

The Justice Sector & the Rule of Law in Namibia



Management, Personnel and Access

John Nakuta & Faith Chipepera

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Background to the Series

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

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

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

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

Acronyms and Initialisms

NAMCIS	Namibian Ministry of Justice Case Management System
JSC	Judicial Service Commission
JTC	Justice Training Centre
UNAM	University of Namibia

List of Acts and Bills

Anti-Corruption Act, No. 8 of 2003
Appellate Division Act, No. 12 of 1920
Community Courts Act, No. 10 of 2003
Criminal Procedure Act, No. 25 of 2004
Criminal Procedure Act, No. 51 of 1977
Electoral Act, No. 24 of 1992
Judges Pension Act, No. 28 of 1990
Judges Remuneration Act, No. 18 of 1990
Judicial Service Commission Act, No. 18 of 1995
Labour Act, No. 11 of 2007
Legal Practitioners Act, No. 15 of 1995
Magistrates Act, No. 3 of 2003
Ombudsman Act, No. 7 of 1990
Public Finance Management Act, No. 1 of 1999
Public Service Act, No. 13 of 1995
State Finance Act, No. 31 of 1991
Supreme Court Act, No. 59 of 1959

Administration of Justice Proclamation No. 21 of 1919
Native Administration Proclamation No. 15 of 1928

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Contents

		Introduction	I
		Management of the Justice System	3
Background to the Series	i	Planning and Financial Management	3
Acronyms and Initialisms	ii	<i>Planning of the Justice Sector</i>	4
List of Acts and Bills	ii	<i>Financial Planning</i>	6
About the Authors	iii	<i>Financial Auditing Procedures</i>	8
		<i>Access to Information about Budgets by Civil Society</i>	9
		Court Administration	12
		<i>Administrative Staff Training</i>	13
		<i>Systems for Record Keeping</i>	14
		<i>Physical Conditions and Facilities at Courts</i>	15
		Access to Legislation and Jurisprudence	16
		<i>Access to Expert Commentary</i>	17

Independence, Accountability, Effectiveness and Conduct of Judges and Lawyers 18

Appointment, Promotion and Dismissal of Judges 18

Independence and Standards of Conduct of the Legal Profession 22

Qualifications in the Legal Profession 25

The Prosecutorial Authority 27

Independence of the Prosecutor-General 29

Access to Justice 31

Knowledge of Rights 31

Physical Access to Courts 34

Financial Access 35

Court Fees 35

Corruption 36

Cost of Legal Advice 36

Locus Standi 37

Community Courts 38

Informal and Traditional Justice 44

Mechanisms to Assert Rights outside the Court System 47

Office of the Ombudsman 47

Opportunities for Improving Access to Justice 51

Bibliography 56

Introduction

In 2009, the Namibia Institute for Democracy embarked on an ambitious project to audit the justice sector and the rule of law in Namibia. This project culminated in three publications, each dedicated to a distinct thematic area. In this, the second publication, three thematic areas that may be regarded as the bread-and-butter issues of the justice sector are addressed, namely: *Management of the Justice System; Independence, Accountability, Effectiveness and Conduct of Judges and Lawyers; and Access to Justice.*

The management of the justice sector has improved over the past years. Measures have been taken to strengthen the autonomous management of the judiciary, but more still needs to be done to develop better coordination between the different compartments of the sector for strategic and management purposes. More concerted efforts should be made to ensure that the judiciary develops and manages its own budget, which is currently still controlled by the executive. This means that the autonomy of the sector is limited. The sector has made commendable efforts towards the automation of the courts, specifically the lower courts. However, the quality and availability of law reports and legislation still leave much to be desired. Furthermore, Namibian courts are chronically understaffed. This causes delays and compromises the quality of the administration of justice. The sector has developed a strategic plan as a basis for action at a sector-wide level and within specific institutions of the sector. The strategic plan seeks, amongst other things, to address the shortage of well-trained administrative staff, and poor record keeping. Needless to say, without adequate funding, the noble ideas espoused in the strategic plan will remain but a pipedream!

The separation of powers between the judiciary and the executive is firmly entrenched in the Constitution of the Republic of Namibia.¹ It can be stated without fear of contradiction that the independence of the courts has largely been respected in Namibia. The most serious threat to judicial independence is the occasional emotive and misguided call, when a judgment is given against the government, for the removal of a judge or judges. A case in point occurred following the recent judgment which found the outright banning of labour hire companies to be inconsistent with the spirit and purport of the Constitution.

¹ Hereinafter "the Constitution".

There have been important reforms aimed at maintaining judicial standards and providing for a more merit-based system of judicial appointments and promotions. The sector can proudly claim that it is the trendsetter when it comes to the empowerment of women.

Namibia has an impressive record of encouraging public education on fundamental human rights as a means to improve citizens' access to justice. Civil society organisations have engaged in human rights promotion campaigns to complement the work of the Ombudsman in this regard. Asserting one's rights often involves complex legal issues and procedures requiring the support of legal practitioners. Despite the efforts made by the state to provide legal aid and paralegal programmes supported by civil society groups aimed at providing assistance to the poorest members of society to enforce their rights, the cost of legal advice continues to exclude many from the courts. The problem is exacerbated by the high costs of legal and administrative proceedings. Furthermore, the Namibian legal system and the administration and institutions supporting it are cumbersome, often overly regulated and generally not user-friendly.²

Progressive and radical reforms are needed to give true meaning to the constitutionally guaranteed right to access to justice. All stakeholders – the government, legal practitioners, professional lawyers' organisations and civil society organisations – must confront the challenges facing the sector head-on. For instance, legal aid must be more meaningfully funded and the system must also be administered in a more efficient and transparent manner. The court system also needs a thorough overhaul. Courts must be diversified and specialised so as to allow them to dispose of matters more speedily. Such reforms should similarly bring about less formality and greater simplicity in the court system. The introduction of administrative tribunals and the much delayed small-claims court would all go a long way to giving substance to the right to access to justice in Namibia.

2 Lorentz Angula, "Access to Justice", in *Insight Namibia* (Editorial), May 2010.

Management of the Justice System

Planning and Financial Management

In Namibia, the Ministry of Justice is responsible for the administration of justice. This ministry was created immediately after the country became independent and was entrusted with the responsibility for transforming the then Department of Justice to reflect the values of a new and independent Namibia. The Ministry of Justice has been subject to ongoing restructuring since 1990. At present, its governance and operational arrangements are based on a model of internal business units, with each department having a clear set of functions.³

The Ministry of Justice has thirteen directorates that are responsible for delivering core justice functions. The Directorate for Legislative Drafting is responsible for the scrutiny and final drafting of all bills emanating from various government ministries before they are submitted to the Attorney-General for certification prior to their introduction in the National Assembly. This directorate also drafts all regulations, subordinate legislation, public notes and general notices.

The Law Reform Secretariat's mandate is to render secretarial services to the statutory body, the Law Reform and Development Commission, which is tasked with reforming all laws that are incompatible with the Constitution, and to recommend new laws.

The Directorate for Legal Support Services is responsible for rendering logistical and administrative services to all directorates in the ministry (Personnel, Finance, the Government Gazette Office, the Master and Registrar of the High and Supreme Court, Transport, Stores etc.). There is also the Directorate for Civil Litigation, the Master of the High Court, the Government Attorney, the Ombudsman and the Prosecutor-General.

³ Ministry of Justice, *Namibian Ministry of Justice Case Management System (Namci Project)*, <http://www.op.gov.na/Decadepeace/moj.htm> accessed 11 May 2009.

The Directorate for Legal Aid is also part of the ministry. This directorate was created by statute as per the provisions of Article 95(h) of the Constitution.⁴ Its primary mandate is to provide legal aid to those who cannot afford the services of legal practitioners. Two other independent structures, namely the Magistrates' Commission and the Judicial Service Commission, also play important administrative and management roles. The Magistrates' Commission is established in terms of the Magistrates Act.⁵ The Magistrates' Commission is charged, amongst other things, with the duty to appoint, promote, transfer, discipline or dismiss magistrates, and the duty to ensure that the applicable laws and administrative directives in this regard are applied uniformly and correctly. The Magistrates Act further establishes a magistracy for lower courts. The magistracy consists of all permanent or temporarily appointed magistrates. Responsibility for the overall administration of the lower courts lies with the Chief: Lower Courts.

Planning of the Justice Sector

To assess whether there is effective planning under the two directorates primarily responsible for the administration of justice, it is crucial to point out some of the challenges that have to be met. It is true that the Registrar of the High Court and the Supreme Court is responsible for the overall administration of the High Court and the Supreme Court. Added to this daunting task are quasi-judicial functions which only aggravate an already onerous workload. Secondly, there are the usual problems of backlogs and cases running for many years, when they could long since have been finalised. Furthermore, court rolls have proved to be notorious in the sense that it takes many months for parties to get a date set down under the current system. There are, of course, also the matters of insufficient offices and chambers and inconvenient access for persons with disabilities. These are but some of the problems currently experienced by the courts in Namibia.

4 Legal Aid Act, No. 29 of 1990.

5 Act No. 3 of 2003.

With these challenges in mind, the Ministry of Justice embarked on a five-year plan to improve the services being offered by the courts. This plan is better known as the Strategic Plan for the Ministry of Justice for the period 2009/10 to 2013/14. The ministry's Strategic Plan was the culmination of numerous in-house consultations aiming to turn the ministry into a strategy-focused and result-oriented organisation. Furthermore, the Strategic Plan identified strategic initiatives needed to overcome performance gaps and to lead to improved service delivery and policy outcomes for each directorate. In alignment with the vision and mission statements of the Ministry of Justice, emphasis is being placed on accessibility, timeliness, quality and integrity .

The Directorate of the High and Supreme Courts undertook to conduct an accessibility and quality perception survey and to monitor complaints against judicial officers with the view to improving the overall performance of the directorate. The Directorate of Lower Courts is planning to expand and enhance the court network, and to streamline processes and offer internet-based services. Furthermore, this directorate plans to implement a customer care programme and to undertake public education. The plan also includes increasing access to courts and establishing more courts to provide an effective network with a view to creating a service-oriented justice system.

The Strategic Plan is accompanied by a Balance Scorecard of strategic measures, targets and initiatives, which individual directorates have taken onboard for alignment, closer focus and smoother implementation. The Balance Scorecard offers such benefits as alignment, focus, accountability and transparency. It is also a proactive tool which will enable the ministry to better identify problems, rectify them and then communicate action and progress to its stakeholders.

It is still too early to determine how viable this new initiative is. Suffice it to say that past experience has shown that while the structures erected have promised to yield positive results, the actual results achieved have been less than satisfactory. This can be attributed to a lack of commitment from the personnel, as well as to logistical issues. Some policy analysts and commentators have noted that directorates have been subject to almost continuous internal restructuring and reorganisation, with the result that plans are not actually realised as implementation responsibilities and priorities are redefined.

One should also note that despite political statements about accountability and transparency, there is as yet no plan in place to actually achieve these objectives. The reality on the ground points to an urgent need to expand the High Court, and to deal with backlogs and court rolls. These are but some of the issues that the Strategic Plan needs to detail in order to ensure better service in the justice sector.

In the implementation of the programme of affirmative action, the ministry has made significant gains. The number of women in the ministry's professional establishment is still growing. By the beginning of 1998, women constituted 51.4% of the total ministerial workforce.

