

ACCESS TO JUSTICE FOR CHILDREN: NAMIBIA

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I. **What is the legal status of the Convention on the Rights of the Child (CRC)?**

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

Under¹ the Namibian Constitution, the CRC and other relevant ratified international instruments binding on Namibia automatically form part of the national law unless the Constitution or an Act of Parliament provides otherwise.² The Constitution also provides that “general rules of public international law” are directly applicable in the Namibian legal system.³

B. Does the CRC take precedence over national law?

The CRC does not take precedence over national law. Article 144 of the Constitution sets out that ratified international instruments, including the CRC, form part of the law of Namibia “*unless otherwise provided by [the] Constitution or Act of Parliament.*”⁴

Therefore, where an act of Namibian Parliament is clearly inconsistent with the CRC or other international instrument, the national law will take precedence and the international instrument will not form part of Namibian law in that respect. It is not clear, however, whether this rule applies to national law that was in place before the Constitution came into force—*i.e.*, before 1990—or only to subsequent legislation.⁵ At the very least, however, the CRC and other international instruments do not take precedence over subsequent legislation.

Nonetheless, national law will be interpreted where possible in a manner consistent with the CRC and other international instruments binding on Namibia, unless Parliament has made it clear that it wanted to derogate from international law.⁶

C. Has the CRC been incorporated into national law?

Namibia ratified the CRC in Namibia on 30 September 1990.⁷ The Namibian

¹ Comments on this report provided by the Legal Assistance Centre, Namibia, September 2015.

² The Constitution of the Republic of Namibia, Article 144, available at http://www.gov.na/documents/10180/30001/Namibia_Constitution.pdf/a6050315-315a-4f65-8a0b-a7fe10a93258.

³ Constitution, Article 144.

⁴ Constitution, Article 144.

⁵ See Onkemetse, T., *The status of international law in Namibian national law: A critical appraisal of the constitutional strategy*, Namibia Law Journal Volume 02 – Issue 01 (January - June 2010), p. 27, available at http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/2010_1/NLJ_section_1.pdf.

⁶ Ibid., p. 28.

⁷ See

Constitution directly incorporates the CRC as well as all other ratified international instruments into national law.⁸ In addition, various individual rights contained in the CRC are also found in the Constitution,⁹ and some rights have been incorporated via other legislation, such as the Children's Status Act (Act No. 6 of 2006), the Children's Act (Act No. 33 of 1960), the Combating of Domestic Violence Act (Act No. 4 of 2003), the Combating of Rape Act (Act No. 8 of 2000) and the Labour Act (Act No. 11 of 2007), in a subject-by-subject, piecemeal manner.

The new Child Care and Protection Act (Act No. 3 of 2015) incorporates to a greater extent rights contained in the CRC. It includes, amongst other things, provisions dealing with child participation in courts, legal aid for children, designated children's courts and a designated children's advocate in the Office of the Ombudsman (discussed in further detail throughout the report).¹⁰ It also creates a National Advisory Council on Children which will advise the Ministry responsible for the protection of children and any government body, and monitor the implementation of national laws relating to children.

¹¹ As at September 2015, the Act is not yet in force (when it is in force it will replace the Children's Status Act 2006 and the Children's Act 1960).

D. Can the CRC be directly enforced in the courts?

In theory, the CRC should in its entirety be directly enforceable in the national courts under Article 144 of the Constitution. The question arises, however, as to whether each individual right within the CRC may in fact be enforced without further national legislation.

Although under the Constitution ratified international human rights treaties should in general operate directly within the domestic legal system, a distinction must be drawn between treaties that are "self-executing" and "non-self-executing." Self-executing treaties are capable of operating automatically in national law, while non-self-executing treaties require enabling legislation before they can be enforced by the courts—for example, because the treaties themselves do not include an enforcement mechanism or specify any remedies or maximum penalties.

In *JT v. AE*,¹² a case concerning a father's access to his child born outside of marriage, the Supreme Court did refer directly to the principle of the child's "best interest" and a child's right to know and be cared for by his or her parents contained in Articles 3 and 7(1) of the CRC.¹³ It could be argued that these general rights do not need a specific remedy clause making them self-executing and that, following the case of *JT v. AE*, similar provisions of the CRC may more frequently be directly enforced by the Namibian courts. However, the Supreme Court in *JT v. AE* referred to the CRC in parallel to similar provisions of the Namibian Constitution (such as the right of a child to know and be cared for by both of his or her parents contained in Article 15(1) of the

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

⁸ Constitution, Article 144.

⁹ See Constitution, Articles 4(1), 15, 20 and 95(b).

¹⁰ See <http://www.lac.org.na/projects/grap/Pdf/ccpa-nwsprr-insert1.pdf>;

<http://www.lac.org.na/projects/grap/Pdf/CCPA08-LegalRepresentation.pdf>.

¹¹ Child Care and Protection Act, Sections 11-12.

¹² *JT v. AE* 2013 (1) NR 1 (SC), available at

<http://www.superiorcourts.org.na/supreme/docs/judgments/civil/thudinyane-edward.pdf>.

¹³ *Ibid*, paras. 17 and 18.

Constitution¹⁴), and it is not clear to what extent it would have directly enforced the rights under the CRC without a similar national law to rely upon.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

Namibian courts have rarely cited international instruments binding on Namibia in a substantive manner,¹⁵ though they have done so in some instances. For example, the Supreme Court recently cited the CRC in *JT v. AE* (see above), and the High Court referred to the CRC in *NS v. RH*, another case concerning custody.¹⁶ Other examples in which the Namibian courts have cited international instruments include cases concerning the apprehension, abduction and deportation of people suspected of crimes to Namibia¹⁷ and freedom of speech.¹⁸

In the examples above, the international instruments were generally cited as sources of interpretive guidance to support existing national law, rather than the main source of authority (see discussion above).

II. **What is the legal status of the child?**

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

The Namibian Constitution provides that all persons have the right to a fair hearing to determine their civil rights and obligations.¹⁹ Furthermore, Clause 25(2) of the Constitution provides that “[a]grieved persons who claim that a fundamental right or freedom guaranteed by [the] Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom.” This gives children a general right to bring a case where their rights have been infringed, as nothing in the Constitution precludes children from being treated as “persons.” However, the Constitution is silent on the question of whether or how children can bring such cases.²⁰

The Children's Act provides for the establishment of children's courts to deal with matters involving children.²¹ Under the Act, magistrates' courts may act as children's courts in areas in which no specialised children's courts have been established.²² Namibia only has one dedicated children's court,²³ so in practice magistrates' courts

¹⁴ Constitution, Article 15(1).

¹⁵ See Horn, N., *International human rights norms and standards: The development of Namibian case and statutory law*, p. 142ff (2008).

¹⁶ *NS v. RH*, available at <http://www.crin.org/Law/instrument.asp?InstID=1556>.

¹⁷ *S v Mushwena & Others* (SA6/04) [2004], available at <http://www.superiorcourts.org.na/supreme/docs/judgments/criminal/mushwena.pdf>.

¹⁸ *Kauesa v. Minister of Home Affairs & Others* [1995] (1) SA 51 (NmHC), available at <http://nam-elaws.com.na/displaylrpage.php?id=4593&dsp=2>.

