisdiction.

232 CEDAW (2007a).

233 No. 25 of 2000.

The Declaration on the Elimination of Violence against Women

The Declaration on the Elimination of Violence against Women (1993) is a further commitment by the UN that relates to the topic of this publication. It goes without saying that violence against women is not a problem peculiar to women living in traditional settings. Unfortunately, violence against women occurs in all socio-economic and educational classes and cuts across cultural and religious barriers. However, the perception that women are subordinated to their male partners still predominates in large parts of traditional communities, and in many cases, tradition is considered to be a justification for violence against women. Violence against women takes a dismaying variety of forms, from domestic abuse and rape to child marriages and female circumcision. The Declaration defines the term *violence against women* in Article 1 as:

... any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

States are called on to condemn violence against women and not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination (Article 4).

Two major documents that still need to be mentioned here are the *Beijing Declaration* and the *Beijing Platform for Action*, which resulted from the UN's Fourth World Conference on Women, titled "Action for Equality, Development and Peace", held in Beijing in 1995. The Beijing Declaration embodies the commitment of the international community to the advancement of women and to the implementation of the Platform for Action, ensuring that a gender perspective is reflected in all policies and programmes at national, regional and international levels. The Beijing Platform for Action, on the other hand, sets out a number of actions for national and international implementation for the advancement of women. Both documents contain several sections that relate either directly or indirectly to issues around women

and custom. For instance, the Platform for Action states that violence against women, including physical, sexual and psychological violence occurring in the family such as marital rape, female genital mutilation and other traditional practices harmful to women, have to be prevented and eliminated.²³⁴

Women and Customary Law

Customary law is the law according to which most of the Namibian population live. It regulates marriage, divorce, inheritance and land tenure, amongst other things. Thus, customary law is a body of norms, customs and beliefs which is relevant for most Namibians. However, despite this relevance for the majority of the population, customary law was for a time marginalised and even ignored, owing to colonial rule. Customary law is a complex, dynamic system which has constantly evolved in response to a wide variety of internal needs and external influences.²³⁵ All evidence relating to the living reality of customary law shows that the law has developed ways and means of preserving its essence in spite of any impairment. Article 66(1) of the Constitution reads:

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

Therefore, Article 66(1) explicitly recognises the constitutional validity of customary law. Customary law must, however, comply with constitutional provisions, notably Chapter 3, which contains fundamental human rights and freedoms. Thus, the constitutional recognition of customary law protects it against arbitrary inroads, and places a legal duty upon national lawmakers to treat customary law like any other law as regards its repeal or amendment.²³⁶ When it comes to cultural rights, Article 19 of the Constitution provides the rudiments of a new cultural approach to customary law:

234 For a collection of most relevant national, regional and international legal texts of instruments dealing with the protection of women's rights in Namibia, see Ruppel (2008c:173-224).

235 Hinz (2003a).

236 Ibid.

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

Through Article 19, the right to culture is guaranteed under the Bill of Rights in the Constitution,²³⁷ as it is through Article 15(1)(a) of the ICESCR. In terms of these two legal instruments, the government is required to take legislative and administrative measures to ensure the fulfilment of these rights. The right to profess, maintain and promote a language arose in the case of *Government of the Republic of Namibia v Cultura 2000*.²³⁸ The respondents – an association for the preservation of the cultural activities of white Namibians – argued, *inter alia*, that the State Repudiation Act,²³⁹ whereby the government had sought to deprive the respondents of certain monies and property allocated to them by the previous administration, was unconstitutional since it was in conflict with Article 19. The Supreme Court rejected this argument without examining it in great detail, holding that the repudiation effected by Section 2(1) of the Act was lawful in terms of Article 140(3) of the Constitution. The judgment in this case makes it clear that the right to culture is not absolute: it is subject to the provisions of the Constitution, and thus cannot impinge on the rights of others or the national interest. This qualification is important because the right to cultural life and traditions – given that many traditional practices are sexually discriminatory – could potentially clash with constitutional rights regarding non-discrimination and with women’s rights.²⁴⁰

Customary Marriages

Namibia has two types of marriage systems, namely the civil system, and customary marriage.²⁴¹ Civil marriage is solemnised by civil or religious rites, while customary marriage is based on tradition. Before

237 For a more detailed discussion of the right to culture cf. Ruppel (2010d).

238 1994 (1) SA 407 (NmS).

239 Act No. 32 of 1992.

240 Naldi (1995:96).

241 Friesen (1998:1).

a customary marriage comes into existence, the prospective spouses and their families negotiate the marriage, exchange marriage considerations, establish a matrimonial residence, and perform traditional ceremonies.²⁴² There are still many people in Namibia who marry under customary law.²⁴³

As heads of households, men traditionally make the final decisions with regard to household property, livestock, and property disposal and acquisition. In many Namibian traditional societies, there is rarely a time in a woman's life when she is not under the direct control of a man. Even though women can head households, in a customary marriage the man is mostly regarded as head of the household. According to LeBeau *et al.*,²⁴⁴ it is evident that women (and female children) do many more chores than men; and they do these chores more frequently than the men do theirs. Women are required to cultivate the field, fetch water and wood, buy goods at shops and markets, make and sell baskets, process *mahangu*,²⁴⁵ feed the family, and watch over the children. This clearly shows that women carry out the tasks of production while men reap the benefits. In the Oshiwambo-speaking society, men have control over arable land and divide their land between themselves and their wives. Although men allocate themselves the larger portion, women are responsible for cultivating the crops not only on their smaller portions, but on all of the homestead's arable land. Despite this, the men may keep the produce of the land for their own use, while women use their produce to feed the family.

Although it is clear that women are the primary users of the agricultural environment,²⁴⁶ women do not have the ability to own land rights or have usufruct over such land rights: they can only do so indirectly, i.e. via their husband or other male relatives. The Legal Assistance Centre (LAC)²⁴⁷ reported that women have some control over their own individual property in matrilineal communities, like that of the Owambo. However, the husband's consent for some property transactions may be needed.

242 Ibid.

243 The following data are found in NPC (2003).

244 LeBeau et al. (2004:80).

245 *Mahangu* (pearl millet, *Pennisetum glaucum*) is the most widely grown type of millet in Namibia.

246 The data indicated that 50% of all women in Namibia work in agriculture, compared with 43% of men (Ambunda & de Klerk (2008:51)).

247 LAC (2005).

Conversely, a husband does not need his wife's consent. Modern consumer goods which confer status – such as motor vehicles, land and cattle – tend to be treated in practice as male property, regardless of which spouse actually acquired them. The LAC report also showed that in Herero communities, women could individually own and control property, including cattle, but that male consent was necessary – at least as a formality.

The Namibian Constitution specifically refers to customary marriages in two of its Articles.²⁴⁸ But what is the status of customary marriages in Namibia? The following questions arise in view of the recognition of customary marriages:

- What are the criteria of a valid customary marriage?
- What are the rules governing the relationship between spouses?
- What is the matrimonial property regime?
- What are grounds for divorce? And how is divorce effected?²⁴⁹

Although customary law provides some answers to some aspects of these questions, legal certainty for the parties to such marriages, certainty for the benefit of the children, and certainty for the public with which spouses entertain transactions require more legislative intervention in the form of a statute comparable to the Marriage Act (as amended) or the Married Persons Equality Act, to name only two that focus specifically on civil marriages.

248 Article 4(3)(b), which addresses the acquisition of citizenship, and Article 12(1)(f), concerning the privilege to withhold testimony against themselves or their spouses.

249 See Hinz (2008a:95ff.).

Bride Price

Traditionally, marriage is regarded as an arrangement between the kinship groups of the man and the woman. Most traditional communities undertake to pay a bride price²⁵⁰ to the women's kinship group. This payment establishes a social relationship between the groups and, in the process, gives the man and his kinship group certain rights of control over the woman. In many customary law systems, the payment of a marriage consideration or *lobola* is the principal criterion for a valid customary marriage. Thus, the bride price is used to distinguish a valid marriage from a non-formalised union. *Lobola*, as the criterion for a valid customary marriage, is tendered by the groom or his parents to the bride's parents. This is usually paid in full and can be in the form of cattle or money.²⁵¹

In Namibia, the payment of *lobola* is not exercised by all traditional communities.²⁵² Therefore, *lobola* is not a major criterion for the validity of a customary marriage in terms of all customary systems, because it varies in form, function and value from community to community. In matrilineal communities,²⁵³ for example, *lobola* is not a major criterion; but the giving of small gifts²⁵⁴ and/or services rendered over a period of time²⁵⁵ are considered the main elements in validating a customary marriage.²⁵⁶ The wedding ox, commonly given in Owambo communities, does not perform the same function as a marriage consideration, although it is referred to as *lobola*;²⁵⁷ for this reason, the donation of the wedding ox is termed a marriage ratification custom.²⁵⁸ The wedding gifts given in matrilineal communities are also termed a marriage ratification custom because they are seen as a way of ratifying the marriage, rather than of preventing divorce.²⁵⁹ In the case of divorce, these presents do not need to be returned, because they are not of high value.

250 Which the Herero call *otjitunya*, the Nama and Damara call */gwalgab*, the Owambo call *iigonda*, and the Caprivians call *malobolo*. In many southern African communities it is known as *lobola* or *lobolo*.

251 In the past, *lobola* could also be and in fact was paid in the form of hoes.

252 Ambunda & de Klerk (2008:54).

253 The Oshiwambo-speaking and Kavango communities.

254 In Owambo communities, the gifts are given by the bridegroom to the bride's parents.

255 This is referred to as a bride service, and is a custom practised by Kavango communities.

256 Bennett (1995:103).

257 Ibid.

258 Becker & Hinz (1995:51).

259 Ibid.

A marriage consideration is mostly only required as the principal criterion in the patrilineal and cognate communities in Namibia. In these communities, the value of the *lobola* is high, and is determined by the bride's family. *Lobola* is traditionally paid in full in the form of cattle or money; however, it can now also be paid in instalments. The main function of the bride price is to prevent divorce: on the wife's side of the family, it is potentially difficult to have to return a significant sum of money or head of cattle to her husband or his family; the same difficulties occur from the husband's side, since he and his family would have to forfeit such sum or cattle.²⁶⁰

In patrilineal communities such as the Herero, *lobola* has the effect of legalising the marriage and establishing patrilineal affiliation for any children born of the marriage. The wife, however, remains part of her own female line, because of the double-descent kinship system practised by the Herero.²⁶¹ In Caprivi communities, the payment of *lobola* – or *malobolo* as they refer to it – is the main criterion for distinguishing a valid customary marriage from a non-formalised one. This custom has been passed from generation to generation. The consent of both spouses' parents is also required, but its effect is not greater than that of *lobola*: even if parental consent has been given but *lobola* has not, the marriage is not valid until the *lobola* has been paid. This simply means that, without *lobola*, there is no valid marriage under Caprivi customary law, irrespective of whether the bride is a virgin, a widow, a divorcée, a young woman, or a mature woman. In the past, *lobola* was – comparatively speaking – cheap and was paid in the form of either an axe or a hoe. This the bridegroom had to give to the bride's parents either before or as he came to take his bride. Today, *lobola* is expensive, and consists of large sums of money and many head of cattle.

Many misunderstandings and misinterpretations regarding the role and meaning of *lobola* exist. Some people believe that paying *lobola* means “buying” the bride. On the other hand, it is argued that *lobola* was not, and is still not, meant to “buy” a bride, but to secure marriage and prevent divorce. Therefore,

260 Ibid.

261 Bennett (1995:104).

lobola is meant to serve as the security in a customary marriage, with the effect of preventing both the spouses and their respective parents from the consequences that arise in the event of divorce. As *lobola* is meant to secure customary marriages, in the event of divorce there are conditions attached to *lobola*; these will determine whether the *lobola* is returned to the groom and his parents by the bride's parents, or whether the groom and his family forfeit the *lobola*.²⁶²

Polygamy and Polygyny

In social anthropology, *polygamy* is the practice of being married to more than one spouse at the same time. Historically, polygamy has most commonly been practised as *polygyny*, which is one man having more than one wife; in other cultures it is practised as *polyandry*, i.e. one woman having more than one husband; less commonly, polygamy can be practised as group marriage, in which the family unit comprises more than one man and more than one woman, all of whom share parenting responsibilities. Polygyny is practised in a traditional sense in many African cultures and countries today, including Namibia. It appears more often in patriarchal societies.²⁶³ As a customary marriage, polygyny is not mere cohabitation and informal union: it is a process, and its specifications differ from community to community.²⁶⁴

Polygyny has proponents and opponents in Namibian society and in Africa at large.²⁶⁵ Some argue that it objectifies women, purporting that it is a vehicle for the oppression of women in marriage. Others have expressed the opinion that women did not consider themselves as being oppressed by their customary laws, and that they embraced these laws and practiced them proudly. For example, the practice of polygyny that is often seen as oppressive by society was embraced as a way to ensure that no children were born out of wedlock, and that all the women who formed part of the traditional community were married and could be looked after by their husband.²⁶⁶

262 Ambunda & de Klerk (2008:56).

263 Stone (2006:Ch. 6).

264 Ambunda & de Klerk (2008:69).

265 Anyolo (2008).

266 For different viewpoints see Ambunda & de Klerk (2008:69ff.) and Anyolo (2008:83ff.).

What is a fact in Namibia, however, is that polygyny is not on par with civil marriage in terms of legal recognition by the state. So far only civil marriages are recorded in the marriage register of the Department of Civic Affairs and are accorded marriage certificates.²⁶⁷ Perhaps the most significant distinguishing factor between a civil and a customary marriage is that polygyny is not only a private arrangement between the couple, but also a union of two families.²⁶⁸

As explained above, various laws outlining the framework that supports the implementation of gender-related constitutional issues have been passed, and policies and programmes that promote and sustain equality for all have been developed,²⁶⁹ but the question of polygyny has not yet been successfully addressed. In this regard, experts on the 23-member Committee on the Elimination of Discrimination against Women²⁷⁰ in 1997 made the following comment on Namibia's first country report:

Namibia should address the question of polygamy. It is further said that even countries where there were religious sanctions for such marriages, efforts were being made to discourage them.

It was stressed that since a majority of Namibians were Christian, it should be easier to prevent polygynous marriages.²⁷¹ The 2005 CEDAW consideration of Namibia's 2nd and 3rd periodic reports takes up this issue and states that polygyny has been identified as an area of concern by the Committee but has so far not received the required attention.²⁷² Women in polygynous partnerships are not afforded legal protection under the general legal system because, currently, only civil marriages are given full recognition by the state's legislation.²⁷³ For example, the much-heralded legislation²⁷⁴ which removes the common law principle of a husband's marital power is not applicable to marriages by

267 Ministry of Home Affairs Marriage Register.

268 Bennett (2004).

269 The National Gender Policy of 1997.

270 This is the monitoring body for CEDAW, in accordance with Article 18 of the Convention. According to Article 18, State Parties are required to submit reports within one year after accession, and thereafter at least every four years.

271 Friesen (1998).

272 See CEDAW (2005).

273 Such as the Marriages Act, 1961 (No. 25 of 1961).

274 The Married Persons Equality Act, 1996 (No. 1 of 1996).

customary law; hence the abolition of marital power has no effect on women in polygynous marriages. It is presumed, therefore, that the consequences of the non-recognition of polygyny, a practice which is simply left to function in a legal vacuum, may result in the violation of women's rights. Since the Namibian Government has introduced the Married Persons Equality Act, it is difficult to understand why the principles therein do not apply to customary marriages.

