

PART I:

BACKGROUND

Chapter 1: Namibia and its Legal Setup

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1 Namibia in a Nutshell: Facts and Figures

The inhospitable Namib Desert constituted a barrier to European colonisation until the late 18th century when traders and missionaries first explored the area. In 1878, the United Kingdom annexed Walvis Bay on behalf of the Cape Colony, while the rest of south-western Africa would soon thereafter fall under German administration, henceforth to be known as German South West Africa. Resulting from the Herero and Nama wars of anti-colonial resistance of 1904–08, Germany consolidated its hold over the colony, and prime-grazing land passed to white control. German overlordship ended during World War I in the wake of South Africa's military occupation of the German colony. On 17 December 1920, South Africa took over the administration of South West Africa in terms of Article 22 of the 1919 Peace Treaty of Versailles (which incorporated the Covenant of the League of Nations) and a mandate agreement by the League Council. South Africa was mandated with the power of administration and legislation over the territory. Article 22 stated as follows:¹

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

In 1946, the League of Nations was superseded by the newly formed United Nations. When the United Nations requested South Africa to place the territory under a trusteeship agreement it refused. In 1966 the South African mandate was officially revoked by the UN General Assembly.² Also in 1966 the South West African People's Organisation (SWAPO), under the leadership of Sam Nujoma, started to put pressure on the

1 Available at <http://net.lib.byu.edu/~rdh7/wwi/versa/versa1.html>, accessed 20 February 2021.

2 For further details see Zaire (2014:37ff.).

South African Government, and took up an armed struggle to liberate Namibia. Political and social unrest within Namibia increased markedly during the 1970s and was often met with repression at the hands of the colonial administration. In 1978, the UN Security Council passed Resolution 435 and authorised the creation of a Transition Assistance Group to monitor the country's transition to Independence.³

In April 1989, the UN began to supervise this transition process, part of which entailed supervising elections for a Constituent Assembly which was also charged with drafting a constitution for the country. After more than a century of domination by other countries and a long struggle on both diplomatic and military levels, Namibian Independence was achieved and officially declared on 21 March 1990, which is a national holiday today. Walvis Bay, which is Namibia's deep-water seaport, remained under South African control until 1994. Namibia has been a member of the Commonwealth of Nations since 1990.

Namibia borders on Angola in the north, Zambia and Zimbabwe in the north-east, Botswana in the east, South Africa in the south and the Atlantic Ocean to the west. The capital of Namibia is Windhoek, with a population estimated to be 446,000.⁴ The latest available census dated 2011 enumerated a population of 2,113,077.⁵ The population density lies at 2.6 inhabitants per km², which makes it one of the least densely populated countries in the world; about 43% of the population live in urban areas.⁶ The surface area of Namibia is 824,268 km², making the country the 31st largest in the world. Namibia is demarcated into 13 regions:

- In the North: Caprivi, Kavango, Kunene, Omusati, Ohangwena, Oshana and Oshikoto;
- in the central part of the country: Omaheke, Otjozondjupa, Erongo and Khomas; and
- in the South: Hardap and Karas.

Namibia's population consists of approximately 50% Ovambo, 9% Kavango, 7% Damara, 7% Herero, 6% White (including about 20,000 of German descent), 5% Nama, 4% Caprivians, 3% San, 2% Rehoboth Baster and less than 1% Tswana.⁷ 87.5% of the population is black, 6% white and 6.5% mixed. English is the only official language today (until 1990 also Afrikaans and German). 80% to 90% of the population is classified as Christian (with at least 50% Lutheran). 10% to 20% of the population hold indigenous beliefs.⁸

3 Amoo / Skeffers (2008:17ff.).

4 CIA, the World Fact book on Namibia, available at <https://www.cia.gov/the-world-factbook/countries/namibia/>, accessed 5 March 2021.

5 Cf. GRN (2012c:25).

6 GRN (2012c:8).

7 The CIA World Fact book on Namibia, available at <https://www.cia.gov/the-world-factbook/countries/namibia/>, accessed 21 February 2021.