¹⁹ Constitution, Article 12(1)(a).

²⁰ *Representing Children Worldwide: How Children's Voices are Heard in Child Protective Proceedings*, available at <http://www.law.yale.edu/rcw/rcw/jurisdictions/afs/namibia/frontpage.htm>.

²¹ Children's Act, Act No. 33 of 1960, Section 4(1).

²² Children's Act, Act No. 33 of 1960, Section 4(2).

²³ See *Alternative report to Namibia's first, second and third periodic reports on the implementation of the United*

fulfil the function of children's courts in most cases. Where a magistrates' court is sitting as a children's court, the magistrate is called a "Commissioner of Child Welfare."²⁴ The procedural rules applicable to magistrates' courts are set out in the Magistrates' Courts Act,²⁵ but neither this act nor the Children's Act contain any specific provisions setting out how children or their representatives can bring cases for rights violations. The provisions of the new Child Care and Protection Act are substantively the same with some technical improvements and changes.

In contrast, the new Child Care and Protection Act provides a broad provision on standing, which explicitly gives the following persons the right to approach a children's court: a child who is affected by or involved in the matter to be adjudicated; any person holding or exercising parental responsibilities and rights in respect of a child; the care-giver of a child; any person acting in the interest of a child; any person acting on behalf of a child who cannot act in his or her own name; any person acting as a member of, or in the interest of, a group or class of children; any person acting in the public interest, including the Minister or a staff member of the Ministry who is authorised by the Minister; and the Children's Advocate acting on behalf of a child or children generally.²⁶

Cases concerning rights violations can also be brought in front of community courts in Namibia. These are regional courts that apply customary law of the community concerned.²⁷ However, the Community Courts Act does not contain any provisions specifically dealing with children or cases brought by children.

If the violation of children's rights involve "*the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedom guaranteed thereunder,*" the case can also be brought directly to the High Court or the Supreme Court (see details below).

If the violation amounts to a crime, and the Prosecutor-General declines to prosecute the alleged offence (and issues a certificate to this effect), any private person who can show they suffered an injury as a result of the offence can institute a prosecution against the offender in any competent court, either in person or through a legal representative.²⁸ Where the offence is committed against a minor (*i.e.*, a person under the age of 21²⁹), the legal guardian or curator of the minor can bring the prosecution.³⁰ However, the

Nations Convention on the Rights of the Child and two optional protocols (1997-2008), Legal Assistance Centre, p. 23 (2012), available at

http://www2.ohchr.org/english/bodies/crc/docs/ngos/LAC_2Namibia_CRC61.pdf.

²⁴ The Child Care and Protection Act will change this term to "Children's Commissioner": see Article 38 of the Child Care and Protection Act.

²⁵ Act No. 32 of 1944, available at <http://www.scribd.com/doc/16488964/Magistrates-courts-act-32-of-1944>.

²⁶ Child Care and Protection Act No, 4 of 2015, Section 52.

²⁷ Community Courts Act (Act No. 10 of 2003), available at http://www.parliament.gov.na/acts_documents/13_act_102003.pdf; see also Section V (Additional factors) hereof.

²⁸ Criminal Procedure Act (Act No. 51 of 1977), Section 7(1), available at <http://www.superiorcourts.org.na/high/legislation/criminal.html>.

²⁹ Age of Majority Act (Act No. 57 of 1972). The Child Care and Protection Act will lower the age of majority to 18.

³⁰ Criminal Procedure Act, Section 7(1)(d).

Prosecutor-General may take over these proceedings at any point.³¹

If the rights violation relates to domestic violence, children can apply for a protection order under Section 4(2) of the Combating of Domestic Violence Act,³² as can any other person who has an interest in the well-being of the child complainant, including the child's representative or any family member.

Complaints concerning violations of fundamental rights and freedoms and abuse of power by government officials, including those relating to children, may be lodged with the Ombudsman of Namibia.³³ While the office of the Ombudsman is not a judicial body, it can offer some forms of redress, including instigating investigations and inquiries, requiring people to give evidence, referring the matter to the Prosecutor-General or Auditor-General and bringing proceedings in a court of competent jurisdiction for an interdict or other suitable remedy.³⁴ As of 2015 the Office of the Ombudsman has appointed a Children's Advocate. The functions of this role are provided for in the new Child Care and Protection Act and are essentially the same as the office of the Ombudsman.

In addition, the Children's Act sets out that any child alleged to be a child in need of care may be brought before a children's court by "*any policeman, probation officer or authorised officer or by a parent, guardian or other person having the custody of the child.*"³⁵ The Child Care and Protection Act strengthens this concept, stating that "if a person who performs professional or official duties with respect to children, obtains during the course of performing those duties information that gives rise to a suspicion that a child is or may be in need of protective services as contemplated in section 131, that person must report such information in the prescribed form to a state-employed social worker or a member of the police". In addition to this mandatory reporting for professionals working with children, any other person may report a case of a child in need of protective services.³⁶

The Maintenance Act allows a child to make a claim for maintenance as the definition of complainant in the Maintenance Act includes the beneficiary.³⁷ However it is not particularly common in practice and some courts have been known to refuse to accept a complaint made by a child.³⁸

Under the new Child Care and Protection Act, the best interests of the child must be the paramount consideration in "all matters concerning the care, protection and well-being of a child" and in "any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general".³⁹ Furthermore, the Act recognises the

³¹ Criminal Procedure Act, Section 13.

³² Act No. 4 of 2003, available at http://www.parliament.gov.na/acts_documents/38_act_4.sep.pdf.

³³ Ombudsman Act (Act No. 7 of 1990), Section 3(1)(a), available at http://www.parliament.gov.na/acts_documents/156_ombudsman_act_7_of_1990.pdf.

³⁴ Ombudsman Act, Sections 4 and 5.

³⁵ Children's Act, Section 30.

³⁶ Child Care and Protection Act No.3 of 2015, Section 132.

³⁷ Maintenance Act No. 9 of 2003, Section 1.

³⁸ Maintenance Matters, An Assessment of the Operation of Namibia's Maintenance Act 9 of 2003, Legal Assistance Centre, 2013, page 150-153, available at: <http://www.lac.org.na/projects/grap/grapmaintmattersreport.html>.

³⁹ Child Care and Protection Act, Section 3.

right of children of all ages to participate in any matters concerning them; “the views expressed by the child, verbally or non-verbally, must be given due consideration”.⁴⁰

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

There is no single legislation setting out the overall civil procedure rules applicable in Namibia.