Women's Land and Property Rights under Customary Law

Most customary systems in Namibia traditionally reflect that women do not own or inherit land. This is partly because women are perceived to be part of the wealth of the community, and therefore cannot be the locus of land right grants. For most women, access to land is via a system of vicarious ownership through men such as husbands, fathers, uncles, brothers and sons. Customary rules, therefore, have the effect of excluding females from the clan or community entity. In most ethnic groups, a married woman does not own property during marriage. Customarily, especially in the rural areas, women in many Namibian cultures are not allowed to own property and do not have control over family finances. Thus, most rural women depend on their husbands to give them money or to send money to them from the urban areas. In effect, therefore, women face continued dependence on men for money – which contributes to maintaining their lower social status vis-à-vis men, and places them at risk of poverty, exploitation, and gender-based violence.²⁷⁵ The woman's entire property – even that acquired before her marriage – is under the sole control of her husband. The control exercised by women over land is over use rather than control or ownership of the rights to it. This subordination of women socially and economically renders them less competitive than they should be under the current economic structuring of society.²⁷⁶

275 Ambunda & de Klerk (2008:57).

276 Bennett (1996).

The issue of women and land rights was taken up in 1995 when the Ministry of Agriculture, Water and Rural Development (MAWRD) adopted a National Agricultural Policy, which highlighted the need to secure the participation of women in agricultural development, and stated that women needed to be recognised as farmers in their own right. According to the Policy, women's access to and control over household resources were marginal. It stated that a specific strategy would be employed to ensure that women farmers were not excluded from the government's commitment to provide for the basic needs of all Namibians. The Policy added that the role of women in agricultural development needed to be re-emphasised and their participation in agricultural organisations ensured. More importantly, the prevalent socio-cultural norms which related to women needed to be changed, according to the Policy, which also emphasised the need to assist women in overcoming constraints to their participation in development efforts related to the lack of skills and poor access to services and finance. Furthermore, the Policy initiated the debate on law reform in regard to the above.

A subsequent major development for rural women came in the form of the Communal (Agricultural) Land Reform Act.²⁷⁷ In terms of the Act, men and women are equally eligible for individual rights to communal land, and the treatment of widows and widowers must be identical. This law alters current practice in some areas, where a widow can be dispossessed of the communal occupation fee.²⁷⁸

Customary Succession and Inheritance Law

In Namibia, succession is governed by both common law and customary law. The relatively simple and clear-cut modern inheritance law privileges the surviving partner to the marriage and their children. Customary inheritance law, however, distributes shares of the estate to the family. Under today's customary law, succession is intestate, universal and onerous. An heir generally inherits not only the property, but also the responsibilities of the deceased, particularly the duty to support surviving relatives. Among Herero communities, for example, the eldest son succeeds the deceased should the

277 No. 5 of 2002.

278 MAWRD (1995).

head of the family die. If the deceased had more than one wife, this would normally be the eldest son of his first wife. Caprivi Region is the only area where widows regularly inherit their deceased husband's property – a practice that is said to be necessary to provide for any surviving children.²⁷⁹

Article 14(1) of the Namibian Constitution requires both husband and wife to be treated equally if their marriage is to be dissolved. This poses a major challenge to customary practice, which excludes widows from inheriting. The constitutional guarantee pertaining to equal treatment might be enough to overturn the customary bar on widows inheriting, despite their right to maintenance from the estate. Therefore, any customary laws that profess that the deceased heir be male would constitute *prima facie* discrimination against female descendants. Admittedly, a widow usually has the right to insist that the heir maintain her out of the deceased estate, but that right may be hedged with restrictions such as the widow being required to continue residing at the deceased's homestead and performing her "wifely" duties. Property grabbing has been identified as one of the worst disadvantages in customary marriage. It is the ill-treatment of widows after their husband's death. The matrilineal family members of the late husband are the ones normally involved in property grabbing. This inheritance practice is defined as stripping a woman of her right to property as provided for under Article 16 of the Constitution and Article 5 of CEDAW. Another practice is the evicting of the widow and her children from the late husband's land – and even from the spouses' common house.²⁸⁰

The issues at hand in customary inheritance law are even more complicated than in customary family law.²⁸¹ The death of a person leaving his or her estate accessible in one way or another to all sorts of legitimate as well as illegitimate interests characterises the special vulnerability of the estate. Less powerful, but nevertheless legitimate interests (interests of women and children) thus call for more protection.²⁸²

279 Ambunda & de Klerk (2008:72f.)

280 Ibid.

281 Proof of this is also the confusing legislation inherited from the colonial administration; cf. the collection of laws contained in Bekker & Hinz (2000).

282 Hinz (2008a:99f.).

Extramarital Children under Customary Law

Under common law, an extramarital (i.e. illegitimate²⁸³) child was previously unable to be an intestate heir of his/her father or paternal relatives. The rule that an illegitimate child could not inherit from his intestate father was applied in the Namibian case of *Lotta Frans v Pasche and Others*.²⁸⁴ Since 2006, the Children's Status Act has provided that, despite anything to the contrary contained in any statutes, common law or customary law, a person born outside marriage is obliged, for purposes of inheritance, either intestate or by testamentary disposition, to be treated in the same manner as a person born inside marriage.

Are Women's Rights a Threat to Custom and Customary Law?

Especially in the rural areas, *women's rights* and *gender equality* are often seen as being "western" concepts. Indeed, some even say that such concepts interfere with cultural values. This view suggests a fear of being almost helplessly exposed to a foreign threat. The increasing process of globalisation has substantially contributed not only to a concomitantly growing recognition of cultural diversity, but also to the weakening of the ethical foundation of societies. Societies which have not developed as a part of the mainland of western human rights experience problems in accepting these as a valid, worldwide legal perception. For example, the payment of a bride price is still one major criterion for a valid customary marriage as a formalised union. From a western point of view, *lobola* might easily be seen as a means of "buying" a bride. However, this interpretation is misguided, as women are not traditionally viewed as a tradable commodity. Indeed, from a cultural perspective, *lobola* is seen as a means of securing the marriage and preventing divorce.

Another example that throws light on the differing attitudes towards cultural practices is the debate surrounding polygyny. The opponents of the institution argue that polygyny objectifies women, and that it is a vehicle for oppressing women within a marriage. The institution's proponents, however,

283 An illegitimate child is defined as one whose father and mother were not legally married to each other at the time of the child's conception or birth or at any subsequent time.

284 P11548/2005 (2007) NAHC 49.

argue that the polygynous marriage keeps families together and lends extra dignity and respect to the woman. Polygyny, in the latter view, is socially valuable in that it provides women with security through a division of labour, a division of household responsibilities and the provision of companionship, while simultaneously curtailing sexual and reproduction demands on the individual woman.

In other words, people have different perceptions about culture depending on their individual backgrounds and the power of choice. The enforceability of these perceptions largely depends on the power relations within a specific community or society. However, aspects of customary law that are indeed inhuman and discriminatory should not endanger the existence of customary law in its entirety as a system of laws governing the way of life of most Africans. The solution is not to abolish customary law, but rather to have such law ascertained.²⁸⁵ One should not be too hasty, making sweeping judgements of customary practices from the outside; rather, one should try to see the customs from the viewpoints of the people who practise them on a daily basis. Abolishing customary law would mean erasing the *modus operandi* of various ethnic groups from the broad spectrum of Namibian society. Instead, one should identify the sensitive aspects under customary practices that do not conform to the constitutional principles of equality, fairness, and justice, and apply law reform to these.²⁸⁶

Past projects of the Law Reform and Development Commission have already ushered in very positive changes.²⁸⁷ The discriminatory concept of *marital power*, for example, was abolished by the Married Persons Equality Act.²⁸⁸ The Domestic Violence Project has been implemented, and the Combating of Rape Act as well as the Combating of Domestic Violence Act, both aiming at combating violence against women, have been enacted.

285 The Ascertainment of Customary Laws Project at the HRDC ultimately seeks to ascertain and eventually publish all the customary laws of Namibia in one collection. The implementation of the Community Courts Act, 2003 (No. 10 of 2003) will be impossible for the courts without having such laws in writing. Without written laws, customary law will continue to be a threat to women. Comprehensive research has already been conducted in order to collect the various laws. In consultative meetings traditional communities were requested to write down their respective customary laws. Cf. Ruppel (2010a).

286 Ruppel (2008c:23f).

287 Namiseb (2008:112).

288 It has to be noted, however, that the abolition of marital power is not applicable to customary law marriages. Cf. section 16 of the Act.

In order to provide women with better protection, customary marriages need to be clothed with the same legal recognition attached to civil law marriages. Not only are customary marriages generally not recognised under Namibian law, but most of the provisions of the Married Persons Equality Act do not apply to them either. It is imperative, therefore, that an enabling piece of legislation which will recognise customary law marriages so as to bring them on a par with common law marriages is realised in the near future. The registration of customary law marriages should be made mandatory, so that the question of marital status becomes more certain and easier to prove. To encourage the registration of customary law marriages, awareness campaigns should be undertaken to sensitise the public about the need to register.²⁸⁹

Nevertheless, the legal framework relating to gender-sensitive issues in Namibia is wide-ranging on international, regional and national levels. Some of these legal instruments take up the potential conflicts between gender equality and customary law by aiming to achieve gender integration and equality. Furthermore, it needs to be stressed that effective implementation, enforcement and monitoring procedures are essential in order to put all these theoretical legal provisions into practice. In this regard, it is imperative that awareness about these issues is raised, and that the rationale and contents of gender-related legal instruments are brought to the grass-roots level.

The younger generation needs to be educated about what their traditions mean. The older generation needs to be informed about concepts which, at first sight, seem alien to them but are not in fact so. Education has always been an empowering force; thus, it should be used to uplift rural women and lead to a gradual shift in mindset – particularly among men. Most importantly, women all over Namibia need to be given the power of choice, which includes the power to choose whether or not to enter into a polygynous marriage, the power to choose whether to marry in terms of customary law or civil law, and the power to choose whether or not to accept a bride price. With regard to the question whether or

289 Ambunda & de Klerk (2008:80).

not women do in fact have the power of choice, dependency still plays a major role. Such dependency can only be diminished by means of empowerment and socio-economic development. If women are free from dependency they will also be free from violence.

Children's Rights

The legal framework relating to children's issues in Namibia is wide-ranging.²⁹⁰ But is it also effective? As stated by Coomer:²⁹¹

Approximately 60 per cent of people in Namibia are under the age of 25. Nearly 40 per cent of the population is under the age of 15.

The fact that children make up such a large proportion of the population is reason enough to support the need for robust legislation on the care and protection of children. But there are more reasons. Many more. Children cannot care for themselves in the same way that adults can. Children cannot make decisions for themselves in the same way that adults can. Children cannot protect themselves from harm in the same way that adults can. There is an urgent need for all countries, including Namibia, to ensure that they have legislation in place that provides the basis for the care and protection of children.

A vital preservation of child rights is found in Article 15(1) of the Constitution:

Children shall have the right from birth to a name, the right to acquire nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.

290 Ambunda & Mugadza (2009:5-52); Ruppel (2009c:53-100).

291 Coomer (2009).

The legal norms of constitutional interpretation in Namibia have been settled in the following cases, to mention but a few: *S v Acheson*,²⁹² *Minister of Defence v Mwandhingi*,²⁹³ and *In Re: Corporal Punishment by the Organs of the State*.²⁹⁴ These cases have stated that the Constitution is a mirror reflecting the national soul. Thus, the word shall in the context of the Constitution where a person's right is concerned requires exact compliance. In other words, the right has to be strictly adhered to, as provided for in the Constitution. The word shall puts the onus on the state to ensure that every child indeed has those rights.

Article 15(1) provides for a clear protection system that is constitutionally guaranteed. However, research has shown that most children do not know about the Constitution or what it contains. In addition, the percentage of children who do not have birth certificates, national identity cards or passports shows traces of a failing child protection system. The birth certificate is an essential document to prove that a person exists in the eyes of the law, and it contributes to creating safer, healthier and more prosperous societies. It was estimated that four out of 10 children do not have a birth certificate. Therefore, in October 2008, the Namibian government, in collaboration with the United Nations Children's Fund (UNICEF), launched a project to ensure that all children born at hospitals are registered at birth and receive a birth certificate recognising their existence as Namibian citizens.²⁹⁵

Article 15(2) further states:

Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this sub-Article children shall be persons under the age of sixteen (16) years.

292 1991 NR 1 (HC).

293 1993 NLR 63.

294 1991 NLR 178.

295 Cf. e.g. MGECW (2009a).

This is another way in which the rights of the children are protected by the Constitution. In order to fully understand the protection provided by this particular provision, it is important to deal with certain aspects individually, i.e.:

- protection from the economic system;
- protection from hazardous work;
- protection from interference with education; and
- health protection.

The Constitution makes it categorically clear that no child is permitted to be exploited by anyone for economic benefit. Others prefer to call this *child labour*. Research has shown that most children work mainly as a result of poverty or family disintegration. Today, the issue of HIV/AIDS has exacerbated children's plight. The child may have been born HIV-positive, or the same poverty and family breakdown scenario forces the child to become involved in promiscuous acts that affect his/her welfare.

Moreover, observations have revealed that in various supermarkets and private businesses in Namibia today, children are seen packing items at till points. In most cases, their remuneration is a customer's loose change. Is this not also a form of economic exploitation that is prohibited by Article 15(2)? This Article must be read in conjunction with Article 15(3), which *inter alia* provides for the following:

No children under the age of fourteen (14) shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament ...

Even if the government is fully committed to ensuring that children are protected from all forms of economic exploitation, a child's plight cannot improve significantly if other stakeholders do not complement government efforts. Furthermore, the situation regarding the protection of children from exploitation as labourers on farms appears to be more deplorable than that it is in urban areas. It is difficult to monitor the illegal employment of children on farms, where it is nonetheless well known that children under the age of 16 are often employed for all kinds of labour. This exposes some shortcomings associated with Article 15(2). The argument is sometimes made that if these children did not perform those menial jobs, they would suffer hunger. Therefore, in as much as Articles 15(2) and (3) protect children from economic exploitation, the practical reality appears to be scarcely affected by such protection. Further protection to children is provided under Article 15(4):

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

Our courts have yet to firmly ascertain what the phrase compel the minor children entails. For instance, a minor boy may find himself in a situation where his parents or guardians are working on a farm, but they are sick or they cannot afford to take proper care of him. The child may see an opportunity to improve his welfare by working at the farm. The question is whether the minor working under these conditions could be interpreted as a case of his being compelled to work for the employer. This kind of scenario appears to be commonplace on many farms in Namibia, i.e. that a minor finds him-/herself working on a farm out of necessity, despite the provisions of Article 15(4). One of the most talked-about protection of minor children detained in holding cells.²⁹⁶ A starting point here is to examine the protection accorded to children by the Constitution. Article 15(5) provides as follows:

296 See Ruppel & Groenewaldt (2008).

No law authorising preventive detention shall permit children under the age of sixteen (16) years to be detained.

Corporal Punishment

Corporal punishment is the deliberate infliction of pain intended to discipline or reform a wrongdoer or change a person's "bad" attitude or "bad" behaviour. The types of corporal punishment that can be distinguished are parental/domestic, school, and judicial. Under customary law, corporal punishment is viewed as the only effective means of instilling discipline: it symbolises a belief in a good and proper life, restores and maintains peace in the community, and teaches people to behave themselves. Corporal punishment intends to convey the message to others contemplating similar misconduct that they will be dealt with in the same way.²⁹⁷

Corporal punishment is also used in the belief that it can teach children to show respect towards their elders, and maintain this respect. It is traditionally believed that if children are not beaten when they do wrong, they will not respect their elders and will keep on misbehaving, since they believe nothing will happen to them. Parent or elders are therefore obliged to beat children in order to obtain the respect they feel is due to them from the children. The limits of a parent's power to correct his/her child are culturally defined. However, what may be seen as reasonable under customary law could well be regarded as inhuman and degrading treatment under common law and the new constitutional regime.²⁹⁸

African thinking on parental power tends to be conditioned by a belief that children are wayward and irresponsible and, hence, in need of discipline. By contrast, Western thinking emphasises the vulnerability of children with a consequent need for protection, and a child's right to self-determination.

297 See Bennett (1999:108f).

298 Ibid.

Common law accordingly interprets parental powers restrictively in favour of the child. It follows in the opinion of the school of thought that a child's best interest should always be the overriding consideration, and that a child who is old enough should be allowed to express a considered opinion to decide his or her own future. The question now arises whether the fundamental rights violated by corporal punishment are interpreted to express these common-law views in preference to African ideas about the "proper upbringing of the child".²⁹⁹

For the first time in Namibia's history, by being upheld in the 1990 Constitution, the status and application of customary law in the country were placed on the same footing as common law as one of the sources of law. However, the constitutional provisions that recognise the application of customary law in Namibia impose the precondition that admissibility of such law cannot be in conflict with the Constitution or any other statutory law.³⁰⁰ For example, in the case of *S v Sipula*,³⁰¹ which, *inter alia*, discussed the issue of the application of corporal punishment by a traditional court, the judge stated the following:

The native law and custom providing for corporal punishment was not expressly declared unconstitutional by the aforesaid decision of the Supreme Court.

