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LAW REFORM AND DEVELOPMENT COMMISSION

REPORT ON REPEAL OF OBSOLETE LAWS

PHASE 2



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REPUBLIC OF NAMIBIA
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Our Ref.:

Your Ref.:

Hon. Yvonne Dausab, MP
Minister of Justice
Private Bag 13302
Justitia Building
Independence Avenue
Windhoek

1 March 2021

Dear Honourable Minister

**RE: STATUTORY SUBMISSION OF THE REPORT ON REPEAL OF OBSOLETE LAWS:
PHASE 2**

Pursuant to section 9 (1) of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991, as amended), the Law Reform and Development Commission (LRDC) is obligated to report to the Minister of Justice for consideration in regard to any matter it examines.

It is my privilege, therefore, as Deputy Chairperson of the LRDC, to present to you this Report on Repeal of Obsolete Laws: Phase 2. In doing so, I would also like to thank the Commissioners of the LRDC as well as all our stakeholders and the staff involved in bringing the report to fruition.

The LRDC will be available to assist the Minister in considering the contents of this Report.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Etuna Joshua'.

**ETUNA JOSHUA (MR.)
DEPUTY CHAIRPERSON**

LAW REFORM AND DEVELOPMENT COMMISSION

The Namibian Law Reform and Development Commission is a creature of statute established by section 2 of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991).

The Commission's core mandate is anchored on research, examination of all branches of the law, and to make recommendations for the review, reform and development, where necessary.

In terms of section 3 of the said Act, Commissioners are appointed by the President. The current members of the Commission are as follows:

Mr. E Josua, Deputy Chairperson

Adv. J Walters, Ombudsman

Mr. H. Gerdes

Mr. A Zender

Ms F! Owoses-/Goagoses

Mrs. Mezui Engo

The Secretary to the Commission, is currently held by Mr. B. Dyakugha, Chief of the Directorate of Law Reform in the Ministry of Justice.

The Directorate of Law Reform serves as the Commission Secretariat, assisting it in exercising its powers and performing its duties and functions under the Act. The Commission and Secretariat are both housed on Floor 8 of Sanlam Building, Windhoek.

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PROJECT COMMITTEE

In June 2019, the LRDC resolved to establish a committee to advise on the methodology and process regarding phase 2 of the Obsolete Laws Project. As a result, the meeting constituted a committee under section 9 of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991) to advise it on the matter.

The LRDC further resolved that the Committee would consist of 3 members, namely LRDC Commissioner Ms. Owoses, as chairperson, Ms. D Hubbard, the Obsolete Laws Project consultant from the Legal Assistance Centre (LAC) and Dr. Zenda, Deputy Chief: Directorate Legislative Drafting, Ministry of Justice.

The Committee held discussions regarding the procedure for phase 2 of the Repeal of Obsolete Laws Project.

The Committee took notice of the list of possibly-obsolete laws submitted by the LAC, prepared on the basis of preliminary research.

The Committee updated the list of obsolete laws provided by Ms Hubbard and resolved that it should be submitted to the LRDC for further research and consideration.

The project leader assigned to this project is Mrs. Chisom C. Obiudo, a senior legal researcher in the Directorate of Law Reform, Ministry of Justice who was supervised and assisted primarily by Ms. D Hubbard, the Obsolete Laws Project Consultant.

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1. Introduction

Article 140 of the Namibian Constitution addresses laws in force at the date of independence. This provision was designed to prevent a *lacuna* in the law by providing that all laws in force immediately before the date of Independence would remain in force until repealed or amended by Act of Parliament, or until declared unconstitutional by a competent Court. The result is that some obsolete laws remain in place in independent Namibia – some of which are racially-discriminatory and some which are objectionable because they were enacted in support of apartheid without regard for basic human rights. Others are simply irrelevant.

The Law Reform and Development Commission (LRDC) developed an initiative to repeal obsolete laws which remain in force in Namibia. In 2013, the LRDC commenced phase 1 of a project to review the statute book for redundant and obsolete laws.

The term “obsolete laws” for the purposes of the project refers to laws that have no current relevance – because they have already been superseded by more recent legislation covering the same subject matter, because they which were meant to serve a specific purpose that has already been concluded, because they are patently unconstitutional relics of the apartheid system or because they are clearly irrelevant in independent Namibia.