The new Child Care and Protection Act uniformly puts the age of majority at 18.⁴¹ However, as noted above, minors affected by or involved in a matter falling within the jurisdiction of a children’s court may bring a matter to the clerk of the court for referral to the children’s court.⁴² Minors may also lay criminal charges, without assistance by their parent or guardian; if a child approaches the police to lay a charge, the correct procedure is to refer the matter to a social worker who can support the child through the process. However, in practice, police are sometimes reportedly reluctant to open a docket if the child’s parent or guardian is not assisting the child.⁴³

The Magistrate’s Court Act sets out that magistrates’ courts “*may appoint a curator ad litem in any case in which such a curator is required or allowed by law for a party to any proceedings brought or to be brought before the court,*”⁴⁴ but does not clarify whether such a curator is required for children to bring a case before a court and, if so, until what age. There are, however, a number of reported cases where curators *ad litem* have been appointed to represent children in the past,⁴⁵ and it therefore seems likely that the foregoing provision of the Magistrate’s Court Act applies to children. In addition, there is also a common law principle that allows Namibian courts more generally to appoint “curators *ad litem*” to represent minors under the age of 21.⁴⁶ The new Child Care and Protection Act states that the court can decide to appoint a curator *ad litem* to a child involved in proceedings if it is in the child’s best interests, even if the child already has legal representation.⁴⁷

The Constitution grants the High Court and the Supreme Court the power to hear and adjudicate on cases “*involving the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedom guaranteed thereunder.*”⁴⁸ The procedural rules of the High Court are set out in the Rules of the High Court of Namibia,⁴⁹ and the procedural rules applicable to the Supreme Court are set out in the

⁴⁰ Ibid, Section 4.

⁴¹ Child Care and Protection Act, Section 10.

⁴² Child Care and Protection Act, Section 52.

⁴³ Rape in Namibia, An Assessment of the Operation of Namibia’s Combating of Rape Act 8 of 2000, Legal Assistance Centre, 2006, page 220-221, available at: <http://www.lac.org.na/projects/grap/Pdf/rapefull.pdf>.

⁴⁴ Magistrates’ Courts Act, Section 33.

⁴⁵ E.g. Brummund v Brummund’s Estate [1992] NR 306 (HC), available at <http://nam-elaws.com.na/displayrpage.php?id=3917&dsp=2>.

⁴⁶ *Representing Children Worldwide: How Children’s Voices are Heard in Child Protective Proceedings*.

⁴⁷ Child Care and Protection Act, Section 47.

⁴⁸ Constitution, Articles 80(2) and 79(2).

⁴⁹ Rules of the High Court of Namibia 2014.

Rules of the Supreme Court of Namibia.⁵⁰ Neither of these sets of rules, however, sets out how children of certain ages may bring a case or if children need the assistance of a representative.

However, the Rules of the High Court do set out that in relation to service of process on a minor, “*service shall be effected upon the guardian, tutor, curator or the like of such minor,*”⁵¹ which may suggest that, where a child is bringing a case to challenge violations of his or her rights, the assistance of such a representative is required.

In conclusion, a child is clearly given standing under the Child Care and Protection Act to bring a case before a children’s court, and the court will appoint a legal representative to assist the child if necessary, or assign a children’s court assistant to help the child present relevant information. The children’s court may also appoint a curator *ad litem*. In other courts, a minor child would need the assistance of a representative to bring a case before a court and could be assisted by a curator *ad litem* appointed by the court.

C. In the case of infants and young children, how would cases typically be brought?

See parts II.A and B above.

Children have the right to parental care under the Constitution.⁵² “Parental authority” is a common law concept in Namibia, but it is generally accepted that a person with parental authority over a child is empowered to assist or represent the child in legal proceedings.⁵³ Parental authority is usually held by the child’s biological parents, but the Children’s Status Act also provides for the appointment of legal guardians where this is not the case.⁵⁴ Adults who do not hold parental responsibility may also be appointed by a court to serve as a child’s curator *ad litem* for the purposes of bringing proceedings under the Magistrates’ Courts Act⁵⁵ and under common law.⁵⁶

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Article 95(h) of the Constitution sets out that the state should seek to promote justice on the basis of equal opportunity by providing free legal aid in defined cases. However, this is limited by the proviso that the state may have due regard to the resources of the state in deciding whether to grant legal aid. The availability of legal aid is further set out in the Legal Aid Act.⁵⁷ There are no special provisions relating to legal aid available to children or their representatives, meaning that the general rules apply to both adults and children.

⁵⁰ Rules of the Supreme Court of Namibia, available at <http://www.superiorcourts.org.na/supreme/docs/SupremeCourtRules.pdf>.

⁵¹ Rules of the High Court, Rule 8(2).

⁵² Constitution, Article 15(1).

⁵³ See Owoses-Goagoses, F., *Custody and guardianship of children* (2009), in Ruppel, O.C., *Children’s Rights in Namibia*, p. 179, available at <http://www.kas.de/namibia/en/publications/18139/>.

⁵⁴ Children’s Status Act (Act No. 6 of 2006), Section 12(3), available at http://www.parliament.gov.na/acts_documents/119_children_status_act_6_of_2006.pdf.

⁵⁵ Magistrates’ Courts Act, Section 33.

⁵⁶ See *Brummund v Brummund’s Estate*.

⁵⁷ Act No. 29 of 1990, available at http://www.parliament.gov.na/acts_documents/181_act_29_of_1990.pdf.

Legal aid in civil cases is limited in Namibia, and the means thresholds applied to decide if a litigant can obtain legal aid are relatively low.⁵⁸ Factors affecting the availability of legal aid in civil cases include whether the applicant has reasonable grounds for instituting proceedings, whether it is in the interest of justice for the applicant to be legally represented, and the financial means of the applicant.⁵⁹ In civil proceedings to which the state is a party, the court can issue a special legal aid certificate to any person who is a party to the case, even if such person has not applied for legal aid. In this case, the reasonableness of instituting proceedings will not be a factor affecting the availability of legal aid.

Children who have been accused of committing an offence are able to obtain legal aid provided by the government if they have insufficient means to engage a legal practitioner for their defence.⁶⁰ The Supreme Court has also affirmed the right of defendants in criminal trials to obtain legal aid.⁶¹ However, there is no overall data available on the number and percentage of cases involving children accused of offences who have been provided with legal assistance.⁶²

The new Child Care and Protection Act provides that a child appearing before the children's courts *must* be provided with legal representation in several broad circumstances:

- if it is requested by the child, with due regard to the child's age, level of maturity and stage of development and the reasonableness of the request;
- if it is recommended in a report by a social worker;
- if there is evidence or allegations of sexual, physical or psychological abuse of the child;
- if any other party besides the child has legal representation; or
- in any other situation where it appears that the child would benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving the best possible outcome for the child.

The court can order that this representation be provided at the expense of the other parties, as state expense through the legal aid programme, or by a children's court assistant (discussed above in part II.B) instead of outside counsel.⁶³

The Children's Act and the new Child Care and Protection Act provide for the representation of children appearing in a children's court by "children's court assistants" appointed by the court, a role ordinarily played by prosecutors.⁶⁴ The role of children's court assistants is to help an unrepresented child to present evidence to the

⁵⁸ See *Access to Justice in Namibia: Proposals for Improving Access to Courts – Costs and Contingency Fees*, Legal Assistance Centre, p. 14 (2012), available at http://www.lac.org.na/projects/grap/Pdf/access2justice3_costs.pdf.

⁵⁹ Legal Aid Act, Section 11.

⁶⁰ Legal Aid Act, Section 10(3); Constitution, Article 12(e).

