

International human rights norms and standards: The development of Namibian case and statutory law

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Introduction

The founding fathers and mothers of the Namibian nation made international and human rights law binding upon Namibia, a part of the laws of the country.²⁸⁸ This means that all the human rights instruments ratified by Namibia are directly applicable in the Namibian legal system. No enacting law is necessary to make the UN human rights covenants and treaties applicable.

Namibia has ratified the following UN human rights instruments:

- International Covenant on Economic, Social and Cultural Rights (ratified 28 November 1994)
- International Covenant on Civil and Political Rights, including Optional and Second Optional Protocols (ratified 28 November 1994)
- Convention for the Elimination of all Forms of Racial Discrimination (ratified on behalf of Namibia by the UN Committee for Namibia on 11 November 1982)
- Convention for the Elimination of Discrimination against Women (ratified 23 November 1992); Optional Protocol (ratified 26 May 2000)
- Convention against Torture and other Acts of Cruel, Degrading and Inhumane Treatment or Punishment (ratified 28 November 1994)
- Convention on the Rights of the Child (ratified 30 September 1990)
- Optional Protocol: Sale of Children (ratified 16 April 2002)
- Optional Protocol: Armed Conflict (ratified 16 April 2002), and
- Rome Statute of the International Criminal Court (ratified 25 June 2002).

While the Constitution does not demand a legal framework for the treaties to be

²⁸⁸ Republic of Namibia. 1990. *The Constitution of the Republic of Namibia*. Windhoek: Ministry of Information and Broadcasting, Article 144.

implemented in Namibian domestic law, it is not always possible to obtain the results aimed at by the treaties without any domestic intervention.

The Torture Convention is a case in point. In terms of the Convention, all members are expected to criminalise torture. Torture has never been criminalised in Namibia. Instead, the prosecutorial authority has always opted to prosecute for assault with the intent to do grievous bodily harm – a common law crime. At first sight, this seems to be a perfect solution since assault with the intent to do grievous bodily harm is a serious offence, and the presiding magistrate or judge can impose a reasonably long prison sentence if the assault caused serious injuries.

However, the definitions of the two crimes are totally different. While *torture* often constitutes a physical attack, it is not always the case. The European Union guidelines for police officers include actions that do not even require that the body of the victim be touched. Long periods of interrogation while a suspect is not allowed to sit down; is deprived of sleep, food or water; playing loud music and shining bright lights while a victim is sleeping – all these constitute *torture*, but do not comply with the elements of *assault*. The best an accused can hope for once s/he is brought before court after an interrogation that constituted psychological torture is that any confession of admission made will be declared unconstitutional and inadmissible as evidence. Under Namibian law, the innocent victim of psychological torture will not be able to lay a charge against his/her torturer and the torturer will never give account for his/her actions in a criminal court.

Even when *torture* constitutes a violent attack that causes grievous bodily harm, there are still good reasons why the requirements of the Torture Convention will not be fulfilled by the prosecution of *assault*. Firstly, one of the reasons for specific anti-torture legislation is to emphasise the serious nature of the crime and to allow the presiding officer to impose a sentence that will reflect it. *Torture* and *assault* are never exactly the same crime. The intention of the torturer is obtain information by inflicting pain or discomfort. It is the evil of the torturer's intent and the psychological effects on the victim that demand special treatment of the crime.

The successful implementation of any treaty by a member state depends on good communication by that state to her people. Not only do state officials need to

know the boundaries of state power, the state's subjects also need to be well informed of their rights if those rights are to be protected. If the domestic courts treat torture simply as a serious form of assault, the public will never be educated to understand the severe effects of torture on the lives of those subjected to it.

The fact that the so-called War on Terror has led many old democracies to become soft on torture²⁸⁹ makes it even more important for all members of the Torture Convention to comply with the treaty's requirements and make torture a specific crime. If not, the examples of the powerful nations in their 'war on terror' will become the example the rest of the world follows.²⁹⁰

Since the treaties ratified by Namibia form part of Namibian law, is it not possible for the law enforcement agencies to apply the treaties and prosecute violators of the Torture Convention? However, since the treaty as an international instrument does not include a penalty clause, it cannot form the object of a criminal offence. The Committee against Torture has acknowledged that, despite the broad framing of Articles 4, 5, 10 and 11, the Torture Convention is not entirely self-executing; and even if a constitution allows for the direct effect of international law – as Namibia's does – a domestic legal framework is necessary for the implementation of the important aspects.²⁹¹

Thus, while the Namibian Constitution provides for the direct implementation of the human rights treaties, it seems almost impossible to implement those treaties

289 See e.g. the statement of US Secretary of Defense, Donald Rumsfeld, stating that the infliction of pain to obtain information does not constitute *torture*; or the recent statement of US Attorney General A Gonzalez that *torture* only occurs when the infliction of pain leads to organ failure. See Center for Constitutional Rights. 2006. *Report on torture and cruel, inhumane and degrading treatment of prisoners at Guantanamo Bay, Cuba*. New York, NY: Center for Constitutional Rights. The latest development in the US is a Bill that not only deprives so-called enemy combatants from the habeas corpus remedy, but also provides for legal torture.

290 See e.g. the response of Gen. M. Shalli to cross-examination relating to alleged torture during the military and police action following the failed secession attack on strategic places in Katimo Mulilo in northern Namibia. See Menges, W. 2003. "Shalli on warpath in treason case". *The Namibian*, 29 October 2003.