8 Figures taken from the CIA World Fact book on Namibia, available at <https://www.cia.gov/the-world-factbook/countries/namibia/>, accessed 21 February 2021.

According to figures from the 2020 Human Development Report, Namibia is ranked 130th out of 189 in the Human Development Index.⁹ Life expectancy at birth (2018) is 63 years;¹⁰ and adult literacy of population aged 15 years and older (2018) is 91.5%;¹¹ Adolescent birth rate (births per 1,000 women aged 15-19) was 62 in 2018, compared to 85 in 2000;¹² the poverty headcount ratio at national poverty lines is at 17.4% of the population.¹³ According to the National Labour Force Survey 2018,¹⁴ the overall broad unemployment rate in Namibia is 33.4%. The HIV/AIDS rate was at 11.7% of the population aged 15 to 49 in 2018 and remains a major problem facing Namibia. As per the World Health Organization, Namibia is grouped among the thirty high Tuberculosis burden countries in the world with an estimated total tuberculosis incidence rate of 486 per 100,000 population;¹⁵ although Namibia is on track to achieve the WHO's Global Technical Strategy for Malaria 2016 to 2030 target of a 40% reduction in malaria case incidence,¹⁶ malaria is still a major health burden in the country. Not only the aforementioned health related problems have been aggravated by the COVID-19 pandemic.

Although Namibia has large reserves of minerals (diamonds, uranium, zinc, copper, and gold) and despite the comparably high income per capita in the region, the wealth distribution is extremely unbalanced in Namibia. Latest available figures from the World Bank from 2015 reveal that the income share held by the highest 20% was 63.7%, while the income share held by the lowest 20% was estimated to be at 2.8%.¹⁷ Almost half the population depends on subsistence farming. Economically, Namibia remains overly dependent on South Africa, its most important partner in the Southern African Development Community (SADC). Namibia is classified as having an upper middle-income level with a GDP (current USD) of USD12.37 billion (2019).¹⁸ The

9 UNDP (2020: 353, 354).

10 https://databank.worldbank.org/views/reports/reportwidget.aspx?Report_Name=Country_Profile&Id=b450fd57&tbar=y&dd=y&inf=n&zm=n&country=NAM, accessed 24 February 2021.

11 See <http://uis.unesco.org/en/country/na>, accessed 24 February 2021.

12 See https://databank.worldbank.org/views/reports/reportwidget.aspx?Report_Name=Country_Profile&Id=b450fd57&tbar=y&dd=y&inf=n&zm=n&country=NAM, accessed 24 February 2021.

13 Ibid.

14 NSA (2018:59). Note that this figure is based on the broad unemployment definition which drops the requirement that the person actively looked for work. In contrast, the strict unemployment definition as used for example by the ILO unemployed population consists of all persons (15 years and above) who are either actively seeking for work or are available for work during the reference period.

15 WHO (2020a:33).

16 WHO (2020b:74).

17 See World Bank figures on World Development Indicators: Distribution of income or consumption available at <http://wdi.worldbank.org/table/1.3>, accessed 6 March 2021.

18 As per figures from the World Bank available at <http://data.worldbank.org/country/namibia>, accessed 6 March 2021.

local currency, the Namibia Dollar (NAD) is linked to the South African Rand. Both currencies are accepted in Namibia.

Estimates for 2019 by the World Bank relating to Namibia's economy reveal the following figures:¹⁹

GDP (current USD) (billions)	12.37	2019
GDP growth (annual %)	-1.1	2019
Inflation, GDP deflator (annual %)	1.5	2019
Agriculture, value added (% of GDP)	6.6	2019
Industry, value added (% of GDP)	26.6	2019
Services, etc., value added (% of GDP)	59.3	2019
Exports of goods and services (% of GDP)	35.8	2019
Imports of goods and services (% of GDP)	47.7	2019
Gross capital formation (% of GDP)	12.7	2019

2 The Legal Setup in Namibia

The following section provides an overview of Namibia's legal setup, necessary for a discussion of the more complex legal issues in the environmental domain.