⁶¹ See, e.g., *Government of the Republic of Namibia & Others v Mwilima & all other accused in the Caprivi treason trial*, 2002 NR 235 (SC), available at <http://www.superiorcourts.org.na/supreme/docs/judgments/criminal/mwilima.pdf>.

⁶² See Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Namibia*, p. 77, available at http://www.bayefsky.com/reports/namibia_crc_c_nam_2_3.pdf.

⁶³ Child Care and Protection Act, Section 58.

⁶⁴ Children's Act, Sections 7(6) and 7(7); Child Care and Protection Act, Section 58.

court, so that the magistrate does not have to get too involved in assisting the child and can thus remain impartial.

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

There are no statutory provisions requiring that a child's parents or guardian consent to that child or his or her curator *ad litem* initiating legal proceedings, or any similar restrictions. In fact, the provision on legal representation for a child who brings or is involved in a matter before a children's court explicitly states that the consent or assistance of the child's parent or guardian is not required in respect of legal representation for this purpose, and that the parent, guardian or other person with physical control of the child may not prevent reasonable private access to the child by a legal practitioner or children's court assistant who is representing or assisting the child.⁶⁵

III. How can children's rights violations be challenged before national courts?

- A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Children and/or their representatives may initiate legal proceedings in civil courts to challenge violations of their rights under domestic law (which incorporates international instruments, as set out above) following the procedural rules of the relevant court. Civil claims seeking money damages under a certain amount may be heard by a magistrates' court under the Magistrates' Courts Act, or are otherwise filed in the High Court.⁶⁶ Claims that relate to the interpretation and upholding of the Constitution, including determinations of whether a particular law or action is unconstitutional, may also be brought directly to the High Court.⁶⁷

See part II.A above regarding proceedings in the children's court.

Judicial review proceedings may be initiated to challenge the acts and decisions of an administrative body or official,⁶⁸ and can be brought directly to the High Court.⁶⁹ Article 18 of the Constitution provides for the basic right to challenge acts of public bodies where they do not act fairly and reasonably and Article 25(2) provides for the right of aggrieved persons who claim their fundamental rights have been violated to bring a claim in front of any competent court, but there is currently no statutory framework setting out the specific procedural rules for judicial review proceedings.⁷⁰

⁶⁵ Ibid, Sections 58(7) and (8).

⁶⁶ Magistrates' Courts Act, Section 50(1).

⁶⁷ Constitution, Article 80(2).

⁶⁸ Constitution, Article 18.

⁶⁹ Rules of the High Court, Rule 76; Constitution, Article 80(2). See also Parker, C., Administrative law in Namibia, its current state, challenges, and proposals for law reform, *The Comparative and International Law Journal of Southern Africa*, Vol. 42, No.1 (March 2009), p. 118, available at <http://www.jstor.org/stable/23253215>.

⁷⁰ See

Private prosecutions may also be initiated before a competent court where the rights violation contravenes criminal law.⁷¹

Complaints about human rights violations and abuse of power by government officials may also be brought to the attention of the Ombudsman,⁷² who may, amongst other things, bring proceedings in a court of competent jurisdiction for an injunction or other suitable remedy (see above).

Individuals, including child victims, their parents or legal representatives, groups, or NGOs recognised by the African Union may submit complaints (known as “communications”) to the African Committee of Experts on the Rights and Welfare of the Child (“African Committee”) about violations of the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”).⁷³ All available domestic remedies must have been exhausted before bringing a case to the African Committee.⁷⁴ The complaint must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, and whether or not the complainant wishes to remain anonymous and the reasons for this.⁷⁵ The African Committee will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.⁷⁶

Individuals, groups or NGOs may submit complaints (known as “communications”) to the African Commission on Human and Peoples’ Rights (“African Commission”) about violations of the African Charter on Human and Peoples’ Rights (“African Charter”).⁷⁷ All available domestic remedies must have been exhausted before bringing a case to the African Commission.⁷⁸ The complaint must include, amongst other things: the name of the person filing it or, in the case of an NGO, the name of the legal representative; whether or not the complainant wishes to remain anonymous and the reasons for this; and the name of the victim, in a case where he/she is not the complainant.⁷⁹ The African Commission will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s)

http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/09-1/hinz.pdf.

⁷¹ Criminal Procedure Act, Section 7.

⁷² Constitution, Article 25(2); Ombudsman Act, Section 3(1)(a).

⁷³ African Charter on the Rights and Welfare of the Child (“African Children’s Charter”), Article 44, available at:

<http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acerwc/acerwc-charter-full-text/>

. For more information about communications, see:

<http://acerwc.org/the-committees-work/communications/>.

⁷⁴ African Committee of Experts on the Rights and Welfare of the Child, ‘Communications’, available at:

<http://acerwc.org/the-committees-work/communications/>.

⁷⁵ War Resisters’ International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, ‘African Committee of Experts on the Rights and Welfare of the Child: communication procedure’, 2012, available at:

<http://co-guide.org/mechanism/african-committee-experts-rights-and-welfare-child-communication-procedure>.

⁷⁶ Ibid.

⁷⁷ African Charter on Human and Peoples’ Rights (“African Charter”), Article 55, available at:

<http://www.achpr.org/instruments/achpr>.

⁷⁸ Ibid., Article 56(5).

⁷⁹ Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010, Rule 93, available at: <http://www.achpr.org/instruments/rules-of-procedure-2010/>.

and measures to prevent recurrence of the violation.⁸⁰ If the case relates to serious or massive human rights violations or if the Commission considers that the State is unwilling to comply with its recommendations in the case, the Commission may refer the complaint to the African Court on Human and Peoples' Rights.⁸¹

B. What powers would courts have to review these violations, and what remedies could they offer?

In civil proceedings, courts have the power either to award money damages or to issue an interdict ordering a party to carry out or cease a particular action.⁸² Civil courts may also issue a temporary interdict (an interdict *pendente lite*) to prevent the defendant from causing irreparable harm relating to the subject matter of the proceedings while the case is pending.⁸³ In civil proceedings held in community courts, the community court may make an order for compensation, damages, restitution or specific performance according to customary law.⁸⁴

In cases brought to challenge a violation of the fundamental human rights and freedoms contained in Article 3 of the Constitution, a competent court (*i.e.*, the High Court or the Supreme Court⁸⁵) may declare any law or action that unjustifiably violates the Constitution invalid,⁸⁶ or may choose to refer the law to Parliament for the defect in violation of the Constitution to be corrected.⁸⁷ The competent court also has the power to make all other orders necessary to secure the rights and freedoms contained in the Constitution, including a declaration of rights, an interdict,⁸⁸ or monetary compensation.⁸⁹

As set out in Part III.A. above, there is no exact statutory framework for judicial review proceedings, but it is generally accepted that courts can grant any of the following remedies in judicial review proceedings: an “order of certiorari,” which would set aside a public decision as unlawful; an order of “prohibition” or “interdict,” which would prevent the public body from doing something; an “order of mandamus,” which would force the public body to follow a particular course of action; or an order of “habeas corpus,” which would require a person to appear before the court.⁹⁰

⁸⁰ War Resisters' International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, ‘African Commission on Human and Peoples' Rights: communication procedure’, 2012, available at:

<http://co-guide.org/mechanism/african-commission-human-and-peoples-rights-communication-procedure>.

