

LEGAL AND JUDICIAL PLURALISM IN NAMIBIA AND BEYOND: A MODERN APPROACH TO AFRICAN LEGAL ARCHITECTURE?

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Introduction

This article⁶⁰ is intended to give an overview on the various structures pertinent to the Namibian legal system as one vital example of legal and judicial pluralism in Africa. Legal pluralism has become a recognised concept all over our globalised world and it is deeply anchored in the Namibian legal system (Hinz 2007). However, as a world-wide observable phenomenon legal pluralism exists not within but also beyond legal orders (Ruppel and Winter 2011). As the concept of legal pluralism is continuously developing in the field of legal theory, it cannot be reduced to one clear, all-encompassing definition. What is clear however, is that

[t]he wide field of law in its various local, global manifestations is more than just a 'law's empire': above all, it concerns dynamic and extremely complex and contested navigation patterns of rules and processes (Menski 2010: 443).

A broad variety of elements influence the applicable sources of law and thus, a legal system in its entirety. These influencing elements include religion, ethics, morality, society, government, globalisation and international law (Menski 2010:

⁶⁰ Our grateful thanks are due to Werner Mostert for his assistance in preparing this article for publication.

443). Different legal mechanisms may be applied for comparable situations (Griffiths 1986: 1-55). This is particularly true for the African, and in this case, the Namibian context, which will be elaborated in the following by focusing on applicable law and various dispute settlement fora. In this context, light will first be shed on the national level, before turning to the African regional level.⁶¹ The article aims to reflect a ‘modern approach’ to African legal architecture. Modern in a sense that it not only focuses on legal pluralism on the national but also on the regional level, where the majority of the people is still governed by multiple legal and increasingly governed by multilayered political or economic regimes. Such complex systems of multi-level governance depend on the strength of interdependence between the regional, national and local levels. A view towards a more transnational pluralism thus offers not only an appropriate account of contemporary African legal reality but also reflects legal pluralistic insights beyond territorially-based application in an African legal environment.

Southwest Africa - Namibia

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. As a result of the Herero and Nama wars of anti-colonial resistance of 1904-1908,⁶² 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.⁶³

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

⁶¹ It should be noted that the numerous bilateral agreements to which Namibia is a signatory will not be discussed within the scope of this article.

⁶² See also Ruppel (2009c, 2011b).

⁶³ See generally Ruppel and Ruppel-Schlichting (2011: 1-13).

and legislation over the territory.⁶⁴ Article 22 stated as follows:

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.⁶⁵

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.⁶⁶ Also in 1966 the South West African People's Organisation (SWAPO), under the leadership of Sam Nujoma,

⁶⁴ See www.state.gov/r/pa/ei/bgn/5472.htm, last accessed on 11 May 2012.

⁶⁵ Available at <http://net.lib.byu.edu/~rdh7/wwi/versa/versa1.html> ; last accessed on 11 May 2012.

⁶⁶ Ibid.

started to put pressure on the 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. The United Nations Institute for Namibia (UNIN) was established to educate Namibians for roles in an independent Republic of Namibia after the proposal was adopted by the United Nations General Assembly in December 1974.⁶⁷ 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 (Amoo and Skeffers 2008).

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.

Legal Pluralism

During the German colonial time, the strict segregation between 'natives' and 'non-natives' was a governing principle, which was also reflected in the plurality of existing laws and their isolated application (Sippel 2011: 203). Today Namibian law reflects the country's rich history. The law in place 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 (Hinz and Santos 2002). Moreover, a broad spectrum of statutory laws and policies have been developed on the national level after Independence and the important role of international law has been anchored in Namibia's Constitution, as will be outlined below.

⁶⁷ The United Nations Institute for Namibia (UNIN) was an educational body set up by the United Nations Council for Namibia until 1990. It was based in Zambia's capital of Lusaka.

The Constitution and International Law

The Namibian Constitution or the *Mother of All Laws*, as Namibians have come to call this legal instrument, is indivisibly linked to the founding of the Namibian state. The adoption of the Constitution came about after a three-decade-long struggle for Independence⁶⁸ and many more decades of colonial and military rule.⁶⁹ On 21 March 1990, Namibia became politically independent, with a basic legal framework drafted by the Constituent Assembly of Namibia. The Constitution was a result of joint efforts of and debates between the political parties represented in the Constituent Assembly, South Africa, the United Nations and the South West Africa People's Organisation (SWAPO) (Diescho 1994).

The Namibian Constitution has been hailed as one of the most democratic and liberal constitutions in the world (Schmidt-Jortzig 1991: 341-351). It shows a strong commitment to the rule of law, democratic government and respect for fundamental human rights and freedoms such as the protection of life, liberty, human dignity, equality, education, freedom from slavery, forced labour, and discrimination to name only a few rights enshrined in it. Furthermore, the Constitution contains mechanisms with regard to checks and balances between the three branches of government, the executive, the legislature and the judiciary. Principles of state policy, which guide the government's legislative processes, are provided in Chapter 11 of the Constitution. The Constitution enjoys hierarchical primacy amongst the sources of law by virtue of its Article 1(6). It is thematically organised into 21 Chapters that contain 148 Articles (Bukurura 2002: 57). The preamble of a constitution is an important tool for the interpretation of such document, because it reflects the general spirit of the drafter (Watz 2004: 21).