Financial Planning

In Mozambique, the key institutions of the justice sector have historically negotiated their budgets individually with the Ministry of Planning and Finance with limited cross-consultation or coordination. In South Africa, on the other hand, budget allocation takes place exclusively at a national level, and the division of resources amongst national, provincial and local spheres of government is a political process. Due to various competing interests, the justice sector receives a relatively small share of the budget.

In Namibia, the national budget is the prerogative of the executive. Article 40 (c) of the Constitution provides that the members of the Cabinet shall have the following functions:

to formulate, explain and assess for the National Assembly the budget of the State and its economic development plans and to report to the National Assembly thereon.

The second leg of the determination of the National Budget is the mandate of the National Assembly, which has the power and function to approve budgets for the effective government and administration

of the country.⁶ To this extent it is clear that the budget is a political process based on negotiation. However, the ministries themselves have internal procedures where individual directorates make their annual projections based on the flow of business over the previous year. They are then given an opportunity to justify their projections with the Minister of Finance before a final figure is arrived at. It is the sum total of all the projections agreed upon per individual directorate that will be discussed by the Cabinet in the national budget.⁷

The directorates that are the focus of this analysis are not fully funded, that is, they do not receive all the resources they need to fulfil all their functions and implement all their strategic priorities. This has meant that on most occasions the directorates have had to revise their plans and scale down on some of their interventions and initiatives. This is not a situation that is peculiar to Namibia – indeed, it is a trend the world over that government agencies must take account of financial constraints and curb their expenses. Wertz and Tyler have proposed the privatisation of standard service delivery.⁸ Privatisation generally refers to the practice of turning to private companies or firms to operate a service which has been provided by public employees – in other words, outsourcing. The United States of America has adopted this practice and has pointed out success stories of substantial monetary savings to the government.

The privatisation of non-core services of the justice sector has not as yet attracted substantial support in Namibia. The reason for this might be because the privatisation of public services has always proved to be controversial. The solution for the shortcomings and concerns of the justice sector does not lie in divesting the public sector of its responsibility for the administration of justice. To achieve greater consistency and quality service delivery across the justice sector, there should be better enforcement of minimum standards.

6 Article 63(2)(a) of the Constitution.

7 Angula, H.K. *The Annual Development Budget 2008/2009 to 2010/2011*. retrievable at <http://www.npc.gov.na/ndp3/foreword.pdf> (accessed 10 May 2009).

8 Werts, R.D & Tyler, B.C. *The Privatisation of Local Government Services: A Growing Trend*, <http://www.cas.sc.edu/poli/courses/scgov/Articles/Privatisatio.htm> (accessed 16 May 2009).

Financial Auditing Procedures

In 1999, South Africa adopted the Public Finance Management Act,⁹ which provides for the establishment of clear and comprehensive financial reporting and auditing procedures in government departments. These procedures have been hailed as generally effective and supportive of fiscal accountability and transparency. The fact that there is a right to access to information in the South African Constitution means that there is a constitutional obligation on the government to be open and accountable.

This provision is lacking in the Constitution, and it has taken a lot of judicial activism for some of the established rules of secrecy to be broken down. For instance, in *S v Nasser*¹⁰ the rules of disclosure by the prosecutor in criminal cases were challenged by the defence to obtain more disclosure from the state. This, of course, was made redundant by the legislature through the enactment of the Criminal Procedure Act.¹¹ Regrettably, for reasons that remain unclear, this Act has still not been implemented. The need for legal certainty dictates that this matter be finalised.

In Namibia, Article 127 of the Constitution establishes the Office of the Auditor-General, whose main function is to audit the State Revenue Fund and to perform all other functions assigned to him or her by the government or by an Act of Parliament, as well as to report annually to the National Assembly. The Auditor-General is independent of the executive in that he or she is not a member of the civil service.¹² The Auditor-General is appointed by the President on the recommendation of the Public Service Commission, with the approval of the National Assembly,¹³ and may not be removed from office unless a two-thirds majority of all members pass a resolution to that effect on the limited grounds of mental incapacity or gross misconduct.¹⁴ The State Finance Act¹⁵ was adopted to give more scope to the mandate established under the Constitution.

The primary function of the Auditor-General is to audit the State Revenue Fund and to report annually

9 Act No. 1 of 1999.

10 1995 (1) SA 212 (Nm).

11 Act No. 25 of 2004.

12 Article 127(3) of the Constitution.

13 Article 127(1) of the Constitution

14 Article 127(4) of the Constitution.

15 Act No. 31 of 1991.

thereon to the National Assembly. Through the year, the office examines papers that touch on public expenditure. Again, as in the case of the Ombudsman, the Auditor-General's report is debated in the National Assembly and, like any other widely publicised document has a restraining effect on the executive's handling of public funds. An audit report for each ministry is conducted at the end of each financial year. The approach is that as and when the report on an office, agency or ministry has been completed, such report is produced on an individual basis and sent to the Ministry of Finance for tabling.¹⁶ The report of the Auditor-General is published on an annual basis and is also accessible to the public.

The problem with the report, however, is that it is general in its scope and does not highlight issues pertaining to each individual directorate. One can only assume that if no particular mention is made about an individual directorate, then all is well. Some of the general findings of the audit report include cases of unauthorised expenditure of significant amounts, some internal journals which were not submitted for audit, and statements of expenditure as required by the State Finance Act.

Access to Information about Budgets by Civil Society

In Namibia there is no clear platform for civil society to participate in the budget process. This applies for all government ministries, including the Ministry of Justice. A survey conducted by the International Budget Partnership Open Budget Survey in 2008 ranked Namibia as a country that gives little information on the budget to the public. According to the International Budget Partnership, Namibia provides incomplete information on budgetary and financial activities to the public. Namibia was ranked 47th on the basis that the government's feedback to the public on the spending of money is somewhat curtailed, making it difficult for the public to hold it to task if needs be.¹⁷ The notions that budgets must be formulated in secret; that non-government intervention can destroy the integrity

16 Office of the Auditor General, *Audit Report on the Accounts of the Ministry of Justice for the Financial Year Ended 31 March 2004*, retrievable at http://www.oag.gov.na/reports/343_Justice_2003_04.pdf (accessed 12 May 2009).

17 Heita, D. "Civil Society Wants Broader Participation in National Budget," *New Era*, 17 February 2009.

of the budget envelope; and that it is the government's mandate to produce the budget internally in a closed process, constitute, as pointed out by Krafchik, a powerful myth.¹⁸ Obtaining information about the budget is not a privilege, but a right. Even though the right to access to information is not enshrined in the Constitution, it is provided for under the African Charter on Human and Peoples' Rights¹⁹ and is thus enforceable in Namibia in terms of Article 144 of the Constitution. Civil society organisations must therefore demand greater transparency and accountability in the handling of public funds.

According to Heita, civic organisations want to be actively involved in the formulation of the national budget to ensure that it addresses crucial developmental aspects and reflects the priorities of communities.²⁰ As from 2010 the civic society has been meeting with communities to solicit priorities they wish to have addressed in the national budget. The opinions expressed will be forwarded to the Ministry of Finance for consideration in the national budget. The Namibia Non-Governmental Organisation Forum (NANGOF) convened a conference in February 2010 with the purpose of critically assessing the budget process from its preparatory phase to the presentation stage as well as to provide in-depth knowledge about the budget process and to develop capacity within civil society to participate in budget analysis.²¹

Namibia is not the only country where NGOs are taking the initiative to take part in the national budget process. Uganda's NGOs have also formed a coalition aimed at engaging in budget advocacy work.²² This forum has made efforts to ensure that the budget process is transparent, inclusive and accountable. Furthermore, it ensures that critical information for effective participation by stakeholders is made available to the forum and other interested parties. They have also made progress in ensuring that budgets are pro-poor and adhere to results-oriented budget management principles.

18 Krafchik, W. Can civil society add value to budget decision-making? A description of civil society budget work. International Budget Project, retrievable at http://www.sasanet.org/curriculum_final_ba_budgetadvocacy_latest.jsp (accessed on 20 December 2009).

19 See Article 9 of the African Charter on Human and Peoples' Rights.

20 Heita, D. Ibid

21 Ibid.

22 Uganda Debt Network, Civil Society Budget Advocacy Group (CSBAG), <http://www.udn.or.ug/CSBAG.html> Accessed 15 May 2009.

As in the South African case of *Moseneke and Others v The Master and Another*,²³ there has been litigation in Namibia that has impacted on planning and budgeting of the justice sector. In *Berendt v Stuurman*²⁴ the court invalidated several sections of the Native Administration Proclamation No. 15 of 1928 as being unconstitutional violations of the prohibition on racial discrimination contained in Article 10 of the Constitution.²⁵ This proclamation provided that the Master's office did not handle deceased estates of black people. The order that the legislation was unconstitutional culminated in the change of the law so that the Master was mandated to deal with all estates without differentiation. This order has necessitated that the Master set in place a consistent approach to all deceased estates, irrespective of the race of the deceased.

Furthermore, the *Mofuka v Mofuka*²⁶ case has also compelled the justice sector to re-evaluate the rules of marital property regimes, which were set along racial lines and geographical location, with the effect that parties to marriages were not aware of or were misinformed regarding their property regimes. The Ministry had to embark on reparatory measures to redress the problem already created.

Therefore, despite the ominous absence of government initiative to bring about more public participation, there are still other avenues for civil society to influence the national budget. It is conceded that this process is not satisfactory, but it is at least a step in the right direction.

23 2001 (2) SA 18 (CC).

24 2003 NR 81 (HC).

25 Hubbard, D. *Law, Race and Gender: Moving towards Equality in Marriage and Inheritance*, Legal Assistance Centre, retrievable at <http://www.lac.org.na/projects/grap/pdf/equality2003.pdf> (accessed on 10 May 2009).

26 2001 NR 318 (HC).

Court Administration

Prior to the attainment of nationhood in 1990 and the promulgation of the Constitution of the Republic Namibia, the courts of Namibia were an extension of the judicial system of South Africa. The Administration of Justice Proclamation No. 21 of 1919 established the High Court of South West Africa, and the Appellate Division Act²⁷ granted the Appellate Division of the Supreme Court of South Africa jurisdiction over decisions of the High Court of South West Africa to hear appeals ensuing from the judgments and orders of that court. 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 Africa²⁸. Amoo contends that this meant that the Appellate Division of the Supreme Court of South Africa maintained jurisdiction over the decisions of the South West Africa Provincial Division.²⁹

In 1990, the new government inherited the South African legal system. This system was a common law system similar to the British system. It was also an apartheid system, which did not allow blacks to be appointed to the High Court, and it also almost completely ignored areas outside of the capital. There were no permanent magistrates in the “homelands” prior to independence. After independence, this problem was quickly addressed.³⁰ In the provision of facilities for the administration of justice, neglected areas were targeted for special attention.³¹ Resident staff consisting of magistrates, prosecutors, legal clerks and interpreters were stationed in many places.³²

27 Act No. 12 of 1920.

28 By virtue of the Supreme Court Act, No. 59 of 1959.

29 Amoo, S.K. “The Structure of the Namibian Judicial System and its Relevance for an Independent Judiciary”, in Horn, N. & Bosl, A. Macmillan Education Namibia, Windhoek, 2008, p. 69-98.