291 See Committee against Torture. [n.d.]. *Summary Records of the 28th meeting*, 29 April – 17 May 2002, and *Note 15, of the 30th meeting*, 28 April – 16 May 2003. Geneva: Office of the High Commissioner for Human Rights. For a discussion of the criminalisation of the offences listed in of Article 4 in domestic law, see Ingelse, C. 2001. *The UN Committee against Torture*. The Hague: Kluwer Law International, pp 337–360.

in the legal process without a legal framework. An investigation into the jurisprudence of Namibian courts since independence shows that human rights treaties have had almost no effect on the domestic legal processes. One searches in vain for an indication that the High and Supreme Courts give serious consideration to these instruments.²⁹²

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

Second-generation rights and the Constitution

The Constitution of the Republic of Namibia has an entrenched Bill of Rights.²⁹³ However, with a few exceptions,²⁹⁴ second-generation – or social and economic – rights are not included in the Bill of Rights. One needs to page through government policy to find economic and social rights.²⁹⁵ Even in Article 95 of the Constitution, important social and economic rights like the right to housing and clean water are only indirectly guaranteed.

In addition, while the Bill of Rights includes the right to legal representation of one's choice in the fair trial section (Article 12), the right to legal aid is only dealt with in Article 95(h). One needs to analyse Article 95(h) to understand why the two complementary Articles – the right to legal representation and the right to

292 A case in point is the now well-known *Frank* case. The Human Rights Committee, the treaty body of the International Covenant on Civil and Political Rights, and other treaty bodies have given several advisory opinions on the meaning of the word *sex* as a category for protection. Almost without exception it included *sexual orientation* as a category. However, the Namibian Supreme Court opted to ignore the jurisprudence of international human rights law and followed the narrow interpretation of the Zimbabwean courts, defining *sex* as a category as “men and women”. See *The Chairperson of the Immigration Selection Board v Frank & Another*, 2001 NR 107 (SC).

293 Chapter 3.

294 For example, the right to own property (Article 16), the right to primary education (Article 20), and the right to form unions and withhold labour (Article 21).

295 See Article 95, which lists the following: the right to equality, the right to public health, the right to form independent trade unions and other workers' rights, the right to fair and reasonable access to public facilities, the right to pensions, the right to social benefits for certain categories, the right to equal opportunities and legal aid, and the right to a living wage.

legal aid – do not follow one another immediately, but are separated by another 83 Articles:

- (h) *a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State; ... (emphasis added)*

Someone has the discretion to decide which cases qualify for legal aid with due regard to the resources of the state. While the constitutional fathers possibly never intended this Article to mean that long, difficult and expensive cases do not qualify for legal aid, this is exactly how the Legal Aid Board has interpreted it at times.²⁹⁶ This does not mean that the Board has not at other times made decisions that complied with a broad interpretation of the right to legal representation and legal aid.

In a recent case, the Legal Aid Directorate settled a case where one of the accused in the Caprivi high treason case refused to accept legal representation by a lawyer employed by the Directorate. The Directorate agreed to provide the accused with a private practitioner.²⁹⁷

Article 95(h) is a good illustration of how social and economic rights will be dealt with in terms of the Namibian Constitution. The government will always be tempted to hide behind a lack of resources when the granting of rights may place a financial burden on the state.

296 In the case of *State v Jacobs*, an unreported case of the High Court of Namibia in 2001, three accused were arraigned on counts of fraud. The case involved the transfer of money from the foreign exchange division of the bank to private accounts. The evidence was built around inter-bank memoranda, transfer documents, debit and credit notes, negotiable instruments, etc. Since the Board correctly envisaged that the trial would be long and that a senior counsel would be needed to deal with the mountain of paper evidence and the difficult factual issues, legal aid was denied. As a consequence, an accused who was eventually sentenced to 15 years' effective imprisonment had to handle her own defence for almost half of the trial. See also the Caprivi secession case, *Samboma & Others v The State*, an unreported case of the Supreme Court of Namibia, delivered on 7 June 2002, where the Supreme Court intervened when the Minister of Justice refused to consider legal aid for more than a hundred people accused of high treason.

297 The lawyer was both a prosecutor and a magistrate before he joined the Legal Aid Directorate.

The effect is clear: unlike the fundamental freedoms of Chapter 3, social and economic rights cannot be enforced under all circumstances. Their enforcement is dependent upon the availability of state resources. Consequently, although Namibia has ratified the Covenant on Economic and Social Rights, it will be extremely difficult for an aggrieved citizen to obtain a court order compelling the state to grant the social and economic rights emanating from that Covenant.²⁹⁸

Thus, despite the provisions of the Namibian Constitution, in practice, the direct application of UN instruments did not exclude the need for a legal framework to enforce the citizen's human rights.

The role of the courts in implementing human rights

Introduction

The courts almost immediately established themselves in the new constitutional dispensation. The early judgments caught the attention of the international community. In Africa, the courts were praised as a forerunner of constitutional interpretation in southern Africa.

Initially, the new spirit was clearly demonstrated in the criminal courts. In *State v Acheson*,²⁹⁹ the High Court refused a postponement for the state in the highly emotional case against the alleged murderer of the South West African People's Organisation (SWAPO) activist, Anton Lubowski. He was fatally shot in front of his house on Luxury Hill on 12 September 1998, a mere six months before independence.