Article 144 of the Namibian Constitution incorporates international law explicitly as law of the land; it needs no legislative act to become so. International law is thus integrated into domestic law. National authorities and the judiciary in particular can, therefore, apply international law directly on the national level, before cases are taken to regional or international judicial or quasi-judicial bodies (Bangamwabo 2008: 168). However, international law has to conform to the Constitution in order to apply domestically. Whenever a treaty provision or other rule of international law is inconsistent with the Namibian Constitution, the latter

⁶⁸ On the struggle for liberation see Katjavivi (1988).

⁶⁹ For a detailed analysis of the background and origin of the Namibian Constitution see Diescho (1994), Erasmus (2002: 5-26).

will prevail.

In Namibia a treaty will be binding in terms of Article 144, if the relevant international and constitutional requirements have been met in terms of the law of treaties, and the Namibian Constitution. International agreements, therefore, will become Namibian law when they come into force for Namibia (Erasmus 1991). The conclusion of or accession to an international agreement is governed by Articles 32(3)(e), 40(i) and 63(2)(e) of the Namibian Constitution. The Executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required by the Constitution that the National Assembly agrees to the ratification of or accession to an international agreement. However, the Constitution does not require the promulgation of an international agreement in order for it to become part of the law of the land (Hinz and Ruppel 2008: 8ff). Further to Article 144, Article 96 of the Constitution promotes international cooperation, peace and security; it also exhorts respect for international law and treaty obligations, as a principle of state policy.

Roman-Dutch and Common Law

The Namibian Constitution is special in several ways. Firstly, it was developed largely under the eyes and with the assistance of the international community. Secondly, the Namibian Constitution was certainly an experiment in southern Africa in putting an end to racial discrimination and apartheid (Watz 2004: 21). Namibia has not totally relinquished its South African legal legacy, however. Article 140 provides for legal continuity, stating that all existing laws prior to Independence are to remain in force until repealed by Parliament. This does not only mean that Roman-Dutch law continues to be the ordinary law of the land, but also that Namibia still has a considerable amount of pre-independence legislation.⁷⁰

Roman-Dutch law is based on Roman law as it was applied by the courts of Holland and other provinces in the Netherlands; it was developed by writers such as Hugo de Groot and Simon van Leeuwen in the 17th and 18th centuries (du Plessis 1990: 40). Roman-Dutch law came to the Cape of Good Hope when the Dutch East India Company under its local Governor Jan van Riebeeck established

⁷⁰ See also Ruppel (2010a: 323-360).

a post for replenishing ships' supplies – today's Cape Town, in 1652. Roman-Dutch Law in South Africa was subject to further developments under the influence of particularly English law (du Plessis 1990: 49ff).

With the effect of Proclamation 21 of 1919, the Roman Dutch law developed by the South African courts became the common law of the territory, binding on the Namibian courts until Independence (Amoo 2008c: 69ff). This position was affirmed by Article 66(1) of the Namibian Constitution, which provides that

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

Common law refers to law and the corresponding legal system developed through court decisions and similar tribunals, rather than through statutory enactment. Common law is created and refined by judges: a decision in a case which is currently pending largely depends on decisions in previous cases and affects the law to be applied in future cases.⁷¹ When there is no authoritative statement of the law, judges have the authority and duty to make law by creating precedent.

African Customary Law

Despite the legal influence of the ex-colonial powers, a large number of Namibians still live under indigenous customary law (Hinz 2002: 69-89). It regulates marriage, divorce, inheritance and land tenure, amongst other things. Thus, customary law is a body of norms, customs and beliefs relevant for most Namibians. However, despite this relevance for the majority of the population, customary law has for a time been marginalised and even ignored owing to colonial rule. Customary law is a complex, dynamic system which has constantly evolved in response to a wide variety of internal needs and external influences (Hinz 2002).

Before the arrival of the colonists the indigenous populations have lived for generations according to their own distinctive laws. Customary law was passed on - orally - from generation to generation. Article 66 of the Namibian Constitution

⁷¹ For further details on the common law in Namibia see Amoo (2008a: 62).

lays the foundation for the constitutional recognition of customary law. It states that both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent that such customary or common law does not conflict with the Constitution or any other statutory law. Section 3 of the Traditional Authorities Act⁷² gives certain powers, duties and functions to traditional authorities and members thereof.

Currently there are 49 officially recognised traditional communities and most of them have their own customary laws and traditions: There are eight Oshiwambo-speaking communities, namely the Ombadja, Ombalantu, Ondonga, Ongandjera, Oukwanyama, Uukolonkadhi, Uukwaluudhi and Uukwambi; five communities in Kavango, namely the Ukwangali, Mbunza, Shambyu, Gciriku and Humbukushu; four communities in the Caprivi region, namely the Mafwe, Mashi, Masubia and Mayeyi. The remaining traditional communities can be divided into five different clusters, such as the Damara, the Ovaherero and Ovambanderu, the Nama, the San, the Batswana ba Namibia and the Bakgalakgadi (Ruppel 2010b: iii-iv).