It can be argued that Articles 140(1) and 25(1)(b) of the Namibian Constitution envisage and require an express and pertinent order from a competent court to declare a specific law or a specific part of it unconstitutional. For argument's sake, however, it can be assumed that, for the purposes of the judgment, it will suffice if the judgment, by necessary implication, declares such law or a specific part of it unconstitutional.

299 Ibid:93.

300 Article 66(1).

301 1994 NR 41 (HC).

The constitutionality of a principle of law under common law was also discussed in the case of *Myburgh v Commercial Bank of Namibia*,³⁰² where the court determined whether or not such principle of law had fallen foul of the Constitution or any other statute. This decision was given with respect to the recognition of common law, but the same argument would apply equally well with respect to the admissibility of customary law in the context of Article 66(1) of the Constitution.

However, in order to determine the unconstitutionality of corporal punishment under customary law in Namibia, one needs to take a closer look at the leading case on the matter, namely *Ex Parte: Attorney-General, In Re: CP by Organs of State*.³⁰³ In this case, the Attorney General, under the powers vested in him by Article 87(c) read with Article 79(2) of the Constitution, referred the constitutional request to the Supreme Court in order for it to determine:

... whether the imposition and infliction of corporal punishment by or on the authority of any organ of state contemplated in legislation is per se; or in respect of certain categories of persons; or in respect of certain crimes or offences or misbehaviours; or in respect of the procedures employed during the inflictions therefore in conflict with any of the provisions in Chapter 3 of the Namibian Constitution and[,] more in particular, Article 8 thereof.

Article 8(2)(b) of the Constitution prohibits punishment or treatment that constitutes torture, or is cruel, inhuman, or degrading. Secondly, in deciding what was inhuman or degrading, the court made a value judgment by looking at the present values of the Namibian people as expressed in its Constitution.³⁰⁴ The court also looked at the values of the civilised international community, of which Namibia is a part.³⁰⁵

302 2000 NR 255 (SC).

303 NR 178 (SC); 1991 (3) SA 78 (Nms).

304 The general interpretation of the Constitution in the words of the verdict of this judgment is as follows: The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law. Practices and values which are [inconsistent] with or which might subvert this commitment are vigorously rejected. Because of the past[,] colonialism as well as the practice and ideology of apartheid from which the majority of the Namibian people have suffered for so long are firmly repudiated. Article 8 must not be read alone.

305 Article 144, Namibian Constitution.

The court concluded that corporal punishment, whether directed at adults or juveniles, was inhuman or degrading punishment and, therefore, in conflict with Article 8 of the Constitution. Regarding the corporal punishment of school children, the court further found that such practice was also in conflict with Article 8, but it did not clearly state that it was torture, cruel, inhuman or degrading punishment. Apart from the ambiguity of its final declaration, in its judgement the Supreme Court expressed many arguments in favour of banning corporal punishment and, therefore, declared it unconstitutional.

In the decision of *S v Sipula*, however, the High Court held that the aforementioned judgment failed to clearly state or display whether or not it applied to the use of corporal punishment used in a traditional setting. In other words, does *traditional authority* fall under the terms *judicial* or *quasi-judicial authority*?³⁰⁶

The Convention on the Rights of the Child (CRC) requires states to protect children from all forms of physical and mental violence while in the care of parents and others.³⁰⁷ It further recommends that all states should implement legal reforms to prohibit all corporal punishment. The reasons for this are manifold: corporal punishment is violent and unnecessary; it may lower self-esteem; and it is liable to instil hostility and rage without reducing the undesirable behaviour. For example, corporal and humiliating punishment allows parents to express their frustration and anger, but it does not teach the child about the logical consequences of their behaviour. It results in fear, resentment and a breakdown of the relationship of trust with parents. Secondly, children who have been humiliated and hit are more likely to do the same to other children. It is also likely to train children to use physical violence. Because corporal punishment is generally ineffective in teaching self-discipline and responsibility, it tends to escalate over time: small slaps become more serious hidings, and so on. Parents charged with assault often say that they were “disciplining” their children.

306 Ibid.

307 Article 19, CRC.

Many traditionalists would argue that, in their cultures, they punish children physically and they will be denied their right to culture³⁰⁸ by being prohibited from doing what their forebears did in the disciplining of their children. Their argument is based on their right protected under Article 19 of the Constitution, which provides as follows:

Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion ...

However, although everyone has a right to culture, a limitation is attached to this right. The same Article that protects one's right to culture further states that this right is:

... subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

This is reflected in the view that:³⁰⁹

Culture can strengthen and validate human rights perspectives; however, certain cultural practices may also violate human rights principles. Cultural aspects of customary law that are inhuman and discriminatory should not endanger the existence of customary law as a system of laws that governs the way of life of most Africans. The solution is not to abolish customary law, but rather to have such law ascertained. One should not be too hasty, making sweeping judgements of customary practices from the outside; rather, one should try to see the customs from the viewpoints of the people who practise them on a daily basis. The abolition of customary law would mean erasing the modus operandi of various ethnic groups from the broad spectrum of Namibian society. Instead, one should identify the sensitive aspects under customary practices that do not conform to the constitutional principles of equality, fairness, and justice, and apply law reform.

308 Article 19, Namibian Constitution.

309 Ruppel (2008c:23).

Violence is a grave social problem in Namibia. It has been acknowledged to be rooted in traditional attitudes and culture, and even sometimes to be underpinned by religion.³¹⁰ But a practice which violates basic human rights cannot be said to be owned by any culture in Namibia, because, in terms of Article 24(3) of the Constitution, no one is permitted to diminish another person's right to dignity and freedom. What may have been traditionally acceptable as a just form of punishment some decades ago appears to be manifestly inhumane and degrading today.³¹¹

As stated earlier, hitting a child may stop its offensive behaviour immediately, but it does not necessarily stop a child from repeating that behaviour in future. This is because children are less likely to learn from this punishment and more likely to resist the parent and find ways to avoid getting caught. Parents are to exercise their authority and customary rights only to protect or nurture their children. They need to bear in mind that discipline is not the same as punishment. Real discipline is not based on force, as is traditionally believed, but grows from understanding, mutual respect and tolerance.

Discipline needs to be administered humanely in that it is consistent with the child's dignity, and children have to be protected from violence and abuse. Instituting the necessary legal changes is not expensive; what is required is the explicit and well-publicised removal of any defences which – either culturally or otherwise – currently justify physically assaulting children. In this way, children will be ensured of equal protection under the law. The focus of law reform should be on prevention and early intervention in order to protect children; the focus should not be on prosecuting parents. The prosecution of parents is seldom in the best interests of the child: it is more important for systems to be available for the family to receive support. Diversion to parenting programmes can be used to achieve this. The promotion of positive discipline can also be built into other health promotion, education and early childhood development programmes.

310 Ruppel et al. (2008:119ff.).

311 *Ex Parte Attorney-General, In Re: Corporal Punishment by Organs of State*, 1991 (3) SA 76.

In conclusion, it can be observed that the corporal punishment of children – also under customary law, whether in the home setting by a parent or otherwise – is in conflict with the Namibian Constitution.

The Children’s Act

The 1960 Children’s Act³¹² has been subject to amendment by means of the Children’s Status Act and, potentially, the recent Child Care and Protection Bill.³¹³ The Children’s Act provides for:

- the appointment of commissioners of child welfare;
- the establishment of children’s courts;
- the protection and welfare of certain children and their supervision;
- the establishment or recognition of certain institutions for the reception of children and juveniles;
- the treatment of children and juveniles after their reception in such institutions;
- the contribution by certain persons towards the maintenance of certain children and juveniles;
- the adoption of children;
- the amendment of the Adoption Validation Act,³¹⁴ the Criminal Procedure Act,³¹⁵ the General Law Amendment Act,³¹⁶ and the Prisons Act;³¹⁷ and
- other incidental matters.

This Act was criticised for its discriminatory provisions, seen against Article 10 of the Constitution, as it did not allow children born outside marriage to inherit from their parents – particularly their fathers. In a *New Era* article entitled “Child law under revision”,³¹⁸ the Children’s Act was said to be outdated and out of keeping with the best interests of the county’s children. Speaking on the need to change the Act, Dianne Hubbard of the LAC expressed the opinion that the abuse of children and the increasing

312 No. 33 of 1960.

313 MGECW (2009b).

314 No. 30 of 1943.

315 No. 55 of 1956.

316 No. 32 of 1952.

317 No. 8 of 1959.

318 Tjaronda (2009).

number of orphans was an urgent situation that was not being effectively responded to through existing legislation. Namibia's Child Care and Protection Bill is intended to replace the Children's Act of 1960, which was inherited from South Africa.³¹⁹

The Children's Status Act

The Children's Status Act provides, *inter alia*, for children born outside marriage to receive the same treatment before the law as those born inside marriage. Specific reference to customary law is made in the context of inheritance, either intestate or by testamentary disposition. In this specific regard, a person born outside marriage is to be treated in the same manner as a person born inside marriage, despite anything to the contrary contained in any statute, common law or customary law.

The Act also provides for matters relating to custody, access, guardianship and inheritance in relation to children born outside marriage. According to Part 4 of the Act, both parents of a child born outside marriage have equal rights to become the child's custodian. One parent has to be the primary custodian, and both parents may agree on who should be the primary custodian of the child, and that agreement may be verbal or in writing. Where there is no agreement as to who should be the child's primary custodian, either parent can apply to the Children's Court for the appointment of a primary custodian. If the child's parents cannot agree as to who should have primary custody, and there is a possibility that the best interests of the child may be compromised or prejudiced, the person who has physical custody of the child may, in the prescribed form and manner, make an *ex parte* application to the court for an interim order of custody. As stated earlier, the person with custody will also be the child's guardian, unless a competent court, on application made to it, directs otherwise. If a parent is a minor, unless a competent court directs otherwise, guardianship of such parent's child vests in the guardian of such parent.

319 Hubbard (2009).

This Act did away with discrimination against illegitimate children, bringing legitimate and illegitimate children on a par. However, the Children's Status Act fails to deliver on some key aspects, such as child trafficking and child prostitution. A commendable action that Namibia has taken is its involvement with the Southern African Regional Network against Trafficking and Abuses of Children, which deals with the issue of human trafficking, especially the trafficking of children for sexual abuse, within the SADC region.³²⁰

The Combined Second and Third Country Reports by Namibia to the Committee for the Elimination of Discrimination Against Women stated that two girls had reportedly been abducted from Swakopmund while on their way to Windhoek for the holidays.³²¹ The girls were apparently held as sex slaves in separate shacks east of Johannesburg. Such incidents should set off alarm bells and spur legislative bodies and government agencies to take appropriate preventative measures. In addition, the government should review the country's adoption laws.

The Maintenance Act

One of the key provisions of this Act³²² includes the parental duty to maintain children. Section 3 provides, inter alia, that both parents of a child are liable to maintain that child if s/he is unable to support him-/herself. This is regardless of whether the child in question is born inside or outside the marriage of the parents; whether the child is born of a first, current or subsequent marriage; and whether the parents are subject to any system of customary law which does not recognise both parents' liability to maintain a child. Thus, the parents of a child are primarily and jointly responsible for maintaining their child. This includes the rendering of any support which the child reasonably requires for his/her proper living and upbringing, such as the provision of food, accommodation, clothing, medical care

320 See www.santac.org; last accessed 15 March 2010.

321 CEDAW (2005).

322 No. 9 of 2003.

and education. The Act also declares any law which requires a parent to give priority to the maintenance of children of a first marriage as invalid.

Practical observations have highlighted a number of difficulties being experienced as regards the implementation of the Act and the protection of children under the Act. As regards children who are in conflict with the law, there are too many delays in the administration of justice to them. Another area of concern is the reporting structure, which hampers the rendering of an efficient service to children. For example, social workers report to the Ministry of Health and Social Services; police officers report to the Ministry of Safety and Security; and magistrates and prosecutors report to the Ministry of Justice. This results in too much bureaucracy, which usually hinders the protection and services offered to children. It is recommended, therefore, that a National Coordinator be provided for in the reporting structure. All role players in children's administration would then be expected to report to the National Coordinator in order to eliminate unnecessary delays in the system.

It is furthermore pointed out that police officers, prosecutors and presiding officers are not trained to deal with children in conflict with the law. They often become impatient with the children they deal with and, under such circumstances, children find it difficult to express themselves freely. In addition, when conducting cross-examination – especially in rape cases – some defence lawyers are ruthless, placing the child at the mercy of a relatively unaccommodating justice system.

The Child Care and Protection Bill

This Bill, originally drafted in 1994 and revised several times since then, aims to give effect to certain rights of children as contained in the Constitution and under the CRC. The Bill is currently being revised again by the MGECW.³²³ This vital piece of legislation is intended to replace the outdated Children's Act. Law reform in this area is essential if children in Namibia are to receive the care and protection they so desperately need. Among other things, the Bill outlines provisions for foster care,

323 MGECW (2009c).

adoption and children's homes, and is expected to include rules about when children acquire the capacity to make important decisions such as giving consent to medical treatment, acquiring contraceptives or being tested for HIV. Also addressed are issues related to child trafficking, child labour and crimes relating to child abuse and neglect.

To ensure that the Bill is in the best possible form before being tabled in Parliament, the MGECW has been running a multifaceted multimedia project to consult with stakeholders and the public on the Bill's content. The Legal Assistance Centre has provided technical assistance to the Ministry throughout the process.³²⁴ The project is supported by UNICEF and guided by a Technical Working Group which meets regularly. The Committee on the Rights of the Child urged the government to fully involve civil society, youth and school councils, and NGOs in activities promoting and protecting the rights of the child, particularly when it comes to cultural practices that tend to discriminate against children born outside marriage and those with disabilities. To date, the Namibian literature on children's rights is limited to a few academic texts. However, the laws and policies either in place or in the making that deal with children's rights are more promising.

Namibia is a signatory to the CRC and the African Charter on the Rights and Welfare of the Child. Through the process of legal reform of national laws in line with the CRC, Namibia should soon enact the Child Care and Protection Act. The Bill that should lead to this long-awaited piece of legislation has received wholehearted support from the various stakeholders. It is hoped that there has been enough consultation on the Bill to ensure that it meets all reasonable expectations, especially in the rural areas. There is a complex patchwork of existing policies, international instruments and local legislation relating to child rights. Provisions relating to children's rights are found in a broad range of laws, from the Constitution and specific legislation on domestic violence, combating of rape, combating of immoral practices, child maintenance, education and social welfare, to laws on divorce and separation proceedings.

324 Hubbard & Coomer (2009).

One barrier to the effective protection of children's rights is the shortage of Children's Courts. A second is the fact that police officers, prosecutors, magistrates and judges appear not to be specially trained in handling children's cases. This puts the children in a compromised position, taking into account their vulnerability. While there has been progress in developing appropriate measures for children, there are still significant gaps in dealing with children in the criminal justice system. The Child Justice Bill has not been tabled in Parliament for more than seven years. There is also an over-reliance on the 1977 Criminal Procedure Act, which still falls short of addressing the challenges of children in conflict with the law.

Moreover, low ages of criminal responsibility under the existing legislation mean that children as young as seven can be held criminally responsible, while children as young as 12 can be imprisoned. In an attempt to remedy this anomaly, the Child Care and Protection Bill provides for Prevention and Early Intervention Services. These are meant to reduce the risk of violence or other harm within the family environment. Prevention services can be targeted at the entire community, where, for example, a programme for parents on effective methods of child discipline could help prevent family conflicts.

Lastly, it is important for children's legislation to have a monitoring mechanism. Namibia may choose a monitoring mechanism which it is comfortable with, but an institutionalised form of monitoring is necessary. It is recommended that such monitoring bodies institutionalise children's participation in monitoring and treaty reporting processes. Namibia also needs to allocate more of its budgetary resources to education, policy development and implementation, and to strengthening programmes that are already in place. However, what the government and other stakeholders have done so far is more than one step in the right direction.