The Constitution of the Republic of Namibia, which was drafted and adopted in 1990, is the fundamental and supreme law of the land.²⁰ It is hailed by some as being amongst the most liberal and democratic in the world. It enjoys hierarchical primacy amongst the sources of Namibian law by virtue of its Article 1(6). It is thematically organised into 21 Chapters which contain 148 Articles. Together, they organise the state and outline the rights and freedoms of people in Namibia.

By virtue of Proclamation 21 of 1919, Roman Dutch law as developed by South African courts was made the common law of the territory and was binding on the courts in Namibia until Independence in 1990. This position is affirmed by Article 66(1) of the Constitution, which provides that both the customary law and common law of Namibia in force at the date of Independence shall remain valid to the extent to which this is not in conflict with the Constitution or any other statutory law.

One of the key requirements of the rule of law is that the courts and the state's prosecution agencies are independent and free of political interference.²¹ Although this doctrine – the separation of powers – is well entrenched in the Namibian Constitution and recognised by the courts, the true measure of the Independence of the judiciary

19 Estimates for 2019 by the World Bank retrieved from <http://databank.worldbank.org/data/reports.aspx?source=world-development-indicators>, accessed 6 March 2021.

20 Cf. Amoo (2008a, b, c). See also Hinz *et al.* (2002) and Bösl *et al.* (2010).

21 Cf. Horn / Bösl (2008a, b).

and the state prosecution services lies in the way these institutions relate to the Executive and other organs of state in practice.

Article 12 of the Constitution contains the provisions for a fair trial. The principle of the rule of law runs throughout the constitutional regime.²² In Namibia, the separation of legislative and executive powers from those of the independent judiciary is constitutionally guaranteed.²³ Various mechanisms are put in place to ensure that each branch of Government remains independent of the other through a system of checks and balances.²⁴ The Constitution explicitly states that Namibia is established as “a democratic and unitary state founded on the principles of democracy, the rule of law and justice for all.”²⁵

3 The Laws

Namibian law reflects the country’s history and is the product of different sources: Firstly, Roman law; secondly, the fusion of Roman law and Roman Dutch customary law – hence the term Roman Dutch law – which came in the wake of Dutch colonisation at the Cape of Good Hope; thirdly, from the early 19th century onwards English law asserted itself, leaving deep traces in Roman Dutch law, after British hegemony in southern Africa had been established; and fourthly, indigenous customary law from time immemorial.²⁶ With few exceptions, German legal influence has disappeared completely.

The Namibian legal system is an object of fascination for comparative lawyers, legal ethnologists and sociologists.²⁷ The concept of legal pluralism – a situation in which more than one type of law or legal tradition operates simultaneously – is commonplace in Namibia.²⁸ Some sources of law are authoritative while others merely have a persuasive authority. The courts are bound by authoritative sources whereas those of persuasive authority may serve to convince a court to apply or interpret a legal rule in a particular manner. The sources of law in which they are usually consulted are statute law or legislation; judgements of the courts; international law (Article 144 of the Constitution); common and customary law (Article 66 of the Constitution) and to some extent legal writing.

The doctrine of *stare decisis* applies in Namibia, making the judgements of the superior courts one of the most important sources of the law. Literally *stare decisis* means

22 Hinz (2003:273).

23 Ruppel (2008d).

24 Diescho (1994:70ff.).

25 Article 1(1) of the Namibian Constitution.

26 Hinz (2002a and 2017).

27 Ruppel (2009i).

28 Ruppel / Ruppel-Schlichting (2012b); Griffiths (1986:1-55).

“the decision stands”. Obviously, when a court arrives at a decision, the parties to the dispute adjudicated will be bound by that decision. But what is the effect of such particular decision on similar disputes arising in future? Is a court, when it has to settle another dispute of a similar or even the same nature bound by previous court decisions, or is it free to formulate its own principles and ignore a previous decision? Strict adherence to the doctrine of *stare decisis* would mean that courts are obliged to follow earlier decisions regardless of whether an earlier decision still makes sense. Therefore, and for greater fairness and legal certainty, Namibian courts are bound by their own decisions unless and until they are overruled by a superior court. It is, however, conceivable that circumstances arise that would render it possible for a court to override its own legal opinion.²⁹