30 In 1990, resident magistrates were posted at twelve offices.

31 By November 1996, resident magistrates were posted at twenty-five offices. There were eighteen magistrates in 1990 and by 1994 the number had increased to thirty-six. In 1996, this number reached fifty-five.

32 These places include *inter alia* Katima Mulilo, Rundu, Ondangwa, Oshakati, Opuwo, Okakarara, Khorixas, Outjo, Karasburg, Aranos, Luderitz, Karibib and Oranjemund.

Administrative Staff Training

A major recruitment drive was undertaken to bring in black Namibians who were previously excluded from playing a role in the administration of justice. This transition required the amendment and repeal of a number of legislative instruments to give effect to the new order. Legislative provisions also had to be made in order to empower the ministry to recruit staff from those Namibian nationals who had obtained their legal qualifications in countries other than South Africa.³³ In the recruitment of staff, due consideration was given to the implementation of the policy of affirmative action, as stipulated in Article 23 of the Constitution.

In keeping with the prime objective of improving the quality of the administration of justice in the country, the ministry initiated the creation of the Justice Training Centre (JTC) within the Faculty of Law of the University of Namibia. The centre is involved in in-service training of magistrates, prosecutors, court interpreters and legal clerks, amongst other things.

Currently, the procedure for employment is for interviews with prospective employees to be conducted, followed by in-house training for those taken in at entry level. In the High Court and the Supreme Court, the Registrar carries out the training of the staff. In addition, the staff members are sent to several training courses to enhance their skills. Sometimes, experienced staff members are directed to give courses to the new employees. On-the-job training such as this, which is different from the procedures in South Africa and other countries, is more practical. South Africa has the Department of Justice and Constitutional Development Justice College, where specialised training courses are conducted for new ministry employees.

33 The Magistrates Courts Act was amended i.a. in 1990 in order to facilitate recruitment.

Administrative staff are public servants, and so the terms and conditions of their employment in the public sector is regulated by the Public Service Act,³⁴ as well as by the Public Service Code of Conduct. Where allegations have been made against any member of staff, an investigation is carried out and the findings are sent to the inspectors under the Ministry of Justice, at which point disciplinary proceedings commence. At this point, depending on the seriousness of the allegations, the member may be suspended. After the hearing, recommendations are made and a final decision is taken.

Systems for Record Keeping

In the High Court and the Supreme Court, each word uttered during the proceedings is recorded on a transcription machine. Judges take short notes and the litigants also take notes, although these are not used by the court. After the court session, a transcription company outsourced by the Directorate types up the record and makes it available to the litigants and the public, at a cost. All Supreme Court judgments are transcribed, but High Court cases are only printed if they are in the public interest. The rest are typed at the request of any interested party. Further restrictions apply to cases where a minor of less than eighteen is a witness, or where the Secrecy Act applies.

However, most records in Namibia are not stored digitally. There are a number of initiatives underway aimed at bringing about digital storage. The Namibian Ministry of Justice Case Management System (NAMCIS) project, though aimed initially at the magistrates' courts, will extend to the High Court and the Supreme Court. This system has already been initiated in several magistrates' courts, generally successfully.³⁵ All Supreme Court judgments are posted on the Supreme Court website, which also contains the Acts and Rules pertaining to the High and Supreme Courts.

³⁴ Act No. 13 of 1995.

³⁵ These include the magistrates' courts in Swakopmund, Karibib, Usakos and Walvis Bay.

Legal professionals generally have little problem in obtaining the relevant information in regard to their case status. However, members of the public struggle to obtain information about their cases. Obtaining information proves to be more difficult where the party does not have the proper case number or is dealing with lower courts. It occasionally happens that files are temporarily or permanently misplaced or lost.

Physical Conditions and Facilities at Courts

Immediately after independence, a lot of energy was expended on rebuilding the court structures in Namibia. A number of court houses were constructed, including the Supreme Court, the Master of the High Court Building, and the Katutura Magistrate's Court, the Oshakati Magistrate's Office, the Uutapi Magistrate's Office, the Eenhana Magistrate's Office, and the periodic courts at Ruacana, Gibion, Mukwe and Henties Bay. Furthermore, a number of court houses were extensively renovated and expanded. These include the High Court building in Windhoek, the Magistrate's Court in Windhoek, the Ondangwa Magistrate's Court, the Omaruru Magistrate's Court, the Oranjemund Magistrate's Court, the Otjiwarongo Magistrate's Court, the Katima Mulilo Magistrate's Court, and the Karasburg Magistrate's Court.

According to the Strategic Plan of the Ministry of Justice, the High and Supreme Courts need attention. The High Court building is overdue for repairs ranging from painting up to major renovations, since the space it provides is inadequate. A feasibility study will inform the decision of whether to extend the current building or to build another High Court. Furthermore, the courts have not made the necessary changes to allow access to persons with disabilities.

In the Supreme Court and the High Court, the issue of stationery is not as acute as it is in the lower courts. This makes it difficult for the courts to deliver the services expected of them.

Generally, court buildings in Namibia are in a reasonable state of repair, especially the courts in urban areas. Certain rural courts tend to be antiquated, with little equipment such as computers, microfilms and office furniture. Although a lot of progress has been made in this regard, and further efforts are being made to improve court structures, there is still a need to provide structures for community courts.

Access to Legislation and Jurisprudence

In 1999 a joint venture between the Ministry of Justice and GTZ (Gesellschaft für Technische Zusammenarbeit / German Technical Cooperation) was entered into with the aim of computerising the Magistrates' Court Programme. This programme was adopted to enable the Ministry of Justice and the Office of the Prosecutor-General to electronically improve the interaction between the magistrates' courts and the cash hall staff. In addition, the NAMCIS project aimed to upgrade the Ministry's digital capacity, focusing on electronic case management and the creation of financial transactions, in order to deal with the increase in the workload and thereby improve the efficiency of court administration and case management.

Law reports are published annually by private publishers. While most legal professionals are able to obtain these reports, lay people are generally not financially able to purchase them. However, the law sections of all libraries, including the National Library, make provision for public access. Furthermore, newspapers give coverage to some of the high-profile cases in reader-friendly language. The courts must budget for the acquisition of manuscripts, and this competes with the needs of the office.

Access to Expert Commentary

Compared to South Africa, only a small number of legal textbooks have been published in Namibia. The tendency has therefore been to rely on South African jurisprudence and legal textbooks. However, more Namibian academics are beginning to publish, and a Namibian Law Journal was recently launched with the aim of giving expert commentary on the laws of Namibia. Once these books are published, it is compulsory to donate some copies to libraries, so that they are updated on the latest local publications. This system works best in the capital, especially for the High Court and the Supreme Court.

However, the courts outside the capital are at a disadvantage, as they have no access to the internet or recent publications. Furthermore, budgetary constraints make it even more difficult for the court libraries to be updated at reasonable intervals.

Independence, Accountability, Effectiveness and Conduct of Judges and Lawyers

The separation of powers between the judiciary and executive is firmly entrenched in the Constitution and is also well recognised in Namibian case law. In general, this principle has been well respected. The most serious threat to judicial independence is the occasional call for the removal of judges following unfavourable judgments given against the state. One such call was recently made by the Secretary of the National Union of Namibian Workers, who was irked by a Supreme Court judgement in which a law seeking to ban the entire labour hire system in Namibia was struck down as unconstitutional. However, to date there has been no account of direct interference with the independence of the judiciary by the executive.

The Namibian judiciary has also experienced racial and gender transformation in recent years. Whereas, upon independence in 1990, Namibia started off with an all-white, all-male Bench of full-time judges in the country's two highest courts, for the first time ever, the country now has three women serving as High Court judges.³⁶ The position of Chief Justice is also held by someone from the previously disadvantaged (black) community.

Appointment, Promotion and Dismissal of Judges

The Judicial Service Commission (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.³⁷

36 Naomi Shivute, wife of the Chief Justice, and Marlene Tommasi were appointed as permanent judges of the High Court effective 1 December 2009.

37 See Ruppel, O.C. "The Role of the Executive in Safeguarding the Independence of the Judiciary". In. Horn, N. & Bösl, A. (Eds.). *The Independence of the Judiciary in Namibia*. Windhoek, Macmillan, p 216.

The JSC makes recommendations to the President regarding the appointment (Article 82) or removal (Article 84) of judges. Article 82 of the Constitution provides that:

All appointments of Judges to the Supreme Court and the High Court shall be made by the President on the recommendation of the Judicial Service Commission and upon appointment Judges shall make an oath or affirmation of office in the terms set out in Schedule 1 hereof.

and that:

All Judges, except Acting Judges, appointed under this Constitution shall hold office until the age of sixty-five (65) but the President shall be entitled to extend the retiring age of any Judge to seventy (70). It shall also be possible by Act of Parliament to make provision for retirement at ages higher than those specified in this Article.

In addition the system of appointing acting judges has greatly assisted the development of the country's young jurisprudence and eased the burden of the High Court's caseload. However, in the long term, it is not a healthy situation that so few lawyers are able and willing to serve on the bench on a permanent basis; thus, the courts rely on the appointment of acting judges from time to time. There may be a perception that such judges, without the security of long tenure, are less likely to be fully independent in the execution of their functions on the bench.³⁸

A judge may be removed from office before the expiry of his or her tenure only by the President acting on the recommendation of the JSC.³⁹ Judges may further only be removed from office on the grounds of mental incapacity or for gross misconduct,⁴⁰ and following an investigation by the JSC into or not the

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

39 Article 84(1) of the Constitution.

40 Article 84(2) of the Constitution.

judge should be removed from office on such grounds.⁴¹ Thus, no other body or group of persons may recommend the removal of judges at any level of the judiciary.

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 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 Act⁴² regulates, *inter alia*, the representation, tenure of office and functions of the JSC and its members.⁴³ Section 5 of the Act points out the need for a balanced structuring of judicial offices.

The only slight executive intervention is the involvement of the Head of State. This can in any event not be seen as a purely executive intervention, since the President acts on the recommendation of an independent commission and not of his own accord, as a member of the executive. Through this mechanism, therefore, the procedures of appointment and dismissal of judges in Namibia effectively guarantee the independence of the judges and the judiciary at large.

The Constitution does not provide for the basis upon which promotion of judges is to be made. Such promotion is made by the President on the recommendation of the JSC. It is believed that such appointments are merely made as an offer that needs to be accepted by the judge to take effect. Namibia's higher courts have been spared the fate of other countries in the Southern African Development Community region, where members of the legal fraternity consistently express grave doubts about the competency and impartiality of judges. In other words, although there was some unease at first, the administration of justice in the Supreme Court and the High Court appear to have been relatively

41 Article 84(3) of the Constitution.

42 Act No. 18 of 1995.

43 Mbahuurua, V.H. 2002. "The Executive Power in the Namibian Constitution: Percept and Practice". In Hinz. M.O., Amoo.S.K. & Van Wyk, D. (Eds.), 2000. *The Constitution at work: 10 years of Namibian nationhood*. Windhoek: university of Namibia, p 56.

smooth and uncontroversial. However, this does not necessarily mean that the perceptions of some influential people and opinion makers have changed.