⁸¹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Article 5, available at:

<http://www.achpr.org/instruments/court-establishment>; Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010, Rules 84(2) and 118, available at:

<http://www.achpr.org/instruments/rules-of-procedure-2010>.

⁸² Magistrates' Courts Act, Section 30(2).

⁸³ Magistrates' Courts Act, Section 30(1) and Section 43(2).

⁸⁴ Community Courts Act, Section 22(1).

⁸⁵ See Constitution, Articles 80(2) and 79(2).

⁸⁶ Constitution, Article 25(1).

⁸⁷ Constitution, Article 25(1)(a).

⁸⁸ Constitution, Article 25(3).

⁸⁹ Constitution, Article 25(4).

⁹⁰ Ruppel, O.C. & Ambunda, L.N., *The Justice Sector & the Rule of Law in Namibia: Framework, Selected Legal Aspects and Cases*, p. 48 (2011), available at

http://www.nid.org.na/pdf/publications/Framework%20Book%20Final%2026_05_11.pdf.

The High Court generally has the power, in its discretion and at the instance of any interested person, “to enquire into and determine any existing, future or contingent right or obligation,” notwithstanding that such a person would not be able to claim any relief as a result of the determination.⁹¹

In criminal proceedings, courts can impose custodial sentences and fines. The courts can also award compensation to the victim, but only where the offence causes “damage to or loss of property.”⁹²

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Namibia’s current law on standing is very restrictive. In general, bringing proceedings requires the identification of at least one individual victim who can demonstrate a direct and substantial interest in the subject matter and outcome of the proceedings.⁹³ The Constitution also specifies only that “aggrieved persons” may approach the courts alleging a violation of a fundamental right or freedom, but does not grant a broader right.⁹⁴

Judicial review proceedings must generally also be brought by “persons aggrieved” by the acts or decisions of an administrative body, but as described in more detail in Part III.E. below, the rules relating to standing may be more lenient in proceedings brought to challenge a violation of fundamental rights and freedoms under the Constitution.⁹⁵

Standing under the terms of certain statutes is also more liberal. For example, under the Combating of Domestic Violence Act, any person who has an interest in the well-being of a child, including a family member, a police officer, a social worker, a health care provider, a teacher, a traditional leader, a religious leader or an employer, can apply for a protective order,⁹⁶ even without the consent of the child victim.⁹⁷ However, the nature of the protective order means that a specific victim would have to be named.

Standing in children’s courts is also substantially broadened by the new Child Care and Protection Act, as discussed above. Hearings before the children’s courts are private, and any details of the cases are confidential under judicial sanction.⁹⁸

Namibia’s Law Reform and Development Commission is considering recommendations on a possible statute which would broaden standing generally in all of Namibia’s courts.⁹⁹

⁹¹ High Court Act, Section 16(d).

⁹² Criminal Procedure Act, Section 300(1).

⁹³ Uffindell v Government of Namibia [2009] (2) NR 670 (HC), at para 12, available at http://www.superiorcourts.org.na/high/docs/judgments/civil/arthur%20f%20uffindell%20t_a%20aloe%20hunting%20safaris%20versus%20govermmen.pdf.

⁹⁴ Constitution, Article 25(2).

⁹⁵ See *Access to Justice in Namibia: Proposals for Improving Access to Courts – Locus Standi*, Legal Assistance Centre, p. ii (2012), available at http://www.lac.org.na/projects/grap/Pdf/access2justice2_locus_standi.pdf.

⁹⁶ Combating of Domestic Violence Act, Section 4(2).

⁹⁷ Combating of Domestic Violence Act, Section 4(4).

⁹⁸ Child Care and Protection Act, Sections 55 and 61.

⁹⁹ Law Reform and Development Commission, Locus Standi Discussion Paper, LRDC 27, March 2014.

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

The concept of collective or class action, where one or more claimants bring an action against one defendant not only on their own behalf but on behalf of others, does not exist in Namibia, whether or not individual victims are named.¹⁰⁰

However, the Rules of the High Court make it possible for any number of claimants to be joined together in one lawsuit where their claims depend on the determination of “substantially the same question of law or fact”.¹⁰¹ In this case, each claimant would still need to be identified. In addition, where separate actions have already been filed, the court may, upon the application of any party and after notice to all other interested parties, make an order consolidating such actions.¹⁰²

E. Are non-governmental organisations permitted to file challenges to potential children’s rights violations or to intervene in cases that have already been filed?

As mentioned above, the law on standing is narrow in Namibia, and in general a person or organisation must be able to show “a direct or substantial” interest that is more than just “abstract, academic, hypothetical or too remote”¹⁰³ to bring a case. Non-governmental organisations may therefore bring civil claims or judicial review proceedings to the extent they satisfy this test.

The High Court has expressly stated, however, that Namibian law “does not recognise standing on the basis of a citizen’s action to vindicate the public interest.”¹⁰⁴ Non-governmental organisations would therefore not be able to challenge potential children’s rights violations unless they can show that they themselves have a direct and substantial interest in the matter, although it is not clear from the case law what would substitute a “direct and substantial interest.”¹⁰⁵ There are no examples of cases where non-governmental organisations have brought claims in Namibia. There are examples in which the Legal Assistance Centre has undertaken public interest or impact litigation, but this has taken the form of assisting individual claimants rather than bringing cases on their own behalf.¹⁰⁶

There have been developments in recent case law that indicate that the rules on standing may be interpreted more widely in proceedings relating to the violation of rights and freedoms under the Constitution,¹⁰⁷ which may make it easier for non-governmental organisations to bring challenges.

¹⁰⁰ See *Access to Justice in Namibia: Proposals for Improving Access to Courts – Locus Standi*, p. 29.

¹⁰¹ Rules of the High Court, Rule 40.

¹⁰² Rules of the High Court, Rule 41.

¹⁰³ *Uffindell v Government of Namibia*, at para 12.

¹⁰⁴ *Uffindell v Government of Namibia*, at para 13.

¹⁰⁵ See *Access to Justice in Namibia: Proposals for Improving Access to Courts – Locus Standi*, p. 7.

¹⁰⁶ Centre for Child Law: *Strategic Impact Litigation on Children’s Rights in Eastern and Southern Africa Seminar*, available at http://crin.org/docs/FileManager/Strategic_Impact_Litigation_Seminar_2011_Report.pdf.

¹⁰⁷ See *Access to Justice in Namibia: Proposals for Improving Access to Courts – Locus Standi*, p. 20.

In addition, non-governmental organisations are able to bring a challenge where a rights violation amounts to the deprivation of liberty. In the case of *Wood and others v Ondangwa Tribal Authority*,¹⁰⁸ it was held that two bishops could bring a claim to protect the rights of persons who could not bring the claim on their own behalf as they were detained. The right has been confirmed in subsequent cases,¹⁰⁹ but is limited to cases that protect another person’s right to liberty rather than rights violations more generally.