It is the overall responsibility of traditional authorities to supervise and ensure the observance of the customary law of that community by its members. Customary law also plays an important role in the sustainable development of natural resources and the protection of biological diversity as it incorporates a broad knowledge of ecosystems relationships (Hinz and Ruppel 2008: 57-58, 2010).

While most of the customary rules have been transmitted orally from generation to generation, the process of ascertaining customary law in Namibia is on-going (Hinz and Namwoonde 2010). Article 66(1) puts customary law on the same footing as any other law of the country as far as its constitutionality is concerned. This means that customary law has to comply with the constitutional provisions, particularly Chapter 3, which contains fundamental human rights and freedoms. Certain conceptions related to human rights are from a customary law perspective sometimes still seen as ‘Western’ concepts (Menski 2010: 443; Hinz 2010a: 15) that interfere with cultural values. However, those aspects of customary law that are inhuman and discriminatory should not endanger the existence of customary law as a system of laws that governs the way of life of most Africans. The solution is not to abolish customary law, but rather to have such law reviewed. The abolition of customary law would mean erasing the *modus operandi* of various ethnic groups from the broad spectrum of Namibian society. Instead, one should

⁷² No. 25 of 2000.

identify the sensitive aspects under customary practices (e.g. in regards to women and children)⁷³ that do not conform to the constitutional principles of equality, fairness, and justice, and apply law reform.

After all, the constitutional recognition of customary law protects it against arbitrary inroads, and places a legal duty upon national lawmakers to treat customary law like any other law as regards its repeal or amendment.⁷⁴ This dichotomy of laws makes the Namibian legal system an object of fascination to comparative lawyers as well as to legal ethnologists and sociologists (Ruppel 2009e).

Judicial Pluralism

The Namibian court system also retains Roman-Dutch elements, inherited from South Africa along with elements of the African traditional (community) court system. The 'formal'⁷⁵ court system comprises the Supreme Court, the High Court, the magistrates' courts and the (traditional) Community Courts (Ruppel and Ruppel-Schlichting 2011: 8).

The courts are required to follow binding 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 (Ruppel and Ruppel-Schlichting 2011: 8).

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

⁷³ See research done on women and children by Ruppel (2008, 2009a).

⁷⁴ Cf Hinz (2002); Ruppel (2010d: 279f).

⁷⁵ For informal justice systems, cf Hinz and Mapaure (2010).

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 (Havenga et al. 2002: 8).

The Higher Court Structure

The Supreme Court serves as the highest court of appeal and also exercises constitutional review of legislation. The seat of the court is in Windhoek. 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 (Amoo 2008b). Its appellate jurisdiction covers appeals emanating from the High Court, including appeals which involve interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder (Amoo 2008c: 72). The Supreme Court is not bound by any judgment, 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 judgment or order of the High Court; and any party to any such proceedings before the High Court, if dissatisfied with any such judgment or order, has a right of appeal to the Supreme Court (Supreme Court Act No. 15 of 1990). Unlike, for example, South Africa, where there is a Constitutional Court, in Namibia the Constitution does not create a separate Constitutional Court per se, but the Supreme Court can constitute itself as a Constitutional Court (Amoo 2008a: 3).

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. 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 (Amoo 2008a: 3).

The High Court is a superior court of record and its jurisdiction is provided by both the Constitution and the High Court Act (No. 16 of 1990). 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 (High Court Act, section 13). It is situated permanently in Windhoek, and since 2009 also in Oshakati. Other than this, the court goes on circuit to venues including Gobabis, Grootfontein and Swakopmund.⁷⁶ The High Court derives its appellate jurisdiction to hear and adjudicate upon appeals from lower courts primarily from the Constitution (Article 80(2)). The court also has the power to confirm, amend, or set aside the judgment or order which is the subject of the appeal, and to give any judgment or make any order which the circumstances may require (High Court Act, section 19).

The Lower Court Structure

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 (No. 32 of 1944). The bulk of the judiciary's work also takes place in the lower courts. There are thirty-two (32) permanent courts and more than thirty (30) periodical courts in Namibia (Amoo 2008c: 83). 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 (Amoo 2008c: 83).

The Magistrates' courts may be classified into regional, district and sub-district, division⁷⁷ and periodical courts⁷⁸. Magistrates' Courts are courts of record⁷⁹ and

⁷⁶ 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.

⁷⁷ Section 2(f.) (2) (a)-(iv) of the Magistrates' Courts Act of 1944.

⁷⁸ 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.

their proceedings in both criminal cases and the trial of all defended civil actions are conducted in an open court.⁸⁰ The jurisdiction of the Magistrates' Courts in respect of causes of action is regulated by Section 29 of the Magistrates' Court Act, as amended.⁸¹ The Magistrates' Courts have jurisdiction over liquid claims not exceeding N\$100,000 and illiquid claims not exceeding N\$25,000.⁸² 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 (Amoo 2008c: 84). 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.