Acheson, an Irish citizen, was suspected to have killed Lubowski or at least to have assisted the covert South African Civil Cooperation Bureau to do so. Lubowski joined SWAPO in 1984 and played an important role in the mobilisation of the internal struggle against apartheid and the South African occupation of Namibia. He also played an important role in making the necessary preparations for the return of the SWAPO leadership from exile. He also spearheaded the election campaign with others.³⁰⁰

298 The Legal Assistance Centre recently took a case of a woman in an informal settlement who did not have running water. The case against the City of Windhoek was settled before it went on trial, which is unfortunate for jurisprudential development.

299 *State v Acheson* 1991 (2) SA 805 (Nm).

300 (*ibid.*:820).

The murder of Anton Lubowski was a highly emotional event. It shocked the Namibian community, especially the SWAPO Party. Judge Ismail Mahomed, later to become the second Chief Justice of Namibia, reflected on the emotional aspects of the case (he was not the Chief Justice at the time):

Firstly, the murder of Adv. Lubowski is a matter of very fundamental public importance. It is common cause that Mr Lubowski was a prominent public figure who was a member of the present governing party and was during his lifetime generally perceived to be a vigorous proponent of the right of the Namibian people to self-determination and to emancipation from colonialism and racism – ideals which are now eloquently formalised inter alia in the preamble to the Namibian Constitution and arts [Articles] 10 and 23.

Referring to the difficult choice between the emotions of a nation and the constitutional rights of an accused, the Judge made the following comments on constitutionality:³⁰¹

The Constitution of a nation is not simply a statute that mechanically defines the structures of government and the governed. It is a ‘mirror reflecting the national soul’, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the process of the judicial interpretation and judicial direction.

When it became clear that the suspected co-accused – without whom the Acting Prosecutor-General did not want to start the hearing – were not going to be extradited by the South African authorities soon, the judge was confronted with the possibility to use the case to implement a constitutional approach to bail applications, or for that matter, criminal procedure, and suffer the consequences, or to toe the populist line.

The judge took the first option. He based his decision on a definite emphasis on constitutional rights. And he made it clear that the law required him –

... to exercise a proper discretion having [regard] not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990.³⁰²

301 (ibid.:814).

302 (ibid.:813).

If the Constitution becomes the foundation of all legal interpretation, especially in criminal procedure, the judge pointed out that the constitutional insistence upon the protection of personal liberty in Article 7, the respect for human dignity in Article 8, the right of an accused to be brought to trial within a reasonable time in Article 12(1)(b), and the presumption of innocence in Article 12(1)(d) are crucial to its tenor and spirit.³⁰³

In a case questioning the validity of corporal punishment, the Supreme Court had the first opportunity to express itself on a constitutional issue. It was confronted with the values of the Namibian people.³⁰⁴ The case had all the elements of high drama. The constitutional issue at stake was —³⁰⁵

... whether the imposition and infliction of corporal punishment by or on the authority of any organ of State contemplated in legislation is in conflict with any of the provisions of [Chapter] 3 of the Constitution of the Republic of Namibia and more in particular [Article] 8.

The Criminal Procedure Act, 1977 (No. 51 of 1977) and several other statutes made provision for whipping of both adult and juvenile male convicts.³⁰⁶ Proclamation 348 of 1967 gave authority to the Customary Courts to impose corporal punishment —³⁰⁷

in accordance with ... Native law and custom.

Schools in pre-independent Namibia followed a policy of corporal punishment that was approved by the Department of Education. The educational rules were often just a smokescreen. Namibian learners, including girls, received indiscriminate corporal punishment in the pre-independent era.³⁰⁸

303 (ibid.:813).

304 *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* 1991(3) SA 76 NmS 178 SC.

305 (ibid.:178).

306 See *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State*, pp 181–185 for the full list of legislation quoted by the court.

307 See sections 3(2) and 4(2).

308 The author's Grade 7 daughter attended the Jan Möhr Secondary School in Windhoek in the late 1980s, where both boys and girls as young as 11 received corporal punishment – an arrangement approved by the Parents' Committee.

The court stated at the outset that the question whether a specific punishment was inhuman or degrading was a value judgment:³⁰⁹

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

The emphasis on the “... norms, aspirations, expectations and sensitivities of the Namibian people” is somewhat complicated: how can the court establish exactly what constitutes these aspects of the Namibian soul? To say that these norms and values are expressed in the Constitution and national institutes does not really help. The Constitution gives us only general principles in this regard and, up until this Supreme Law’s inception, the national institutes expressed themselves by allowing corporal punishment.

Consequently, the question remains unanswered. For the rest of the judgment, the court evaluated several other jurisdictions with similar provisions in their constitutions as well as international instruments and some South African judgments; it came to the conclusion that corporal punishment was indeed degrading and inhuman.³¹⁰

Due process and the Constitution

Most of the constitutional issues in the Namibian courts dealt with the right to a fair trial and other civil and political rights. Article 12 of the Constitution of the Republic of Namibia guarantees a fair trial. Over the years, the South African government introduced amendments to the Criminal Procedure Act and other legislation to assist the state in its prosecutorial effort. The latter Act was made applicable to Namibia in 1977. The amendments and other legislation created presumptions, reversed the onus of proof, limited access by the defence to evidential material before the trial (maintaining that the Police docket was privileged), and allowing inadmissible evidence under certain circumstances.

309 *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State*, p 189.

310 (*ibid.*:189–193).

The adversarial legal system added to the vulnerability of accused persons. If one bears in mind that the new Criminal Procedure Act was promulgated in 1977, the political agenda becomes clearer. It was the time of the so-called Total Onslaught, a phrase used by the then State President, PW Botha, to emphasise the alleged international communist attack on South Africa and its policies.

