



Criminal Procedure Act 51 of 1977



What does the law do?

As its name indicates, this law governs procedure in criminal cases.

What is the purpose of the law?

This law regulates every aspect of the criminal justice process, from arrest and bail to trial and sentencing. It is a long law that covers many issues. To understand the law well, it is important to consider some of the many court cases that have applied and interpreted it. This short summary will describe only a few aspects of the law that are of broad public interest.

When did the law come into force?

22 July 1977. This is a South African law that was made applicable to Namibia, before Namibian independence. South Africa continues to have a law with the same name and number, but the Namibian version is different from the South African version because different amendments to the statute have been made in the two different countries.

In 2004, the Namibian Parliament passed the *Criminal Procedure Act 25 of 2004*. This 2004 law was intended to replace the 1977 law, but stakeholders realised that there were some problems with the 2004 replacement version. The 2004 law was repealed by the *Criminal Procedure Act Repeal Act 14 of 2018* without ever being brought into force.

What does the Namibian Constitution say about criminal procedure?

The table on the next page contains a simple summary of some of the key points in the Namibian Constitution about criminal proceedings.



Summary of key constitutional provisions relevant to criminal cases

Protection of Life – Article 6	The death penalty will not be imposed in Namibia.
Protection of Liberty – Article 7	Procedures set out in law must be followed when anyone is deprived of their personal liberty.
Respect for Human Dignity – Article 8	Human dignity must be respected in all court proceedings and in the enforcement of penalties. No one can be subjected to torture or to “cruel, inhuman or degrading treatment or punishment”. The Namibian Supreme Court has said that this means that physical punishment for a crime (such as whipping and caning) is no longer allowed. ¹ The Supreme Court has also said that long prison sentences and even life imprisonment are constitutional as long as there is some possibility of release on parole. ²
Arrest and Detention – Article 11	No one can be arrested or detained arbitrarily. Anyone who is arrested must be promptly informed of the basis for the arrest. Anyone who is arrested must be brought to a magistrate or a judge within 48 hours of the arrest – or “if this is not reasonably possible” as soon as possible after that time period. No one can be kept in custody after that unless the magistrate or the judge has authorised it.
Fair Trial – Article 12	<p>Everyone accused of a crime is entitled to a fair hearing by an independent, impartial court.</p> <p>The press and the public can be excluded from a criminal trial only for reasons of morals, public order or national security, as necessary in a democratic society. Judgments in criminal cases must be given in public, except where the interests of juveniles or morals require otherwise.</p> <p>The criminal trial must take place within a reasonable time. Otherwise, the accused must be released. The Namibian courts have said that what qualifies as a “reasonable time” will be different in different cases, depending on factors such as the reasons for the delay, how much the delay has negatively impacted the accused and the public interest.³</p> <p>Anyone charged with a crime is innocent until proven guilty, after they have had a chance to call their own witnesses and cross-examine the witnesses against them.</p> <p>Anyone charged with a crime has a right to be defended by a legal practitioner of their choice. They must be given adequate time and facilities to prepare and present their defence. The Namibian Supreme Court has said that this means that the State must provide legal representation to a person who cannot afford their own lawyer, if failing to do so would prevent the accused person from having a fair trial.⁴</p> <p>No one can be forced to give evidence against themselves or their spouses (including spouses in a civil or a customary marriage).</p> <p>Confessions obtained by torturing suspects cannot be used as evidence against them.</p> <p>No one can be tried, convicted or punished more than once for the same crime.</p> <p>No one can be tried or convicted for a crime that did not exist at the time. The law cannot make something into a crime retroactively.</p>
Presidential pardons – Article 32(3)(d)	The President has the power to pardon or reprieve a convicted offender, with or without conditions. In practice, this power has been used to grant blanket pardons to certain categories of prisoners.

¹ *Ex Parte Attorney-General, Namibia: Re: Corporal Punishment by Organs of the State*, Supreme Court, 1991

² *S v Tcoeb*, Supreme Court, 1999; *S v Gaingob*, Supreme Court, 2018

³ These are some of the cases that have discussed this questions: *S v Nunes*, High Court, 2001; *S v Strowitzki*, High Court, 1995; *S v Heidenreich*, High Court 1995; *Malama-Kean v Magistrate, District of Oshakati*, Supreme Court, 2002; *S v Myburgh*, Supreme Court, 2008; *Mahupelo v Minister of Safety and Security*, High Court, 2020.