4 The Court System

The Namibian court system retains Roman Dutch elements, inherited from South Africa along with elements of the African traditional (community) court system. The formal court system comprises the Supreme Court, the High Court, the Magistrates’ Courts and the Community Courts. The Supreme Court serves as the highest court of appeal and also exercises constitutional review of legislation. Prior to the attainment of nationhood in 1990 and the promulgation of the Constitution of the Republic of Namibia, which created an independent judiciary, the courts of Namibia were an extension of the judiciary system of South Africa.³⁰

4.1 The Supreme Court

The Supreme Court is primarily a court of appeal, and its appellate jurisdiction covers appeals emanating from the High Court, including appeals which involve interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed there under.³¹ The Supreme Court is not bound by any judgement, ruling or order of any court that exercised jurisdiction in Namibia before or after Independence. The Constitution further vests in Parliament the power to make legislation providing for the appellate jurisdiction of the Supreme Court. The Supreme Court is vested with unlimited appellate jurisdiction over appeals against any judgement or order of the High Court; and any party to any such proceedings before the High Court,

29 Havenga *et al.* (2002:8ff.).

30 Amoo (2008a, b, c).

31 Amoo (2008b:72ff.).

if dissatisfied with any such judgement or order, has a right of appeal to the Supreme Court.³²

In the exercise of its appellate jurisdiction, the Supreme Court has the power to receive further evidence, either orally or by deposition before a person appointed by the court, or to remit the case for further hearing to the court of first instance or to the court whose judgement is the subject of the appeal, with such instructions relating to the taking of further evidence or any other matter as the Supreme Court may deem necessary. The Supreme Court is also empowered to confirm, amend or set aside the judgement or order that is the subject of the appeal, and to give any judgement or make any other order which the circumstances may require.³³ The Supreme Court has original jurisdiction over matters referred to it for decision by the Attorney-General under the Constitution, and with such other matters as may be authorised by Act of Parliament. Thus, the Supreme Court has original jurisdiction over constitutional matters, but this original jurisdiction is not exclusive to the Supreme Court because the High Court is also vested with original jurisdiction over constitutional matters. Unlike, for example, in the case of the judicial structure in South Africa, where there is a Constitutional Court, the Namibian Constitution does not create a separate Constitutional Court *per se*, but the Supreme Court can constitute itself as a Constitutional Court.³⁴ The Supreme Court may exercise this jurisdiction *ex mero motu* (of the court's own accord) should it come to the notice of the court or any judge of that court, that an irregularity has occurred in any proceedings, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court. The seat of the court is in Windhoek. A decision of the Supreme Court is binding on all other courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament, lawfully enacted in conformity with the principles of legislative sovereignty.³⁵

4.2 The High Court

The High Court is a superior court of record and its jurisdiction is provided by both the Constitution and the High Court Act.³⁶ The Constitution vests the High Court with both original and appellate jurisdiction, and all proceedings in the High Court are to be carried in an open court.³⁷ The court may, however, exclude the press and/or the public from all or any part of the trial for reasons of morals and the public order or

32 Cf. Supreme Court Act No. 15 of 1990.

33 Ibid.

34 Amoo (2008a:3ff.).

35 Ibid.

36 No. 16 of 1990.

37 Section 13 of the High Court Act.

national security.³⁸ It is situated permanently in Windhoek, and since 2009 also at Oshakati. Other than this, the court goes on circuit to venues, including Gobabis, Grootfontein and Swakopmund.³⁹ The High Court derives its appellate jurisdiction to hear and adjudicate upon appeals from lower courts primarily from the Constitution.⁴⁰ During the appeal process, the court may receive further evidence, either orally or by deposition before a person appointed by the court, or remit the case to the court of first instance or the court whose judgement is the subject of the appeal, for further hearing, with such instructions relating to the taking of further evidence or any other matter as the High Court may deem it necessary. The court also has the power to confirm, amend, or set aside the judgement or order which is the subject of the appeal, and to give any judgement or make any order which the circumstances may require.⁴¹