Before 1977, the mandated territory of what was then South West Africa had a Criminal Ordinance under which criminal prosecutions took place. While the Ordinance and the Criminal Procedures Act were similar, there were a few substantial differences – the most important of which being that the independence of the Attorney-General³¹¹ (the head of prosecutions in Namibia) was guaranteed, unlike his South African counterparts, who worked under the authority of the Minister of Justice. With the escalation of the border war against SWAPO and the involvement of the South African Defence Force in Angola, the last thing the South Africa's military headquarters in Pretoria wanted was an Attorney-General that did not toe the government line in Windhoek. Consequently, in 1977, the Attorney-General of the High Court of South West Africa was placed under the authority of the South African Minister of Justice.

It was inevitable that the new emphasis on rights and the powers of judicial review would move criminal procedure to the main arena of constitutional jurisprudence. The court was the place where people experienced the power of the state. Therefore, it is not surprising that most of the constitutional cases in Namibia involved the rights of convicted criminals and alleged foul play in the course of the criminal investigation or the early stages of the trial.

In the courts, accused people felt the effects of a reversed onus, namely a presumption aiming at preventing the accused to exercise some of his/her most fundamental due process rights like the right to remain silent, the right not to incriminate oneself, or the right to know the full spectre of the state's case against one.

While the Constitution did not necessarily introduce rights unknown before independence, it lifted due process rights to a new level. Since the competent courts could review laws and strike them down if they were unconstitutional,

311 The South African/South West African Attorney-General was the equivalent of the post-independence Prosecutor-General in Namibia and the Director of Public Prosecutions in South Africa.

the legislator could no longer take away fundamental rights and maintain a false image of legality.

Consequently, the Bill of Rights became an important instrument in the hand of criminal defence lawyers to ensure a fair trial for their clients. The courts became champions of human rights. However, there was also a backlash. Victims of crime, the Police and the prosecutorial authority experienced the new dispensation as criminal-friendly. Criminals were let off the hook because of what the Police and prosecutors perceived to be technical constitutional issues. The escalation of crime also did not help to create a spirit of understanding and appreciation for the Bill of Rights amongst ordinary Namibians. The populist politicians were not helpful either. After every high profile criminal case they called for the death penalty or made statements to the effect that criminals had given up their human rights by committing crime.

The prosecutorial authority took a while to make peace with the Bill of Rights. Initially, the state vigorously opposed all applications of a constitutional nature. However, in 1999, at the Annual Conference of the International Association of Prosecutors in Beijing, China, the Namibian delegation signed the Human Rights Charter for Prosecutors.³¹²

Several elements of a fair trial were argued before the High and Supreme Courts in the first five years of independence.

There were, however, issues that only came on the agenda of the Namibian courts after they had been resolved in favour of accused persons before South African courts. A case in point is the right to be warned of the right to legal representation.

While the issue of legal representation was raised in several cases before 1997, it was only in *State v Kapika & Others*³¹³ in 1997 that the courts, following a

312 Myjer, E, B Hancock & N Cowdery (Eds.). 1999. *IAP Human Rights Manual*. The Hague: International Association of Prosecutors. See also Cowdery, N. 1999 (online). *The IAP Standards and their significance: President's message, 4th Annual Conference of the International Association of Prosecutors, Beijing*; available at http://odpp.nsw.gov.au/speeches/IAP%20STANDRADS%20paper_h.htm; last accessed 16 March 2008. Namibia was represented by Prosecutor-General Hans Heyman, Advocates LN Campher and L du Pisani, and Dr N Horn.

313 1997(1) NR 286 (HC).

ruling by Judge Froneman in South Africa, looked seriously at the right of an accused to be warned that s/he has a right to legal representation. I shall return to this issue below.

After the *Acheson* case, the legal fraternity raised issues of constitutionality on a regular basis. And the courts did not hesitate to declare provisions offending the Constitution unconstitutional.

In one of the first cases concerning a reversed onus, *State v Titus*,³¹⁴ a full bench of the High Court concluded that the mere reversal of onus did not negate the presumption of innocence and the right not to testify against oneself. The court used the so-called rational connection test, and quoted the American case *Tut v the United States of America*.³¹⁵ The decision was overturned by the Supreme Court in *State v Shikunga & Another*.³¹⁶ However, this shows the High Court was not as liberal and open-minded in the first five years after independence as it is often made out to be.

The argument of the court in *State v Titus* fails to address the real issue, namely whether the reversed onus demands of the accused to *de facto* prove his/her innocence. However, as the court later pointed out in *State v Pineiro*,³¹⁷ the American test that the court relied on dealt with a somewhat different scenario, namely where evidence had already been led, and the court had to decide if the evidence could be allowed despite the fact that the onus of proof had shifted.

The High Court was quick per Justice Levy in to make a better choice from the jurisprudential history of Namibia. The rigid approach in the *Titus* case was abandoned for the test of the Constitution in the *Pineiro* case. The test set out by Judge Levy is, as stated above, a simple one. To put it another way, who is obliged to carry the final burden of guilt: the presumption or the state? Consequently, the court ruled that the presumption of guilt in the Sea Fisheries Act, 1973 (No. 58 of 1973) contradicts the presumption of innocence contained in Article 12(1)(d) of the Constitution.³¹⁸

314 1991 NR 318 (HC).

315 319 US 463.