The LRDC consulted widely before finalizing its repeal proposals.¹ The purpose of the consultations was to secure a wide range of views on the proposals from all categories of persons who might be affected by the proposals – including central, regional and local government, parastatals, non-governmental organizations, trade bodies and other interested stakeholders. With respect to central government, any department or agency with an interest in the subject matter of the repeal proposal was specifically invited to submit comment.

The result of this project and its attendant consultations was the Repeal of Obsolete Laws Act, 2018 (Act No. 21 of 2018) which repealed 38 principal statutes and their amendments.

As one of its programmes for the 2019/2020 year, the LRDC initiated phase 2 of the Repeal of Obsolete Laws project, with a view to identifying and repealing additional laws that have no current relevance in Namibia.

¹ *Report on the Repeal of Obsolete Laws Project*, LRDC 25, 2014.

2. Methodology

2.1 Public advertisement

The LRDC placed an advert in *The Namibian* newspaper on 24 March 2020 inviting the general public to help identify obsolete laws and to provide feedback on the list of possibly obsolete laws identified by the LRDC. Although little input resulted from this advert, the LRDC considers it important to be open about its projects and to make sure that the public is fully informed. Because many of the laws are somewhat technical in nature, widespread response was not expected.

2.2 Consultation with specific bodies

In February 2020, under the authority of the former Chairperson of the LRDC, official letters were sent to identified stakeholders requesting input on the status of laws identified as being possibly obsolete which were specifically relevant to each of the stakeholders.

Most bodies contacted for specific input were government ministries or agencies, as the aim was to get input from the body that would bear responsibility for administering the laws under study.

In mid-March 2020 a national state of emergency was declared due to the global Covid-19 health pandemic, which led to a period of lockdown and halted consultations with stakeholders. In May 2020, a series of follow up phone calls, emails and visits to stakeholders were conducted in efforts to obtain official responses to the letters sent in February 2020.

In mid-July 2020, under the authority of the Chief of Law Reform, another official letter was sent to the remaining stakeholders who had not responded, requesting input on the status of the possibly-obsolete laws relevant to these stakeholders. Between late July and mid-September 2020, these letters were also followed up with calls, emails and visits to the non-responsive stakeholders.

Consultations with stakeholders who were willing to give input were conducted via official letters, emails and face-to-face meetings as the situation required. Written responses from stakeholders varied greatly in terms of substance with some responses providing substantial input while others amounted to a mere acknowledgement of receipt of the LRDC letter. Face-to-face consultations proved to generate the best results.

The table records the responses received as of 30 October 2020, along with the dates of initial contact and written follow-up. Where no written response was received, telephonic follow-ups were made to try and arrange meetings.

Ministry/Office/Agency	Letter sent (with follow-up letters as indicated)	Response	Follow-up call/email/ in-person
Bank of Namibia	17 February 2020	Comment received	-
Central Procurement Board of Namibia	17 February 2020	Comment received	-
Law Society of Namibia	17 February 2020	Acknowledged receipt	-
Ministry of Agriculture, Water & Forestry	17 February 2020 14 July 2020	Comment received	-
Ministry of Defence and Veterans Affairs	17 February 2020 14 July 2020	Comment received	-
Ministry of Education, Arts and Culture	17 February 2020	-	Yes-no response
Ministry of Finance	17 February 2020 14 July 2020	-	Yes-no response
Ministry of Fisheries and Marine Resources	17 February 2020 14 July 2020	-	Yes-no response
Ministry of Health and Social Services	17 February 2020 14 July 2020	-	Yes-no response
Ministry of Industrialization, Trade and SME Development	17 February 2020	Comment received	
Ministry of International Relations and Cooperation	17 February 2020	-	Yes-no response
Government Attorneys	17 February 2020	Comment received	
Ministry of Labour, Industrial Relations and Employment Creation	17 February 2020	Comment received	
Ministry of Land and Resettlement	14 July 2020	-	Yes-no response
Ministry of Mines and Energy	17 February 2020	Acknowledged receipt	
Ministry of Safety and Security	17 February 2020	-	-
Ministry of Urban and Rural Development	17 February 2020	Comment received	
Namfisa	17 February 2020	Comment received	
Namibian Police Force	17 February 2020 14 July 2020	-	Yes- no response
Namibian Statistics Agency	17 February 2020	Comment received	
Public Service Commission	17 February 2020	Comment received	
Social Security Commission	17 February 2020	-	Yes- no response
Namibia Agronomics Board	20 October 2020	-	Yes –no response
Alexander Forbes	20 October 2020	Comment received	

Ministry of Agriculture, Water & Land Reform	20 October 2020	Acknowledged receipt	
OUTsurance Namibia	20 October 2020	-	

2.3 Stakeholder submissions

Below is a summary of the detailed submissions received by the LRDC on specific laws. Other feedback from stakeholders is discussed under the review of specific laws in the following section of this paper. Some of the responses received did not contain substantive input. The LRDC would like to thank all of the stakeholders who provided responses, particularly those who compiled detailed submissions.