The International Framework³²⁵

One basic human rights principle laid down in the UDHR is that all human beings are born free and equal in dignity and rights.³²⁶ However, specifically vulnerable groups such as women, indigenous people, and children have been assigned special protection by the UN legal framework. The protection of children's rights under international treaty law can be traced back to the first Declaration of the Rights of the Child adopted by the League of Nations in 1924, which was a brief document containing only five principles by which members were invited to be guided in the work of child welfare.³²⁷ An extended version of this text was adopted by the UN General Assembly in 1948, which was followed by a revised version adopted by the General Assembly in 1959 as the UN Declaration on the Rights of the Child.³²⁸ In 1978, however, a proposal for a new convention on children's rights was made by Poland,³²⁹ which had consistently raised issues with regard to children's rights being binding.³³⁰ Poland's draft, with minor amendments, served as the basis for the 1989 Convention on the Rights of the Child. The reasons for an international change of heart towards the protection of children's rights were manifold,³³¹ but all signatories fundamentally recognised that the 1959 Declaration on the Rights of the Child no longer reflected the needs of many of the world's children.³³²

Although legal instruments were developed that targeted the protection of children in particular, it has to be emphasised that basic human rights instruments already recognise these rights. The so-called International Bill of Human Rights,³³³ for example, contains a broad bundle of human rights also applicable to children, and many of its principles are reflected and substantiated in children-specific

325 The following passages are largely based on Ruppel (2009d).

326 Article 1, Universal Declaration of Human Rights.

327 Fortin (2005:35).

328 For further details on the 1959 Declaration and its ten principles, see Fortin (2005:35).

329 Poland submitted a draft resolution to be recommended for adoption by the UN Economic and Social Council. The resolution contained a draft text for the Convention on the Rights of the Child. Cf. Detrick (1999:14f.).

330 Cf. Van Bueren (1998:13).

331 Van Bueren lists seven principal reasons; see Van Bueren (1998:13f.).

332 Ibid.

333 Three documents – the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights – are recognised as covering the core of universal human rights and are collectively labelled the International Bill of Human Rights.

legislation. Children enjoy protection by way of general human rights provisions, and their relevance should not be underestimated. The Universal Declaration of Human Rights, as the most prominent and fundamental UN human rights document, provides in its Article 25 that childhood is entitled to special care and assistance. Furthermore, the UN International Covenant on Civil and Political Rights, a legally binding document which came into force in 1978, contains provisions specifically referring to children.³³⁴ The Human Rights Committee has emphasised that:³³⁵

... the rights provided for in Article 24 are not the only ones that the Convention recognises for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant.

The International Covenant on Economic, Social and Cultural Rights contains several children-specific provisions,³³⁶ with a focus on the right to education and protection from economic and social exploitation. Moreover, the Convention on the Elimination of All Forms of Discrimination against Women also contains children-protective provisions. For example, it encourages State Parties to specify a minimum age for marriage,³³⁷ and it emphasises that the interests of children are paramount.³³⁸ Another important legal document also applicable to children is the Convention on the Rights of Persons with Disabilities, which establishes the principle of respect for the evolving capacities of children with disabilities. The same applies to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee established under the latter Convention has already expressed its concern about the general vulnerability of abandoned children who are at risk of torture and other cruel, inhumane or degrading treatment or punishment, especially children being

334 Articles 14(1), 23(4) and 24.

335 Human Rights Committee (1989:para 2).

336 Articles 10(3) and 13.

337 Article 16(2).

338 Articles 5(b) and 16(1)(g).

used as combatants.³³⁹ After all, it can be stated that children's rights are covered by a multitude of general human rights provisions. However, due to the physical and mental immaturity or dependent status of children,³⁴⁰ the legal instruments to be discussed in the next few paragraphs have been adopted to more specifically enhance children's rights.

The systems of the UN encompass four legally binding instruments tailored to protect children's rights, namely:

- the Convention on the Rights of the Child (CRC);
- the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC-OPSC);
- the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC-OPAC); and
- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime.

Convention on the Rights of the Child

The most prominent UN initiative to advance children's rights is the CRC. The Convention was adopted by Resolution 44/252 of 20 November 1989 at the Forty-fourth Session of the UN General Assembly, and entered into force on 2 September 1990, in accordance with Article 49(1) of the CRC. To date, the Convention has 193 parties.³⁴¹ Namibia ratified the CRC on 30 September 1990.

339 In this context, the Committee referred specifically to children used as combatants by the armed groups operating on the territory of the Democratic Republic of Congo and urged the State Party to adopt and implement emergency legislative and administrative measures to protect children, especially abandoned children, from sexual violence and to facilitate their rehabilitation and reintegration. The Committee further recommended that the State Party take all possible steps to demobilise child soldiers and facilitate their rehabilitation and reintegration into society. Cf. Committee against Torture (2005).

340 Cf. Brett (2009:227).

341 As of October 2009, the Convention had not been ratified by Somalia or the United States; see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en; last accessed 27 October 2009.

The CRC, which consists of 54 Articles, incorporates the full range of human rights – civil, cultural, economic, political and social – and creates the international foundation for the protection and promotion of human rights and fundamental freedoms of all persons under the age of 18.³⁴² The Convention represents widespread recognition that children should be fully prepared to live an individual life in society, and be brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

Although the Articles of the CRC are interrelated and should be considered together, the Committee on the Rights of the Child has accorded four provisions contained in the Convention, namely Articles 2, 3, 6 and 12, the status of general principles.³⁴³ The CRC is, therefore, founded on the following principles, which build the foundation for all children's rights:

The right to equality: No child may be discriminated against on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The best interest of the child has to prevail:³⁴⁴ Whenever decisions are being taken which may have an impact on children, the best interest of the child has to be taken into account at all stages. This applies to the family as well as to state action.

The right to life and development: Every member state has to ensure, to the maximum extent possible, the survival and development of the child by, *inter alia*, providing access to health care and education, and by protecting the child from economic and social exploitation.

Respect for children's own views: Children should be respected and taken seriously, and they should be involved in decision-making processes according to their age and maturity.

342 The definition of child as being a person under the age of 18 is contained in Article 1 of the CRC. However, this principle may be inapplicable where, under the law applicable to the child, majority is attained earlier.

343 See Fortin (2005:37).

344 The concept of the best interest of the child is considered to be the provision underpinning all other provisions, even though, theoretically, none of the four principles is considered to be more important than any other. Cf. Fortin (2005:37).

The CRC follows a holistic approach to children's rights, recognising that the rights anchored in the Convention are indivisible and interrelated, and that equal importance must be attached to each and every right contained therein.

However, since the rights derived from the basic principles outlined above are multifaceted, they can be clustered into eight categories,³⁴⁵ namely:

- general measures of implementation;
- definition of *child*;
- general principles;
- civil rights and freedoms;
- family environment and alternative care;
- basic health and welfare;
- education, leisure and cultural activities; and
- special protection measures.

General measures of implementation refer to the CRC's Articles 4, 42 and 44(6). Inter alia, these cover the thematic issues of bringing domestic legislation and practice into full conformity with the principles and provisions of the Convention. This includes an obligation to make remedies available and accessible to children in cases where the rights recognised by the Convention have been violated. The Convention foresees the granting of international assistance or development aid for programmes geared at children where such cooperation is needed to properly implement the provisions of the CRC

345 This classification is used by the Committee on the Rights of the Child for the reporting by and questioning of states parties; cf. Committee on the Rights of the Child (2005). It has to be noted, however, that the rights contained in the Convention have been categorised in a variety of ways. LeBlanc, for instance, has grouped the rights into "survival rights", "membership rights", "protection rights" and "empowerment rights" (LeBlanc 1995:65ff). Hammarberg developed a classification scheme applicable exclusively to the CRC, calling his scheme the "three P's" of "provision" (the fulfilment of basic needs such as the rights to food, health care, and education), "protection" (the right to "be shielded from harmful acts or practices" such as commercial or sexual exploitation and involvement in warfare), and "participation" (the right "to be heard on decisions affecting one's own life"); cf. Hammarberg (1990:99ff). On "the four P's", see also Van Bueren (1998:15).

and thereby advance the social, economic and cultural rights of children. Raising awareness of the CRC is another core issue: States Parties are obliged to make the principles and provisions of the Convention widely known to both adults and children. A further obligation for States Parties is to make their reports widely available to the public. Appropriate measures in this regard may include the translation of the concluding observations of the Committee into official and minority languages, and their wide dissemination, including through the print and electronic media.³⁴⁶

The second cluster refers to the **definition of *child*** according to Article 1 of the CRC, as domestic laws may differ from the general rule of the Charter, namely that children are all persons under the age of 18.

The group of **general principles** contained in the Convention makes reference to its Articles 2, 3, 6 and 12, and covers the issues of non-discrimination; the best interests of the child; the right to life, survival and development; and respect for the views of the child. Appropriate measures to implement these rights have to be taken by States Parties, e.g. by way of measures to protect children from xenophobia and other related forms of intolerance. Furthermore, States Parties are required to ensure that persons under the age of 18 are not subject to the death penalty; that the deaths of children are registered; and, where appropriate, that such deaths are investigated and reported. Moreover, States Parties are encouraged to take measures to prevent suicide among children and to monitor its incidence; to ensure the survival of children at all ages; and to make every effort to ensure the risks to which adolescents in particular may be exposed, such as sexually transmitted diseases or street violence, are minimised.

³⁴⁶ For further information, see Committee on the Rights of the Child (2002, 2003c).

The fourth broad category of rights contained in the CRC refers to **civil rights and freedoms**, as laid down in its Articles 7, 8, 13–17 and 37(a). The rights referred to within this group include the right to a name and nationality; the right to the preservation of identity; the right to freedom of expression, thought, conscience and religion, association and of peaceful assembly; the right to the protection of privacy; the right to access to appropriate information; and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, including corporal punishment.

The fifth group of rights under the CRC relate to **family environment and alternative care**, covering the Convention's Articles 5, 9–11, 18(1) and (2), 19–21, 25, 27(4) and 39. This cluster addresses the fields of parental guidance; parental responsibilities; separation from parents; family reunification; recovery of maintenance for the child; children deprived of a family environment; adoption; illicit transfer and non-return; and abuse and neglect including physical and psychological recovery and social reintegration.

The group of **basic health and welfare** summarises the Convention's Articles 6, 18(3), 23, 24, 26, and 27(1)–(3), namely the right to survival and development; the right to special protection of children with disabilities; the right to health and health services; the right to social security and child care services and facilities; and the right to an adequate standard of living. In this context, national efforts to combat HIV and AIDS and diseases such as malaria and tuberculosis, particularly among special groups of children at high risk, are of high relevance, as well as measures to be taken to prohibit all forms of harmful traditional practices,³⁴⁷ such as female genital mutilation.³⁴⁸

347 With regard to harmful traditional practices, it was the Committee on the Elimination of Discrimination against Women which expressed its concern that Namibia's Traditional Authorities Act, No. 25 of 2000 may have a negative impact on women in cases where customary laws perpetuate the use of customs and cultural traditional practices that are harmful to and discriminate against women, Cf. Visser & Ruppel-Schlichting (2008:153).

348 For further information, see Committee on the Rights of the Child (2003a, 2003b).

The following rights fall under the cluster of **education, leisure and cultural activities**, found in Articles 28, 29 and 31: the right to education, including vocational training and guidance; and the right to rest, leisure, recreation and cultural and artistic activities. Especially in countries where children do not or do not fully enjoy the right to education, either due to a lack of access or because they have left or been excluded from school, this group of rights is highly relevant.³⁴⁹

The last group of rights contains **special protection measures** as laid down in Articles 22, 30, 32–36, 37(b)–(d), 38, 39 and 40. Special protection measures are provided for, inter alia, children in situations of emergency; refugee children; children in armed conflicts, including physical and psychological recovery and social reintegration; children in conflict with the law with regard to the administration of juvenile justice; children deprived of their liberty, including any form of detention, imprisonment or placement in custodial settings; children in situations of exploitation, including child labour; and children belonging to minority or indigenous groups.

The institution responsible for monitoring compliance with and implementation of the provisions of the CRC is the Committee on the Rights of the Child. Provision for this UN treaty body is made in Articles 43 and 44 of the CRC. The Committee is an independent body consisting of 18 international experts³⁵⁰ in the field of children's rights.

The monitoring mechanism is a special reporting system as provided for in Article 44 of the CRC, according to which States Parties undertake to submit reports on the measures they have adopted which give effect to the rights recognised in the Convention and on the progress made on the enjoyment of those rights. States Parties are obliged to submit an initial report within two years after acceding to the Convention, and periodic reports every five years thereafter. After submission, the reports of the

349 For further information, see Committee on the Rights of the Child (2001)

350 Prior to the amendment to the CRC (UN General Assembly Resolution 50/155 of 21 December 1995) which entered into force on 18 November 2002), the Committee only consisted of ten experts.

States Parties are reviewed by the Committee, which is entitled to request further information from its authors if necessary. In its concluding observations, the Committee addresses progress that has been made by the State Party concerned in implementing the Convention, identifies areas of concern or outright incompatibilities of national law, and makes recommendations on how to improve the implementation of the Convention's provisions.³⁵¹ One major problem in the CRC reporting process – as with other UN human rights treaties – is the delay in governments submitting their periodic reports in time. Currently, a total of 97 government reports are overdue in respect of the CRC, while there are 96 overdue on the two Optional Protocols.³⁵²

States Parties may request technical assistance and advisory services from the UN Centre for Human Rights in preparing their reports. Where reports by States Parties are overdue, the Committee issues regular reminders. Where a State Party persists in not reporting to the Committee, the Committee may decide to consider the situation in the country in the absence of a report, on the basis of the information available.

However, individual complaints or cases cannot be addressed to the Committee and the CRC does not have its own enforcement mechanism. The fact that the CRC does not provide for specific enforcement mechanisms giving a right of individual petition similar to the systems of the European Convention on Human Rights or the African Charter on the Rights and Welfare of the Child is considered to be one of the CRC's major weaknesses.³⁵³ However, the drafters of the CRC refrained from establishing enforcement procedures because they feared many countries, particularly developing countries, would be reluctant to ratify the Convention if such mechanisms were in place. Individual complaints (including those of children, if legally represented) or complaints by third States Parties are required to be brought before other UN legal bodies, e.g.:

351 Scheinin (2009:605).

352 These figures include multiple overdue reports by the same state. Statistical data with regard to the seven major human rights treaties, including the CRC and its Optional Protocols, are available at <http://www.unhchr.ch/tbs/doc.nsf/newhvoverduebytreaty?OpenView&Start=1&Count=250&Collapse=3#3>; last accessed 19 October 2009.

353 Fortin (2005:48).

- the Human Rights Committee, which hears complaints under the International Covenant on Civil and Political Rights;
- the Committee to Eliminate Racial Discrimination, which hears complaints under the Convention on the Elimination of All Forms of Racial Discrimination;
- the Committee against Torture, which deals with complaints under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; or
- the Committee to End Discrimination against Women, which deals with complaints under the Convention on the Elimination of all Forms of Discrimination against Women.

By way of summary, it can be stated that, although the CRC is a legally binding instrument according to the principles of public international law, there is no supervisory body to compel States Parties to comply with the provisions of the Convention. Moreover, individual complaints cannot be considered by the Convention's treaty body, the Committee on the Rights of the Child, and there is no judicial organ established under the Convention to which violations of children's rights could be brought.³⁵⁴ However, the Convention is an important instrument as it has heightened awareness of children's rights violations and, in many cases, has resulted in improved national law and policy regarding the protection of children's rights.

Namibia has been a State Party to the CRC since 1990. Namibia issued its initial State Party Report³⁵⁵ to the CRC in 1993. The respective concluding observations³⁵⁶ were adopted by the Committee in 1994. In its responding report, the Committee welcomed Namibia's political commitment to improving the situation of children, pointing out that activities had been undertaken to promote greater public awareness of the rights of the child and that several initiatives had been realised to promote and protect

354 There are, however, ongoing campaigns by several agencies supporting a communications procedure under the CRC.

355 See CRC doc. CRC/C/3/Add.12 22/01/1993; available at <http://daccessdds.un.org/doc/UNDOC/GEN/G93/152/69/IMG/G9315269.pdf?OpenElement>; last accessed 15 October 2009.