⁴ *Government of the Republic of Namibia v Mwilima*, Supreme Court, 2002 (Caprivi treason trial)

Search and seizure

The law gives the police certain powers to search persons and places, and to seize items that reasonably appear to relate to a crime.

Normally, police must approach a magistrate or a judge to get a search warrant. The police must say why they need to do the search, and the warrant will say what persons and places can be searched. Searches that take place in terms of a search warrant must take place in the daytime, unless searches at night have been specifically authorised.



Police may search persons and places without a search warrant in several circumstances:

- if the relevant persons give consent
- if the police reasonably believe that a warrant would be issued, but the delay involved would probably defeat its purpose (because it would give the suspects time to hide or destroy the evidence).



Police may search a person who has been arrested on a reasonable suspicion of committing a crime without a search warrant. Police may seize anything in that person's possession or control as evidence of the crime.

Police who are carrying out a lawful search may use “such force as may be reasonably necessary” to overcome resistance to the search, including breaking into the relevant place by force – but they must first demand entrance and explain the purpose of the search. Police can enter a place without announcing themselves if they have a reasonable belief that the evidence they are seeking would be hidden or destroyed if they requested entry first.

It is a crime for police to carry out an unlawful search – which includes a search that does not comply with the relevant search warrant, or a search that does not follow the procedures set out in the law. It is also a crime for anyone to give false information that leads to the issue of a search warrant.

Women may be physically searched only by a female.

The law contains rules and procedures about the treatment of items that are seized as evidence. Items that were used to commit a crime may be kept permanently by the State.

Arrest

A person reasonably suspected of committing a crime may be arrested. An arrest is not supposed to be a form of punishment, but a way of making sure that a person accused of a crime will appear in court for the criminal trial.

An arrest can take place with or without a warrant. A warrant can be issued by a magistrate or a judge if a police officer or a prosecutor provides information showing a reasonable suspicion that a particular crime has been committed.

Arrest is not the only way to make sure that someone appears in court. The law also provides for various types of notices calling on a person to come to court to face criminal charges. Anyone who fails to obey such a notice can be arrested. For example, this procedure is common in some traffic violations where police give the driver a notice to either pay a fine or come to court on a specific date.



There is also a long list of circumstances that justify arrest without a warrant. They all involve situations where the arresting officer has some personal knowledge or basis for suspicion that the arrested person has committed certain crimes – or where there is some other law that authorises arrest without a warrant in certain circumstances. In such situations, the delay involved in getting the warrant would probably allow persons who are strongly suspected of being criminals to escape.



If the person being arrested does not submit voluntarily, then the person making the arrest must physically touch the accused person or, if necessary, forcibly confine them.

A person making an arrest can forcibly enter a place to make an arrest, after first demanding entry and explaining the reason.



The law allows for the use of force in connection with an arrest, in certain circumstances. But force should be used only as a last resort. Police should consider other methods first, such as oral warnings or warning shots fired into the air. The person attempting the arrest must also consider whether a fleeing suspect can be arrested at a later stage. For example, if the suspect can be identified and traced, then the use of force to make an immediate arrest is probably not justifiable. Any use of force must also be proportional to the seriousness of the crime. Police are justified in using force in their own self-defence, or to protect the life, safety or property of someone else.⁵

A person making an arrest must explain the reason for the arrest. If there is an arrest warrant, the accused person has a right to a copy of it.

The person who has been arrested can be confined at a police station, or at some other place named in a warrant of arrest, until they are lawfully released. A release might take place, for example, because bail is paid, because the charges have been withdrawn or because the person has been tried and found not guilty.

Police have a right to demand that a suspect or a witness to a crime must provide their correct name and address. Anyone who refuses to do this can be arrested on the spot, without a warrant, and detained for up to 12 hours, until their name and address have been confirmed. Failure to supply a name and address is also a crime in itself.



What happens after an arrest?

Police may take the fingerprints, palmprints or footprints of anyone who has been arrested. They can also take photographs, blood samples and DNA samples.⁶

The *Criminal Procedure Act* echoes the “**48-hour rule**” in the Namibian Constitution. It says that an arrested person must be brought before a lower court within 48 hours of the arrest – but it also contains some rules that make allowances for the time of day that the court closes and for days when courts are not operating, and for situations when an accused person is being transported from one area to another or is too ill to appear.