In Namibia, the implementation of an affirmative action policy in the judiciary as well as the maintenance of a balance between the expertise, experience and integrity of the judiciary have been issues of central concern. Whenever there has been a qualified person from previously disadvantaged groups, this person would be considered and appointed. Judges from beyond Namibia's boundaries have also been considered and appointed. The manner of appointment and security of tenure of judges are known to be among matters of the utmost importance in the enhancement of the independence of the judiciary. In Namibia, the remuneration of judges is dealt with under the Judges Remuneration Act⁴⁴ and the Judges Pension Act.⁴⁵ Whereas the provision for pensions is an issue of a long-term nature, salaries and allowances are of immediate concern. As with appointments, Section 5 of the Judges Remuneration Act provides that the JSC needs to be consulted by the President when it comes to making regulations governing the remuneration of judges. It has been pointed out that the President, in consultation with the JSC, has been mindful of the changes in the cost of living and has reviewed the terms and conditions once every five years. Nevertheless, the remuneration and conditions of service do not seem to attract legal practitioners to high legal offices, and many senior lawyers are reluctant to put their names forward for consideration. The author is drawn to the conclusion that the remuneration rate has not changed sufficiently to cater for the anticipated living standard and status of judges within the community.

A local newspaper published a list of the country's highest earners, who became known as the country's "fat cats".⁴⁶ If what we read is true, the earnings of judges do not come anywhere near what the so-called "fat cats" earn. In view of the importance of the constitutional position judges occupy, and the range of the duties and functions they perform, it is debatable whether the difference in earnings between

44 Act No. 18 of 1990.

45 Act No. 18 of 1990.

46 *The Namibian*, 11 August 2000.

the judges and the highest earners can be justified. The Annual Report of the Ministry of Justice (1998/1999) acknowledged the inadequacy of remuneration for judges thus:⁴⁷

The backlog of cases in the High Court roll is still a major concern ... It cannot be emphasized enough that more judges must be appointed to deal with increased criminal cases. Good working conditions must be created to keep and to attract competent and experienced staff members to deal with this serious problem.

The chronic backlog, especially in criminal cases, experienced in Namibia's courts is directly attributable to the current size of the judiciary. However, given the relatively low salaries earned by judges and magistrates, it is hard to imagine that senior or aspiring lawyers would leave their lucrative practices to join the bench and/or the ranks of magistrates on a permanent basis. Needless to say, this situation can best be addressed through a drastic increase in the remuneration packages of the judiciary, so as to attract the much-needed expertise and services.

Independence and Standards of Conduct of the Legal Profession

The piece of legislation that regulates all matters relating to the legal profession and legal practitioners in Namibia is the Legal Practitioners Act.⁴⁸ Even if there is no explicit provision with regard to the independence of the legal practitioners, the Act *inter alia* deals with admission and enrolment;⁴⁹ discipline and removal from practice;⁵⁰ and restoration to the roll.⁵¹ In terms of Part II of the Act, legal practitioners have certain privileges and restrictions, and can be charged with offences in connection with practice. Amongst other things, a legal practitioner may not practice on his/her own account or in partnership unless he/she holds a fidelity fund certificate or is exempted from holding such a

47 Supra.

48 Act No. 15 of 1995.

49 Section 3 of the Legal Practitioners Act.

50 Part IV of the Legal Practitioners Act.

51 Section 38 of the Legal Practitioners Act.

certificate; contravention of this stipulation shall guarantee liability on conviction to a fine not exceeding N\$200 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment.⁵²

In terms of the Act, legal practitioners are not exempted from civil liability from their actions improperly undertaken in the exercise of their official duties. On the contrary, the Act penalises such actions. Legal practitioners derive their powers and duties from the Legal Practitioners Act, and they are required to act in accordance with the Act in the exercise of their official duties. In terms of Section 33 of the Act, unprofessional, dishonourable or unworthy conduct on the part of a legal practitioner includes, amongst other things, willfully misleading the court, deceiving or misleading a client, practising without a fidelity fund certificate, and acting or purporting to act for any person without proper instructions from that person.⁵³

In addition, Section 41 of the Act established the Law Society of Namibia, a self-regulating body which serves the profession and the public by promoting justice, protecting the independence of the judiciary and upholding the rule of law. Amongst the society's objectives is maintaining and enhancing the standards of conduct and integrity of all members of the legal profession.

Rule 21 of the Rules of the Law Society of Namibia governs the behaviour of legal practitioners. Its regulations relate *inter alia* to withholding the payment of trust money without a lawful excuse, engaging in unfair practices, overcharging clients, and engaging in touting practices.⁵⁴

52 Sections 20(1) and (2) of the Legal Practitioners Act.

53 See Sections 20, 21, 31 and 33 of the Legal Practitioners Act.

54 [http:// www.lawsocietynamibia.org/ rules.htm](http://www.lawsocietynamibia.org/rules.htm) (accessed on 13 May 2009).

There have not been many reported cases in Namibia involving misconduct by lawyers or the involvement of judicial officials in corruption, or other related instances of misconduct. According to a survey conducted by Afrobarometer in Namibia in 2006, 41% of the respondents interviewed thought that police officers were more involved in corruption than lawyers and judicial officers.⁵⁵

Allegations of misconduct by legal practitioners are handled by the Legal Ethics and Investigatory Committee in terms of Rule 22 of the Rules of the Law Society of Namibia. Under Rule 22, the Committee is empowered to investigate the conduct of any member which in its opinion warrants disciplinary action and to advise the Council accordingly.

A recent and arguably the most prominent case to date that cast a shadow over the integrity of the judiciary was that involving former Acting Supreme Court Judge, Pio Teek. In January 2005 the Namibian Police announced that they had arrested the former judge on charges that he had abducted and sexually molested two girls, aged nine and ten.⁵⁶ Teek was the first ever member of Namibia's judiciary to be arrested and criminally charged.⁵⁷ He was suspended for misconduct, but before any action could be instituted against him, and amidst intensive public debate, the 58-year-old former judge requested the President to relive him of his duties. The Law Society subsequently recommended to the President that his request be granted, and the President complied forthwith.⁵⁸ Mr. Teek was eventually acquitted of all charges without ever being requested to enter the witness box to answer to the charges levelled against him. The South African judge presiding over Teek's trial, Judge Ronnie Bosielo, cited as reasons for his judgment the sloppy investigation work conducted by the police, the contradictory statements given by the two complainants, and what he termed a proven conspiracy on the part of the police to incriminate Mr. Teek.⁵⁹

55 The Afrobarometer is a research project aimed at garnering information in order to measure the political, social and economic state of affairs in Africa; the research is conducted through standardised country surveys in over 12 countries.

56 Menges, W. "Pio Teek retires as Judge in wake of rape charges", *The Namibian*, Windhoek, 17 October 2005.

57 Ibid.

58 Ibid.

59 Kuvée Kanguechi, "Judge's Findings See Plot against Teek", *New Era*, 1 August 2006.

The Judge also observed that the two girls came from dysfunctional families and referred to the older complainant as a “pathological liar”.⁶⁰ The state appealed against the judgment and the Supreme Court ordered that the Mr. Teek be retried; the retrial is ongoing.

The insensitive disposition displayed by Judge Bosielo towards the socioeconomic status and background of the two girls in the Teek case is regrettable, as it stereotypes children from disadvantaged families as being liars, cheats and unreliable members of society.

The judgement feeds the notion that justice is reserved for the rich and well-connected members of society. The views expressed by the majority of people who joined the public debate following the judgment made it clear that the finding of the judge in this case did not add to the public’s confidence in the judiciary. It is perplexing why the same judge who held such strongly disapproving views regarding the complainants was again tasked with presiding over the case. Court rules and protocols aside, the rules of natural justice dictate that someone who presides over a matter wherein he or she has a real or potential bias must recuse him/herself from the case in question. It is fundamentally important that justice should not only be done, but should manifestly and incontrovertibly be seen to be done.

Qualifications in the Legal Profession

The prerequisites for admission to practise as a legal practitioner in Namibia are detailed in the provisions of the Legal Practitioners Act. A candidate desirous of admission must satisfy the High Court on application that he/she is:

- *a fit and proper person;*
- *duly qualified (LLB degree); and*
- *a Namibian citizen, permanent resident, ordinary resident or a holder of an employment permit.*

A candidate is regarded as being duly qualified if he or she:

⁶⁰ Ibid.

- *is the holder of a degree in law from the University of Namibia or an equivalent qualification in law from another recognised university; and*
- *has been issued with a certificate from the Board for Legal Education confirming that he or she has satisfactorily undergone practical training and passed the Legal Practitioners' Qualifying Examination.*

In regard to the latter requirements of having passed the Legal Practitioners' Qualifying Examination and having had practical legal training, the Act prescribes that a candidate must, subject to limited exceptions, attend one year of prescribed postgraduate studies offered at the JTC, hosted by the Faculty of Law of the University of Namibia. Government attorneys are exempted from undergoing the practical legal training after having worked in a related field within the public service for a certain number of years.

The quality of the practical legal training offered by the JTC, and that of graduates from the faculty of law in general, has been questioned in several quarters in recent years. The JTC training has been specifically criticised for being too theoretical and not equipping aspirant lawyers with the necessary practical skills to enter the legal profession. The B. Juris and LLB programmes offered by the University of Namibia (UNAM) have also been criticised for overemphasising theory at the expense of practice. Indeed, the Prosecutor General, Ms. Martha Imalwa, recently relayed her concerns and doubts regarding the quality of the UNAM law graduates joining her office to the Dean of the Faculty of Law. Following these discussions, the Faculty of Law commissioned an external consultant to assess the performance of and public perceptions regarding UNAM law graduates employed in the public and private sectors.

Clearly, the practical legal training offered by the JTC is in urgent need of review and upgrading. The Board of Legal Education, the statutory body charged with administering practical legal education,

should take immediate steps in this regard. The action taken by the Faculty of Law in this regard is applauded, and it is hoped that the report of the consultant will be well received. Without pre-empting the findings of the report, the author advises the Faculty of Law to review its current courses with a view to rendering them less theoretical. Students should be equipped with skills and knowledge that will enable them to apply the law in actual situations.

The Prosecutorial Authority

The Office of the Prosecutor-General in Namibia was established by Article 88 of the Constitution, which states:

There shall be a Prosecutor-General appointed by the President on the recommendation of the Judicial Service Commission ...

The Constitution dictates that no person is eligible for appointment as Prosecutor-General unless that person is legally qualified and entitled to practice in all courts in Namibia, and is a fit and proper person, by virtue of their experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office. The Prosecutor-General is not a political appointee. The Constitution is silent on the Prosecutor-General's terms of office. It can reasonably be assumed that the incumbent holds office in the same manner as the judges and the Ombudsman, i.e. until the age of 65, with the option for extension by the President to age 70. In Articles 84 and 94, the Constitution makes provision for the removal of judges and the Ombudsman from office. There are, however, no similar provisions for the Prosecutor-General.

Under Article 88(2) of the Constitution, the Prosecutor-General has powers:

- a. to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;
- b. to prosecute and defend appeals in criminal proceedings on the High Court and the Supreme Court;
- c. to perform all functions relating to the exercise of such powers;
- d. to delegate to other officials, subject to his or her control or direction, authority to conduct criminal proceedings in any Court;
- e. to perform all such other functions as may be assigned to him or her in terms of any other law.