316 1997 NR 156 (SC), 2000 (1) SA 616 (NmS).

317 1991 NR 424 (HC), p 416.

318 (ibid.).

The old question concerning the conclusions that a court can make from the decision of an accused who fails to testify was raised in *State v Haikele & Others*³¹⁹ and *State v Kamajame & Others*.³²⁰ In the latter case, which was specifically overturned by *State v Shikunga & Another*,³²¹ the court still held that that silence by the accused person where an innocent man would have spoken can amount to admission. More soundly, and in line with the developments since 1990, the court ruled in the *Haikele* case that the privilege of an accused against self-incrimination means that the state has to prove all the elements of the crime. The mere fact that an accused does not give evidence cannot remedy deficiencies in the state's case.

In *State v D & Another*,³²² the court per Justice Frank said in an obiter dictum that the cautionary rule for single female witnesses in sexual offences could be contrary to the non-discriminatory clause, since it operates from the presumption that female complainants are likely to lie and lay false charges.

Not all attempts to adapt the common law went the way of the defence. In *State v De Bruyn*,³²³ the High Court was invited to accept the defence of entrapment developed in the United States, and declare evidence so obtained inadmissible. The defence of entrapment does not deal with all police traps, but only those *of a person not otherwise predisposed to commit an offence by a government official who then instigates prosecution against such person*. While the court stated that such action would be intrinsically unfair, it assumed (without deciding) that such conduct is so unfair that evidence so gathered should be excluded as being prejudicial to the right of the accused to a fair trial as intended in Article 12(a) of Constitution of the Republic of Namibia. Yet, the court decided that not all police traps are illegal.

In other cases, the common law obligation of a presiding officer to assist an accused, especially if she is undefended, were placed within a constitutional framework. In *State v Khoeinmab*,³²⁴ the court held that it is a gross irregularity not to allow an accused person to address the court. Since it affects the fairness of the trial, it cannot be remedied.

319 1992 NR 54 (HC).

320 1993 NR 193 (HC).

321 1997 NR 156 (SC).

322 1991 NR 371 (HC).

323 1999 NR 1 (HC).

324 1991 NR 99 (HC).

In *State v Scholtz*,³²⁵ the Supreme Court ruled that the state was obliged to disclose the content of the police docket. In the pre-constitutional era, the docket was considered privileged.

Foreign case law, especially Canadian and US jurisprudence, played an important role in this process. Constitutionality was not totally new in Namibia's history: colonial South Africa had had a written Constitution, and Namibia's interim government, which was semi-autonomous at times between 1978 and independence, had also adopted a Constitution with a Bill of Rights. The Constitution of the Republic of Namibia, however, brought with it a democratic culture and a constitutional linkage to international law. Article 144 states that, in interpreting the Constitution, the courts shall, amongst other things, consider international law.

The judgment of Justice Dumbutshena in *State v Scholtz* illustrates the way in which the courts dealt with international law in the years immediately after independence:³²⁶

Any system of justice that tolerates procedures and rules that put accused persons appearing before the courts at a disadvantage by allowing the prosecution to keep relevant materials close to its chest in order to spring a trap in the process of cross-examining the accused and thereby secure a conviction cannot be said to be fair and just. Full disclosure is in accord with articles 7 and 12 of the Constitution. It would be wrong to maintain a system of justice known to be, in some respects, unfair to the accused. The right to disclose has acquired a new vigour and protection under the provisions of articles 7 and 12 of the Constitution. English cases cited above are proof beyond doubt that non-disclosure leads to the denial of justice.

For disclosure to be effective it must be done at the earliest possible time [– in] some instances soon after arrest and in others long before the accused is asked to plead and in some cases only after the witness has given his evidence in chief

The principal feature of the judgment is the presentation of the common custom of disclosure that developed in the England, Wales and Canada. In terms of constitutional interpretation, the judgment is somewhat of an embarrassment, however. It relies first and foremost on the development in England and Wales,

325 1998 NR 207 (SC).

326 *Supra*, p 447.

which jurisdiction had the same privileged rules until 1961. However, the jurisdiction has no written Constitution, a fact that the judge acknowledged:³²⁷

But what is significant for our purposes is that these developments have taken place in England and Wales without a Bill of Rights and without the benefit of a written Constitution.

Legislation supporting the UN instruments

As we have already noticed, the Namibian courts were reluctant to apply the principles of the instruments without the back-up of a legal framework. While the courts were generally more than willing to apply the principles of the Constitution both in the civil and criminal courts, it hardly ever referred to the instruments in their judgments.

Parliament has now implemented several laws to strengthen the human rights components of the Namibian legal framework. However, there is also a trend to challenge earlier human rights judgments with new conservative legislation. Most of these laws have not yet been challenged in the courts (some have been signed into law, but have not been implemented).

We shall first look at the legislation that has played a positive role in the implementation of international human rights law in Namibian domestic law.

The Married Persons Equality Act, 1996 (No. 1 of 1996)³²⁸

Under South African common law, in some instances, husbands had marital power over their wives. This rule was repealed by the Act. Other legislation and common law rules that discriminated against wives were all repealed.

The effect of the changes was that married women became fully emancipated, with the right to enter into contractual agreements, own property, act as directors of companies, and bind themselves as surety.

The most important aspect of the Act was the abolishment of the common law rule that the husband is the paterfamilias, or head of the family or household. Following the Act, either spouse can act as head of the household or they can

327 (ibid.:442).