⁵ See “[Use of force by law enforcement officials in Namibia](#)”, Legal Assistance Centre, 2019, which discusses court rulings about the use of force during arrests.

⁶ In the case of [S v Eigowab](#), High Court, 1994, the Court said that refusing to provide a blood sample after being arrested on a charge of driving under the influence of alcohol makes a person guilty of the crime of obstructing justice. The Court also said that police can use force to get the sample if the suspect refuses or resists. In the case of [S v Gemeng](#), High Court, 2018, the Court said that an accused person can similarly be ordered to provide DNA samples as evidence.

Courts have also considered when the 48-hour rule in the Constitution can validly be exceeded. The Namibian Supreme Court has said that relevant factors might include the availability of a magistrate, police manpower, transport and the distances involved – but convenience is *not* a relevant factor. Police are expected to plan around the 48-hour rule, such as by making sure in advance that a magistrate will be on hand.⁷ The Namibian Supreme Court has also said that the 48-hour rule is a very important human right because it helps protect people from being held in detention without a proper reason, and from being tortured or killed without anyone knowing.⁸



Another very important constitutional right is the **right to legal assistance**. Again, this is echoed in the *Criminal Procedure Act* which says that an accused person is entitled to legal assistance from the time of arrest and during any criminal proceedings. This means that police have a duty to tell an accused person about this right as soon as there is an arrest. Failure to do so could mean that statements made to the police by the accused might not be allowed into court as evidence.⁹ This also means that the magistrate or judge in a criminal matter has a duty to inform an accused person of the right to legal representation.¹⁰

The *Legal Aid Act 29 of 1990* says that any accused person can apply for State-funded legal aid which may be provided if the accused person cannot afford to pay a lawyer privately and if it is in the interests of justice. It is not possible for the State to provide free legal aid for every person accused of a crime who cannot afford a lawyer. But the Namibian Supreme Court has said that the State has a duty to provide legal representation *where the accused persons would otherwise not have a fair trial as guaranteed by the Namibian Constitution*. This means that, even if there are not enough resources to provide a lawyer through the scheme set up under the *Legal Aid Act*, the State must provide legal representation through other channels if this is necessary for a fair trial. In deciding when the State must provide legal representation for accused persons who cannot afford their own lawyers in a specific case, factors to consider include the complexity of the case, the ability of the accused persons to defend themselves and the seriousness of the criminal charges (which will determine the possible impact of a conviction on the accused).¹¹



Bail

Bail is the temporary release of a person charged with a crime, after they provide a deposit of money or some other security. If the accused person does not come to court for the criminal proceedings, the money or the security they provided will be forfeited to the State.

There is no right to be released on bail, but every accused person has the right to *apply* for release on bail. Because the Namibian Constitution says that an accused person is innocent until proven guilty, accused persons cannot be kept in detention before trial as a form of advance punishment.¹²

⁷ *Minister of Safety and Security v Kabotana*, Supreme Court, 2014 (agreeing with statements made by the High Court in the 1991 case of *S v Mbahapa*)

⁸ *Minister of Safety and Security v Kabotana*, Supreme Court, 2014 (agreeing with statements made by the High Court in the 1991 case of *Sheehama v Minister of Safety and Security*)

⁹ *S v Kapika*, High Court, 1997; *S v De Wee*, High Court, 1999

¹⁰ *S v Mwambazi*, High Court, 1990

¹¹ *Government of the Republic of Namibia v Mwilima*, Supreme Court, 2002 (Caprivi treason trial)

¹² *S v Acheson*, High Court, 1991. (The *Criminal Procedure Act* was amended after this case was decided to add additional grounds for denying bail to persons charged with certain serious crimes.)

Police officers are allowed to release accused persons on bail in the case of certain crimes that are not too serious. Decisions on bail are otherwise handled by the courts.

Bail can be denied in any criminal case if there is a risk that the accused will run away or interfere with State witnesses or evidence. Where the accused is charged with certain serious offences – including treason, murder, rape, robbery, housebreaking, theft and bribery – the court can also take into consideration the interests of the public and the administration of justice. An accused person who is denied bail can appeal this decision to a higher court.

If a court grants bail, it will often set conditions for the accused person, such as handing in their passport, reporting regularly to a police station or having no contact with witnesses or victims.