In the matter of *High Stead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and others*,⁶¹ it was held that the discretion to decide whether to proceed with a prosecution or to withdraw is one of the fundamental functions in exercising a duty to prosecute. The Constitution makes the exercise of prosecutorial powers subject to its provisions in Article 88(2)(a). The Prosecutor-General can therefore not act in conflict with constitutional provisions.⁶²

The constitutional powers and legitimacy of the Prosecutor-General are complemented by the Criminal Procedure Act.⁶³ Section 2(1) of the Act makes it the Prosecutor-General's prerogative to institute criminal proceedings regarding all offences that fall within the jurisdiction of the Namibian courts. All such proceedings are to be instituted on behalf of the Namibian people and in the name of the state, save for private prosecution, as provided for in Section 13(1) of the Act. The Prosecutor-General has the power to take over private prosecution and continue with the prosecution. Section 6 of the Act sets out the powers of the Prosecutor-General to withdraw charges before the accused has pleaded, and to stop proceedings thereafter. A prosecution can only be stopped with the written consent of the Prosecutor-General or any other person authorised to do so. Section 61 of the Act sets out the Prosecutor-General's powers to summons an accused person and stipulates an admission-of-guilt fine.

61 1994 (1) SA 387 (C).

62 Indongo, L. "The uniqueness of the Namibian Prosecutor-General". In Horn, N. & Bösl, A. (Eds.). 2008. *The Independence of the Judiciary in Namibia*. Windhoek, Macmillan Publishers, p 100.

63 Act No. 51 of 1977 (the new Criminal Procedure of 2004 has not yet been implemented).

The Prosecutor-General also has the power to authorise the accused's release on bail, as provided for by Section 68 of the Act.

Independence of the Prosecutor-General

The independence of the Prosecutor-General was addressed in the case of *Ex Parte: Attorney-General, Namibia. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*.⁶⁴ Article 87(a) of the Constitution states that the Attorney-General⁶⁵ exercises final responsibility for the Office of the Prosecutor-General. It is because of this provision that, in August 1993, the Attorney-General instructed the Prosecutor-General to withdraw the prosecution in a certain matter. The Prosecutor-General refused to follow this instruction and the Attorney-General successfully applied for a postponement of the trial in order to seek an interpretation of the relationship between the two offices from the Supreme Court. The court was asked to determine the constitutional relationship between the Attorney-General and the Prosecutor-General in respect of whether the Attorney-General had the authority to:

- *instruct the Prosecutor-General to institute proceedings, decline to prosecute or terminate a pending prosecution in any matter;*
- *instruct the Prosecutor-General to take or not to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution; and*
- *require the Prosecutor-General to keep the Attorney-General informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.*

⁶⁴ 1998 NR 282 (SC).

⁶⁵ The Office of the Attorney-General was established in terms of the provisions of Article 86 of the Constitution. The Attorney-General is the principal legal adviser to the government. In terms of the provisions of Article 87 of the Constitution, the Prosecutor-General falls under the Office of the Attorney-General. The Prosecutor-General is the prosecuting authority of the state. Another office which falls under the Office of the Attorney-General is the Government Attorney who is responsible for defending the government in civil cases, and handling civil cases on behalf of the government.

After considering the different models in the commonwealth for the arrangement of the functions of the Attorney-General and the Prosecutor-General, the court held that the Namibian Attorney-General's appointment was a political one and that his or her functions were executive in nature. It also held that the Prosecutor-General, on the other hand, was not a political appointee and exercised a quasi-judicial function. The court further held that the fundamental rights and freedoms would not be protected if a political appointee were allowed to dictate which prosecutions were to be initiated or terminated, or how they should be conducted. In addition, the court held that such a position would not be in accordance with the ideals and aspirations of the Namibian people, taking into account the nation's historical background. The Court accordingly ruled that:

There is nothing in the Namibian Constitution that makes the Office of the Prosecutor-General subject to the superintendence or direction of the Attorney-General. The Office of the Prosecutor-General, appointed by an independent body, should be regarded as truly independent subject only to the duty of the Prosecutor-General to keep the Attorney-General properly informed so that the latter can exercise ultimate responsibility for the office. In this regard, it is my view that final responsibility means not only financial responsibility for the Office of the Prosecutor-General but it will also be his duty to account to the President, the Executive and the Legislature therefore.

The court held that the Constitution created an independent Prosecutor-General, on the one hand, while enabling the Attorney-General to exercise responsibility for the Office of the Prosecutor-General, on the other. The above conclusion was viewed as the only one which reflected the spirit of the Constitution. By this decision, the Supreme Court clearly defined the relationship between the Prosecutor-General and the Attorney-General. This decision also cemented the fact that the Prosecutor-General was independent and not subject to any superintendence or direction by any body or organ.

Access to Justice

The right to a fair public hearing of any dispute is constitutionally entrenched and also outlined in several international and regional treaties that Namibia has ratified. Civil society organisations have engaged in human rights promotion campaigns to complement the educational programmes conducted by the Office of the Ombudsman. The financial cost of legal proceedings remains a significant barrier to realising access to justice in Namibia. In particular, the costs of legal professional services remain unaffordable for the average Namibian. Despite this, a culture of *pro bono* work amongst legal practitioners remains glaringly absent. The legal profession is also generally opposed to the use of paralegals.

In 2007, Parliament passed the Labour Act.⁶⁶ This Act introduces mandatory alternative dispute resolution procedures as an alternative means to access justice at the workplace. The trade unions welcomed the change introduced by the law in this regard. In 2003, Parliament also passed the Community Courts Act⁶⁷ as a practical forum for dispute resolution, especially in rural areas. However, this Act has yet to be implemented.

Knowledge of Rights

It is difficult to assess the degree of awareness of human rights on the part of the nation at large. No systematic surveys or studies have “measured” levels of awareness of human rights. Suffice it to say that at this point there is a significant gap between the awareness levels in urban areas and rural areas. This is a development that is not peculiar to Namibia – indeed, it reflects the general situation in Africa.

In a 2004 survey on the level of public awareness of democracy, Namibia was rated as having an awareness of 65%, as compared to Malawi which rated 88% in the same survey.⁶⁸ It was speculated

⁶⁶ Act No. 11 of 2007.

⁶⁷ Act No. 10 of 2003.

⁶⁸ The survey covered Botswana, Ghana, Malawi, Namibia, Nigeria and Zimbabwe. See in this regard Bratton, M. & Mattes, R. “What ‘The People’ Say About Reforms”, in Gyimah-Boadi, E. (Ed.), *Democratic Reform In Africa: The Quality of Progress*, Lynne Rienner Publishers, 2004, p. 67.

that the diffusion of political ideas occurs more easily in geographically small countries with high population densities than in large, sparsely populated countries.

Nonetheless, one author found that “a vast improvement has been observed in terms of human rights awareness and enforcement – particularly of civil political rights – due to the work of NGOs in Namibia, and indeed in the region.”⁶⁹

The Ministry of Justice has the final responsibility for the promotion and protection of human rights on behalf of the government. In practice, most work on human rights education has been carried out by NGOs. A lot of activity has centred on women’s and children’s rights. At the most basic level, programmes have aimed to promote awareness and sensitivity to gender issues in government circles and amongst the general public. The radio and print media ensure that debate and discussion of the obstacles faced by women reach a wide audience.

The Legal Assistance Centre has worked on campaigns to educate the public on the rights of women and children, translating the UN Convention on the Elimination of Discrimination Against Women into Namibian languages.⁷⁰

Some of the notable projects embarked upon by civil society include an initiative supported by the Swedish International Development Agency (SIDA), which sought to ensure that women’s concerns and priorities were fully integrated into national planning process.⁷¹ The programme emphasises training in gender-sensitive planning for civil servants and networking among key ministries.

69 Namises, R. “Making Human Rights a Reality for Rural and Urban Communities: the Role of Government and Civil Society”, in University of Namibia, *Human Rights and Democracy in Southern Africa: Papers Presented at the Conference: Cultivating Co-operation amongst Human Rights Institutions in the UNITWIN Network in Southern Africa*, New Namibia Books, Windhoek, 1998, p. 77-80.

70 USAID, “Women’s Inheritance and Property Rights”, Namibia, 30 July 2002, retrievable at <http://www.usaid.gov/na/news12.html> (accessed 7 April 2009).

71 FAO, “Women, Agriculture and Rural Development”.

Language barriers can be an obstacle to awareness.⁷² According to Gutto, there is a greater chance of success if human rights activists or jurists connect to the ordinary people and communities by using the terms and concepts that they ordinarily use, rather than the language found in instruments, which may be very useful to intellectuals for establishing conceptual reference points, but which is far removed from real experience.⁷³

Furthermore, while one cannot deny that the origins of human rights are to be found in Western civilisation, the methodology used to bring about awareness of human rights in that part of the world does not easily apply in an African setting. The statist ideology (the belief that human rights and freedoms are the duty of the state) which dominates the conception of human rights, freedoms and duties and which informs the belief that rights, freedoms and duties ought to be concerned only, or mainly, with relations between the state and the people, is therefore understandable. But such an understanding is incomplete, and is a contributing factor to alienating people from human rights. Human rights need to be reduced to find their proper context in Africa. For instance, Gutto notes that it is difficult for communities to comprehend what human rights entail if they are pigeon-holed to only apply between the state and the people. He states:⁷⁴

African Communities may find it difficult to comprehend rights and freedoms which only regulate their relations with the state and not among themselves. Transplanting ideas and usages developed in the specific historical experiences of other societies without taking into consideration the living reality of the communities we belong to, work in and endeavour to influence can only undermine the legitimacy of human rights.

72 See criticisms of simple language in human rights law: Davis, D.M. "The Unbearable Lightness of Language," *South African Journal on Human Rights* Vol. 9, (1993), South Africa, p. 311-316; Gutto, S.B.O. "The Unbearable Lightness of Language," *South African Journal on Human Rights*, Vol. 9, (1993), South Africa, p. 316-317.

73 *Infra.*

74 *Ibid.*

It is a truism that human rights require changes in some deep-rooted values and practices, and it is equally true that they are not limited to preventing state violence and authoritarianism. This sentiment is expressed in Article 5 of Constitution:

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 ...

Despite these challenges, it is clear that the courts are important for safeguarding and promoting rights. As contended by Brickhill, without the ability to resort to litigation, legal knowledge alone is not always sufficient to vindicate one's rights.⁷⁵ More often than not, when unrepresented, vulnerable persons facing legal proceedings are doomed to fail. This begs the question whether in their present form and mode of operation these courts may be viewed as institutions for ensuring that human rights are a reality in the life of communities. These considerations will be discussed in turn.

Physical Access to Courts

The distribution of courts in Namibia is not geographically balanced, leading to limited physical access to justice depending on which part of the country one resides in. Courts are mainly found in areas with high concentrations of economic activity. This anomaly is partly addressed through the system of circuiting Regional and High Courts.

Courts are not accessible to people with physical disabilities. The government does not require special access to public buildings for persons with disabilities, and as a result, most public buildings, including courts, remain inaccessible to them.⁷⁶ As matters stand, the only access that people with physical

75 Brickhill, J. "The Right to a Fair Civil Trial: The Duties of Lawyers and Law Students to Act Pro Bono," *South African Journal on Human Rights*, Vol. 21, (2005), 293-322.