According to sections 4-6 of the Traditional Authorities Act, there are 49 recognised traditional authorities in Namibia. These traditional authorities, as well as unrecognised traditional communities are governed by their customary laws and run traditional courts to decide upon matters brought before them (Hinz 2010b: 93). Community courts are a formal creation of the Community Courts Act (No. 10 of 2003), which also provides detailed procedures and requirements for the establishment and recognition of Community Courts in particular traditional communities. (For more details see Hinz 2010b.) The Community Courts are required to cater for all forms of proceedings exercised under customary law. 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 law. This formal recognition also brings the proceedings

⁷⁹ 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' (Amoo 2008c: 83).

⁸⁰ Section 5 of the Magistrates' Courts Act of 1944.

⁸¹ Magistrates' Courts Amendment Act No. 9 of 1997.

⁸² 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.

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 (Amoo 2008c: 90). The Community Courts Act has, however, not yet been implemented, although it is in force. The office of the Ministry of Justice has pointed out that the delay in giving effect to the Act may be associated with a lack of funds for implementing the necessary infrastructure, as well as the lack of trained staff in the area of customary law (Hinz 2008: 78). It is yet to be seen when and how the Community Courts Act finally brings judicial scrutiny to customary law in Namibia. When this is done, it is expected that all Namibian courts will become even more mindful of the fact that the application of customary law is only valid to the extent to which it does not conflict with the Constitution or other statutory law.⁸³

The Ombudsman

One further mechanism to offer solutions for conflicts on the national level is the institution of the Ombudsman which was established in 1990 as a constitutional office by Chapter 10 of the Namibian Constitution and the Ombudsman Act No. 7 of 1990. The Ombudsman, an institution that can be classified neither as a traditional, nor as an informal justice system (Ruppel and Ruppel-Schlichting 2010), is designed to be an independent, impartial and neutral institution to keep a vigilant eye on the proper exercise of power and the protection of human rights. Broadly speaking, the Ombudsman in Namibia investigates complaints concerning violations of fundamental rights and freedoms and about the administration of all organs of Government. More precisely, the Office of the Ombudsman promotes and protects human rights, fair and effective public administration, and protects the environment and natural resources through investigations and the resolution of complaints.

Namibia and the African Union (AU)

The historical foundations of the African Union originated in the Union of African States, an early confederation that was established by Kwame Nkrumah in the 1960s. The Organisation of African Unity (OAU) was established on May 25,

⁸³ As also observed by the Namibian Chief Justice Hon. Peter Shivute in his Preface to Hinz and Namwoonde (2010: ii).

1963. On 9 September 1999, the heads of state and governments of the OAU issued the Sirte Declaration (named after Sirte, in Libya), calling for the establishment of an African Union. The Declaration was followed by summits at Lomé in 2000, when the Constitutive Act of the African Union was adopted, and at Lusaka in 2001, when the Plan for the Implementation of the African Union was adopted. During the same period, the initiative for the establishment of the New Partnership for Africa's Development (NEPAD), was also established. The African Union was launched in Durban on July 9, 2002, by the then South African President, Thabo Mbeki⁸⁴, at the first session of the Assembly of the African Union. The Union's administrative centre is in Addis Ababa, Ethiopia and the working languages are Arabic, English, French, Portuguese, and Swahili. The African Union counts 53 member States with Morocco being the only African State that is not a member. Geographically, the African Union covers an area of 29,757,900 km² and for 2010, the United Nations Population Division estimated it to have a total population of 1,033,043,000.⁸⁵

The Constitutive Act of the AU, to which Namibia is a party, provides that the African Union intends to function as Africa's premier institution and principal organisation for the promotion of accelerated socio-economic integration of the continent, which will lead to greater unity and solidarity between African countries and peoples. The AU envisages building a united and strong Africa and recognises the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion amongst the peoples of Africa. As a continental organisation, the AU focuses on the promotion of peace, security and stability on the continent as a prerequisite for the implementation of the development and integration agenda of the Union. To this end, a multitude of legal instruments have been adopted, inter alia, on the fields of human rights protection, economic issues, but also in the field of environmental protection (Ruppel 2011a: 55; for further details see: Viljoen 2007: 157; Ruppel 2009b; Visser and Ruppel-Schlichting 2008; Gawanas 2009; Keetharuth 2009). Some of these laws are binding upon Namibia.

The legal instruments under the umbrella of the African Union each have their

⁸⁴ Thabo Mbeki was the African Union's first President.