356 Committee on the Rights of the Child (1994).

these rights. Such initiatives included the Early Childhood Protection and Development Programme and the development of Youth Councils. However, the Committee also expressed its concern on a number of issues. For example, it saw the reasons for the identified deficiencies in the implementation of the Convention in a combination of the consequences of colonial administration, apartheid and war and the problems of poverty. In its concluding observations the Committee drew specific attention to the legacy of laws from the pre-Independence period which it considered to be contrary to the provisions of international instruments and the Namibian Constitution. It was observed that, at that stage, Namibia had not yet become a State Party to all the major international human rights instruments, and that much national legislation still needed to be reformed in order to bring it in line with the provisions of the CRC. Some of the issues that the Committee addressed critically included:

- the definition of *child*;
- the extent of discrimination on the ground of gender as well as against children born outside marriage and children in especially difficult circumstances;
- discrimination practised against children with disabilities;
- teenage pregnancies;
- the high incidence of households headed by a single person;
- the apparent lack of widespread understanding among parents of their joint parental responsibilities;
- the quality of education;
- the incidence of child labour, particularly on farms and in the informal sector;
- the number of children dropping out of school; and
- the system of juvenile justice.

In order to improve the rights of children in Namibia, the Committee recommended, *inter alia*, that consideration be given to the possibility of Namibia becoming a party to all the major international human rights instruments, to the integration of the CRC into the national legal framework and into national plans of action, and to the adoption of a new Children's Act. Among the positive remarks the CRC made was that Namibia had instituted an Ombudsman, who had the mandate to deal with complaints about human rights violations, including those relating to children. The important role being played by community leaders was also underlined by the Committee, particularly with respect to:³⁵⁷

... [overcoming] the negative influences of certain traditions and customs which may contribute to discrimination against the girl child, children suffering from disabilities and children born out of wedlock.

Unfortunately, Namibia has not yet issued any further State Party reports to the Committee. Taking into consideration the numerous efforts Namibia has made in terms of law, policy reform, and child-related initiatives and activities since the adoption of the Committee's last concluding observations, it can be expected that the situation with regard to compliance with the provisions of the CRC has improved considerably.

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

The CRC-OPSC was adopted by the UN in May 2000 and entered into force on 18 January 2002, in accordance with its Article 14(1). To date, the CRC-OPSC has 132 States Parties. Namibia is among these, having ratified the Protocol on 16 April 2002. The CRC-OPSC consists of 17 Articles aiming

357 Ibid.

to extend the measures that States Parties should undertake in order to guarantee children protection from being sold, prostituted or used for pornography. Although some voices questioned the need for the Protocol,³⁵⁸ it was adopted due to concern with regard to the significant and increasing international traffic in children for the purposes stated in the Protocol.³⁵⁹ One major aim of this document is to address the need for legislation to hold citizens accountable in cases of “sex tourism” i.e. where sexual crimes are committed in countries other than those of the offender’s nationality or residence. Such accountability can be established by either determining the extent of extraterritorial jurisdiction or by extraditing the offenders to be tried in the country in which the crime has been committed. The CRC–OPSC is monitored by the Committee on the Rights of the Child.

Namibia will address the issue of commercial sexual exploitation in the envisaged Child Care and Protection Act. The envisaged Act makes it a crime to use, procure, offer or employ a child for the purposes of commercial sexual exploitation.³⁶⁰

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

The CRC–OPAC was adopted in May 2000 and entered into force on 12 February 2002, in accordance with its Article 10(1). Today, the CRC–OPAC has 130 States Parties, including Namibia, which ratified the Protocol on 16 April 2002. The CRC–OPAC, which is monitored by the Committee on the Rights of the Child, comprises 13 Articles aiming at strengthening the implementation of the CRC and increasing the protection of children during armed conflicts.

The motivation for this Protocol lay in a conflict that arose during the drafting process of the CRC. The CRC drafters had agreed on the age of 18 as regards the definition of child. However, the two Additional Protocols to the 1949 Geneva Conventions, which were adopted in 1977, set a minimum age

358 The lack of clarity as to the need for the Protocol was criticised by both the Committee on the Rights of the Child and NGOs working on these issues. They argued that the issues addressed in the Protocol were “adequately covered in the CRC itself, and time would be better spent on strengthening the interpretation and implementation of existing provisions than in another drafting exercise”. Cf. Brett (2009:241).

359 Cf. Preamble, CRC–OPSC.

360 See GRN (2009:74).

of 15 years for recruitment by armed forces; some States Parties therefore insisted on the permissibility of recruiting those under 18. Thus, the relevant provision contained in the CRC³⁶¹ needs to be seen as a compromise: while the CRC urges governments to take all feasible measures to ensure that children under 15 have no direct part in hostilities, and sets 15 years as the minimum age at which an individual can be voluntarily recruited into or enlisted in the armed forces, the CRC–OPAC goes one step further by obliging States Parties to raise the minimum age for voluntary recruitment into the armed forces, however, without explicitly requiring a minimum age of 18. States Parties are reminded that children under 18 are entitled to special protection. The CRC–OPAC bans compulsory recruitment below the age of 18 and States Parties are compelled to take legal measures to prohibit independent armed groups from recruiting and using children under the age of 18 in conflicts.

According to Article 3 of the CRC–OPAC, States Parties are obliged to deposit a binding declaration upon ratification of the Protocol that sets forth the minimum age at which they will permit voluntary recruitment into their national armed forces, as well as a description of the safeguards that they have adopted to ensure that such recruitment is not forced or coerced. The respective declaration may only be withdrawn if it is substituted by a declaration prescribing a higher minimum voluntary recruitment age, not a lower one.

Pursuant to this provision, Namibia has declared that it does not practise conscription or any form of forced obligatory service. Voluntary recruitment to the Namibian Defence Force is permitted at the minimum age of 18. Candidates are required to prove their age by showing a certified copy of a legally recognised Namibian identity document, as well as a birth certificate.

361 Article 38, CRC.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime

This Protocol was adopted on 15 November 2000 and entered into force on 25 December 2003 in accordance with its Article 17. To date, it has 124 States Parties, including Namibia, which ratified the Protocol on 16 August 2002. Despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there was still no universal instrument that addressed all aspects of trafficking in persons. The Protocol therefore aims at preventing and combating trafficking in persons, paying particular attention to women and children, at protecting and assisting the victims of such trafficking, and at promoting cooperation among States Parties in order to meet those objectives.³⁶² The Protocol urges States Parties to adopt legislative and any other measures necessary to establish the trafficking in persons as a criminal offence. Namibia has addressed this obligation by enacting the Prevention of Organised Crime Act,³⁶³ however, the Act has still to come into force. Furthermore, the Child Care and Protection Bill, which is currently in the process of being finalised, will address the issue of child trafficking. The envisaged Act makes child trafficking a criminal offence, and provides for extraterritorial jurisdiction to address trafficking by citizens or permanent residents of Namibia outside Namibia's borders.³⁶⁴

The Beijing Rules

The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, better known as the Beijing Rules, were adopted by the UN General Assembly on 29 November 1985:³⁶⁵

362 Article 2, Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

363 No. 29 of 2004.

364 See GRN (2009:65).

365 Cf. Preamble, Beijing Rules.

... recognizing that the young, owing to their early stage of human development, require particular care and assistance with regard to physical, mental and social development, and require legal protection in conditions of peace, freedom, dignity and security ...

One aim is to avoid treating young offenders in an over-aggressive and inhumane way.³⁶⁶ The Beijing Rules are not of a binding nature per se, which is considered a major weakness.³⁶⁷ Nonetheless, this legal instrument provides a detailed framework for the operation of national juvenile justice systems. The broad fundamental principles contained in the Beijing Rules are aimed at promoting juvenile welfare to the greatest possible extent, minimising the necessity for intervention by the juvenile justice system and, in turn, reducing the harm that may be caused by any intervention that is required. The Beijing Rules are deliberately formulated in order to apply within different legal systems, regardless of the definition of *juvenile* under those systems. For example, for historical and cultural reasons, the minimum age for criminal responsibility differs widely among members of the UN. Indeed, to date, no lowest age limit for criminal responsibility has been agreed upon internationally. Nonetheless, what has been agreed on are the most important objectives of juvenile justice, as laid down in the Beijing Rules, namely –

- the promotion of the well-being of the juvenile;
- the principle of proportionality between just desert in relation to the gravity of the offence;
- the right to the presumption of innocence;
- the right to be notified of the charges;
- the right to remain silent;
- the right to counsel;

³⁶⁶ Cf. Fortin (2005:35).

³⁶⁷ Ibid:34.

- the right to the presence of a parent or guardian;
- the right to confront and cross-examine witnesses;
- the right to appeal;³⁶⁸
- the right to privacy;³⁶⁹
- the right to be represented by a legal adviser;³⁷⁰ and
- the prohibition of capital punishment.³⁷¹

To sum up, one could say that the Beijing Rules display what an ideal juvenile justice system should aim to achieve at the different stages of a process involving children who have committed crimes.

The African Charter on the Rights and Welfare of the Child

The year 1979 saw the Assembly of Heads of State and Government of the OAU³⁷² recognise the need to take appropriate measures to promote and protect the rights and welfare of the African child by adopting the Declaration on the Rights and Welfare of the African Child. Two decades later, in 1990,³⁷³ the African Charter on the Rights and Welfare of the Child (ACRWC) was adopted, and came into force in 1999 according to its Article 47(3). As of February 2009, 45 AU Member States had ratified the ACRWC. Namibia ratified the ACRWC in 2004, after having signed it in 1999.

The ACRWC contains 47 Articles, divided into four Chapters. Chapter 1 deals with the rights and welfare of the child; Chapter 2 establishes and organises the Committee on the Rights and Welfare of the Child; Chapter 3 describes the Committee's mandate and procedures; and Chapter 4 is dedicated

368 Rule 7.1.

369 Rule 8.

370 Rule 15.

371 Rule 17.

372 At its Sixteenth Ordinary Session in Monrovia, Liberia, from 17 to 20 July 1979.

373 It has been argued that one reason for the timing of the adoption of this instrument shortly after the CRC's adoption was that African State Parties had been underrepresented in the drafting process of the CRC: only Algeria, Egypt, Morocco and Senegal had participated significantly in it. Cf. Keetharuth (2009:203); see also Viljoen (2007:263).

to miscellaneous provisions. The ACRWC aims to supplement the CRC³⁷⁴ and additionally addresses issues of particular importance to children in Africa. The ACRWC was adopted in view of the critical situation in which most African children find themselves in terms of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger. Thus, in its Preamble, the ACRWC points out that children require particular care and legal protection, and that they deserve freedom, dignity and security due to their physical and mental development.

Overall, it can be concluded that Namibia has strongly committed to the protection of children's rights by incorporating a broad variety of international legal instruments into the domestic system. Namibia is a State Party to the most relevant legal instruments dealing with the protection of children's rights on global, regional and sub-regional levels. These instruments contain a broad variety of material rights for children. Thus, the statutory side offers a comprehensive system of children's rights applicable in Namibia. However, from a procedural perspective, there is still room for improvement. This applies to reporting processes as well as to the question of complaints in cases of violations of children's rights.

The reporting mechanisms for States Parties under the CRC have a longer history than those on the regional and sub-regional levels, so it is not surprising that reporting seems to be more effective under the CRC. One indication of this is the higher number of initial and periodic State Party reports submitted to the CRC Committee.

On the level of the AU, financial and administrative hurdles still hinder progress, but this will hopefully

374 In its Preamble, the Charter states that OAU Member States agree on the Charter: "REAFFIRMING ADHERENCE to the principles of the rights and welfare of the child contained in ... other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child; ..."

improve in the near future. Since overdue reports are a particular problem under the CRC and the AU Charter, Member States should persistently be encouraged to submit their reports in time. Since deficiencies can only be addressed and resolved once they have been identified, the whole reporting system needs to be seen as imperative for enhancing the situation of children in Namibia and on the continent as a whole. Change will only come if the parties to the relevant legal instrument collaborate. Another critical issue is the complaint mechanisms under the respective instruments. While it is regrettable that the CRC does not provide for the option of bringing individual complaints before its treaty body, the Committee on the Rights of the Child, it is laudable that under the AU Charter, individuals including the victimised child and/or his parents or legal representatives, governments or NGOs recognised by the AU, by a member state, or by the UN, can bring complaints relating to any matter covered by the Charter to the African Committee of Experts on the Rights and the Welfare of the Child (ACERWC). However, it seems that individuals are still reluctant to bring such communications to the ACERWC. This is most probably not due to the fact that violations of children's rights are always efficiently and satisfactorily addressed by national courts, but because the system of bringing communications to the ACERWC is not commonly known or is not considered as a fruitful avenue for children or those who assist children in enforcing their rights to take.

Statistical data on the situation of children in Namibia and in Africa in general still reflect the sad reality that children belong to the most vulnerable groups and that, de facto, their rights remain at risk. A more active approach is required from the international community and all stakeholders, particularly from governments and civil society, who should redouble their efforts in order to make the future a better place for today's children and their children's children.

Enforcement of Human Rights under the Constitution

A keystone of Namibia's Constitution is the Bill of Rights. Given Namibia's long history of political and social discrimination, it is proper that all persons in the nation should now be treated equally. It was also crucial to the drafters that nothing be left to chance and that human rights enjoy a prestigious position in the constitutional dispensation. The Constitution made certain assertions which envisaged certain ideals which had been usurped and trivialised under the colonial regime. As observed by Botha:³⁷⁵

The values inscribed in the Constitution have their source and origin in the history and experience of the Namibian people. This document is a reaction to the authoritarianism and racial exclusivity which has characterized past constitutional practice. At the same time it draws heavily on international norms and standards ... This is in stark contrast to the isolationism of the apartheid years.

In the words of the Chief Justice in *S v Acheson*:

The Constitution of a nation is not simply a statute which mechanically defines the structures of the government and the relationship between the government and the governed. It is a mirror reflection of the nation's soul, the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government.

A similar approach was taken in the case of *Minister of Defence, Namibia v Mwandinghi*,³⁷⁶ where it was held that the Constitution must be interpreted broadly, liberally and purposively to avoid the austerity of "tabulated legalism". The provisions of the bill of rights are constitutionally protected from amendment. Article 25 (1) provides:

375 Botha (1994: 233, 237).

376 1992 (2) SA 355 (Nms) 362.

Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid.

Article 25(1) (a) gives a court of competent jurisdiction the power to declare an Act of Parliament which is inconsistent with the provisions of Chapter 3 of the Constitution, invalid. However, instead of declaring the Act of Parliament invalid, the court has the discretion to refer it to the National Assembly for the defect in the impugned law to be corrected.³⁷⁷

Article 131 of the Constitution further provides that:

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

The Constitution only grants the High Court³⁷⁸ and the Supreme Court³⁷⁹ the power to hear and adjudicate on cases involving the interpretation, implementation and upholding of the Constitution. Judges and magistrates are constitutionally bound to defend and uphold the Constitution, including its human rights provisions.³⁸⁰ Firstly, Article 5 of the Constitution provides that:

the fundamental rights and freedoms enshrined in this Chapter shall be respected by the ... Judiciary ... and shall be enforceable by the Courts in the manner herein prescribed.

377 Article 25(1)(a) Namibian Constitution.

378 Article 80(2), Namibian Constitution.

379 Article 79(2), Namibian Constitution.

380 Nakuta (2008:89-100).

Secondly, Article 25 deals with the enforcement of rights by providing in sub-Article (2) that:

Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent court to enforce and protect that right or freedom ...

Thirdly, Article 79, which establishes the Supreme Court, provides in sub Article (2) that:

The Supreme Court ... shall hear and adjudicate upon appeals ... which involve the interpretation, implementation and upholding this Constitution and the fundamental rights and freedoms guaranteed thereunder.

Furthermore, Article 80, which establishes the High Court provides that:

The High Court shall...bear and adjudicate upon ... cases which involve... upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder.³⁸¹

Finally, Schedule 1 of the Constitution, which provides the oath/affirmation of judges, imposes a duty on each individual judge to *defend and uphold the Constitution*.³⁸²

In practice, the Namibian courts have handed down a number of cases upholding the rights and freedoms of individuals under the Bill of Rights. Some of the notable cases relate to:

- the recognition and enforcement of rights of persons with HIV/AIDS (*Nanditume v Minister of Defence*³⁸³);

381 See Article 80(2), Namibian Constitution.

382 Namandje (2000).

383 2000 NR 103.