76 Bureau of Democracy, *Namibia Country Reports on Human Rights Practices*.

disabilities have to courts, is to the ground floors of most courts. In order to access any other floors, they need to be aided. For instance, at the Katutura Magistrate's Court, if a physically disabled person has a hearing on the upper landing of the court, they have to be carried to that floor. The indignity of this cannot be overstated. In all fairness, the government has recognised its responsibility towards persons with disabilities. The new High Court building in Oshakati has been built with access for the disabled in mind. Plans under the Strategic Plan of the Ministry of Justice also encompass the renovation of the courts to allow access for the physically disabled.

Financial Access

The cost of litigation is very high in Namibia. This is especially true for civil suits; in Namibia, civil litigation is by and large within the reach of only a privileged few.

The plans to introduce a small claims court system for the country remains a lofty ideal. Nothing concrete has resulted from the announcement made by Cabinet in 2004 that it had given the Minister of Justice permission to table the Small Claims Courts Bill in the National Assembly. It cannot be overemphasised that small claims courts are an effective means of making justice more accessible.

Court Fees

Court fees for the filing of legal processes in a case are stipulated by statute. In general, court fees, in contrast to practitioners' legal fees, do not hinder access. In most courts there are procedures to apply for indigent rulings, which would exempt the party concerned from paying any court fees. In the District Labour Courts,⁷⁷ no charge was payable to open a case; likewise, no fees are payable for cases in the traditional courts.

⁷⁷ These courts have been repealed by the 2007 Labour Act. However, cases that were pending before these courts at the time the new law was implemented are still heard under the repealed Labour Act of 1992.

Corruption

Reports published in the newspapers make it clear that the court system has not been spared from the tentacles of corruption in Namibia. For instance, in 2006 four counts of corruption, three counts of fraud, three charges of forgery and a count of defeating or obstructing the course of justice were opened against a public prosecutor and two court officials. The trio allegedly solicited a bribe of N\$7 000 from the wife of an incest and rape suspect in May 2005, in return for granting the suspect bail.⁷⁸ The case is still to be heard by the High Court.

Cost of Legal Advice

The cost of litigation, as observed above, is very high. It follows that the major barrier to access to justice in Namibia remains the high costs of legal services, with a small proportion of the population being served by a high proportion of the trained legal professionals. There is general consensus that legal professional services are not affordable to the average person in Namibia. The country's Gini Coefficient of 0.6 ranks it as one of the world's most unequal societies, where 5% of the population control 70% of Gross Domestic Product. This divide has increased since independence in 1990.⁷⁹ From the above, it can reasonably be concluded that a significant number of Namibians cannot afford daily food, let alone legal advice.

Commenting on the cost of legal advice, Smith accused the legal fraternity of renegeing on their duty to uphold the law and maintain regulatory rigour, and of abusing their fiduciary positions of privilege.⁸⁰ He further states that the word and not the spirit, loopholes, ambulance chasing and obfuscation have become a mantra, and that standards have dissolved in a soup of cash. Smith added that the definition of human rights in Namibia is, almost without exception, dependent upon the money or political influence available to the accused.⁸¹

78 Werner Menges, "Prosecutor in the dock for corruption", *The Namibian*, 29 June 2006.

79 Ibid.

80 Smith, C. "Lawyers vs Justice" *The Namibian* 1 April 2009.

81 Ibid.

Of course, the proportion of cases being handled on a *pro bono* basis in Namibia is nowhere comparable to that in the United States of America, where the system includes tax advantages, amongst other things, as incentives for lawyers to take up such cases. Namibia might consider some of these incentives to boost a culture of *pro bono* representation.

In the past, Namibia followed the split-bar system, as was the case in South Africa. This system resulted in clients often having to pay for the professional services of both an advocate and an attorney, which had the effect of increasing the cost of legal representation. This was changed in 1995 when Parliament adopted the Legal Practitioners' Act, which brought about the integration of attorneys and advocates. Some of the reasons behind this move were to remove what was regarded as an artificial division of work between an attorney and an advocate, and also to render justice more affordable, as clients are no longer required to pay for the services of two people.

However, despite the good intentions underlying this endeavour, it does little more than scrape at the surface of the problem. The truth of the matter is that a great deal still needs to be done in the area of legal costs. Currently, the costs of legal advice are prohibitively high, and prevent the poor and vulnerable from accessing quality legal services.

Locus Standi

Namibian courts still take a restrictive stance on the issue of standing. The Constitution, regrettably, does not give clear guidance regarding the right to be heard in court. Courts have thus shown a general reluctance to allow for wide access to the judicial process. The effect of the strict rules on *locus standi* in Namibia have meant that representative organisations have on occasion been denied standing on the

basis that their interest, as opposed to that of their members, is insufficiently direct. Organisations such as the Legal Assistance Centre have thus been unable to institute class actions in the public's interest. It follows that for the right to personal liberty to be fully realised, it is necessary to loosen the stringent approach adopted on rules of *locus standi*.⁸² It is submitted that the strict rules of *locus standi* may very well go against the spirit of the equality provision in the Constitution. They fail to provide a platform to promote and vindicate public interest demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or socially or economically disadvantaged should not go unnoticed and unaddressed. The current position on *locus standi* thus has the effect of perpetuating substantive inequality at the expense of the poor and the indigent by denying them practical access to justice.

Community Courts

Community courts are a creation of the Community Courts Act, which also provides detailed procedures and requirements for the establishment and recognition of community courts in particular traditional communities.⁸³ The Act was drafted to formalise and give legislative recognition to the jurisdiction of the traditional courts that render essential judicial services to members of traditional communities who subject themselves to their jurisdiction and to 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. 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. Furthermore, an appeal against an order or decision made or given by a magistrate's court is to be heard by the High Court.

82 Carpenter G. 1987. *Introduction to South African Constitutional Law*. Butterworths, Durban, pp. 102-103.

83 For more details see Hinz, M.O. "Traditional Courts in Namibia – Part of the Judiciary? Jurisprudential Challenges of Traditional Justice", in Horn, N. & A. Bösl (Eds.) 2008. *The Independence of the Judiciary in Namibia*, Windhoek, Macmillan, 149-176.

However, the Community Courts Act has not yet been promulgated, and one can therefore not enforce the provisions of the Act. 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 necessary infrastructures, as well as with the lack of trained staff in the area of customary law. Another issue in the Act requiring clarification is whether the community courts shall be vested with both criminal and civil jurisdiction.

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

A community court is to be presided over by one or more justices appointed by the Minister of Justice. A justice of the community court is required to be conversant with the customary law of the area of his/her jurisdiction, and is not permitted to be a member of the Parliament, a regional council or a local authority council. A person will also not be eligible for appointment as a justice of a community court if he or she is a leader of a political party, regardless of whether or not that political party is registered under Section 39 of the Electoral Act.^{84; 85} The Minister of Justice has the power to remove from office any justice of a community court if such justice becomes subject to the disqualifications mentioned above, but only after consultation with the traditional authority concerned and after the Minister has afforded the justice concerned the opportunity to be heard. It is a requirement that this removal be published in the *Government Gazette*. A justice of a community court may appoint one or more assessors to advise the court on any matter to be adjudicated upon by the court in the proceedings in question,⁸⁶ but the opinion of the assessor is advisory, and not binding on the court.⁸⁷

84 Act No. 24 of 1992.

85 Section 8(1) and (s) (a) (b) (c) of the Community Courts Act.

86 Section 7(2) of the Community Courts Act.

87 Section 7(7) of the Community Courts Act.

The jurisdiction of community courts is provided for under Section 12 of the Community Courts Act, according to which, a community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognised by the customary law. This would, however, only be awarded if the cause of the action or any element thereof arose within the area of jurisdiction of that community court;⁸⁸ or if the person or persons to whom the matter relates in the opinion of that community court are closely connected with the customary law.⁸⁹ The importance of this section is that it makes it clear that the court's jurisdiction extends to civil matters. Nevertheless, it remains a matter of dispute to what extent these courts shall have both civil and criminal jurisdiction.

Since the community courts have traditionally administered justice over persons and in jurisdictions where the operating and functional law was/is customary law, cognisance was taken of this practice when the Act was being promulgated, and provisions were accordingly incorporated therein for community courts to apply customary law.

Sections 13 and 14 of the Community Courts Act provide as follows:

- 13) *In any proceedings before it, a community court shall apply the customary law of the traditional community residing in its area of jurisdiction: Provided that if the parties are connected with different systems of customary law, the community court shall apply the system of customary law which the court considers just and fair to apply in the determination of the matter.*

88 Section 12(a) of the Community Courts Act.

89 Section 12(b) of the Community Courts Act.

14) *If a community court entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, after having considered such submissions thereon as may be made and such evidence thereon as may be tendered by or on behalf of the parties concerned, it may, without derogation from any other lawful source to which it may have recourse, consult decided cases, text books and other sources, and may receive opinions, either orally or in writing to enable it to arrive at a decision in the matter: Provided that -*

- (a) any cases, text books, sources and opinions consulted by the court shall be made available to the parties; or*
- (b) any oral opinion shall be given to the court in the same manner as oral evidence.*

The Ascertainment of Customary Laws Project at the Human Rights and Documentation Centre seeks to ascertain and eventually publish all the customary laws of Namibia⁹⁰ in one collection. The implementation of the Community Courts Act will not be feasible for the courts without having such laws in writing, and 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. The ascertainment publication will satisfy the interest in such laws that has been expressed by various segments of society, and will facilitate an understanding of such law for current and future generations of traditional communities, Namibian society at large and the international community, not least for law students and the legal fraternity. The writing down of these laws facilitates discussion of constitutional issues and, where necessary, the bringing in line of customary laws with constitutional principles.

90 Ruppel, O.C. "The Human Rights and Documentation Centre at UNAM", in Horn, N. & Bösl, A. (Eds.). *Human Rights and the Rule of Law in Namibia*, Windhoek, Macmillan, 131-140.

Under Section 16 of the Community Courts Act, a party to any proceedings before a community court is obliged to appear in person, and may represent himself or herself or be represented by any person of his or her choice. According to Chief Herman Iipumbu⁹¹ of Uukwambi District, there are no specific requirements regarding who shall represent the parties to the dispute. However, such representation shall not be made by a person under the ages of 18, since such a person would not even be allowed to sit in on a community court session. Thus, it would appear from the provisions of the Act that legal practitioners may be able to represent their clients in community courts. If this is the correct interpretation of the Act, then the Namibian situation differs from that pertaining in some jurisdictions, where legal practitioners may not represent clients in similar courts. However, the Chief could not recall an instance where either party had been represented by a lawyer in a community court. This practice therefore respects the right to a fair trial as guaranteed by the Constitution, and the standards of due process can be said to have been maintained in the traditional community courts.

In terms of Section 26 of the Act, a party to any proceedings in a community court who is aggrieved by any order or decision of that community court may lodge an appeal in the magistrate's court:

A party to any proceedings in a community court who is aggrieved by any order or decision of that community court may appeal to the magistrates court: Provided that where the appeal is lodged against an order or decision of a community court recognized under section 2, and such court is vested with the jurisdiction contemplated in the proviso to subsection (5) of that section, an aggrieved party shall first exhaust his or her rights of appeal existing within such community court: Provided further that if such party is dissatisfied with the decision of the last-mentioned court he or she may appeal against such decision to the magistrate's court.