328 Enacted 28 May 1996.

act together in this capacity as partners. Consequently, Namibia became one of the first African countries to fully comply with Article 16 of the Convention on the Elimination of Discrimination against Women (CEDAW). Article 16 of the Convention deals with equality of males and females in all spheres of life. Presently, there are still 24 nations that have entered reservations against Article 16, mostly because of the cultural and religious belief that the husband is always the head of the family.³²⁹

Some Churches and traditional authorities also complained that it was either against the Bible, their faith, or African traditions.³³⁰ However, the Act was accepted by the vast majority of the Namibian people and opposition to it soon came to an end.

However, the Act did not change the fate of women living in rural areas under a traditional authority. The authorities by and large maintained the position of the paterfamilias in their communities. The only remedy for an enlightened rural woman is to enter into a civil rather than a customary marriage.

The government is presently busy with the preparation of an amendment to the Act that will rule out bigamous and polygamous marriages, both in the civil and customary sphere.³³¹ Government's initial idea was to limit customary polygamous marriages to a total of four spouses. However, should a man enter into a civil marriage before or after entering into one or more customary marriages, a line is drawn and he cannot enter into a subsequent customary marriage.³³²

While traditional authorities, especially those from north-eastern Namibia, blamed Western or capitalist pressure for the proposed Bill, the pressure was applied much closer to home. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which was adopted by

329 These countries include Bahrain, Brunei Darussalam, the Cook Islands, Djibouti, the Holy See, Iran, Kazakhstan, Kiribati, Republic of Korea, the Marshall Islands, Mauritania, Micronesia, the Principality of Monaco, Myanmar, Nauru, Niger, Niue, Oman, Palau, Qatar, San Marino, Saudi Arabia, the Solomon Islands, Somalia, Sudan, Swaziland, Syria, Tonga, Tuvalu, and the United Arab Emirates.

330 The Act is not applicable to customary law marriages.

331 One of the drafters of the proposed Bill, Dianne Hubbard, wrote an article in *The Namibian* in 2005, stating that the Bill would outlaw all polygamous marriages.

332 Discussion with several ministers in Katima Mulilo; conference in preparation of Community Courts, May 2004.

African Heads of State on 10 July 2003, called for the total abandonment of polygamy.

The idea of a Protocol developed in Africa when activist women groups such as Women in Law and Development in Africa and the African Centre for Democracy and Human Rights Studies lobbied the African Commission on Human and Peoples' Rights at a conference held in Lomé, Togo in March 1995.³³³

The fate of rural widows living under some of the customary laws was also not addressed in the Act. In many communities a widow cannot inherit. The rule developed in a time when a widow was taken into the kraal (homestead) of her late husband's eldest brother. Her needs were taken care of by her new husband. Her late husband's estate went to his mother and sisters in compensation for having raised him.

In a modern society, where even rural women are entering the workplace and share the responsibility with their husbands to build a joint estate, these customary laws no longer make sense. When a woman's husband passes away, even the property that she helped him to acquire goes to his mother. And if the emancipated rural widow refuses to be dealt with like an inheritance, and refuses to move in with her husband's brother, she is left on the street with no assets.³³⁴

In Namibia, traditional authorities have limited legislative powers. They can make their own customary laws, provided that these are in line with the Constitution and relevant legislation. At least one such authority has already used this power to repeal the community's customary laws that prevent wives from inheriting, thus bringing these laws in line with the rights of women.³³⁵

333 Delpont, E. 2004 (online). *The African regional system of human rights: Why a Protocol on the rights of women?*. Available at <http://www.powa.co.za/documents/sadc%20-intro%20african%20system%20and%20draft%20protocol.doc>; last accessed 2 October 2006.

334 For a perspective on all aspects of women and inheritance laws in Namibia, see Hubbard, D (Ed.). 2005?. *The meanings of inheritance*. Windhoek: Gender Research and Advocacy Project, Legal Assistance Centre. See also LAC. 2005. *Women's land and property rights – The missing link: Proposals for the reform of inheritance laws in Namibia*. Windhoek: LAC.

335 Centre for Applied Studies (Compilers). 1993. *Laws of Indonga*. Windhoek: Centre for Applied Social Studies.

While Namibia has done exceptionally well in bringing its domestic law in line with the expectations of both CEDAW and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, there are still serious cases where old customs and traditions seriously affect the right of women, especially rural women.

The Combating of Domestic Violence Act, 2003 (No. 4 of 2003)

This Act is closely related to the protectionist Articles of CEDAW and the Convention on the Rights of the Child.

While CEDAW does not directly address the issue of violence, its emphasis on equality and the dignity of women and its position on respect for women obviously make violence a contradiction of everything that the Convention stands for. In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women. While this is not an Optional Protocol, it does provide a framework and guidance for member states who wish to protect women from violence in terms of the provisions of CEDAW. Charlotte Bunch describes the importance of the Declaration as follows:³³⁶

This Declaration was a landmark document in three ways: It framed violence against women within the dialogue on human rights; it identified being female as the primary risk factor for violence; and it broadened the definition of gender violence to include all aspects of women's and girls' lives.

The Combating of Domestic Violence Act follows the guidelines of the Declaration. Although the wording is gender-neutral, its application is primarily directed at the protection of women and children. The Act provides for protection orders and several other measures (e.g. the seizure of weapons) to protect vulnerable family members from violent spouses, partners and guardians. It also defined several crimes related to violence in the home.