The Magistrates’ Court Rules allow the court to grant leave to a third party to intervene in proceedings, but only where that person has an interest in the proceedings.¹¹⁰ Namibian common law allows for an “*amicus curiae*” or “friend of the court” to participate in proceedings in certain situations—for example, where the court requests a legal practitioner who is not representing either party to address complex points of law—but Namibian law does not have a more general right for non-interested parties to intervene to offer expertise or give evidence.¹¹¹ In one recent case, a request by a Namibian NGO to act as such an *amicus* in a case involving corporal punishment at a private school was turned down by the High Court.¹¹²

As discussed above, the Child Care and Protection Act has liberalised laws on standing in relation to matters involving children. The Act allows cases to be brought in children’s courts by, amongst others, “anyone acting on behalf of a child who cannot act in his or her own name,” “anyone acting as a member of, or in the interest of, a group or class of children” or “anyone acting in the public interest [...]”.¹¹³

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children’s rights, such as:

A. **Venue.** In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

As above, civil cases are usually filed with in magistrates’ courts or, where they seek damages in excess of N\$100,000 (for liquid claims) or N\$25,000 (for illiquid claims), in the High Court.¹¹⁴ The Magistrate’s Court Rules and the Rules of the High Court provide guidance on how to initiate civil proceedings.¹¹⁵ Civil cases can also be filed in community courts applying customary law under the Community Courts Act.

Claims for judicial review, and claims involving the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedom guaranteed

¹⁰⁸ *Wood and others v Ondangwa Tribal Authority* [1975] (2) SA 294 (A).

¹⁰⁹ *Vaatz v The Municipality Council of Windhoek* [2011] NAHC 178, available at <http://www.saflii.org/na/cases/NAHC/2011/178.html>.

¹¹⁰ Magistrates’ Court Rules, Rule 28.

¹¹¹ For more information see *Access to Justice in Namibia: Proposals for Improving Access to Courts – Amicus Curiae Participation*, Legal Assistance Centre, p. ii (2012), available at http://www.lac.org.na/projects/grap/Pdf/access2justice2_locus_standi.pdf.

¹¹² Information from Legal Assistance Centre.

¹¹³ Child Care and Protection Act 3 of 2015, Section 52.

¹¹⁴ Magistrates’ Courts Act, Section 29.

¹¹⁵ Magistrates’ Court Rules, Rules 5–7, 15 and 16; See Rules of the High Court.

thereunder, can be filed directly with the High Court.¹¹⁶ The Rules of the High Court provide guidance on required steps and fees.

Criminal proceedings are generally initiated in the magistrates' courts, but might be tried in the High Court depending on the nature and seriousness of the alleged offence.¹¹⁷

Under the new Child Care and Protection Act, magistrate's courts act as children's courts which have jurisdiction over child protection proceedings, and issues of parentage, custody, guardianship, and adoption. There is an actual specialised children's court only in the capital. There are no specialised children's courts dealing with children accused of committing offences.¹¹⁸

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

As discussed in part II.D. above, legal assistance in bringing civil claims is not typically available through the court system. However, as already discussed above, the Child Care and Protection Act provides for legal representation for children at the expense of the state or other the parties to the case in certain circumstances in children's courts.

The Magistrates' Court Rules provide for civil proceedings to be brought or defended by "paupers"—referred to in the magistrates' courts as *pro Deo* applicants.¹¹⁹ Where an applicant brings his or her case as a pauper, he or she is not required to pay court fees and other costs that would normally be payable.¹²⁰ Appeals to the Supreme Court can similarly be brought *in forma pauperis*.¹²¹

Community courts, magistrates' courts and the High Court all charge various filing and administrative fees where the applicant is not a pauper, such as security for costs in order to bring an appeal.¹²²

In addition, the losing party is generally ordered at least a portion of the winning party's legal costs.¹²³ In practice, Namibian courts sometimes decline to require public interest plaintiffs to pay the defendants' costs, but this is in the court's discretion on a case-by-case basis and is not determined at the outset of the proceedings.¹²⁴ However, a new High Court rule makes it possible for a litigant in a public interest case to seek a

¹¹⁶ Rules of the High Court, Rule 76; Constitution, Article 80(2).

¹¹⁷ Criminal Procedure Act, Section 12(1); Magistrates' Courts Act, Sections 89 and 92.

¹¹⁸ See *Alternative report to Namibia's first, second and third periodic reports on the implementation of the United*

Nations Convention on the Rights of the Child and two optional protocols (1997-2008), p. 23.

¹¹⁹ Magistrates' Court Rules, Rule 53, available at <http://www.scribd.com/doc/16488879/magistrates-court-rules>.

¹²⁰ Magistrates' Court Rules, Rule 53(4).

¹²¹ Rules of the Supreme Court, Rule 4.

¹²² Magistrates' Court Rules, Rule 51; High Court Act, Section 18(5)(b)

¹²³ Magistrates' Courts Act, Sections 42(b) and 48(d).

¹²⁴ See *Access to Justice in Namibia: Proposals for Improving Access to Courts – Costs and Contingency Fees*, p. i.

protective costs order at the outset,¹²⁵ with a view to ensuring that worthy cases are not deterred by fears of costs awards.

If a child complainant or his or her representative brings a private criminal prosecution, the person bringing the prosecution has to pay a deposit as security that he or she will prosecute the charge to a conclusion without undue delay,¹²⁶ as well as all other court fees and costs.¹²⁷ Where the accused is convicted, the court may order the offender to repay such fees and costs.¹²⁸

C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

Agreements where payment of legal fees is contingent on the success of the lawsuit are prohibited in Namibia.¹²⁹

It is, however, possible to obtain legal assistance on a pro bono basis from organisations including, among others:

- Legal Assistance Centre;¹³⁰
- National Society for Human Rights (NamRights);¹³¹ and
- Association for the Defense of Refugee Rights (ADR).¹³²

It should be noted that the Legal Assistance Centre will only take on public interest cases which will have a wider impact on the community at large, although many cases where a child is claiming a violation of his or her rights should fall within this.¹³³ The Legal Assistance Centre can also help refer complainants to individual lawyers that may take on a case on a pro bono basis and can provide other information relating to court proceedings.

Overall, access to pro bono legal services is limited in Namibia and may not be sufficient to overcome the problem of high court fees and costs of professional legal services.¹³⁴

D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

¹²⁵ Rules of the High Court, Rule 20.

¹²⁶ Criminal Procedure Act, Section 9.1(a) and (b).

¹²⁷ Criminal Procedure Act, Sections 14 and 15(1).

¹²⁸ Criminal Procedure Act, Section 15(2).

¹²⁹ Rules of the Law Society of Namibia, Rule 21(2)(n), available at

http://www.lawsocietynamibia.org/index.php?option=com_content&view=article&id=26&Itemid=56.

¹³⁰ www.lac.org.na#sthash.1bwLIKXf.dpuf.

¹³¹ www.nshr.org.na.

¹³² <http://www.refugeelegalaidinformation.org/namibia-pro-bono-directory#sthash.lamNxUa8.dpuf>.

¹³³ <http://www.lac.org.na/about/default.html#litigation>.

¹³⁴ Nakuta, J. & Chipepera, F., *The Justice Sector & the Rule of Law in Namibia: Management, Personnel and Access*, p. 31 (2011), available at

http://www.nid.org.na/pdf/publications/Management%20Book%20Fianl%2026_05_11.pdf.