⁸⁵ Africa's entire population was estimated to be 1 033 043 000 in 2010, which includes the population of Morocco, estimated at 32 381 000. See <http://esa.un.org/unpp/p2k0data.asp>; last accessed 13 November 2010.

own provision on how disputes are to be settled. Alternative dispute resolution plays an important role in this regard since it is the favoured mechanism, as e.g. provided for in the African Convention for Nature Conservation. However, as a general rule, the African Court of Justice (ACJ) has the ultimate jurisdiction. The African Court of Justice, which is to be merged with the African Court on Human and Peoples' Rights, was established in 2002 (Hansungule 2009: 237). The Protocol establishing the ACJ was adopted in 2003 and will come into force after ratification by 15 AU member States. The Court is located in Arusha, Tanzania but has not yet become operational. The merged court will have jurisdiction over all disputes and applications referred to it which *inter alia* relate to the interpretation and application of the AU Constitutive Act or the interpretation, application or validity of Union Treaties, as well as human rights violations. To date, the African Commission on Human and Peoples' Rights, a quasi-judicial body established by the African Charter on Human and Peoples' Rights, is responsible for monitoring compliance with the African Charter on Human and Peoples' Rights.

By means of Article 144 of the Namibian Constitution international law explicitly becomes law of the land, needing no legislative act to become so. Article 144 mentions two sources of international law that apply in Namibia: general rules of public international law, and international agreements binding upon Namibia. The Constitutive Act of the AU and SADC Treaty (*infra*) constitute such international agreements which are binding in Namibia in terms of Article 144. The accession to such agreements is governed by Articles 32(3)(e), 40(i) and 63(2)(e) of the Namibian Constitution. The Executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required by the Constitution that the National Assembly agrees to the ratification of or accession to an international agreement. Namibia's national legal framework is therefore complemented by *inter alia* the laws and policies of the African Union and the Southern African Development Community.

Namibia and the Southern African Development Community (SADC)

Namibia is a member of the Southern African Development Community (SADC). SADC was established in Windhoek in 1992 as the successor organisation to the Southern African Development Coordination Conference (SADCC), which was

founded in 1980. SADC was established by the signing of its constitutive legal instrument, the SADC Treaty. SADC envisages

[...] a common future, a future in a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa.⁸⁶

SADC currently counts 15 states among its members, namely Angola, Botswana, the DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles,⁸⁷ South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. SADC's objectives include amongst others the achievement of development and economic growth; the alleviation of poverty; the enhancement of the standard and quality of life; support of the socially disadvantaged through regional integration; the evolution of common political values, systems and institutions; the promotion and defence of peace and security; and achieving the sustainable utilisation of natural resources and effective protection of the environment.⁸⁸

The Summit of SADC Heads of State and Government of SADC held in Sandton, South Africa, 16 – 17 August 2008 launched the SADC Free Trade Area (FTA) which is the first milestone in the regional economic integration agenda. The Summit recognised that free trade in the region would create a larger market, releasing potential for trade, economic development and employment creation. The SADC regional integration programme ambitiously provides that the establishment of the Free Trade Agreement⁸⁹ will be followed by a Customs Union by 2010, a

⁸⁶ SADC's Vision, available at <http://www.sadc.int/index/browse/page/64>; last accessed on 11 May 2012.

⁸⁷ The Seychelles was a member of SADC from 1997 to 2004 and rejoined SADC in 2008.

⁸⁸ These are some of the SADC objectives laid down in Article 5 of the SADC Treaty.

⁸⁹ While 12 member states (Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe) have already ratified the SADC Protocol on Trade, Angola and the

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Common Market by 2015, a monetary Union by 2016 and a single currency by 2018.⁹⁰ So far, the launch of the SADC customs union initially scheduled for 2010 has however been postponed due to the slow pace of implementation of the SADC. It is being observed that many countries are behind in harmonisation of regional standards and participation in terms of the SADC Trade Protocol.

The heterogeneity of SADC member states is not only reflected by surface area, population figures, size of the domestic markets, per capita incomes, the endowment with natural resources and the social and political situation, but also by the variety of legal systems applied in different member states. The legal systems of the world are commonly classified into various legal families or categories which describe the juristic philosophy and techniques shared by a number of nations with broadly similar legal systems by recognising the important relationship between law, history and culture. Over the centuries several main categories of legal systems have been described in the course of the world's legal history. Main categories include civil (or Romano-Germanic) and common law, socialist law (which has obviously forfeited relevance since the fall of the Iron Curtain) and several religious legal systems (Menski 2008).

African legal systems have always been an object of fascination to comparative lawyers as well as to legal ethnologists and sociologists, due to the broad variety of applied legal systems on the African continent. In the states of sub-Saharan Africa, the concept of legal pluralism is predominant. Despite the legal influences of the ex-colonial powers, a large number of Africans in SADC still live under indigenous customary law (Hinz 2002).

In view of the heterogeneity of legal systems within SADC but also with regard to a harmonious jurisdiction, it could be argued that in the long run the legal systems within the community should be unified (Latigo 2008). Of increasing significance for SADC member states will be the harmonisation of law working by the implementation and transformation of protocols and guidelines and aiming to reduce or eliminate the differences between the national legal systems by inducing them to adopt common principles of law. In terms of regional integration, the

Democratic Republic of the Congo (DRC) will join the SADC Free Trade Area (FTA) at a later stage.