With South African and Tunisia, Namibia is among only three African countries that have enacted legislation against domestic violence, and one of only 46 countries worldwide.³³⁷

336 Bunch, C. 2006. *The intolerable status quo: Violence against women and girls*. Geneva: UN Children's Fund. Available at <http://www.unicef.org/pon97/40-49.pdf>; last accessed 25 September 2006.

337 (ibid.).

Protection of women and children against sexual offenders

The Combating of Immoral Practices Amendment Act, 2000 (No. 7 of 2000)

This amendment makes sexual intercourse or sexual acts with children under the age of 16 an offence punishable by a fine not exceeding N\$40,000 or imprisonment for a period not exceeding ten years.

The weakness in the Act is the fact that it opted for 16 years as the age of maturity, whereas the Convention on the Rights of the Child made 18 the age of maturity.³³⁸ It is also not applicable if the offender is older than the victim by up to three years.

The Act does not apply to married people, both in civil and customary marriages. Presently, a girl as young as 15 can get married without permission from the Minister of Home Affairs.

The Combating of Rape Act, 2000 (No. 8 of 2000)

This Act extended the protection of vulnerable people (including young boys) against sexual exploitation, molestation and rape. Before the implementation of the Act, rape was a common law crime. *Rape* was extremely narrowly defined as vaginal penetration by a male penis, and was difficult to prove. Consequently, other serious forms of rape, such as oral or anal penetration, were seen as *indecent assault*, which is not as serious as rape.

The definition of *rape* was further broadened by including the insertion of any object into the body of the victim, as well as any form of genital stimulation. Whereas *consent* was the real issue of the common law crime, the Act included consensual sex under the definition of *rape* if it took place under coercive circumstances.

Coercive circumstances include the application of physical force to the complainant or to a person other than the complainant; threats; circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant; circumstances where the

338 Article 1.

complainant is unlawfully detained; circumstances where the complainant is affected by physical disability or intoxicating liquor or any drug or other substance; sleep; and circumstances where the complainant is influenced to believe s/he is having sex with someone other than the perpetrator.

The Act is gender-neutral. Consequently, it also protects small boys and teenagers, who in the past had to rely on a lesser common law offence – sodomy.

The Act provides for mandatory prison sentences for different categories of offenders. The sentences are high when it involves children under the age of 16, which complies with the Convention on the Rights of the Child; where a parent or guardian is the perpetrator; where the child is younger than 13; where the victim has suffered serious injuries; and where a perpetrator has previously been convicted under the Act or for rape under common law.

The Act acknowledges rape within marriage, making Namibia one of fewer than 20 countries worldwide to criminalise marital rape.³³⁹ South Africa is the only other African state that provides for prosecution of rape within marriage.

The Children's Status Act, 2007 (No. 6 of 2007)

The Act went through several phases and was referred to a Select Committee before eventually being enacted in 2007.

The Act removes the stigma attached to so-called illegitimate children. Under Namibian common law, *illegitimate children* (children born out of wedlock) were prohibited from inheriting.

The father of a child born out of wedlock formerly had no right of access to his child, but had the obligation to pay maintenance. This derogated from the child's right to know and have a relationship with the parent concerned. The Act now gives all parents of children born out of wedlock rights of access.

The Act also moves away from the so-called 'tender age' principle. The principle assumed that it was in the best interests of a child of seven or younger to stay

339 The other countries are Australia, Austria, Barbados, Canada, Denmark, France, Germany, Ireland, New Zealand, Norway, Poland, South Africa, Spain, Sweden, Trinidad and Tobago, the United Kingdom, and the USA.

with its mother.³⁴⁰ The new Act looks at the interests of the child without presumptions.

The Act has been contentious from the outset. Initially, men in Parliament complained that it was still biased against fathers, which resulted in the Bill being sent back for further consultation.

On the other hand, the LAC and others have expressed serious concerns regarding a section in the Act granting automatic joint custody to both parents. The LAC's concern is based on the fact that Namibia has experienced serious logistical problems with a vast percentage of unmarried fathers who avoid paying maintenance. For the LAC, this is a clear indication that many fathers are not fit parents. They suggest an amendment which will leave custody issues in the hands of the court to make a decision in the best interests of the child.³⁴¹

Legislation dealing with issues of racism and apartheid

Article 23(1) of the Constitution makes provision for the criminalisation of racial discrimination and the practice and ideology of apartheid:

The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.

However, while Parliament has passed legislation to prohibit racial discrimination, there is still no legislation to prohibit the ideology of apartheid. While the practice of apartheid is partly covered by the Racial Discrimination Prohibition Act, 1991 (No. 26 of 1991), the drafters of the Constitution seem to have had more in mind. The wording of the Constitution and specifically the word *ideology* seems to refer to legislation similar to the German legislation prohibiting the promotion of Nazism.

340 For the creation of a family advocate to serve the interests of the child in custody cases, see Burman, S & F McLennon. 1996. "Providing for children? The family advocate and the legal profession". In Keightley, R (Ed.). 1996. *Children's rights*. Kelwyn: Juta and Co, pp 69–81.

341 See a letter in *The Namibian*, 3 March 2006, supported by several NGOs, individuals and Churches.

Thus, there are no laws to prevent Namibians from propagating an ideology of apartheid. It is possible that the legislator eventually decided that freedom of speech was a higher value that needed to be protected, or that apartheid, as a political ideology, had died a natural death, making such legislation unnecessary.