For civil proceedings, the time limit for bringing cases depends on the type of claim brought, as set out in the Prescription Act.¹³⁵ In general, claims involving violations of rights would need to be brought within 3 years of the cause of action.¹³⁶ There are certain circumstances under which claims may be brought after the usual time limits, including where the claimant is reasonably unaware of the facts from which the relevant damage arose.¹³⁷ In the case of claims affecting children, the prescribed period is extended so that it does not expire for one year past the age of majority (currently age 21, but to be changed to 18 when the Child Care and Protection Act comes into force),¹³⁸ providing the opportunity to bring cases relating to violations of their rights during childhood as young adults.

As set out above, there is no clear statutory framework relating to judicial review, and there is no general time limit applicable to all judicial review proceedings. However, certain pieces of legislation do contain specific time limits relating to claims brought against public bodies. For example, the Public Service Act sets out that legal proceedings against public bodies or officials under the act must be brought within 12 months from the date on which the claimant had knowledge or might reasonably have been expected to have knowledge of the cause of action.¹³⁹ Similarly, under the Police Act, civil proceedings must be initiated within 12 months.¹⁴⁰

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The Civil Proceedings Evidence Act¹⁴¹ governs the types of evidence that are admissible in civil proceedings, which include documents, physical evidence and witness statements and testimony. The Civil Proceedings Evidence Act sets out that in principle every person shall be competent and compellable to give evidence in any civil proceedings unless they are “*deprived of the proper use of reason.*”¹⁴² Child witnesses can give evidence without taking an oath where “*due to ignorance arising from youth*” they do not understand the nature and obligation of the oath, as long as the child is admonished by the presiding judge to tell the truth and it appears that the child will be influenced by such instruction.

Chapter 24 of the Criminal Procedure Act sets out the kinds of evidence that are admissible in criminal proceedings, which include documents, physical evidence, finger prints, photographs, recordings and witness statements and testimony. Witnesses in criminal proceedings are in most cases required to testify in open court in the presence of the accused.¹⁴³

¹³⁵ Act No. 68 of 1969, available at <http://www.scribd.com/doc/16476253/Prescription-Act>.

¹³⁶ Prescription Act, Section 11(d).

¹³⁷ Prescription Act, Section 12(3).

¹³⁸ Prescription Act, Section 13(1)(a).

¹³⁹ Public Service Act (Act No. 13 of 1995), Section 33, available at http://www.parliament.gov.na/acts_documents/26_public_service_act.pdf.

¹⁴⁰ Police Act, (Act No. 19 of 1990), Section 39(1), available at http://www.parliament.gov.na/acts_documents/169_act_19_of_1990.pdf.

¹⁴¹ Act No. 25 of 1965.

¹⁴² Civil Proceedings Evidence Act, Sections 8 and 9.

¹⁴³ Criminal Procedure Act, Sections 152 and 158.

In criminal proceedings, the court must not regard the evidence of a child as inherently unreliable and must not treat such evidence with special caution only because the witness is a child.¹⁴⁴ Children under 14 can give evidence in criminal proceedings without taking an oath, as long as the child is instructed by the judge to tell the truth.¹⁴⁵ Cross-examination of a child witness under 13 can only be conducted through the presiding judge or another suitably qualified person.¹⁴⁶

There are also various protections provided to child witnesses and children accused of committing offences under the Criminal Procedure Act. Among other things, courts may make special arrangements for witnesses under 18, including privacy screens, video links, relocation of the trial and examination with the help of a support person.¹⁴⁷ In addition, as an exception to the general rule preventing hearsay evidence, a record of a statement made by a child under 14 is admissible.¹⁴⁸ Further, where a child under 18 is giving evidence, the court may direct that no person other than the child and his parent or guardian, or a person *in loco parentis*, shall be present,¹⁴⁹ and identifying information relating to a witness or accused under 18 cannot be published unless authorised by the presiding judge.¹⁵⁰

The new Child Care and Protection Act gives directives on the physical environment during children's courts hearings to ensure that they are as informal as possible. The room must be, as much as possible, "furnished and designed in a manner aimed at putting children at ease", "conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the dignity of the court", "not ordinarily used for the adjudication of criminal trials", and "accessible to disabled persons and persons with special needs".¹⁵¹ The new Child Care and Protection Act also provides that the special procedures which may be utilised in criminal proceedings involving children (discussed above) may also be applied to any matter being heard in a children's court.¹⁵²

F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

The magistrates' courts handle liquid claims not exceeding N\$100,000 and illiquid claims not exceeding N\$25,000.¹⁵³ Claims exceeding these amounts are heard by the High Court. Neither the Magistrates' Court Rules nor the Rules of the High Court contain absolute time requirements for courts to reach decisions, and there are no exact statistics available on the average trial length of civil proceedings in either court system. However, the High Court has a large backlog of civil cases, including cases overdue for almost 10 years, and it is recognised that cases are on average taking too long to be decided.¹⁵⁴

¹⁴⁴ Criminal Procedure Act, Section 164(4).

¹⁴⁵ Criminal Procedure Act, Section 164(1)(b).

¹⁴⁶ Criminal Procedure Act, Section 166(4).

¹⁴⁷ Criminal Procedure Act, Section 158A.

¹⁴⁸ Criminal Procedure Act, Section 216A.

¹⁴⁹ Criminal Procedure Act, Section 153(5).

¹⁵⁰ Criminal Procedure Act, Section 154(3).

¹⁵¹ Child Care and Protection Act, Section 54.

¹⁵² Ibid, Section 55(2).

¹⁵³ Magistrates' Courts Act, Section 29.

¹⁵⁴ See *Promoting Access to Justice in the High Court of Namibia: First Report* (2010), available at

In criminal trials, according to the Constitution, an arrested person must be brought before a court within 48 hours of the arrest or as soon as possible thereafter, and the trial must take place within a “reasonable time.”¹⁵⁵ However, the Namibian criminal justice system is characterised by lengthy pre-trial detentions caused by a serious backlog of criminal cases, and as a result delays of up to a year or more between arrest and trial are not uncommon.¹⁵⁶

G. Appeal. What are the possibilities for appealing a decision to a higher court?

In civil proceedings, decisions from a community court may be appealed to the relevant magistrates’ court.¹⁵⁷ Decisions from magistrates’ courts can be appealed to the High Court¹⁵⁸ following the procedures set out in the Magistrates’ Court Rules.¹⁵⁹ Appeals to the High Court must generally be filed within 21 days of the judgment appealed against or within 14 days of receipt of a copy of the written judgment, whichever period is longer.¹⁶⁰

Appellate courts may opt to hear further evidence in the case or to remit the case to the court of first instance for further hearing, with such instructions as the High Court may deem necessary. Appellate courts also have the power to confirm, amend or set aside the judgment or order, and to give any judgment or make any order which the circumstances may require. Appeals to the High Court are governed by the Rules of the High Court.¹⁶¹

Decisions from the High Court may be appealed to the Supreme Court.¹⁶² In the case of the High Court sitting as a court of first instance, no leave to appeal shall be required; in the case of the High Court sitting as a court of appeal, leave to appeal must first be granted. In deciding whether to grant leave to appeal, the High Court and the Supreme Court are entitled to take into consideration “*whether the questions of law or fact involved in the appeal are of such a nature as to require the attention of the Supreme Court.*”¹⁶³

Appeals to the Supreme Court are governed by the Rules of the Supreme Court.¹⁶⁴ As discussed above, any “poor person” may apply for leave to prosecute or defend an appeal *in forma pauperis*.¹⁶⁵

<http://www.republikein.com.na/fileadmin/pdf/2010/rep/JCN-Report-10-12-10.pdf>.