In cases involving domestic violence or rape, the victim has a right to provide information about any fears of harm or intimidation that the court should consider before making a decision on bail. The victim can also make submissions to the court on bail conditions. If a person accused of rape is released on bail, there must be an automatic bail condition prohibiting any contact with the victim. If the crime involved domestic violence, the court must impose certain bail conditions unless there are special circumstances that make them inappropriate:

- a prohibition on contact with the victim
- a prohibition on the possession of any firearm or other specified weapon
- an order that the accused must continue to provide maintenance to the victim and any other dependants at the same or greater level as before the arrest.



Bail in any kind of case can be cancelled if the accused fails to show up in court or fails to comply with the bail conditions, or where there is information showing that the accused is planning to run away. If bail is cancelled, then the accused will be arrested and kept in custody until the criminal trial is over.

Once the criminal case is finished, the bail will be refunded – even if the accused is found guilty.

It is also possible for an accused person who has been arrested to be released “on warning” if the crime involved is not too serious. This means that the accused person is released without having to provide bail, and warned that they must come back to court. A person who does not show up after being released on warning will be arrested.

Pleading to the charge

Before the trial starts, the accused will be asked to plead. The main pleas are “guilty” or “not guilty”. There are also some other options – for example, the accused person might say that they have already been found guilty or not guilty of the same criminal charge, or that the court does not have authority to hold a trial on this criminal charge.

If an accused person pleads “guilty” to any crime other than a minor one, the presiding officer will ask questions to make sure that the accused really understands all of the elements of the crime that they are admitting. If this is not the case, then the plea will be changed to “not guilty”.

Criminal trials

Where an accused person pleads “not guilty”, there will be a criminal trial. The trial involves a state prosecutor on one side and the accused person on the other side. Crime victims may be witnesses in the criminal trial, but they do not otherwise take part. The State must prove the case against the accused.

Criminal trials may take place in a magistrate's court, a regional magistrate's court or the High Court, depending on the nature of the criminal charge and how severe the possible sentence might be.

Criminal trials are open to the public except in certain very limited situations – such as where the accused or a witness is a child, or the case involves a sexual crime or domestic violence, or the court must be closed to protect national security, public morals or the safety of a witness. If all or part of a case takes place behind closed doors, the court can direct that certain information about that part of the proceedings may not be published by anyone.

In some countries criminal cases are decided by juries made up of people from the community. Namibia does not use jury trials. Criminal cases are decided by the magistrate or the judge.

Only the prosecutor can **withdraw a charge** or **stop a prosecution**. In practice, a victim who no longer wishes to proceed with a criminal case can fill out a withdrawal statement. A prosecutor could continue with the case without the victim's cooperation if there was sufficient evidence of the crime.

The prosecutor acting for the State has the responsibility to prove that the accused person is guilty. The prosecutor and the accused person can both present evidence to support their side of the case. Accused persons can be assisted by legal practitioners, or they can present their cases in court on their own. The accused (or the lawyer representing the accused) has a right to question any witnesses who testify for the State.



There are many rules in the *Criminal Procedure Act* about how the trial will take place and what kinds of evidence can be considered. For example, one rule is that a confession made by an accused person can be considered only if it was made freely and voluntarily, without undue influence.

Another rule that has been developed in court cases is that a fair trial means that accused persons must have access to information about the evidence against them so that they can prepare their defence, unless disclosure of the information might endanger justice or the public interest. Examples would be where certain information might endanger an informer or a witness, or where it might disclose police investigation techniques that need to be kept confidential.¹³

There is a procedure for converting a criminal trial to a proceeding under the *Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971* for placing a person who is addicted to drugs or alcohol in a rehabilitation centre, if the prosecutor agrees to this.

Vulnerable witnesses

Some categories of witnesses at a criminal trial are considered to be “vulnerable witnesses”: children (persons under age 18), victims of sexual offences, victims of domestic violence at the hands of a close family member or an intimate partner, or anyone else who is likely to suffer undue stress or trauma while testifying. There are various special arrangements that can be made to make vulnerable witnesses more comfortable in court:



¹³ *S v Nassar*, High Court, 1994; *S v Angula*; *S v Lucas*, High Court, 1996; *S v Scholtz*, Supreme Court, 1998

- **alternative venues for trials**, so that they can held in places less intimidating than courtrooms
- **testifying behind one-way screens** or by means of closed-circuit television, so that the witness does not have to see the accused
- **allowing support persons to accompany witnesses while they are testifying**, so that (for example) a young child could speak to the court while sitting on the lap of a family member
- **strict limitations on the use of irrelevant questioning that may intimidate or confuse witnesses**
- **requiring that questions be asked through the presiding officer or another impartial person**, to make sure that lawyers or accused persons do not try to intimidate or confuse a witness.