(a) Government Attorney Proclamation, 1982 (Proclamation No. 61 of 1982)

The Government Attorney Proclamation, 1982 (Proclamation No. 61 of 1982) establishes the Office of the Government Attorney as a branch of the South African Office of the State Attorney. After the attainment of Namibia's independence, the legal status of the Office never changed.

The **Office of the Government Attorney** submitted that although Namibia is no longer part of South Africa as at 21 March 1990, the Office continues to exist under the 1982 Proclamation, which has to a large degree become obsolete, as well as being overridden by the Namibian Constitution and the Public Service Act, 1995 (Act No. 13 of 1995). The Government Attorney's Office is now structured as an Office within the Office of the Attorney-General.

It was further submitted that the Proclamation provides no clear provision for the appointment of the Government Attorney and staff members, or for the powers and functions of the Government Attorney.

The Office of the Government Attorney proposed that the Proclamation should be repealed, or amended to suit the current constitutional dispensation.

(b) Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, 1971

A **public stakeholder** proposed that the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, 1971 (Act No. 41 of 1971) be repealed, or amended by deleting cannabis from the Schedule.

The LRDC however advises that the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act is not obsolete given that it regulates a wide range of potentially dangerous drugs, including amphetamines, codeine, heroin, morphine and opium (just to name a few which are well-known).

Amendments to laws which are in need of improvement fall outside the scope of this project, but may be considered for possible future LRDC projects.

(c) Laws affecting women, girls, sex workers & LGBT communities

A group of **Namibian civil society organisations representing women, girls, sex workers & LGBT communities** submitted an extensive submission proposing amendments to the following laws:

- Criminal Procedure Act, 1977 (Act No. 51 of 1977)
- Combating of Domestic Violence, 2003 (Act No. 4 of 2003)
- Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980)
- Labour Act, 2007 (Act No. 11 of 2007)
- Affirmative Action Employment Act, 1998 (Act No. 29 of 1998)
- Namibian Constitution, 1990.

The LRDC appreciates this extensive submission. However, none of these laws are obsolete in the sense envisaged by the current project. As noted above, amendments to laws which need improvement fall outside the scope of this project but may be considered for possible future LRDC projects. For example, one of the topics raised in this submission is a call for the repeal of the law on sodomy (a common-law offence) and related provisions in the Criminal Procedure Act 51 of 1977. The repeal of the law on sodomy is already the subject of another LRDC investigation.

(d) Submission from Ministry of Urban and Rural Development

The **Ministry of Urban and Rural Development** submitted a list of local authority regulations which may be outdated. The repeal of regulations can be actioned directly by relevant local authorities and does not need Parliamentary action,² so the regulations listed will not be examined in this project. We recommend that the Ministry discuss the regulations in question with the relevant local authorities.

The Ministry's input also included a list of laws identified by the Omusati Regional Council as being possibly obsolete. This list is reproduced below, with comments:

- **Public Service Act, 1980 (Act No. 2 of 1980):** This law has already been repealed, by the Public Service Act, 1995 (Act 13 of 1995).
- **Water Research Act, 1971 (Act No. 34 of 1971):** This law was added to the list of laws for investigation, and is discussed below.
- **Land Titles Proclamation Act, 1921 (Act No. 2 of 1921):** This law was added to the list of laws for investigation, and is discussed below.
- **Livestock Improvement Act, 1977 (Act No. 25 of 1977):** This law is still in active use, with breeds of animals regularly being registered under it – most recently in 2017. Thus, while it may need updating, it cannot be considered obsolete.

² Section 24 of the Local Authorities Act 23 of 1992 authorises local authority councils to make a wide range of regulations; the power to make regulations implicitly encompasses the power to amend or repeal such regulations.