¹⁵⁵ Constitution, Article 11(3) and Article 12(1)(b).

¹⁵⁶ Nakuta, J. & Cloete, V., *The Justice Sector & the Rule of Law in Namibia: The Criminal Justice System*, p. 19 (2011), available at

http://www.nid.org.na/pdf/publications/Criminal%20Justice%20Book%20Final%202026_05_11.pdf.

¹⁵⁷ Community Courts Act, Section 26(1).

¹⁵⁸ Magistrates’ Courts Act, Section 83; High Court Act, Section 16(a).

¹⁵⁹ Magistrates’ Court Rules, Rule 51.

¹⁶⁰ Magistrates’ Court Rules, Rule 51(3).

¹⁶¹ Rules of the High Court, Part 13 (Appeals).

¹⁶² High Court Act (Act No. 16 of 1990), Section 18, available at

http://www.superiorcourts.org.na/supreme/acts_rules/index.html.

¹⁶³ High Court Act, Section 18(5)(a); Supreme Court Act, Section 14(4).

¹⁶⁴ Rules of the Supreme Court, Rule 5.

¹⁶⁵ Rules of the Supreme Court, Rule 4.

Criminal appeals are governed by the Criminal Procedure Act.¹⁶⁶ Decisions in criminal cases can be appealed from lower magistrates' courts to higher magistrates' courts, and subsequently to the High Court. High Court decisions may be further appealed to the Supreme Court, provided leave to appeal is granted and the appeal is filed within 14 days of the sentence (or such longer period as the court may allow).¹⁶⁷

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Precedent plays an important role in the Namibian legal system and courts are bound by decisions of all higher courts. The Supreme Court may depart from its own decisions in limited situations, but only where it is clear that it has erred,¹⁶⁸ meaning that the effect of a bad decision for children's rights could be felt for many years. Within the judicial system, a negative decision from a higher court will be more far-reaching and have greater effects than a negative decision from a lower court.

There have been several instances where the legislator has taken action to "reverse" or "compensate for" court decisions in contentious cases. For example, the Supreme Court held in *State v Scholtz*¹⁶⁹ that disclosure by the state was obligatory in criminal cases. In an attempt to compensate the state, the Criminal Procedure Act 2004,¹⁷⁰ which has been promulgated but not yet enacted (and which is possibly going to be jettisoned and re-worked), makes provision for compulsory disclosure by the accused,¹⁷¹ which may be seen as violating the constitutional right of an accused to remain silent and not to disclose his or her defense before the trial.¹⁷²

While the Namibian Constitution allows Parliament to overturn Supreme Court judgments with new legislation,¹⁷³ any new law so passed can in turn be declared unconstitutional by the Supreme Court or the High Court if it violates the Constitution.¹⁷⁴

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

There are no reports of difficulties in enforcing positive court judgments.

As courts do not generally substitute their decision for that of the administrative body, courts in judicial review proceedings most often impose an "order of certiorari," which sets a decision or action of an administrative body aside as being unlawful but does not

¹⁶⁶ Criminal Procedure Act, Chapters 30 and 31.

¹⁶⁷ Criminal Procedure Act, Section 316(2).

¹⁶⁸ See, e.g., *Schroeder and Another v Solomon and 48 Others* (SCA 1/2007) [2010] NASC 11, available at [http://www.superiorcourts.org.na/supreme/docs/judgments/civil/schroeder-solomon\(1\).pdf](http://www.superiorcourts.org.na/supreme/docs/judgments/civil/schroeder-solomon(1).pdf).

¹⁶⁹ *State v Scholtz* [1998] NR 207 (SC), available at [http://www.superiorcourts.org.na/supreme/docs/judgments/criminal/s-scholtz\(1\).pdf](http://www.superiorcourts.org.na/supreme/docs/judgments/criminal/s-scholtz(1).pdf).

¹⁷⁰ Act No. 25 of 2004, available at http://www.parliament.gov.na/acts_documents/225_act_25_of_2004.pdf.

¹⁷¹ Criminal Procedure Act 2004, Section 114.

¹⁷² See Horn, N., *International human rights norms and standards: The development of Namibian case and statutory law*, p. 163f (2008).

¹⁷³ Constitution, Article 81.

¹⁷⁴ Constitution, Article 25(1).

provide for a directly enforceable remedy that requires the body to follow a particular course of action.¹⁷⁵ Instead, the administrative body would have the chance to reconsider their decision in light of the court ruling, but may ultimately opt to make a similar decision or take a similar action as before the ruling.

V. Additional factors. Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

The majority of the Namibian population lives in the rural areas, where customary law is still regularly practiced. The Namibian government has accorded formal recognition to community courts that apply local customary laws through the Community Courts Act.¹⁷⁶ It has been argued that various customary law practices are in conflict with the Constitution, especially regarding the provisions in the Bill of Rights in the Constitution.¹⁷⁷ As many of these courts are informal in nature, it is difficult to assess the number of traditional courts operating, the law they apply and whether all such courts will be recognised under the Community Courts Act.¹⁷⁸ The advantages of traditional or community courts are that they generally involve lower costs and are more easily accessible for the majority of the Namibian population. As the costs involved in bringing courts before magistrates' courts and the High Court exceed the means of most Namibians, and are hard to reach for people in rural areas,¹⁷⁹ community courts may give people access to justice where it would not otherwise be possible.

On the other hand, it is not yet clear that all such courts operate consistently within the parameters of gender equality and other constitutional values, meaning that there is also grounds for caution in recommending them as an alternative to the general court system. Also, although they are intended to be courts of record, in order to allow for appeals by aggrieved parties, this is not yet uniformly observed in practice, meaning that appeals from such courts might pose difficulties. Furthermore, at present, community courts are authorised only to implement customary law, which does not yet incorporate sufficient protection for the best interest of children in all contexts. Thus, attention must also be given to improving the quality of service in and the accessibility of children's courts.

This report is provided for educational and informational purposes only and should not be construed as legal advice.

¹⁷⁵ Chairperson of the Immigration Selection Board v Frank & Another [2001] NR 107 (SC), available at <http://nam-elaws.com.na/displaylrpage.php?id=4700&dsp=2>.

¹⁷⁶ No. 10 of 2003, as above.

¹⁷⁷ See Amoo, S. and Skeffers, I., *The rule of law in Namibia*, p. 26 (2008), available at http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/amoo_skeffers.pdf.

¹⁷⁸ See Hinz, M.O., *Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice* (2010), available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/hinz.pdf.

¹⁷⁹ See *The Justice Sector & the Rule of Law in Namibia: Management, Personnel and Access*, p.