⁹⁰ SADC Final Communiqué of the 28th Summit of SADC Heads of State and Government, held in Sandton, Republic of South Africa from August 16 to 17, 2008, www.sadc.int/index/browse/page/203; last accessed on 11 May 2012.

conformation of law is one central instrument to reduce normative barriers within the community. Unified law can indeed promote greater legal predictability and legal certainty, both essential for the investment climate and economic development in general. However, the extent and method of harmonisation is problematic as national positions and traditions have to be taken into consideration and, as a matter of fact, the differences that exist in respect of legal traditions in different countries of SADC must also be respected, even or rather especially in times of regionalisation and globalisation.

In terms of SADC Community Law, the SADC Treaty is the highest source of law within SADC's legal framework. In its Preamble, the Treaty determines, *inter alia*, to ensure, through common action, the progress and well-being of the people of southern Africa, and recognises the need to involve the people of the SADC region centrally in the process of development and integration, particularly through guaranteeing democratic rights, and observing human rights and the rule of law. The Preamble's contents are given effect within the subsequent provisions of the SADC Treaty. Chapter 3, for example, which deals with principles, objectives, the common agenda and general undertakings, provides that SADC and its member states are to act in accordance with the principles of human rights, democracy and the rule of law (Article 4(c)).

The SADC Protocols are the legal instruments by means of which the SADC Treaty is implemented. A Protocol comes into force after two thirds of SADC member states have ratified it. A Protocol legally binds its signatories after ratification. The implementation of the Protocol's provisions is the responsibility of the SADC member states (Article 14, SADC Protocol). The existing SADC Protocols include the following: Corruption; Culture, Information and Sports; Combating Illicit Drugs; Education and Training; Energy; Protocol on Extradition; Control of Firearms, Ammunition and Other Related Materials; Fisheries; Forestry; Gender and Development; Immunities and Privileges; Legal Affairs; Mutual Legal Assistance in Criminal Matters; Mining; the Facilitation of Movement of Persons; Politics, Defence and Security Co-operation; the Development of Tourism; Trade; Transport, Communications and Meteorology; and the Tribunal and the Rules of thereof (Ruppel and Ruppel-Schlichting 2012: 45).

The SADC Tribunal is the judicial body of SADC that has jurisdiction over disputes relating to the Protocol on the Tribunal and the Rules of Procedure thereof (Article 18, SADC Protocol). The establishment of the Tribunal was a major event in SADC's history as an organisation as well as in the development of

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its law and jurisprudence. The Tribunal was established in 1992 by Article 9 of the SADC Treaty. The legal provisions governing the SADC Tribunal are contained in the SADC Protocol on the Tribunal and the Rules of Procedure thereof (the Protocol), which entered into force in 2001. The Protocol comprises 39 Articles⁹¹ and, among other things, establishes the Tribunal and clarifies its functions. According to Article 23 of the Protocol, the Rules of Procedure (the Rules) form an integral part of the Protocol. These Rules comprise 90 regulations governing, *inter alia*, the constitution and functions of the Tribunal; representation before the Tribunal; written, oral and special proceedings; and decisions.

The inauguration of the Tribunal and the swearing in of its members took place on 18 November 2005 in Windhoek, Namibia. The Council also designated Windhoek as the Seat of the Tribunal. The Tribunal began hearing cases in 2007. One of the first cases before the Tribunal was the case of Mike Campbell (PVT) Limited, challenging human rights violations by the expropriation of agricultural land in Zimbabwe by the government. (For more information see: Ruppel 2012, 2011c, 2009d, 2009f, 2009g, 2009h; Ruppel and Bangamwabo 2008.) In 2008 the SADC Tribunal in its final decision ruled in favour of Mike Campbell and 78 other white commercial farmers. The Tribunal held that the Republic of Zimbabwe was in breach of its obligations under the SADC Treaty. The ruling was considered to be a landmark decision, yet, Zimbabwe has so far refused to recognize the rulings of the SADC Tribunal. This unresolved issue of Zimbabwe's refusal to bow to rulings made by the Tribunal continues to haunt SADC. Only recently the SADC Tribunal was suspended until August 2012 while its role and functions and also the implications of a member state ignoring its rulings are reexamined. Interestingly, in March 2012 the African Commission on Human and Peoples' Rights decided to register and consider a complaint about the suspension of the SADC Tribunal. The claimants requested the African Commission to refer their communication to the African Court of Justice so it can order the SADC summit and its member states to lift, with immediate effect, the suspension of the tribunal, to reappoint the tribunal's judges and to give the tribunal the funding it needs to get on with its work.

⁹¹ It has to be noted, however, that Articles 35 and 36 (ratification and accession, respectively) of the Protocol have been repealed by the Agreement Amending the Protocol on the Tribunal.