- the constitutionality of legislative provisions or practices relating to corporal punishment (*Ex Parte Attorney-General: In re Corporal punishment by organs of the State*³⁸⁴);
- the restraining of prisoners by chaining them to each other by means of metal chains (*Namunjepo & Others v Commanding Officer, Windhoek Prison & Another*³⁸⁵);
- the rights of accused to legal representation provided by the state (*Government of the Republic of Namibia & Others v Geoffrey Kupuzo Mwilima & Others*³⁸⁶).

An important question is whether economic and social and cultural rights enjoy the same protection under the Namibian Constitution. The point of departure is that the Namibian Constitution's Bill of Rights does not incorporate ESC rights, which means they are not accorded the same status as civil and political rights. This position is not a peculiar aspect of Namibian constitutional law, but reflects international trends which tend to place emphasis on civil and political rights over ESC rights. The pertinent provision on ESC rights in the Constitution is Article 95, which directs the state to promote and maintain the welfare of the people by adopting policies aimed at inter alia, promoting selected ESC rights. However, Article 101, which provides for the application of the said Article 95, states that:

the principles of state policy contained in this chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to fundamental objectives of the said principles ...

While on the surface, the Namibian Constitution seems to sideline the application of ESC rights, the enquiry does not end there. Namibia has ratified the ICESCR and is bound to uphold its international agreements as mandated by Article 144 of the Constitution. This position was confirmed in *Kauesa v Minister of Home Affairs and Others*, where the court was confronted with the enforcement of rights under the African Charter on Human and People's Rights. It was held that those rights were

384 1991(3) SA 76 (Nms).

385 2000 (6) BCLR 671 (NmS).

386 Supreme Court Case No.SA 29/2001.

directly applicable to Namibia through Article 144, and were therefore enforceable.³⁸⁷ It is therefore submitted that the same logic applies to the enforcement of ESC rights. The current state of affairs shows little judicial activism that marked the independence of Namibia. The tempo has dropped to predictability and a great reliance on South African jurisprudence. It should be noted, however, that South African jurisprudence is something of a world trendsetter, and has influenced judgments in the United Kingdom and other countries.

Case Study:

In the case of *Fantasy Enterprises CC t/a Hustler The Shop v The Ministry of Home Affairs and Another; Nasilowski and Others v The Minister of Justice and Others*,³⁸⁸ the applicants ran sex shops in Windhoek, Walvis Bay and Swakopmund. The police confiscated magazines and videos at the sex shops because they said that the possession and sale of these items was unlawful. The police said that the magazines and videos were indecent or obscene photographic matter as defined in Section 1 of the Indecent and Obscene Photographic Matter Act, No. 37 of 1967. Section 2(1) of the Act makes it an offence to possess these kinds of photographic matters. The police also confiscated adult toys and novelties, in view of the fact that these items were supposedly intended to be used to perform unnatural sexual acts, also unlawful in terms of Section 16(1) of the Combating of Immoral Practices Act, No. 21 of 1980.

The applicants then applied to the High Court, asking that Section 2(1) of the Indecent and Obscene Photographic Matter Act and Section 17(1) of the Combating of Immoral Practices Act be declared unconstitutional. They also asked that the confiscated items be returned to them. Regarding Section 2(1) of the Indecent and Obscene Photographic Matter Act, the court recognised that the right to freedom of speech and expression guaranteed by Article 21(1)(a) was important in an open and democratic society. This right also applied to non-political speech and

387 See the position of international law in Namibia by Erasmus (1991:94); Ruppel (2008d:101ff).

388 1998 NR 97 (HC).

expression, such as the videos and magazines confiscated by the police. It also protected information and ideas that could disturb, offend or shock people and not only information and ideas that were pleasant or neutral.

Parliament could make laws to uphold standards of decency and morality in society, so the laws complied with Article 21(2) of the Constitution. The problem was that the definition of *indecent and obscene photographic matter* was too broad. A wide range of photographic material could be indecent or obscene. It also prohibited possession of photographic material that was inoffensive or could be of legitimate interest. Section 2(1) therefore violated Article 21(1)(a) and the court declared the Section unconstitutional.

Regarding Section 17(1) of the Combating of Immoral Practices Act, the court held that the Section violated the applicants' freedom to carry on any trade or business guaranteed by Article 21(1)(j). The Section prohibited the manufacture, sale or supply of any Article that is intended to be used to perform an "unnatural sexual act". The court further found that the section was so vague that it was not a reasonable limitation of the applicants' freedom to carry on any trade or business and was therefore unconstitutional (*S v Shikunga and Another*³⁸⁹).

Racial Discrimination

The Committee for the Elimination of all Forms of Racial Discrimination is charged with monitoring states' compliance with the Convention on the Elimination of all Forms of Racial Discrimination. As part of this compliance, states are expected to report to the committee on measures taken by them to bring their respective countries in line with their legal obligations under international law. The latest report handed in by Namibia is the combined report of its 8th to 12th periodic reports, spanning the years from 1997 to 2005.

389 2000 (1) SA 616 (NmS).

Introducing the report to the committee, the Chief of Law Reform in the Ministry of Justice, Advocate Tousy Namiseb, said that Namibia is a State Party to a number of international instruments and upheld the rules of international law by putting into effect the provisions of international law in domestic laws. Accordingly, there are provisions in the Constitution that criminalise racial discrimination and these had been given further effect by the creation of the Office of the Ombudsman, which receives such complaints. Amongst other things, the delegation³⁹⁰ briefed the committee on issues posing the major challenges to the Namibian Government as a whole. Gerson Kamatuka, Deputy Director in the Office of the Prime Minister at the time, specifically addressed the issue of the San people in Namibia, pointing out that their natural resources were slowly depleting and that they were consequently resorting to other means of survival.

As observed in Namibia's Country Report on Human Rights Practices,³⁹¹ the San have historically been exploited by other ethnic groups despite the law providing for the equality of all persons. The government has also taken measures to end social discrimination against the San, including seeking their advice about proposed legislation regarding communally held lands and increasing their access to education. The Prime Minister has taken measures to raise the awareness amongst the population of the needs of the San community. The report notes, however, that despite these efforts, many San children still did not attend school.³⁹² The San Development Program was one measure taken to assist the San people in bringing about change in this regard. He further pointed out that the government aimed at accelerating San people in education, literacy and resettlement programmes and was building development centres to assist in the challenges faced.

Namibia enacted the Racial Discrimination Prohibition Act in 1991. This is the principal legislation which criminalises acts of racial discrimination, prohibiting the propagation of racial discrimination

390 The Namibian delegation which presented the report included representatives from the Ministry of Justice; the Office of the Prime Minister; the Ministry of Education, and the Ministry of Lands and Resettlement.

391 Bureau of Democracy, Human Rights, and Labour, Namibia: Country Reports on Human Rights Practices, 6 March 2007, <http://www.state.gov/g/drl/rls/hrrpt/2004/41618.htm>; last accessed 7 April 2009.

392 Ibid.

and the practice of apartheid. Moreover, the Office of the Ombudsman has a constitutional and statutory responsibility to call public and private institutions to order whenever racial discrimination has been detected. This is a part of its mandate regarding the enforcement of fundamental human rights. The Government of the Republic of Namibia has pursued policies and implemented various programmes specifically aimed at the improvement of the living standards of persons from marginalised communities. The 2001 National Resettlement Policy gave special protection to groups such as the San, specifically to women and children. On affirmative action, a number of measures were underway specifically in the fields of employment and land reform; in this regard, the impacts of the provisions of the Affirmative Action (Employment) Act³⁹³ could clearly be seen. Affirmative action loan schemes had also been implemented to assist disadvantaged groups in acquiring land. On land acquisition for resettlement purposes, it was noted that the government had established the Ministry of Lands and Resettlement, which specifically deals with land redistribution. Currently, guidelines with regard to land redistribution can be obtained from the Agricultural (Commercial) Land Reform Act³⁹⁴ (as amended), the National Land Policy, the Resettlement Policy and the Communal Land Reform Act.³⁹⁵ The targeted groups for the land resettlement program were San communities, ex soldiers, returnees, displaced persons, people with disabilities and people from overcrowded communal areas.

In conclusion, it can be stated that Namibia has – at least partially – fulfilled its reporting obligations to the CERD. Although Namibia must be applauded for its efforts to eliminate racial discrimination, more effort seems to be required to eradicate racism and tribalism and to deal more firmly with cases that surface. Implementing a new law or amending the existing law on racial discrimination will only be a first step. Educating the public is another step that is required to enable the public to identify cases of racial discrimination to which they might be exposed. A lack of knowledge about the law, especially with regard to the definition of the crime, is one of the reasons why the relevant institutions have thus far been unable to identify such cases of racial discrimination.

393 Act No. 29 of 1998.

394 Act No. 6 of 1995.

395 Act No. 5 of 2002

Torture

Torture is one of the most serious violations of human rights. Article 1(1) of the Convention against Torture of 10 December 1984 defines torture as an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from him or a third person information or a confession, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The Convention against torture requires each State Party to take effective legislative, administrative, judicial or other measures to prevent any and all acts of torture. As an indication of its commitment to the complete eradication of torture, Namibia acceded to the Convention on 6 October 1994. The Convention is therefore part of Namibian law in terms of Article 144 of the Namibian Constitution.

The torture of any person is totally unacceptable as an investigative technique in the Namibian Police. In *Ex Parte, Attorney-General: In re Corporal punishment by organs of the State*, the judge stated that no derogation from the rights entrenched by Article 8 of the Constitution is permitted and that the state's obligation was absolute and unqualified. This case formed a significant watershed in the constitutional history of Namibia; it put to rest all cruel, inhuman and degrading treatment or punishment meted out by various institutions of the state and sought to promote the inherent dignity of all persons in our society. To date, beside the Constitution, there is no legislative enactment which outlaws torture in Namibia. Most of the torture-related cases are dealt with in accordance with the law pertaining to common law assaults, assaults with intent to do grievous bodily harm (GBH), murder, etc.³⁹⁶

Following the submission of Namibia's State Report to the Committee against Torture,³⁹⁷ the committee recommended that Namibia should enact a law defining torture in terms of Article 1 of the Convention against Torture and should legally integrate this definition into Namibia's substantive and procedural criminal law system, taking into account:

396 Ngiishililwa (2000:315).

397 CAT/C/SR.293 and 294/Add.1.

- the need to define torture as a specific offence committed by or at the instigation of or with the consent of a public official with the special intent to extract a confession or other information, to arbitrarily punish, to intimidate, to coerce or to discriminate against;
- the need to legislate for complicity in torture and attempts to commit torture as equally punishable;
- the need to exclude the legal applicability of all justification in cases of torture;
- the need to procedurally exclude all evidence obtained through torture in criminal and other proceedings except in proceedings against the perpetrator of torture himself (*S v Minnie's*³⁹⁸); and
- the need to legislate for and enforce prompt and impartial investigation into any substantiated allegations of torture.

In considering this report, the committee had more concerns to deal with, most importantly on how the Namibian authorities imagined that the Convention would be self-executing when most of its provisions require the Parliament to enact laws. There have been no cases reported on this issue and the committee required a basis on which prosecution for an act of torture could be initiated when all such cruel, inhuman, degrading acts were covered under the umbrella of assault “GBH”. Since torture was considered to be a common law crime, the elements were not provided by the delegation. The committee also required more information with regard to the issue of traditional courts and how the judges were acquainted with the provisions of international law relating to the prohibition on torture. In addition, the committee wanted to know whether, with regard to internal investigations by the police, there was an independent body consisting of persons of integrity to inspect situations in prisons or a similar body to inspect the situation in the police cells. Furthermore, there were no penalties laid down for acts of torture or assault “GBH” and no provisions for the rehabilitation of victims.

The delegation explained to the committee that considering the ill-treatment, torture and imprisonment of thousands of Namibians at the hands of the South African Defence Force and police in pre-independent Namibia, the Constitution advocated for respect for human dignity,³⁹⁹ also providing that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Although the Convention had not yet been incorporated into national legislation, it was possible to invoke the Convention in any court of law.⁴⁰⁰ The landmark case on this issue was *Ex parte Attorney – General, Namibia: in re Corporal Punishment by organs of the state*, wherein the Supreme Court declared corporal punishment imposed and inflicted by or on the authority of a state organ to be illegal.

Regarding the determination of whether Namibia has provisionally fulfilled its obligations, it was pointed out that any instance of torture was considered as a criminal or civil wrong, and that the victim could institute civil proceedings,⁴⁰¹ and that any act of torture is considered as a common law crime.⁴⁰² As far as Article 16 is concerned, the common law rules relating to criminal offences and Article 8 of the Constitution prohibiting torture usually made it possible to charge, prosecute and punish persons responsible for cruel, inhuman or degrading treatment or punishment. In addition, the Namibian Parliament had passed a new Extradition Act⁴⁰³ according to which no person would be extradited to a requesting state if there was any likelihood that he or she might be tortured or sentenced to death on returning.⁴⁰⁴ If the person alleged to have committed any offence referred to in Article 4 was found in Namibia and claimed by another country, the matter would be dealt with according to Namibian extradition law. If the person was a national of Namibia and had committed the alleged offence in a

399 Article 8, Namibian Constitution.

400 At that time, there was no specific case before the courts involving the applicability of treaties and other international agreements binding on Namibia.

401 Article 2 of the Convention.

402 Article 4 of the Convention.

403 Act No. 11 of 1996.

404 Article 3 of the Convention.

requesting state, he or she will be tried under Namibian criminal law.⁴⁰⁵ This process only applies if requesting states have extradition treaties with Namibia; they must be members of the Commonwealth scheme for the rendition of fugitive offenders and have designated Namibia as a state enjoying reciprocity. In the absence of any extradition agreement, and if the requesting state was not part of the Commonwealth, such state requests would be left to the discretion of the President.

The delegation also pointed out that there are materials used in the training of personnel of law enforcement agencies aimed at bringing the prohibition against torture to the trainees' attention, as per Article 10 of the Convention. Furthermore, there is a system in place for receiving and dealing with complaints from inmates in prisons or police lock-ups⁴⁰⁶ and torture perpetrated by a state agency such as the Police was treated as an offence both against departmental rules and in terms of criminal law. A new set of regulations pertaining to Prison Services personnel and the treatment of prisoners is contained in GN 226/2001 (GG 2643). In accordance with Article 13 of the Convention, it has been said that anyone who claimed to have been subjected to torture was entitled to lodge a complaint with the police or the Prosecutor-General, who decided whether or not to initiate proceedings.

Since Article 8 of the Constitution prohibits any act of cruel or inhuman treatment, traditional leaders are also bound to apply customary law that is fair and just, and they must comply with the Constitution, as provided for in Article 66.⁴⁰⁷ Therefore, any customary practices which constituted cruel, degrading and inhuman treatment would be declared invalid in terms of Article 8 of the Constitution.

405 Article 7 of the Convention.

406 See the Prisons Act, No. 17 of 1998.

407 Article 66, Namibian Constitution: "Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which customary law or common law does not conflict with this Constitution or any other statutory law."

It is not clear that Namibia has fulfilled its reporting obligations under this Convention. It is, however, important firstly to understand the nature of torture and the need to criminalise such acts (as is clear from the ongoing Caprivi cases).⁴⁰⁸ The seriousness and effect of the crime is definitely not considered and therefore victims of torture can never be effectively protected. Since the first step of domestication has not been fulfilled, all other provisions of the Convention can also not be said to have been fulfilled. It is therefore impossible for the Convention to be self-executing.