Furthermore, an appeal against an order or decision made or given by a magistrate's court is to lie to the high court.⁹²

91 Interviewed by Ambunda, L. on 11 May 2009, at Embandu, Uukwangula District in northern Namibia.

92 Section 29(1) of the Community Courts Act

It is clear that unlike a magistrate's court, a community court does not have a police force behind it, and so the enforcement of community court orders may be a bit unusual. During the discussion with Chief Iipumbu on this topic, it was made clear that by and large, court orders (i.e. where the court summonses a party to appear or makes an order for the payment of compensation) are respected. Since most of the compensation orders are made for the payment of cattle, of which the market value is now in the order of N\$800, if the wrongdoer cannot bring cattle, he/she may bring money, or both cattle and money, depending on the amount of the compensation to be paid. If the wrongdoer refuses to pay, especially in criminal cases, the traditional authority may refer the case to the magistrate's court. Once the case is put on the roll, the offender will be arrested and detained for the crime committed. This transfer of a case is accordingly based on the notion that, since the community courts do not have enforcement mechanisms, the cases are normally placed in the hands of state authorities for the enforcement of the orders, subject to the decision of the magistrate's court. Therefore, if the wrongdoer does not respect the court order granted by the community court, he or she may rest assured that arrest and detention will follow. According to the Chief, an understandable unwillingness to be arrested and detained forces wrongdoers to pay the compensation and, in effect, to respect the order of the community court.

Instead of approaching the community courts or the formal justice system for the resolution of a dispute, it is common that the parties initially try to resolve the dispute between their respective families by discussing the matter and reaching a compromise. If this should fail, citizens may also approach church leaders or the headman in their respective villages.

Informal and Traditional Justice

As in many, if not most African countries, the official, state-provided system of justice, with its institutions inherited from the colonial era, has struggled to respond to the needs and expectations of its citizens. Many prefer to use systems of customary law that draw their inspiration from pre-colonial structures. According to Bennett:⁹³

Functionalist anthropology has played a critical role in demonstrating that societies with no evident concern for law and legality could nonetheless function peacefully and harmoniously. Techniques of social control were simply different. Mediation and conciliation were essential processes for maintaining order and so too was the healing force of ritual, belief in which involved the co-operation of watchful ancestral shades.

Needless to say, the advent of human rights shakes the very core of African cultural existence, and its place on a pedestal has meant that some customs and practices that people ordinarily identified with have been made subordinate to the seemingly colonial law.

This is clearly reflected in Article 66(1) of the Constitution of Namibia, which states:

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

Most rural citizens first encountered the legal system through the traditional courts, which dealt with minor criminal offences such as petty theft and infractions of local customs among members of the same ethnic group. The law delineates which offences may be dealt with under the traditional system. The law defines the role, duties and powers of traditional leaders and provides that customary law is invalid if it is inconsistent with provisions of the Constitution or legislation.

93 Bennett, T.A. *Human Rights and African Customary Law under the South African Constitution*, p. 3.

Immediately after independence, the Ministry of Justice sought to restructure traditional courts, an endeavour that culminated in the establishment of community courts (see above).⁹⁴ However, as noted by Hinz,⁹⁵ despite ten years having been required to produce the much awaited legislation that was meant to repeal inherited South African legislation and harmonise certain areas of law applicable to traditional courts, as well as to translate the constitutional requirements into the law of the traditional courts, a further six years later the Act has not yet been implemented. It follows that after the repeal of the legislation establishing traditional courts, the current operation of the traditional courts is not backed by legislation.

Hinz maintains that apart from the Constitution, there is no piece of general law available to govern traditional courts. This is cause for concern, as it means that there are no set standards available to guide these courts. It follows that the practices of time immemorial will still find application with the effect that the dictates of the Constitution, especially with regard to the Bill of Rights, may not be given their due in these proceedings.

Is this the standard of access to justice that was envisaged by the framers of the Constitution? Clearly, despite the merit of being locally available, the gap between the formal courts and the traditional courts may more often than not mean that considerations hailed as important in the magistrates' courts are of no significance in the traditional courts. As noted by Bennett, "forms of government native to Africa had nothing in common with the Rechtsstaat, in the sense that legitimacy was not tested by a rule of law."⁹⁶ For instance, what might be used as evidence in a traditional court might be totally inadmissible in a magistrate's court.

94 Established by the Community Courts Act No. 10 of 2003.

95 Hinz, M.O. "Women's Rights and the Gap between Customary and Statutory Law", in Ruppel, O.C. *Women and Custom in Namibia: Cultural Practice Versus Gender Equality*, Macmillan Publishers, 2008, Windhoek, pp. 107-112.

96 Bennett, T.W. *ibid.*, p. 2.

One is tempted to question the legitimacy of the courts at the moment. The Constitution establishes the Lower Courts under Article 83 (1) of the Constitution, which provides:

Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures by such Act and regulations made thereunder.

What, then, is the source of authority for the decisions passed by the current traditional courts? On what basis, if any, would one appeal such decisions? In fact, is anyone bound by these decisions? The current position of the traditional courts is just the same as if they did not exist, because they have been stripped of their legitimacy. They have no legislation upon which to base their existence.

Furthermore, the fact that traditional court officials are not trained in human rights issues calls into question their competence to deal with these issues. However, if the state is to discharge its duty to provide access to courts, then the maintenance of traditional courts seems a prudent measure. Bennett notes that some of the merits of these courts are that they involve minimal costs, familiar language and simple procedures, and do not require professionally trained personnel.⁹⁷ These courts provide vital judicial services for the poorer members of the community who are also at a geographical disadvantage for approaching the current formal courts.

97 Bennett, T.W. *Traditional Courts and Fundamental Rights*, p. 164-5.

Mechanisms to Assert Rights outside the Court System

In 1996, the UN Committee on the Elimination of Racial Discrimination recommended the establishment of a human rights commission to deal with human rights cases and to assist in drafting state reports to international bodies.⁹⁸ The committee recommended that Namibia seek the counsel of the Office of the UN High Commissioner for Human Rights in South Africa with regard to the way forward. However, this recommendation has not been acted on. By way of comparison, South Africa has a well-grounded and prominent Human Rights Commission, which plays an active role in promoting and combating all forms of racial discrimination in South Africa. Its role in this regard was recognised by the South African Government, and it played a vital role in the compilation of the report to the Committee on the issue of racial discrimination. In Namibia, this work is attempted only by the Office of the Ombudsman, which, however, has a more limited mandate.

Office of the Ombudsman

The Office of the Ombudsman also plays significant role with respect to the protection of human rights. Although the office does not award monetary compensation or any other remedy, alleged victims of human rights violations may approach the office for legal advice and assistance.

In their quest for transparency, accountability and fair public administration, the framers of the Constitution deemed it necessary to create a popular and accessible extrajudicial institution to be permanently on the lookout for abuses and shortcomings of the administration. In Namibia, the Office of the Ombudsman is entrenched in the Constitution.⁹⁹ The institution of the Ombudsman stands for the protection of and respect for the rights of the individual, the promotion of the rule of law and the promotion and advancement of democracy and good governance.¹⁰⁰

98 Concluding observations of the Committee on the Elimination of Racial Discrimination: Namibia. 27 September 1996, CERD/C/304/Add.16.

99 For more detail see Ruppel-Schlichting, KGVE. "The Independence of the Ombudsman in Namibia", in Horn, N. & Bösl, A. (Eds.). *The Independence of the Judiciary in Namibia*. Windhoek, Macmillan, 271-290.

100 Kasuto E.; *The Institution of the Ombudsman in Namibia*; in Kasuto E. and Wehmhörner A. (Eds.), *The Ombudsman in Southern Africa: Report of a Subregional Conference*. Friedrich Ebert Stiftung, Windhoek (1996) p. 118.

Included in the Namibian Bill of Rights is a provision dealing with the enforcement of fundamental human rights and freedoms:¹⁰¹

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 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.

The most important legal provisions relating to the Ombudsman are to be found in Chapter 10 of the Constitution, as well as in the Ombudsman Act.¹⁰²

Even though in Namibia the formal state system is considered to be functioning well,¹⁰³ there is a need for informal mechanisms for conflict resolution. The Office of the Ombudsman has the function of a watchdog for the people who will hold the government accountable. The broad mandates of the Ombudsman do in the optimal case give the citizen an expert and impartial agent in a broad variety of matters without personal costs and bureaucratic hurdles to the complainant, without time delay, without the tension of adversary litigation, and without the requirement of professional legal representation.

Broadly speaking, the Ombudsman investigates complaints concerning violations of fundamental rights and freedoms and about the administration of all organs of government. Violations are corrected by attempting to reach a compromise between the parties concerned, by bringing the matter to the attention of the authorities, by referring the matter to the courts or by seeking judicial review.

101 Chapter 3 Article 25(2) of the Namibian Constitution.

102 Act No. 7 of 1990 (GG 32/1990 GN 11).

103 Ruppel O.C. (2008). "The Role of the Executive in safeguarding the Independence of the Judiciary in Namibia", in Horn, N. & Bösl, A. (Eds.). *The Independence of the Judiciary in Namibia*. Windhoek, Macmillan.

In order to provide an insight into the fields of activity of the institution of the Ombudsman in Namibia, its mandates will be introduced briefly prior to a more detailed discussion of the concept of independence.

The Office of the Ombudsman is intended to function as an independent body to ensure that citizens have an avenue open to them, free of bureaucratic tape and free of political interference.¹⁰⁴ Despite proactive functions such as contributions towards educational and developmental issues,¹⁰⁵ the Ombudsman has reactive functions as laid down in the Constitution and the Ombudsman Act. Several types of actions can give rise to complaints under the competence of the Ombudsman, including the failure to carry out legislative intent, unreasonable delay, administrative errors, abuse of discretion, lack of courtesy, oppression, oversight, negligence, inadequate investigation, unfair policy, partiality, failure to communicate, rudeness, maladministration, unfairness, unreasonableness, arbitrariness, arrogance, inefficiency, violation of law or regulations, abuse of authority, discrimination and all other acts of injustice.

Complaints may be submitted to the Office of the Ombudsman by any person free of charge and without specific form requirements. However, the Ombudsman may also conduct an investigation without having received a complaint if such investigation is about issues and authorities that would be within the institution's competency if they had been brought by a complainant.

104 Tjitendero M., Opening Address to the Subregional Conference on the Ombudsman in Southern Africa (see Kasuto E., Wehmhörnner A., *The Ombudsman in Southern Africa: Report of a Subregional Conference*. Windhoek (1996), p. 10.

105 The Office of the Ombudsman provides for outreach programmes and specific human rights education, in order to enhance public education. These programmes are run in collaboration with NGOs, community leaders, local authorities, etc. Several awareness campaigns have been and are being performed by the Office of the Ombudsman. Such awareness 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 the Ombudsman, in collaboration with NGOs, civil society organisations and the Council of Churches, established the Ombudsman Human Rights Advisory Committee consisting of 20 members of the aforementioned institutions, in order to create a forum for the exchange of dialogue regarding all areas of human rights. For details on specific awareness campaigns undertaken by the Office of the Ombudsman, see Walters J., *The protection and promotion of human rights in Namibia: The Constitutional mandate of the Ombudsman*, in Bösl A., & Horn N., *Human rights and the rule of law in Namibia*. Windhoek (2008): pp. 122 and 129.