The Tripartite Initiative

The fact that the process of regional integration in Africa is accelerating becomes even more evident when observing the following recent developments. In October 2008, the Heads of States of Governments of the member states of the SADC, the Eastern African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) negotiated a communiqué of the Tripartite Summit of 22 October 2008 under which the Heads of State and Government representing the three regional economic communities agreed that the communities should merge into a single Customs Union beginning with a Free Trade Area in order to promote the rapid social and economic development of the region.⁹² This is particularly remarkable given that the Free Trade Area covers all 26 countries of COMESA, EAC, and SADC. In December 2010, a revised Draft Agreement and Annexes, inter alia on Rules of Origin, Trade Remedies, and Dispute Settlement have been finalised and with the 2011 Second Tripartite Communiqué the respective Heads of State adopted the following developmental approach to the Tripartite Integration process that will be anchored on three pillars: Market Integration based on the Tripartite Free Trade Area (FTA); Infrastructure Development to enhance connectivity and reduce costs of doing business as well as Industrial Development to address the productive capacity constraints.⁹³

According to the Communiqué, the Tripartite initiative incorporates almost half of the African Union with 600 million people and a Gross Domestic Product (GDP) of approximately US\$1.0 trillion. A Tripartite Free Trade Area is envisaged by 2016. The negotiations are expected to take place in two phases, whereas in the first phase trade in goods, free movement of business people will be addressed; and in the second phase trade in services, intellectual property rights, competition

⁹² Cf. First Communiqué of the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government *COMESA EAC SADC TRIPARTITE*. 2008; available at <http://www.comesa-eac-sadc-tripartite.org/sites/default/files/documents/Final%20Communique%20-%20The%20Tripartite%20Summit%202008.pdf>; last accessed 19 October 2011.

⁹³ Cf. Second Communiqué of the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government *COMESA EAC SADC TRIPARTITE*. 2011; available at <http://www.comesa-eac-sadc-tripartite.org/sites/default/files/documents/Communique%20of%20the%202nd%20Tripartite%20Summit%20-%20English%20-%2012.06.2011.pdf>; last accessed 19 October 2011.

policy, trade development and competitiveness will be discussed. The outcomes of both phases have greatest significance for the environment in the single market and it will be seen if the Tripartite initiative will also bring prosperity to the people that have so far been left behind in Sub-Saharan Africa. Transforming society will require comprehensive legal, political, social, and economic reforms and development initiatives, such as investing more in education, public services, and infrastructure, enhancing participation in trade and protecting the environment for present and future generations. Moreover, it will be seen if the Tripartite initiative will push the regional integration agenda also to empower the poor and reduce pressures such as under-development, unemployment, environmental neglect, health emergencies, and strife (Ruppel and Ruppel-Schlichting 2012: 59).

Namibia and the Southern African Customs Union (SACU) and Related Agreements

Having celebrated its 100th anniversary in 2010, SACU is the world's oldest customs union (Ruppel 2010c). SACU has five members, namely South Africa, Botswana, Lesotho, Namibia, and Swaziland. One objective of SACU is to facilitate the cross-border movement of goods between the territories of the Member States. The legal framework of the SACU is the SACU Treaty. The latter in its part eight on common policies provides for the development of common or harmonised policies and increased cooperation, in the areas of industrial development, agriculture and competition policy. However, at this stage, no common SACU policy is in place.

SACU has entered into trade agreements with third parties. In 2006 for example, SACU signed an FTA with European Free Trade Area (EFTA) states (Iceland, Liechtenstein, Norway and Switzerland), which came into force in 2008. As a first step towards the creation of a Free Trade Area between the *Mercado Común del Sur* (MERCOSUR) and SACU, SACU has signed a Preferential Trade Agreement (PTA) with MERCOSUR countries⁹⁴ in 2009. Trade liberalisation is the focus of this agreement and read together with its annexes, specific preferences are granted from MERCOSUR to SACU and vice versa. In 2008, SACU and the United States signed a Trade, Investment and Development Cooperation Agreement (TIDCA), in order "to promote an attractive investment climate and to expand and diversify

⁹⁴ Common Market of South America, consisting of Argentina, Brazil, Paraguay and Uruguay.

trade between SACU and the United States” (Article 1 of TIDCA). During the recent past, voices warning that SACU is in danger of being discontinued have become louder (Ruppel 2010c). Two crucial issues have moved to the centre of the debate. The first is the European Partnership Agreement (EPA) negotiation process, and the second the financial shortfall due to plunging revenues due to reduced imports amidst the global economic crisis which affected African economies by way of a drop in export values (McCarthy 2010). Currently, SACU is discussing possibilities on how to adapt to political and economic developments and addressing challenges such as a common negotiating mechanism, overlapping memberships, the institutional and policy framework, investment, competition and procurement. With regard to dispute resolution, the SACU Agreement establishes an ad hoc Tribunal to resolve any differences that might occur between or amongst member states (Articles 7(f) and 13). The Tribunal has not yet been established.