The idea is that witnesses who are not frightened or traumatized are likely to give more reliable evidence that will lead to more just outcomes.

Conviction and sentencing

If there is a reasonable doubt about an accused person's guilt, the court must make a finding of "not guilty". If the State has proved its case, the court will find the accused person "guilty".

It is possible in some cases for a person who was charged with one crime to be convicted of another similar crime. For example, a person who was charged with rape might be convicted of attempted rape or indecent assault instead. The law sets out the rules about this, to make sure that the accused person had a fair chance to put forward a defence to the crime in question.

After an accused person is found guilty, there will be a separate consideration of the appropriate sentence. Both the prosecution and the convicted offender may address the court on the issue of sentencing. The court will consider the crime (including its impact on the victim), the personal circumstances of the offender and the interests of society.

Possible sentences: The Namibian Constitution forbids the death penalty and any sentence that involve physical punishment. Many statutes provide maximum sentences that may be imposed for a specific crime, and a few provide minimum sentences.



In general, a sentence for a crime can be imprisonment, periodical imprisonment, a fine, declaration of the offender as an "habitual criminal" or confinement to any institution established by law (such as an alcohol rehabilitation centre). *Periodical imprisonment* must include imprisonment for a minimum of 100 hours and a maximum of 2000 hours, but it does not have to be over a continuous time period. This option has been used in practice as a punishment for failure to pay child maintenance, since it can allow the offender to continue working to provide the maintenance that is owed while still being penalised.

Postponed or suspended sentences: A court may postpone or suspend a sentence for up to five years, either with or without certain conditions. Possible conditions might include:

- compensation or some other form of benefit or service to the victim
- community service
- submitting to some kind of instruction or treatment
- submitting to supervision by a probation officer
- attendance at a specified centre for a specified purpose
- good conduct during the period of postponement or suspension.

If the offender does not comply with the conditions, the court can order the arrest and detention of the offender. It can then impose a sentence where sentencing was postponed, or put into operation a sentence that was suspended.

One of the conditions that can be imposed when a sentence is postponed or suspended is *community service*. The Namibian High Court has suggested that a court should consider whether the accused is a suitable candidate for community service and willing to carry it out, who will supervise and control the community service, what days and times the community service should cover, and how long it should continue.¹⁴ In another case, the High Court said that the offender must be given an opportunity to give input before community service is required.¹⁵

Caution or reprimand: If no law sets a minimum sentence for the crime in question, a court may decide to release a convicted offender with only a caution or a reprimand.

Appeals, reviews and pardons

A finding of guilt or innocence, or a sentence, can be appealed to a higher court. In other words, an accused person can appeal a finding of guilt or ask for a lighter sentence, and the Prosecutor-General can appeal a finding of innocence or ask for a heavier sentence. If one side appeals, the other side can “cross-appeal” at the same time.

If the accused person did not have a lawyer, the sentence imposed by a magistrate’s court may be automatically reviewed by a judge of the High Court, depending on a combination of the length of the sentence (or the amount of the fine) and the magistrate’s years of experience. The High Court can also review a decision of a lower court in any case where it appears that there may have been some form of corruption or a fundamental legal mistake in the trial. “Review” means that the judge examines the record of the case to be sure that there was no error or unfairness. This is an extra safeguard to make sure that no one is unfairly deprived of their liberty.



Victim compensation

The court that tried the criminal case can award compensation to the victim, upon application by the victim or prosecutor. This compensation is designed to make up for property damage or loss.¹⁶ The court also impose compensation for various kinds of losses suffered by the victim as a condition of a postponed or suspended sentence.¹⁷

Juvenile offenders

The law has a few special procedures that apply to juveniles, who are persons under 18.

Juveniles accused of a crime may be released into the custody of their parent or guardian while awaiting trial. Alternatively, they may be allowed to stay in a place of safety, such as a children’s home, until the trial is over. Keeping juveniles in prison or a police cell while they are awaiting trial should be a last resort, but appropriate alternatives are not always available.