It has been strongly recommended that the Namibian Government implement legislation that recognises torture as a crime. In addition, various torture cases before and after independence need to be investigated and the perpetrators brought to justice. It was further recommended that justice training be offered to the officials, mostly in prisons and the police, to understand what torture is and prevent it in all its manifestations. The communities also have to be informed on the nature of the crime in order to easily identify and report to the necessary authorities. NGOs and public offices, e.g. the Office of the Ombudsman, must be actively involved in the investigations with regard to human rights violations. Currently, the office of the Ombudsman and the Law Reform Commission are working on

408 "The Caprivi is a narrow strip of land in the far northeast of Namibia, about 400 kilometers long. The East Caprivi, bordered by the Kwando, Linyanti, Chobe and Zambezi Rivers, is a region of swamps and flood plains. It was obtained from Great Britain by Germany in 1890 to give then German South West Africa access to the Zambezi River west of Victoria Falls. Originally part of Botswana – then Bechuanaland – the Caprivi was ceded by Britain to the Germans in a complicated land exchange deal designed to link German colonies from west to east Africa. During the 1970s and 1980s, the territory was used as a rear base by the South African army at the height of the apartheid era in its war against the Namibian independence movement, SWAPO, and as a support base for UNITA, the Angolan rebel movement then backed by the Western powers in the proxy war against Angola's Soviet- and Cuban-backed government. The Caprivi is considered strategically important because it is a narrow panhandle extending out from Namibia's northern border contiguous with four other countries – Botswana in the south, Angola and Zambia in the north and Zimbabwe in the east. It is also important because some of the arid southern African region's most important rivers, including the Zambezi and the Okavango, run along or through it. And as a popular destination for international tourists, the Caprivi brings in hard currency to the national coffers. The majority of the 100 000 population of Caprivi are Lozi-speaking and share a common history and culture with Lozis across the border in Zambia. The Lozi in eastern Caprivi do not identify with the rest of the Namibian population, and in 1994 formed the Caprivi Liberation Front, which began campaigning for a measure of autonomy to pursue closer ties with the Lozi in western Zambia. In 1998 the Namibian Government said it had located a military training camp run by the Caprivi Liberation Front, and with the discovery 15 Front officials fled to Botswana. In August 1999 the Namibian Government imposed a state of emergency in the eastern part of the Caprivi Strip. People were killed in an attack by members of the Caprivi Liberation Front on a military base, police station and other installations in Katima Mulilo. People have been detained on suspicion of ties with the separatist Caprivi Liberation Army." (See <http://www.globalsecurity.org/military/world/para/caprivi.htm>, last accessed 16 March 2009.)

a Draft Bill on Torture. However, no substantive information regarding its contents could be obtained at this point.

Case Study

The first trial related to assaults that Caprivi high treason suspects claim to have suffered at the hands of police officers after being arrested in the wake of separatist attacks at Katima Mulilo in August 1999 was concluded in the High Court in Windhoek. High treason suspects Kisko Sakusheka and George Liseho are claiming amounts of N\$60 000 and N\$370 000 respectively from the Minister of Home Affairs for allegedly being unlawfully arrested and assaulted by police officers. Their case against the Minister, who at the time of their arrest and alleged assaults had been responsible for the Namibian Police, is the first of more than 100 similar claims by suspects in the Caprivi high treason case to have resulted in a trial in the High Court. Other civil claims, likewise resulting from the alleged torture, assault and abuse of treason suspects by members of the police after the Caprivi secessionist attacks, which had been set for trial in the High Court have all been settled out of court.⁴⁰⁹

409 <http://www.lac.com.na>; last accessed on 23 February 2009.

Judge Louis Muller reserved his judgment on the case of Sakusheka and Liseho, after hearing arguments from Legal Assistance Centre lawyer Lynita Conradie, who is representing the two men, and George Coleman, who is representing the Minister on instructions from the Government Attorney. Coleman argued that the claims of both men should be dismissed. Conradie argued that they had proven that they were unlawfully arrested and assaulted. She conceded that an additional claim by Liseho, of having been unlawfully detained after his arrest, had not been proven. She suggested that it would be reasonable if the court ordered the Minister to pay Sakusheka between N\$40 000 and N\$50 000 in damages and Liseho between N\$70 000 and N\$80 000.

Sakusheka claimed that he was assaulted by police officers after his arrest at Makanga, a village some 70 kilometres southwest of Katima Mulilo, on 15 April 2000. He claimed he was punched with fists, struck with rifle butts and beaten with a sjambok at Makanga, and after being transported to the Katima Mulilo Police Station, was again beaten until he collapsed. Liseho claimed he was first arrested on 3 November 1999, assaulted by being beaten with a sjambok, and then released the next day. On 2 March 2000, Liseho claimed he was again arrested and again assaulted, with several of his teeth being knocked out in the process and a gun being pointed at his head with its barrel shoved into his mouth at one stage.

A claim by another suspect in the high treason case, Aggrey Makendano, against the Ministers of Home Affairs and Defence, had been set to be heard together with the case of Sakusheka and Liseho, but Makendano's case was also settled. Makendano had claimed a total of N\$550 000 for alleged unlawful arrest and assault by police officers.

In the trial before Judge Muller, a succession of police officers passed through the witness box to deny the claims that Sakusheka and Liseho had been assaulted. Conradie commented on this

issue in her arguments: “It can hardly be expected that a police officer would admit to an assault on an accused. The consequences would be dire and this case would not be the first where police officers say they did not assault people while they in fact did.”

Coleman pointed out that the testimony of both Sakusheka and Liseho differed from the claims they initially made when they had filed their cases against the Minister. Sakusheka told the court that a scar on his right ear was the result of the alleged assaults. However, according to a magistrate to whom he made an alleged confession after his arrest, he told her that the scar was the result of a childhood injury. This should seriously undermine Sakusheka’s credibility. He further commented that two magistrates before whom Liseho made appearances after the assaults in which he claimed his teeth were knocked out and his jaw was badly injured, did not observe any injuries on him. Liseho had been a “fundamentally unreliable witness”, Coleman charged.⁴¹⁰

The Rome Statute and the International Criminal Court

Apart from the human rights instruments discussed above, Namibia is also a State Party⁴¹¹ to the Rome Statute of the International Criminal Court (ICC), which was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. Undoubtedly, the Rome Statute imposes legal obligations and expectations on its member states. These are, *inter alia*, to ensure the effective prosecution of most serious crimes of concern to the international community as a whole; to put an end to impunity for the perpetrators of these crimes; to contribute to the prevention of such crimes; and to exercise national criminal jurisdiction over those responsible for international crimes.⁴¹² In addition, State Parties are also encouraged and expected to incorporate the crimes as defined in the Rome Statute within their national legislation. As regards to the domestication and implementation of the Rome Statute by the Namibian Government,

410 Ibid.

411 Namibia became a State Party to the Rome Statute on 25 June 2002.

412 Bangamwabo (2008:167).

the author of this research is not aware of any legal or administrative measures put in place by Namibia to comply with its obligations.

Case Study:

The domestication of the Rome Statute within Namibia cannot be completed without looking at the recent and much published saga involving the petition of the National Society for Human Rights (NSHR) to the ICC.⁴¹³ In this petition, the Namibian human rights NGO requested the ICC to investigate or prosecute Namibia's Founding President, Dr. Sam Nujoma, and other persons for crimes allegedly committed during the liberation struggle against the then apartheid regime. There were two issues raised by this petition:

- Does the permanent ICC legally have the power to hear cases involving crimes committed before the entering into force of the Rome Statute, i.e. whether the ICC has retrospective jurisdiction?
- Does the "continuous crimes doctrine" form part of the Rome Statute?

To adequately address these issues, one has to look at the provisions of the Rome Statute creating the ICC. Article 11(1) of the Statute states that "the court has jurisdiction only with respect to crimes committed after the entry into force of this statute".⁴¹⁴ This provision is further buttressed by Article 24, which deals with non-retroactivity *ratione personae*. Under this Article, it is clear

413 The NSHR requested that the ICC investigate human rights abuses carried out in SWAPO camps in exile prior to independence in 1990 and in the north-east of the country in the 1990s. The NSHR cited Sam Nujoma and retired army Lieutenant General Solomon Hawala as being responsible for the detention, torture and enforced disappearance of thousands of SWAPO members in Angola in the 1980s. The submission to the ICC also sought the prosecution of former Defence Minister Erkki Nghimtima for the torture of separatist suspects in Caprivi in 1999 and army Colonel Thomas Shuuya for operating an alleged shoot-to-kill policy in the Kavango region in the 1990s. The NSHR's submission was strongly condemned by the ruling party as a threat to the policy of national reconciliation. The ICC does not have jurisdiction for crimes committed prior to July 2002 and therefore the NSHR's submission would not be admissible. See <http://www.amnesty.org/en/region/namibia/report-2008>; last accessed 22 November 2009.

414 The Rome Statute creating the ICC entered into force on 1 July 2002.

that that no person shall be criminally responsible for activities prior to the entry into force of the Rome Statute.

The second issue is the so called “continuous crimes doctrine” upon which the National Society of Human Rights based the admissibility of its case.⁴¹⁵ To determine whether or not continuous crimes are prosecutable by the ICC, again one must look at the statute that creates the court. There is definitely no provision in the Rome Statute with regard to the court’s jurisdiction to hear continuous crimes.⁴¹⁶

Consequently, the applicant in this petition had no legal grounds on which the petition could be heard by the ICC, and the judges were not prepared to bend or amend the Rome Statute in this case. Judges do not make laws – they merely interpret them, even though there is no doubt that the Rome Statute forms part of Namibian law by virtue of Article 144 of the Constitution.

The impact of international justice on the debate about public memory and visions of reconciliation in Namibia were analysed in a recently published article.⁴¹⁷

*“Focusing on a recent submission to the International Criminal Court, it shows how domestic actors used international justice to advance their claims for reconciliation and it thus challenges the common assumption that reconciliation is an entirely domestic process ...”*⁴¹⁸

415 The “continuous crime doctrine” can be defined as the umbrella of cases that has a continuous nature, e.g. in the case of “enforced disappearance”, which is a crime against humanity punishable under the Rome Statute. Someone might have disappeared prior to the entry into force of the statute but the crime would continue after entry into force to the extent that the disappearance persisted.

416 Surprisingly, the drafting committee at the Rome Statute had initially appended a footnote on Para 1 of Article 24 which read: “The question has been raised as regards a conduct which started before entry into force and continues after the entry into force”, see UN Doc. A/CONF.183/C.1/L.65/REV.1, P.2.

417 Höhn (2010).

418 See <http://afraf.oxfordjournals.org/content/109/436/471.abstract>, last accessed 15 November 2010.

Bibliography

Amoo, S.K. 2008a. *Introduction to Law: Cases and Materials*. Windhoek: Macmillan Namibia.

Amoo, S.K. 2008b. "The Structure of the Namibian Judicial System and its Relevance for an Independent Judiciary," In Horn, N. & A. Bösl (Eds.). *The Independence of the Judiciary in Namibia*. Windhoek: Macmillan Education, pp 69-98.

Amoo, S.K. 2008c. "The Constitutional Jurisprudential Development in Namibia since 1985". In Horn, N. & A. Bösl (Eds.). *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Education, pp 39–57.

Amoo, S.K. & I. Skeffers. 2008. "The Rule of Law in Namibia". In Horn, N. & A. Bösl (Eds.). *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Education, pp 17–38.

Ambunda, L.N. & S. de Klerk. 2008. "Women and Custom in Namibia – A Research Overview". In Ruppel, O.C. (Ed.). *Women and Custom in Namibia. Cultural Practice versus Gender Equality?* Windhoek: Macmillan Education, pp 43-82.

Ambunda, L.N. & W.T. Mugadza. 2009. "The Protection of Children's Rights in Namibia: Law and Policy". In Ruppel, O.C. (Ed.). *Children's Rights in Namibia*. Windhoek: Macmillan Education, pp 5–52.

Anyolo, P. 2008. "Polygyny Among the Ovambadja: A Female Perspective". In Ruppel, O.C. (Ed.). *Women and Custom in Namibia. Cultural Practice versus Gender Equality?* Windhoek: Macmillan Education, pp 83-92.

Bangamwabo, F-X. 2008. "The Implementation of International and Regional Human Rights Instruments in the Namibian Legal Framework". In Horn, N. & A. Bösl (Eds.). *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Education, p 167.

Baxter, L. 1984. *Administrative Law*. Cape Town/Wetton/Johannesburg: Juta.

Becker, H. & M.O. Hinz. 1995. "Marriage and Customary Law in Namibia". *Namibia Papers Working Document No. 30*. Windhoek: Centre for Applied Social Services, p 22 ff.

- Bekker, S. & M.O. Hinz. 2000. *The Laws of Persons and Family Law: Statutory Enactments and Other Material*. Windhoek: Centre for Applied Social Sciences.
- Bennett, T.W. 1995. *Human Rights and African Customary Law Under the South African Constitution*. Cape Town: Juta & Co.
- Bennett, T.W. 1996. *Customary Law and the Constitution*. Windhoek: Law Reform and Development Commission.
- Bennett, T.W. 1999. *Human Rights and African Customary Law*. Cape Town: Juta & Co.
- Bennett, T.W. 2004. *Customary Law in South Africa*. Cape Town: Juta & Co.
- Botha, H. 1994. "The Values and Principles Underlying the 1993 Constitution" *SAPL* pp 233- 237.
- Bradley, A.W. & K.D. Ewing. 1997. *Constitutional and Administrative Law* (12th Edition). London: Longman.
- Brett, R. 2009. "Rights of the Child". In Krause, C. & M. Scheinin (Eds.). *International Protection of Human Rights: A textbook*. Turku/Åbo: Institute for Human Rights, Åbo Akademi University, pp 227–246.
- Bukurura, S.H. 2002. "The Namibian Constitution and the Constitution of the Judiciary". In Hinz, M.O., S.K. Amoo & D. van Wyk (Eds.). *The Constitution at Work: 10 Years of Namibian Nationhood*. Windhoek: University of Namibia Press, p 299 ff.
- CEDAW/Committee on the Elimination of Discrimination against Women. 2005. *Combined Second and Third Periodic Report. Namibia*. CEDAW/C/Nam/2-3. Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/510/07/PDF/N0551007.pdf?OpenElement>; last accessed 5 November 2009.
- CEDAW/Committee on the Elimination of Discrimination Against Women. 2006. *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Democratic Republic of Congo*.

Available at <http://www.un.org/womenwatch/daw/cedaw/36sess.htm>; last accessed 11 May 2009.

CEDAW/Committee on the Elimination of Discrimination Against Women. 2007a. *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Namibia*. Available at <http://www.un.org/womenwatch/daw/cedaw/37sess.htm>; last accessed 11 May 2009.

CEDAW/Committee on the Elimination of Discrimination Against Women. 2007b. *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Mozambique*. Available at <http://www.un.org/womenwatch/daw/cedaw/38sess.htm>; last accessed 11 May 2009.

Committee Against Torture. 2005. *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture – Democratic Republic of the Congo*. Available at <http://www.unhcr.org/refworld/pdfid/45c30b7cc.pdf>; last accessed 14 October 2009.

Committee on the Rights of the Child. 1994. *Concluding Observations of the Committee on the Rights of the Child: Namibia, 07/02/94. CRC/C/15/Add.14*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.14.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.14.En?OpenDocument); last accessed 14 October 2009.

Committee on the Rights of the Child. 2001. *General Comment No. 1 on the Aims of Education*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2001.1.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2001.1.En?OpenDocument); last accessed 19 October 2009.

Committee on the Rights of the Child. 2002. *General Comment No. 2 on the Role of Independent National Human Rights Institutions*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2002.2.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2002.2.En?OpenDocument); last accessed 19 October 2009.

Committee on the Rights of the Child. 2003a. *General Comment No. 3 on HIV/AIDS and the Rights of the Child*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.3.En?OpenDocument); last accessed 19 October 2009.

Committee on the Rights of the Child. 2003b. *General Comment No. 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.4.En); last accessed 19 October 2009.

Committee on the Rights of the Child. 2003c. *General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En); last accessed 19 October 2009.

Committee on the Rights of the Child. 2005. *General Guidelines for Periodic Reports Regarding the Form and Content of Periodic Reports to be Submitted by States Parties under Article 44 (1)(b), Adopted by the Committee, UN doc. CRC/C/58/Rev.1*. Retrieval at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.58.Rev.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.58.Rev.1.En?Opendocument); last accessed 19 October 2009.

Coomer, R. 2009. "Protecting the Next Generation: Have Your Say on the Child Care and Protection Bill". *The Namibian*, 29 May 2009.

Damaseb, P. 2008. "Judicial Perspective: Democracy in Namibia – Before and After Independence". *New Era Newspaper*, 19 September 2008.

Detrick, S. 1999. *A commentary on the United Nations Convention on the Rights of the Child*. The Hague: Kluwer Law International.

Dicey, A.V. 1965. *An Introduction to the Study of the Law of the Constitution* (10th Edition). London: The Macmillan Press Ltd.

Diescho, J. 1994. *The Namibian Constitution in Perspective*. Windhoek: Gamsberg Macmillan.

Diescho, J. 1998. *The Politics of the Presidential Third Term in Namibia*. Windhoek.