4.3 The Lower Courts

The lower courts are responsible for administering justice. In terms of Article 78 of the Constitution, the lower courts form part of the judiciary, one of the three branches of the state. Lower courts are established in terms of Section 2(1) of the Magistrates' Courts Act.⁴² The bulk of the judiciary's work also takes place in the lower courts. There are 34 permanent courts and 32 periodical courts in Namibia.⁴³ Lower courts are divided into a Regional Division and five administrative districts, namely Windhoek, Oshakati, Otjiwarongo, Keetmanshoop and Rundu. Each district has a seat for a regional court that presides on all criminal matters except high treason but has no jurisdiction in civil matters.⁴⁴

38 Article 12(1)(a) of the Namibian Constitution; Amoo (2008b:76).

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

40 Article 80(2) of the Namibian Constitution.

41 Section 19 of the High Court Act.

42 No. 32 of 1944.

43 See address by Chief Justice of the Republic of Namibia Peter S. Shivute at the opening of the 2020 legal year, Supreme Court of Namibia, Windhoek 12 February 2020, available at <https://bit.ly/3kOxxfE>, accessed 6 March 2021.

44 Amoo (2008b:83).

4.4 The Magistrates' Courts

Magistrates' Courts in Namibia may be classified into regional, district and sub-district, division⁴⁵ and periodical courts.⁴⁶ Magistrates' Courts are courts of record⁴⁷ and their proceedings in both criminal cases and the trial of all defended civil actions are conducted in an open court.⁴⁸ The jurisdiction of the Magistrates' Courts in respect of causes of action is regulated by Section 29 of the Magistrates' Court Act, as amended.⁴⁹ The Magistrates' Courts have jurisdiction over liquid claims not exceeding N\$ 100,000 and illiquid claims not exceeding N\$ 25,000.⁵⁰ Magistrates' Courts are presided over by judicial officers, and advocates or attorneys of any division of the Supreme Court may appear in any proceeding in any court. All Magistrates' Courts have equal civil and criminal jurisdiction, except the regional Magistrates' Courts, which have only criminal jurisdiction.⁵¹ The territorial jurisdiction of a Magistrate's Court is the district, sub-district or area for which it is established; a court established for a district has no jurisdiction in a sub-district. Magistrates' Courts also have the jurisdiction to hear and determine any appeal against any order or decision of a Community Court.

4.5 The Community Courts

The Community Courts shall cater for all forms of proceedings exercised under customary law. Community courts are a formal creation of the Community Courts Act,⁵² which also provides detailed procedures and requirements for the establishment and recognition of Community Courts in particular traditional communities.⁵³ The Act was drafted to give legislative recognition to and formalise the jurisdiction of the traditional (African) courts that render essential judicial services to members of traditional communities who subject themselves to their jurisdiction and the application of customary

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

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

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

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

49 Magistrates' Courts Amendment Act No. 9 of 1997.

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

51 Amoo (2008b:84ff.).

52 No. 10 of 2003.

53 For more details see Hinz (2008a).

law. This 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.⁵⁴

5 The Ombudsman

In order to protect and maintain the respect of the state for the rights of the individual citizen, to promote the rule of law, and to promote and advance democracy and good governance, the Office of the Ombudsman has been established. The relevant legal provisions with regard to the Ombudsman are to be found in Chapter 10 of the Namibian Constitution as well as in the Ombudsman Act.⁵⁵ The mandate of the Ombudsman relates to three widely defined categories:⁵⁶ human rights, administrative practices, and the environment. Complaints, which are related to the mandate of the Ombudsman, may be submitted by any person, free of charge and without specific formal requirements. To ensure that citizens have an avenue, open to report complaints free of red tape, and free of political interference, the Ombudsman is politically independent, impartial, fair, and acting confidential in terms of the investigation process.⁵⁷ Negotiation and compromise between the parties concerned are the main objective when handling complaints.⁵⁸

54 Amoo (2008b:90).

55 No. 7 of 1990.

56 For more details on the mandates of the Ombudsman see Ruppel / Ruppel-Schlichting (2010) and Chapter 27 in this book.

57 Tjitendero (1996:10). As to the characteristics of a classical Ombudsman in general see Gottehrer / Hostina (1998).

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