The court will notify a juvenile’s parent or guardian that they must attend the trial, if they can be located without a long delay. It is a crime for the parent or guardian to ignore a notice to come to court in these circumstances, unless the court has exempted them from attending for some reason. The parent or guardian is allowed to assist the juvenile in court.

¹⁴ *S v Fillemon*, High Court, 2013

¹⁵ *S v Linus*, High Court, 2013

¹⁶ *S v Tjisuta*, High Court, 1991; *S v Hendriks*, High Court, 2004

¹⁷ See *S v Mila*, South African High Court, Orange Free State Provincial Division, 1973; *S v P*, South African High Court, Cape Provincial Division, 1986; *S v Petrus*, High Court, 2006

The court is always closed to the public during a criminal trial when the accused is under age 18. (A court may also decide to close a trial to the public when a witness under age 18 is giving evidence, or prohibit anyone under age 18 from attending a criminal trial if they are not giving evidence.)

No one is allowed to publish information that may reveal the identity of an accused or a witness who is under age 18 unless the judge or magistrate presiding over the trial has given permission for this.

A court that is conducting a criminal trial may convert the proceedings into a child protection enquiry if it appears that the juvenile accused may be a child in need of protective services. For example, the child may have been forced into criminal activity by an adult, or driven into crime by neglect, poverty or substance addiction. This could mean that the child needs assistance rather than criminal punishment.

If juveniles are convicted of crimes, the law provides some alternatives to placing them in correctional facilities:

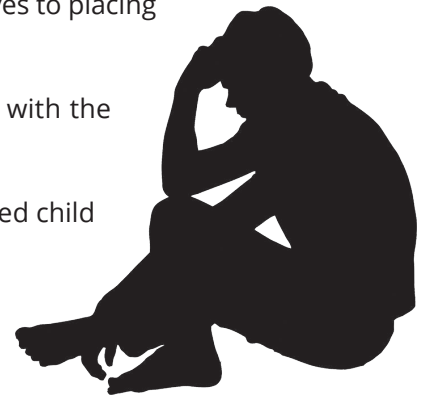
- placing them under the supervision of a probation officer
- placing them in the custody of a suitable person (possibly also with the supervision of a probation officer)
- placing them in a child detention centre.

One problem is that Namibia does not currently have any specialised child detention centres in place.

If juveniles are confined in police cells or correctional facilities at any stage of the criminal process, the *Child Care and Protection Act 3 of 2015* contains certain rules that apply unless there is a court order that says otherwise:

- They must be kept separately from adults, except that they may be in the same room as adults for meals and exercise, under proper supervision.
- They must be allowed visits by their parent or guardian, as well as by other persons where the contact is in the best interests of the child.
- They must be kept in conditions that reduce any risk of harm, keeping in mind the special vulnerability of children.
- They must be kept only with children who are at the same stage of the criminal process, so that children awaiting trial are detained separately from children who have been convicted.

This law also set up a complaints system that is designed to lead to social worker investigations in the case of injury or other problems with children in detention.



Some criticisms and possible law reforms

Juvenile offenders: Additional rules and procedures for young offenders are expected to be added by a forthcoming law on child justice. This law is expected to include procedures for taking children out of the criminal justice system and putting them into programmes that hold them accountable for their wrongdoing while also helping them change their ways without having to undergo a criminal trial and conviction. Diversion programmes are already operating in practice in Namibia, but there is no legal framework for this approach as yet.



Plea bargaining: Amendments to the *Criminal Procedure Act* are under consideration in order to provide for plea and sentence agreements, more commonly known as “plea bargaining”. This refers to the situation where the accused person agrees to plead guilty to a crime while knowing in advance what sentence will be imposed. Such negotiations typically allow the accused to plead guilty to a less serious crime than the one in the original charge. The advantage to the State

is that such agreements help to reduce court backlogs, and can sometimes be used to motivate accused persons to give evidence against crime ringleaders. A bill to add a formal procedure for plea bargaining was introduced into Parliament in 2021, but withdrawn before it was passed. This proposal suggested that accused persons should only be allowed to enter into plea bargains if they have legal representation, to be sure that their rights are protected. It also suggested that the Prosecutor-General should have the power to issue directives limiting plea bargains to certain categories of crimes, to make sure that they are not used to allow people who commit serious crimes to avoid appropriately harsh sentences. The pros and cons of introducing this approach to Namibia's criminal justice system are still under discussion.¹⁸