- **Magistrate’s Courts Act, 1944 (Act No. 32 of 1944):** This law, despite dating back to 1944, is still the primary piece of legislation governing the operation of magistrates’ courts in Namibia. It has been extensively amended over the years, to bring it more up to date and cannot be considered obsolete.
- **Marine Traffic Act, 1981 (Act No. 2 of 1981):** This law was amended in 1991 to make it consistent with an independent Namibia and amended again in 1994. Thus, it cannot be considered obsolete.
- **Marriage Act, 1961 (Act No. 25 of 1961):** This law is still the operative law for the solemnisation of marriage in Namibia and is thus in regular use. The Ministry of Home Affairs, Immigration, Safety and Security is, as of October 2020, in the final stages of preparing a new Marriage Bill for tabling in Parliament which would replace the 1961 statute.
- **Hazardous Substances Ordinance, 1974 (Ord No. 14 of 1974):** This law regulates harmful radiation and other hazardous substances. It was amended by the Atomic Energy and Radiation Protection, 2000 (Act No. 5 of 2000) which was brought into force in relevant part on 18 November 2011 by Government Notice 220 of 2011.³ The amendments adjusted definitions of terms in some sections of the Ordinance without altering its overall structure. Thus, it appears that this Ordinance is not obsolete.
- **Heraldry Act, 1962 (Act No. 18 of 1962):** This law is still in use. The Office of the President cites it on their website as one of the sources relevant to the national symbols of the Republic of Namibia, along with the National Symbols Act, 2018 (Act No. 17 of 2018).⁴ According to the Ministry of Defence, the Heraldry Act is still relevant with regard to unauthorized use of military decorations and misuse of uniforms.⁵
- **Immovable Property (Removal or Modification of Restrictions), 1965 (Act No. 94 of 1965):** This law empowers a court to alter or amend conditions placed by a will on the inheritance of immovable property and limits the nomination of fideicommissaries in wills. It is still relevant to the law of succession.⁶
- **Accommodation Establishments and Tourism Ordinance, 1973 (Ordinance No. 20 of 1973):** This law is still in active use. Regulations relating to accommodation establishments and tourism were issued under the Act in Government Notice 75 of 1974, and were amended

³ Government Gazette 4835 <www.lac.org.na/laws/2011/4835.pdf>.

⁴ “National Symbols”, website of the Office of the President, undated: <www.op.gov.na/national-symbols>.

⁵ Ministry of Defence communication to LRDC.

⁶ See, for example, Florian Beukes, “Freedom of testation v section 37C of the Pension Funds Act, 1956 (No. 24 of 1956)”, *Namibian Law Journal*, Volume 04, Issue 01, 2012, page 56 (footnote omitted), available at <www.kas.de/c/document_library/get_file?uuid=3e8fd8a1-d615-2aee-2d7a-2b09f1e4704c&groupId=252038>:

If a testator bequeaths something to a person subject to the condition that, when the testator dies or after a period of time after his/her death, the benefit will accrue to another, the first heir is the fiduciary and any succeeding beneficiary is a fideicommissary. Thus, one can nominate fideicommissaries ad infinitum for movable property. For immovable property, the testator’s freedom is limited to nominating only two fideicommissaries. Thus, for immovable property, first the fiduciary would inherit, followed by the first fideicommissary and then the second fideicommissary. Even if the testator has provided for fideicommissaries ad infinitum in respect of immovable property, his/her wishes will be limited to the first two fideicommissaries.

as recently as 2000.⁷ The Namibia Tourism Board Act, 2000 (Act No. 21 of 2000) repealed portions of this Act but retained others. Thus, this law – while it might well be in need of updating - cannot be said to be obsolete.

(e) Submission from Namibia Statistics Agency

The Namibia Statistics Agency proposed that the Census of Dwellings Proclamation, 1945 (Proclamation No. 24 of 1945) should be declared obsolete as this law has been superseded by the Statistics Act, 2011 (Act No. 9 of 2011). This law is on the list of laws identified by the LRDC for investigation and is discussed below.

(f) Submission from Ministry of Industrialisation, Trade and SME Development

The LRDC held a follow-up consultation with the **Ministry of Industrialisation, Trade and SME Development**.

The Ministry proposed a list of laws to be declared obsolete:

- Importation of Cement Ordinance, 1963 (Ordinance No. 24 of 1963)
- Promotion of the Economic Development of National States Act, 1968 (Act No. 46 of 1968)
- Shop Hours Ordinance, 1939 (Ordinance No. 15 of 1939)
- Sunday Trading Proclamation, 1919 (Proclamation No. 12 of 1919).