Nonetheless, the Racial Discrimination Prohibition Act does prohibit the dissemination of ideas on racial superiority.³⁴²

Racial Discrimination Prohibition Act, 1991 (No. 26 of 1991) and Racial Discrimination Amendment Act, 1998 (No. 26 of 1998)

The Racial Discrimination Prohibition Act prohibits discrimination at the workplace and public amenities, as well as other forms of differentiation and discrimination based on race or ethnic origin. However, because section 11(1)(b) of the Act was found to be too wide and a hindrance to free speech,³⁴³ the wording was changed in an Amendment Act.

Over the years, only a few people have been prosecuted under the Act. It may be an indication that Namibia experiences a fair deal of racial harmony. However, it may also indicate that the absence of a clear anti-hate-speech clause, and the fact that *public conduct* is an element of a contravention of the use of discriminatory language, renders the Act inadequate in terms of eradicating all forms of racial discrimination in Namibia.

Labour legislation

The Labour Act, 1992 (No. 6 of 1992) laid the foundation for sound labour practices in Namibia. Those who have employment are protected by an Act that followed the Conventions and Protocols of the International Labour Organisation. The Act also prohibits forced and child labour.

342 Even the extreme right wing of the apartheid era now denies that it is based on an ideology of racial superiority. In the last days of South African control over Namibia, apartheid was portrayed as a policy of treating people as ‘equal but separate’ – hence the second-tier ethnic administrations of the Transitional Government of National Unity. However, the dishonesty of the policy was exposed by the fact that the second-tier Administration for Whites received a share of taxes paid totally out of proportion to the number of whites in the county and to taxes paid to other second-tier administrations

343 *State v Smith & Others* 1997 (1) BCLR 70 (Nm).

However, the Act does not solve the problem of unemployment, and it excludes the most vulnerable members of the labour market from essential rights, i.e. farm workers and domestic workers are excluded from overtime arrangements for weekend work.

Unlike the Constitution, the Act includes sexual orientation as a category of persons against whom employers may not discriminate.³⁴⁴

A new Labour Act came into operation in 2007 (No. 11 of 2007), but it did not improve the position of the weakest groups in society. It also no longer refers to sexual orientation as a category of non-discrimination, but opted for the less controversial word *sex*, without defining it.³⁴⁵

In addition, the new Act does not make provision for day labourers, and it does not set a minimum wage. Namibia is undoubtedly in dire need of a legal framework to develop and guarantee the social and economic rights of the most vulnerable section of the labour force.

Legislation in tension with the UN instruments

Not all Namibian legislation has been human-rights-friendly. There are several instances where the legislator has opted to either ignore international human rights law or even legislate in a manner that opposes human rights standards.

To use but one example, the new Criminal Procedure Act, 2004 (No. 25 of 2004), which has been promulgated but not yet enacted, diametrically opposes human rights standards. It seems as if the legislator wanted to overturn or annul the judgments of the Supreme Court on human rights and constitutional standards.³⁴⁶

344 In the new Labour Act, which had already been promulgated in 2004, but had not yet been enacted and was actually finally discarded before it came into operation, *sexual orientation* is dropped as a non-discriminatory category. This is in line with the anti-gay lobby in government which became extremely vocal after 1996. The *Frank* case followed suit, and found that *sexual orientation* is not a category listed in the non-discriminatory clause of the Constitution (Article 10(2)). *Sex*, according to the Supreme Court, means “men and women”. See *The Chairperson of the Immigration Selection Board v Frank & Another*, *supra*.

345 Section 5(2)(a).

346 For a critical discussion of the Act, see Horn, N & J Schwikard. 2008. *Commentary on the Criminal Procedure Act of 2004*, *Namibian Law Library*, Vol. 1. Windhoek: Orumbonde

Earlier in this paper, reference was made to the Supreme Court decision in *State v Scholtz*, which makes state disclosure obligatory. In an attempt to compensate the state, the new Act makes provision for defence disclosure.³⁴⁷ However, the latter provision violates not only the constitutional right of an accused not to disclose his or her defence before the trial, but also the right to remain silent. The right to a fair trial, guaranteed by the International Covenant on Civil and Political Rights (ICCPR), will undoubtedly be violated by the Act once it comes in operation.

The Namibian Constitution allows Parliament to overturn Supreme Court judgments with new legislation.³⁴⁸ Therefore, the making of a law that contradicts a Supreme Court judgment or judgments is not unconstitutional as such. However, the new Act will eventually have to pass the test of constitutionality. Therein lies at least some consolation.

Conclusion

Both the Namibian legislator and the courts have gone a long way since independence to create a human-rights-sensitive society. After the oppression of the apartheid regime, the process to create a legal framework where human rights are respected and protected will take a while.

There are, however, also indications that Namibia has become less liberal and less sensitive in respect of human rights issues since 1996. The gay and lesbian debacle and the consequent *Frank* judgment, the lack of a legal framework for social and economic rights, and the flagrant neglect of basic human rights in the new Criminal Procedure Act are all warning lights that Namibian society needs to remain sensitive to human rights issues.

The government has done more than any other country in Africa to bring its domestic legislation in line with the UN human rights instruments, but much more still needs to be done.

Press Namibia. For a discussion on disclosure, see Dausab, Y. 2008. *The disclosure provisions in terms of sections 113, 114 and 115 of the Criminal Procedure Act (CPA): Their potential effect on the right to a fair trial*. Windhoek: OrumbondePress.Namibia, pp 81–100.

347 Section 114.

348 See Article 81 of the Constitution.