Erasmus, M.G. 1991. "The Namibian Constitution and the Application of International Law in Namibia." In van Wyk, D *et al.* *Constitutional and International Law Issues*. VerLoren van Themaat Centre for Public Law Studies, pp 94.

Fortin, J. 2005. *Children's Rights and the Developing Law* (Second Edition). Cambridge: Cambridge University Press.

Friesen, T. 1998. "Reform of Namibia's Customary Marriages Law". *Draft Issue Paper*. Windhoek: Centre for Applied Social Sciences.

Gawanas, B. 2002. "Office of the Ombudsman 1990–2000". In Hinz, M.O., S.K. Amoo & D. van Wyk (Eds.). *The Constitution at Work – 10 Years of Namibian Nationhood*. Pretoria: University of South Africa, pp 102–110.

Gawanas, B. 2009. "The African Union: Concepts and Implementation Mechanisms Relating to Human Rights". In Bösl, A. & J. Diescho (Eds.). *Human Rights in Africa. Legal Perspectives on their Protection and Promotion*. Windhoek: Macmillan Namibia, pp 135-162.

Gottcherer, D.M. & M. Hostina. 1998. *Essential Characteristics of a Classical Ombudsman*. Available at www.usombudsman.org/documents/PDF/References/Essential.PDF; last accessed 6 June 2008.

Griffiths, I. 1986. "What is Legal Pluralism?" In *Journal of Legal Pluralism* 24, 1986, 1-55.
GRN/Government of the Republic of Namibia. 2004. *Millennium Development Goals Report 2004 for Namibia*. Windhoek: National Planning Commission.

GRN/Government of the Republic of Namibia. 2008a. *Second Millennium Development Goals Report 2008 for Namibia*. Windhoek: National Planning Commission.

GRN/Government of the Republic of Namibia. 2008b. *Action Programme on the Elimination of Child Labour in Namibia*. Windhoek: Ministry of Labour and Social Welfare.

GRN/Government of the Republic of Namibia. 2009. *Summary of the Draft Child Care and Protection Bill*. Windhoek: MGECW.

Haarman, D. 2009. "Towards a Basic Income Grant for All." *Basic Income for Namibia 2009*. Unpublished Discussion Paper Presented at the 1st Training Workshop for BIG Campaigners, 10-12 July 2009, Greiter Lodge, Windhoek.

Hammarberg, T. 1990. "The UN Convention on the Rights of the Child – and How to Make it Work". *Human Rights Quarterly*, 12(1):97–105.

Hinz, M.O. 2002. "Local Knowledge and its Legal Protection". Paper Presented at the International Trade Law Workshop of the International Development Law Institute, University of Stellenbosch, 24 June–12 July 2002. Windhoek: University of Namibia - Trade Law Centre for Southern Africa.

Hinz, M.O. 2003a. *Customary Law in Namibia. Development and Perspective* (Eighth edition). Windhoek: Centre for Applied Social Sciences.

Hinz, M.O. 2003b. "The Rule of Law and the New African Constitutionalism": In Hinz, M.O. (Ed.). *Without Chiefs there would be no Game: Customary Law and Nature Conservation*. Windhoek: Out of Africa Publishers, p 273.

Hinz, M.O. 2006. "The Ascertainment of Customary Law". In Hinz, M.O. (Ed.). *The Shade of New Leaves: Governance in Traditional Authority: A southern African perspective*. Berlin: LIT Verlag.

Hinz, M.O. 2008a. "Strengthening Women's Rights: The Need to Address the Gap between Customary and Statutory Law in Namibia". 2008. In Ruppel, O.C. (Ed.). *Women and Custom in Namibia. Cultural Practice versus Gender Equality?* Windhoek: Macmillan Education, pp 93-106.

Hinz, M.O. 2008b. "Traditional Courts in Namibia – Part of the Judiciary? Jurisprudential Challenges of Traditional Justice". In Horn, N. & A. Bösl (Eds.). *The Independence of the Judiciary in Namibia*. Windhoek: Macmillan Education, pp 149-176.

Hinz, M.O. 2009. "Phase 1 of the Namibian Ascertainment of Customary Law Project to be Completed Soon". *Namibia Law Journal*, 2:109.

Höhn, S. 2010. "International Justice and Reconciliation in Namibia: The ICC Submission and Public Memory". *African Affairs*, Vol. 109 issue 437, pp 471-488.

Horn, N. & A. Bösl (Eds.) 2008. *The Independence of the Judiciary in Namibia*. Windhoek: Macmillan Education.

Horn, N. & A. Bösl (Eds.) 2008. *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Education.

Hubbard, D. 2009. "Namibia's Draft Child Care and Protection Bill: Process for Public Qwareness and Input". Retrieval at <http://www.google.de/search?hl=de&ei=wTHkSuW7Aczt-Aa6lsXICQ&sa=X&oi=spell&resnum=0&ct=result&cd=1&ved=0CAUQBSgA&q=hubbard+children%27s+act+namibia&spell=1>; last accessed 20 October 2009.

Hubbard, D. & R. Coomer. 2009. "Inter-country Adoption: The Complexities Behind the Conflict". *The Namibian*, 1 October 2009.

Indongo, L. 2008. "The Uniqueness of the Namibian Prosectutor-General". In Horn, N. & A. Bösl (Eds.). *The Independence of the Judiciary in Namibia*. Windhoek: Macmillan Education, pp 99-112.

Keetharuth, S.B. 2009. "Major African Legal Instruments". In Boesl, A. & J. Diescho (Eds.). 2009. *Human Rights in Africa*. Windhoek: Macmillan Education.

LAC/Legal Assistance Centre. 2005. *Marital Property in Civil and Customary Marriages: Proposal for Law Reform*. Windhoek: LAC.

LeBeau, D., E. Iiping & M. Conteh. 2004. *Women's Property and Inheritance Rights in Namibia*. Windhoek: Pollination Publishers & University of Namibia.

LeBlanc, L. 1995. *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights*. Lincoln: University of Nebraska Press.

Madhuku, L. 2002. "Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa". In *Journal of African Law*, 46(2):232-245.

Ministry of Agriculture, Water and Rural Development/Ministry of Agriculture, Water and Rural Development. 1995. *National Agricultural Policy*. Windhoek: MAWRD.

MGECW. 2009a. *Booklet No. 1: The Draft Child Care and Protection Act: Issues for Public Debate*. Windhoek: Republic of Namibia.

MGECW. 2009b. *Booklet No. 2: The Draft Child Care and Protection Act: Issues for Public Debate*. Windhoek: Republic of Namibia.

MGECW. 2009c. *Draft Child Care and Protection Bill, April 2009*. Windhoek: Republic of Namibia.

MGECW. 2009d. *National Plan of Action 2006–2010 for Orphans and Vulnerable Children in Namibia. Annual Progress and Monitoring Report for 1 April 2007 to 31 March 2008*. Windhoek: Republic of Namibia.

MOJ/ Ministry of Justice. 2008. *Annual Report 2006-2007*. Windhoek: Republic of Namibia.

Mbahuurua, V.H. 2002. "Executive Power in the Namibian Constitution: Precept and Practice". In Hinz, M.O., S.K. Amoo & D. Van Wyk (Eds.). *The Constitution at Work: 10 Years of Namibian Nationhood*. Windhoek: University of Namibia, pp 57.

Nakuta, J. 2008. "The Justiciability of Social, Economic and Cultural Rights in Namibia and the Role of the Non-governmental Organisations," In Horn, N. & A. Bosl (Eds.). *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Education, pp 89-100.

Naldi, J. 1995. *Constitutional Rights in Namibia*. Cape Town: Juta & Co.

Namandje, S. 2000. "What Restrictions, if any, should be imposed on Fundamental Freedom of Expression and Press in a Democratic Society? A look at Namibia". Available at <http://www.wisis.unam.na/theses/namandje2000.pdf>; last accessed 28 May 2009.

Namiseb, T. 2008. "Women and Law Reform in Namibia". In Ruppel, O.C. (Ed.). *Women and Custom in Namibia. Cultural Practice versus Gender Equality?* Windhoek: Macmillan Education, pp 107-112.

Nghiishililwa, F. 2000. "The Constitutional Prohibition on Torture". In Hinz, M.O., S.K. Amoo K & D. Van Wyk (Eds.). *The Constitution at Work: 10 Years of Namibian Nationhood*. Windhoek: University of Namibia, p 315.

NPC/National Planning Commission. 2003. 2001 *Population and Housing Census: Basic Analysis with Highlights*. Windhoek: Central Bureau of Statistics, NPC.

Office of the Ombudsman. 2007. *2006 Annual Report*. Windhoek: Office of the Ombudsman.

Office of the Ombudsman. 2008. "Ombudsman Report to the Parliamentary Committee on Constitutional and Legal Affairs in Regard to Human Rights Violations in Namibia". Unpublished.

RoN/Republic of Namibia. 1997. *National Gender Policy*. Windhoek: Department of Women Affairs, Office of the President.

Ruppel, O.C. 2008a. "The Human Rights and Documentation Centre at UNAM". In Horn, N. & A. Bösl (Eds.). *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Education, pp 131–140.

Ruppel, O.C. 2008b. "The Role of the Executive in Safeguarding the Independence of the Judiciary in Namibia". In Horn, N. & A. Bösl (Eds.). *The Independence of the Judiciary in Namibia*. Windhoek: Macmillan Education, pp 206-228.

Ruppel, O.C. 2008c. (Ed.). *Women and Custom in Namibia. Cultural Practice versus Gender Equality?* Windhoek: Macmillan Education.

Ruppel, O.C. 2008d. "Third-generation Human Rights and the Protection of the Environment in Namibia". Horn, N. & A. Bösl (Eds.). *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Education, pp 101–120.

Ruppel, O.C. & A. Groenewaldt. 2008. *Conditions of Police Cells in Namibia*. Windhoek: Konrad Adenauer Foundation. Available at http://www.kas.de/wf/doc/kas_14189-544-1-30.pdf; last accessed 7 October 2009.

Ruppel, O.C., K. Mchombu & I. Kandjii-Murangi. 2008. "Surveying the Implications of Violence against Women: A Perspective from Academia". In Ruppel, OC. (Ed.). *Women and Custom in Namibia. Cultural Practice versus Gender Equality?* Windhoek: Macmillan Education, pp 119-130.

Ruppel, O.C. & F-X. Bangamwabo. 2009a. "The SADC Tribunal: A Legal Analysis of its Mandate and Role in Regional Integration". In Bösl, A., W. Breytenbach, T. Hartzenberg, C. McCarthy & K. Schade (Eds.). *Monitoring Regional Integration in Southern Africa*. Yearbook Vol. 8. Stellenbosch: US Printers. A Tralac Publication, pp 179-222.

Ruppel, O.C. 2009b. "Regional Economic Communities and Human Rights in East and Southern Africa". In Bösl, A. & J. Diescho (Eds.). *Human Rights in Africa. Legal Perspectives on their Protection and Promotion*. Windhoek: Macmillan Education, pp 284–318.

Ruppel, O.C. 2009c. (Ed.). *Children's Rights in Namibia*. Windhoek: Macmillan Education.

Ruppel, O.C. 2009d. "The Protection of Children's Rights under International Law from a Namibian Perspective". In Ruppel, O.C. (Ed.). *Children's Rights in Namibia*. Windhoek: Macmillan Education, pp 53-100.

Ruppel, O.C. 2009e. "The Southern African Development Community (SADC) and its Tribunal: Reflexions on a Regional Economic Communities' [sic] Potential Impact on Human Rights Protection". *Verfassung und Recht in Übersee (VRÜ)*, 2:173–186.

Ruppel, O.C. 2009f. "The SADC Tribunal, Regional Integration and Human Rights: Major Challenges, Legal Dimensions and some Comparative Aspects from the European Legal Order". *Recht in Afrika*, 2:203–229.

Ruppel, O.C. & S. de Klerk, S. 2009. "Rule by the People?" Participatory Democracy and Community Based Citizen Participation. In *Discourse 2009/1*. Windhoek: Hanns Seidel Foundation.

Ruppel, O.C. 2010a. "The Namibian Customary Law Ascertainment Project". In Hinz, M.O. & E.N. Namwoonde (Eds.). *Customary Law Ascertained. Volume 1. The Customary Law of the Owambo, Kavango and Caprivi Communities*. Windhoek: Namibia Scientific Society.

Ruppel, O.C. 2010b. "SACU 100: The Southern African Customs Union Turns 100". *Namibia Law Journal*. 2:121-134.

Ruppel O.C. 2010c. "Women's Rights and Customary Law in Namibia: A Conflict between Human and Cultural Rights?" In: Basler Afrika Bibliographien BAB Working Paper 2010/2 (Basel: BAB). 36 pp. (http://www.baslerafrika.ch/upload/files/WP_2010_2_Ruppel.pdf).

Ruppel O.C. 2010d. "Environmental Rights and Justice in Namibia". In Bösl, A., N. Horn & A. du Pisani (Eds.). *Constitutional Democracy in Namibia. A Critical Analysis after Two Decades*. Windhoek: Macmillan Publishers.

Ruppel, O.C. & K.G.V.E. Ruppel-Schlichting. 2010. "Between Formal and Informal Justice? The Mandate of the Ombudsman in Namibia". In Hinz, M.O. & C. Mapaire (Eds.). *In Search of Justice and Peace. Traditional and Informal Justice Systems in Africa*. Windhoek: Namibia Scientific Society, pp 363-382.

Ruppel-Schlichting, K.G.V.E. 2008. "The Independence of the Ombudsman in Namibia". In Horn, N. & A. Bösl (Eds.). *The Independence of the Judiciary in Namibia*. Windhoek: Macmillan Education, pp 271–290.

Scheinin, M. 2009. "International Mechanisms and Procedures for Monitoring". In Krause, C. & M. Scheinin (Eds.). *International Protection of Human Rights: A Textbook*. Turku/Åbo: Institute for Human Rights, Åbo Akademi University, pp 601–620.

Sippel, H. 2003. "Rechtsrezeption in Namibia. Prozesse Direkter und Indirekter Rezeption Deutschen und Südafrikanischen Rechts". *Recht in Afrika*, 2003:69-89.

Stone, L. 2006. *Kinship and Gender. The Center for Research on Tibetan Marriage and Polygamy* (Third Edition). Tibet: Westview.

Tjaronda, W. 2009. "Child Law Under Revision". *New Era*, 20 April 2009.

Tjitendero, M. 1996. "Opening Address to the Subregional Conference on the Ombudsman in Southern Africa". In Kasuto, E. & A. Wehmhörner (Eds.). *The Ombudsman in Southern Africa: Report of a Subregional Conference*. Windhoek: Gamsberg Macmillan, pp 9–12.

Tjombe, N. 2008. "Appointing Acting Judges to the Namibian Bench: A Useful System or a Threat to the Independence of the Judiciary?" In Horn, N. & A. Bösl (Eds.). *The Independence of the Judiciary in Namibia*. Windhoek: Macmillan Education, pp 229-242.

Tshosa, O. 2001. *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe*. Burlington: Ashgate Publishing Company.

Van Bueren, G. 1998. *The International Law on the Rights of the Child*. The Hague: Kluwer Law International.

Viljoen, F. 2007. *International Human Rights Law in Africa*. Oxford: Oxford University Press.

Visser, W. & K.G.V.S. Ruppel-Schlichting. 2008. "Women and Custom in Namibia – The Legal Setting". In Ruppel, O.C. (Ed.). *Women and Custom in Namibia. Cultural Practice versus Gender Equality?* Windhoek: Macmillan Education, pp 149-164.

Viveca, N. 1997. "Empty-bench Syndrome: Congressional Republicans are Determined to put Clinton's Judicial Nominees on Hold". *Time*, 26 May, p 37.

Walters, J. 2006. *Special Report on Conditions Prevailing at Police Cells Throughout Namibia*. Windhoek: Office of the Ombudsman.

Walters, J. 2008. "The Protection and Promotion of Human Rights in Namibia: The Constitutional Mandate of the Ombudsman". In Horn, N. & A. Bösl (Eds.). *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Education, pp 121–130.

Notes

A series of horizontal dotted lines for writing notes.

Notes

A series of horizontal dotted lines for writing notes.

Notes

A series of horizontal dotted lines for writing notes.