Use of force: The rules in the *Criminal Procedure Act* about

the permissible use of force need attention. These rules have been qualified by court cases, but this means that the limits on the use of force are not entirely clear. The police follow an *Operations Manual* that has better and clearer directives about use of force, but this is not the same as having clear rules in a binding law. The permissible use of deadly force requires particular attention, keeping in mind the constitutional right to life alongside awareness of the practical challenges of policing, including the need for police



to make split-second decisions under pressure. The rules on the use of force in the law should be improved to set clear standards that are consistent with the Namibian Constitution and the relevant international guidelines, while retaining enough flexibility to allow police to carry out their duties.¹⁹

“Schedule 1 crimes”: There is a list of crimes at the end of the *Criminal Procedure Act* called “Schedule 1”. Anyone suspected of committing one of these crimes can be arrested without a warrant. The law also authorises police to use deadly force to arrest persons suspected of committing these crimes, if this is necessary to make the arrest. This seems reasonable for some of the crimes on the list – such as murder, rape, robbery and assault that has caused a dangerous wound. But it seems very unreasonable for other non-violent crimes on the same list – such as fraud, forgery or knowingly receiving stolen property. Most problematic of all, the list includes the crime of sodomy, which once included certain forms of rape but now covers only sexual acts between consenting adults. So treating consensual sodomy in this way is a serious form of discrimination against gay men. Another problem with the list is that it is too broad. It includes any crime

Schedule 1

Treason.	Culpable homicide.	Sodomy.
Sedition.	Rape.	Bestiality.
Murder.	Indecent assault.	Robbery.

Assault, when a dangerous wound is inflicted.
 Arson.
 Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.
 Theft, whether under the common law or a statutory provision.
 Receiving stolen property knowing it to have been stolen.
 Fraud.
 Forgery or uttering a forged document knowing it to have been forged.
 Offences relating to the coinage.
 Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately here-under, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.
 Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.
 Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

¹⁸ Sakeus likela, “[Opposition blasts 'Fishrot bill'](#)”, *The Namibian*, 25 February 2021

¹⁹ See “[Use of force by law enforcement officials in Namibia](#)”, Legal Assistance Centre, 2019

that can be punished by imprisonment for more than six months without the option of a fine. In South Africa, the Constitutional Court found that a similar “Schedule 1” list of crimes was unconstitutional because it was a “rag-bag” that mixed serious violent crimes together with relatively petty crimes that do not involve any kind of physical threat. It was an illogical list of crimes for its purpose. The similar law in South Africa has been amended since that case was decided. In Namibia, it appears that the police do not actually apply the “Schedule 1” list as it stands in practice, but this aspect of the *Criminal Procedure Act* should be amended.²⁰



Victim compensation: It has been suggested that arrangements for victim compensation should be expanded and improved. The desire for compensation sometimes motivates victims to withdraw criminal charges and settle the case privately by taking money from the offender, or to resolve cases in customary tribunals instead of criminal courts. These alternative approaches could leave the general public at risk from the offender. Victim compensation could be more well-integrated into the criminal justice system.²¹

Other relevant laws

Once a person is convicted of a crime, the ***Correctional Service Act 9 of 2012*** contains rules and procedures about their confinement in prisons (now officially called “correctional facilities”).

There are several general statutes that focus on procedures relating to crimes that cross national borders in some way:

- The ***Extradition Act 11 of 1996*** sets out rules and procedures for transferring persons accused of certain crimes from one country to another, as well as procedures for dealing with persons convicted of certain crimes who are still unlawfully at large in other countries.
- The ***International Co-operation in Criminal Matters Act 9 of 2000*** deals with cooperation between Namibia and certain other countries on issues such as providing evidence, carrying out sentences and confiscating the proceeds of crime.
- The ***Transfer of Convicted Offenders Act 9 of 2005*** covers the transfer of sentenced offenders between Namibia and other countries.



²⁰ See “[Use of force by law enforcement officials in Namibia](#)”, Legal Assistance Centre, 2019

²¹ The *Criminal Procedure Act 24 of 2004*, which was repealed without ever coming into force, broadened the possibilities for victim compensation and provided more detailed procedures for this.