Challenges

From the above it becomes clear that a myriad of laws are relevant for Namibia, on the local, national and regional levels. These sources of law evidently come from quite different and thus often inevitably conflicting sources (Menski 2010: 443, 2011: 149). On the national level, conflicts may arise for example between customary law and human rights law as provided for in the Constitution. One example for this out of many could be clause 24 on traditional marriages of the Combined Laws of the Kwangali, Mbunza, Shambyu and Gciriku which provides that

[I]n the Kavango tradition, polygyny (having more than one wife at the same time) shall be permitted. A man shall be allowed to marry more than one wife, but a woman shall not be permitted to have more than one husband. (Hinz and Namwoonde 2010: 380)

Article 10 of the Namibian Constitution on equality and freedom from discrimination reads:

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

Article 66 (1) of the Namibian Constitution, the Supreme Law of Namibia, provides that

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

Article 8 on marriage and family rights of the SADC Protocol on Gender and Development states that

States Parties shall enact and adopt appropriate legislative, administrative and other measures to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage.

And, last but not least, Article 6 on marriage of the AU Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa states that:

Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that [...]

- c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.

The authors refrain from going into the details of this particular conflict at this stage. However, the example illustrates – admittedly stereotyping – the challenges that the concept of legal pluralism is facing in Namibia. This is not only true for the sources of applicable law, but also for the issue of jurisdiction of Namibian courts. Some of the cases that are being dealt with under customary law and before traditional courts may just as well fall into the jurisdiction of Magistrates Courts or the High Court.

On the regional level, the fact that many African states are members of various regional economic communities can be regarded as a hurdle in respect of the regional integration process (Viljoen 2007: 525). Except Mozambique, all SADC countries are at the same time members of at least one other trade agreement in the region. Eight SADC members are also members of the Common Market of Eastern and Southern Africa (COMESA), four countries, including Namibia, are

members of SADC and the Southern African Customs Union (SACU), Swaziland is a member of SADC, SACU and COMESA, and Tanzania is a member of SADC and the East African Community (EAC). Various bilateral free-trade agreements as well as the membership of all SADC countries in the African Union (AU) may be regarded as obstacles to deeper integration in many respects. Such overlapping memberships are not only problematic in terms of duplication of work and costs, but also because a sub-regional customs union is envisaged by both COMESA and SADC, and double membership might result in conflicting tariffs. Moreover, overlapping memberships increase the number of applicable laws, inevitably increasing the risk of conflicting laws as well.

The question of concurrent jurisdiction of different judicial organs is another contentious issue with regard to multiple memberships which needs to be addressed. (For a more detailed discussion see Ruppel 2009d.) Namibia on the regional level ‘only’ falls under the jurisdiction of the judicial organs of SADC, SACU (if established) and the judicial bodies on the level of the African Union. However, the issue of overlapping or even conflicting jurisdiction of regional courts on the African continent may become a prominent one, especially for those countries that are members of more regional economic communities in Africa. For the time being, the consequence of overlapping jurisdiction is that a claimant may in fact choose to which judicial body a case is to be submitted,⁹⁵ as a competent court may not decline jurisdiction – the argument being that another court may as well be competent. In this context factors such as the cost of litigation, the organisational context in which the dispute would be decided, the entity which would decide the dispute, the advantages of the applicable law, who can initiate a complaint against whom, procedural advantages, the possibility of appeal, the remedies that can be obtained, the parties who are bound by an eventual ruling, and the consequences of non-compliance will be decisive (Pauwelyn 2004: 304).

Conflicts may of course also arise between national and international law. In this regard, it can be stated that the rule of exhaustion of national remedies, a rule that is normally being provided for by the laws of procedure of international courts, ensures that cases have to be dealt with on the national level first, before being heard by international courts; the latter may then decide on the question as to whether the national law in question is in line with community law.

⁹⁵ Referred to as ‘forum-shopping’: see Viljoen (2007: 502).

Concluding Remarks

Namibia is a fascinating country, particularly in terms of legal and judicial pluralism. At the same time, it becomes clear, that such pluralism relevant for Namibia, on the local, national and regional level can be challenging. Namibian law reflects the country's rich history and the process of internationalisation. The law in place is the product of different sources, a mixture between imported and African law. Yet, sometimes the customary laws of the people do not fully reconcile human rights with their traditions and heritage. The challenge is, however, not to vitiate, but to find common ground between international law, human rights, customary law and practice in Namibia.

For that purpose the concept of legal and judicial pluralism needs further exploration and at the same time comparative law can help to reconcile the different types of law or legal traditions. The African legal architecture is gradually changing and it is therefore no longer self sufficient to only focus on legal pluralism on the local and national levels. Except Mozambique, all SADC countries are for instance at the same time members of the African Union and at least one other regional economic community in the region. The aforementioned implies that the legal mix of civil law, common law, roman-dutch law, customary law traditions must inevitably become more responsive to the (at times overlapping and concurrent) community laws (and jurisdictions) of the respective African and sub-regional economic communities. This holds particularly true in Namibia where the Constitutive Act of the AU and SADC Treaty constitute international agreements which are binding upon Namibia in terms of Article 144.

In conclusion, a view towards a more transnational pluralism is much needed in Namibia and beyond. Such view offers not only an appropriate account of contemporary African legal reality but also reflects legal pluralistic insights beyond territorially-based application of the law in complex systems of multi-level governance.

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