The Office of the Ombudsman cannot investigate complaints regarding decisions of courts; it also may not assist complainants financially or represent a complainant in criminal or civil proceedings. Authorities that may be complained about include government institutions,¹⁰⁶ parastatals,¹⁰⁷ local authorities and – in the case of the violation of human rights or freedoms – private institutions and persons.¹⁰⁸ In 2006 complaints were brought against the City of Windhoek, the Government Institutions Pension Fund, several ministries, the Namibian Police, Namibian Wildlife Resorts, the Public Service Commission and the Prison Service, amongst others.¹⁰⁹ Within the group of complaints against government institutions, statistical breakdowns for the years 2004 – 2006 show that approximately 65% of these complaints relate to the Ministry of Justice, the Namibian Police or prison-related matters.¹¹⁰

The Ombudsman has relatively broad mandates and corresponding powers.¹¹¹ According to Article 91 of the Constitution, the mandates of the Ombudsman in Namibia mainly relate to four broad categories: human rights; administrative practices; corruption;¹¹² and the environment.

106 E.g. ministries, the National Assembly, the National Planning Commission, the Attorney General.

107 E.g. Nampower, Telecom, Namwater, Nampost, NBC.

108 Gawanas, B. *Office of the Ombudsman 1990-2000*, in Hinz M.O., Amoo S.K. van Wyk D. (Eds.), *The Constitution at work – 10 years of Namibian nationhood*. Windhoek (2002), p. 104.

109 2006 Annual Report of the Office of the Ombudsman, p. 27ff.

110 2006 Annual Report of the Office of the Ombudsman, p. 35.

111 For more details on the mandates of the Ombudsman see Ruppel O.C. and Ruppel-Schlichting K.G., *Between Formal and Informal Justice? The mandate of the Ombudsman in Namibia*, in Hinz M.O., Traditional and informal justice systems (forthcoming publication (2009)).

112 According to an Article in The Namibian newspaper on 16 September 2008, however, Cabinet intends to amend the Constitution to remove the word “corruption” from the list of functions of the Ombudsman in Article 91. The government had allegedly been working secretly to change a number of provisions in the Constitution – including criteria for citizenship, reducing the terms of regional councils, and removing the job of fighting corruption from the Office of the Ombudsman, according to a Cabinet letter dated 11 November 2007. For more details, see <http://www.namibian.com.na/2008/September/national/08297C131F.html> (last accessed 21 September 2008). In this regard, the Ombudsman would be stripped of some of his/her constitutional powers to deal with corruption and/or its manifestations. The intention behind this proposed amendment might be to avoid a duplication of functions between the Office of the Ombudsman and the Anti-Corruption Commission of Namibia. The latter was established by the Anti-Corruption Act, No. 8 of 2003, and inaugurated early in 2006. Thus, processing of all corruption-related complaints would ideally be centralised with the Anti-Corruption Commission. See Ruppel-Schlichting, K.G.V.E. “*The Independence of the Ombudsman in Namibia*”. In Horn, N. & Bösl, A. (Eds.), 2008. *The Independence of the Judiciary in Namibia*. Windhoek, Macmillan publishers, p. 274.

In addition to the traditional function of investigating complaints and grievances from citizens about maladministration, the Namibian Ombudsman has wide terms of reference. Mbahuurua¹¹³ points out that the functions of the Ombudsman range from investigating human rights violation (which allows the office to serve as a human rights commission) to investigating abuses of power by government functionaries, as well as harsh, insensitive and discourteous treatment of citizens by the same. The Ombudsman fulfils this watchdog role by giving independent attention to complaints about unfair treatment of citizens by the government or its administrative functionaries.

The Office of the Ombudsman cannot investigate complaints regarding decisions of courts; it also may not assist complainants financially or represent a complaint in criminal or civil proceedings. It is merely equipped with wide powers to give effect to findings and recommendations. In 2006, a total of 2 060 complaints were brought to the Office of the Ombudsman, compared to 2 257 the previous year. A statistical analysis of complaints according to the Ombudsman mandates shows that in 2006, 1 286 of these complaints related to the mandate of maladministration, 177 to human rights violations, 39 to corruption and only two to environmental matters. Basic human rights violations cover racial discrimination, wrongful arrest and detention, assaults, ill-treatment of prisoners and loss of their property, and undue delays in finalising appeals to the High court.¹¹⁴

Opportunities for Improving Access to Justice

According to Budlender,¹¹⁵ the existence of rights and correlative positive duties does not mean that they are unlimited in their extent. No right is unlimited.

113 Mbahuurua, V.H., "The executive power in the Namibian Constitution: Precept and practice" in Manfred O. Hinz, Sam K. Amoo & Dawid van Wyk (eds), *The Constitution at Work. 10 years of Namibian nationhood*. (Pretoria: VerLoren van Themaat Centre/University of Pretoria, 2002). p 58.

114 Walters, J. "The protection and promotion of human rights in Namibia: the constitutional mandate of the Ombudsman". In Horn, N. & Bösl, A. 2008. *The Independence of the Judiciary in Namibia*. Windhoek, Macmillan Publishers, p. 122.

115 Budlender, G. *Access to Courts*, 121 SALJ 342, 339-358 (2004) p. 347.

The limitations are brought about by three main mechanisms: by qualifications which are expressly stated in the Constitution; by laws of general application, which meet the requirements of Article 22 of the Constitution; and by balancing with other rights which compete with the right in question.

The Constitution requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights in question.¹¹⁶ The provision for the right to access to courts is not limited or subject to any conditions. It is an absolute right. Furthermore, Article 22 of the Constitution authorises the state to adopt laws of general application where it intends to limit a right or freedom in the Constitution.

Notwithstanding the wisdom of the above provisions, the question is whether budgetary concerns should be used to justify the failure to provide access to courts. In the United States of America, the court in *Watson v City of Memphis*¹¹⁷ held that “it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.” However, as pointed out by Budlender,¹¹⁸ the US model is not a reliable basis for coming to any conclusion under the Constitution.

The Supreme Court of Canada has dealt with the question of whether cost is a valid ground for the limitation of rights. Their model is of importance as Canada also has a Bill of Rights couched with limitation clauses, like that in the Constitution. The position in Canada was succinctly stated in

*Schachter v Canada*¹¹⁹ where the court held that budgetary considerations cannot be used to justify a violation of the rights under the Charter. According to Weinrib:¹²⁰

116 See Article 95 of the Constitution.

117 373 US 528 (1963) at 537.

118 Budlender, G. *Access to Courts*, 121 SALJ 342, 339-358 (2004) p. 348.

119 [1992] 2 SCR, 679 at 709.

120 Weinrib, L. “The Supreme Court of Canada and Section 1 of the Charter” *Supreme Court Law Review* 469-486.

it is inherent in the nature of constitutional rights that they must receive a higher priority in the distribution of available government funds than policies or programs that do not enjoy that status. A different preference for allocation of resources cannot justify encroachment on a right.

The court found, however, that such considerations are clearly relevant once the violation is proved and the court has to determine what action should be taken thereunder. It was further stated in *Egan v Canada*¹²¹ that the government must be accorded some flexibility in extending social benefits, and that it is not realistic for the court to assume that there are unlimited funds to address the needs of all.

In South Africa, the courts have also been confronted by this problem. In *S v Vermaas; S v Du Plessis*¹²² the court had to deal with a case where the accused had not been granted legal aid due to the fact that measures had not been taken to allow for the exercise of that right. It was stated that:

the court is mindful of the multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform. But the Constitution does not envisage, and it will surely not brook any undue delay in the fulfilment of any promise made about it about a fundamental right.

The Constitution does not place any qualification on the right to access to justice. It follows that where the state does not fulfil the right of access to justice, it is prima facie in breach of its duties under the Constitution. The enquiry does not end here, however: the question then becomes whether this limitation of the right is constitutionally justified. Giving effect to Article 95(h), the Legal Aid Act¹²³ creates the framework and mechanism through which the state enables indigent people to obtain the services of lawyers at the expense of the state.

121 [1995] 2 SCR 513.

122 1995 (3) SA 292 (CC).

123 Act No. 29 of 1990.

Needless to say, there is a practical difficulty raised by an approach which accepts the lack of resources as a justifiable ground for limitation. Budlender¹²⁴ points out that there is a risk in making the realisation of constitutional rights dependent on budgetary allocations made by the government. Giving the government the power to determine whether a right will be limited, and if so to what extent, undermines the rights structure of the Constitution.

The above analysis suggests that most people are facing and will continue to face problems when seeking justice. However, this disconcerting scenario does not mean that the poor have no alternative means of confronting the violation of their rights. There are several formal and informal legal approaches that can be adopted to bridge the gap between the people and justice. Informal approaches are means not provided by the central administration which may nevertheless be used by the underprivileged in order to prevent or remedy the violation of their rights. In contrast, formal approaches include those offered and administered by the state.

Informal approaches have been adopted in many different countries, either due to the incapacity of the state to administer justice in certain areas, to the absence of the state or to the dissatisfaction with the ways in which the state was administering justice. In Peru, for example, many peasants and indigenous communities have tended not to use the public system of justice as they have found it to be too expensive and unreliable. They adopted alternative dispute resolution systems whereby the community formed neighbourhood groups whose duty was to adjudicate cases involving debt, family disputes and property rights. This phenomenon – if one can call it that – has grown rapidly all over the world since the 1960s. It was facilitated and brought to life by the ever-increasing numbers of lawsuits which have left the courts swamped and unable to cope with the pressure, resulting in long delays and, in some cases, procedural errors.¹²⁵

124 Budlender, G. *Access to Courts*, 121 SALJ 342, 339-358 (2004) p. 351.

125 The increase in lawsuits can be attributed to the unfolding human rights dispensation which saw changes in discrimination laws giving people new grounds for seeking accommodation for ill treatment. At the same time, the women's movement and the environmental movements were growing as well, and this led to another host of court cases.

In Namibia, dispute resolution of one kind or another existed in rural settlements well before colonisation.¹²⁶ Despite this widely known fact, when the colonial regime settled in, it refused to acknowledge the judicial function of traditional rulers as a means of dispute resolution, and an attempt was made to eradicate traditional dispute mechanisms in preference for the formal methods of dispute resolution as established in courts. However, the fact that the traditional rulers were not officially recognised did not affect their operation. The acceptance of the general populace still gave legitimacy to their operation and guaranteed their ongoing existence. This state of affairs prompted the formulation of legislation by the state in an effort to gain some control over the activities of the traditional leaders. Furthermore, despite the fact that the community courts have dragged on for six years without being finalised, the traditional authorities are still operating, and as in the colonial past, deriving their legitimacy from the people themselves.

It follows, therefore, that the relative success of informal systems of justice provides lessons regarding how existing systems of formal justice can be improved. These experiences underscore the importance of constructing a system of justice that is close to the people – both socially and geographically. Fortunately, Namibia has long recognised the importance of such experiences and has left behind the erstwhile hostile attitudes to informal systems of justice through the adoption of community courts and similar proceedings under the Labour Act.

As for the formal system, it is contended that to remedy the present problems of access to justice, old structures need to be dismantled and new legal tools created. However, pending a thorough overhaul of the legal system – a major, long-term undertaking, indeed – its current deficiencies can to some extent be addressed by improving the knowledge of the poor, and by providing more comprehensive legal aid.

126 Steadman, F. *Settling Disputes in Communities*, in Pretorius, P. (Ed.). (2003). *Dispute Resolution*. Cape Town. Juta and Co, Ltd. p. 126.

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