These laws are on the list of laws identified by the LRDC for investigation and are discussed below.

⁷ Government Gazette 2264 <www.lac.org.na/laws/2000/2264.pdf> and Government Gazette 2304 <www.lac.org.na/laws/2000/2304.pdf>.

3. Review of Possibly Obsolete Laws

We would like to acknowledge the Legal Assistance Centre publication, *NAMLEX: Index to the Laws of Namibia*, last updated in March 2020. This document served as a key reference point for the research of the laws contained herein, and the summaries of many of the laws discussed here are taken directly from NAMLEX, which is now published under the co-copyright of the Legal Assistance Centre and the Government of the Republic of Namibia.

Some of the laws discussed here may have been “repealed by implication” by subsequent laws that cover the same topics.⁸ This paper will not consider that question; for the avoidance of doubt, it recommends explicit repeal of all the laws which have been determined to be obsolete.

The laws discussed in this section are presented in alphabetical order.

Note that where the total repeal of a principle law is recommended, this recommendation should be understood to contemplate the repeal of all amending legislation as well. The amendments to each law are listed in full in each entry below.

⁸ This issue was recently discussed by Namibia’s Supreme Court in *Minister of Trade and Industry v Matador Enterprises (Pty) Ltd* (SA 44-2014) [2020] NASC (19 March 2020).

(1) Acquisition of Shares in Rössing Uranium Limited Proclamation, 1985 (AG No. 31 of 1985)

Summary:

This South West African Proclamation⁹ authorises the Government's purchase of shares in Rössing Uranium Ltd. It reads in full as follows:

Definitions

1. In this Proclamation, unless the context indicates otherwise

“board” means the board of directors of Rössing Uranium Limited;

“company” means the company Rössing Uranium Limited;

“Central Revenue Fund” means the Central Revenue Fund established by section 3 of the Exchequer and Audit Proclamation, 1979 (Proclamation No. 85 of 1979);

“territory” means the territory of South West Africa.

Shares and dividends

2. (1) The Administrator-General may acquire shares in the company as and when he may deem it necessary and such shares shall be paid for out of moneys appropriated by him for that purpose.

(2) The Administrator-General may enter into agreements for the purpose of directly or indirectly extending the interests of the State in the company.

(3) Any dividends which may accrue to the Administrator-General, as shareholder of the company shall be deposited in the Central Revenue Fund.

Appointment of Director

3. (1) The Administrator-General shall, as soon as he becomes entitled thereto in terms of the memorandum of association or articles of the company, or any shareholders' agreement or other document appoint a director to the board for the period determined by him.

(2) The director shall act as a representative of the Administrator-General and in the best interests of the territory.

(3) The director shall exercise his vote as determined in the articles of the company or any shareholders' agreement.

(4) The Administrator-General shall appoint the director for his ability in relation to, and his experience of, business.

Alternate director

4. The Administrator-General may appoint an alternate director to perform the duties of the director during his absence or his inability to hold office.

Short title and commencement

5. This Proclamation shall be called the Acquisition of Shares in Rössing Uranium Limited Proclamation, 1985, and shall be deemed to have come into operation on 1 March 1985.

⁹ <www.lac.org.na/laws/1985/og5060.pdf>.

Amendments:

None.

Current status:

The Government has purchased shares and board representation has been achieved. The Namibian Government currently has a 3% shareholding and a 51% majority vote when it comes to issues of national interest.¹⁰ Although the wording of the law is not entirely clear, the provisions on appointment of a director by the Administrator-General appear to have applied to the initial appointment only (“The Administrator-General shall... appoint a director to the board for the period determined by him.”).

Recommendation:

The purpose for which the Act was promulgated has been achieved. Therefore, the Act appears to have no ongoing relevance and can be repealed.

¹⁰ “Rossing Uranium Limited Working for Namibia, 2011 Report to Stakeholders: Facing challenges head-on” 2011, available at <www.rossing.com/files/rossing_stakeholder_report2011.pdf>.

(2) **Amendment of Execution (Mortgaged Properties) Proclamation, 1933 (Proclamation No. 6 of 1933)**

Summary:

This South West African Proclamation¹¹ supplements the law relating to the execution of judgements in respect of immovable property, in order to provide assistance to mortgage debtors by providing for suspension periods “in view of the prevailing financial depression”. There is, however, no time limit on its application.

Amendments:

None.

Current status:

The execution of judgments is adequately addressed by other general legislation.

The High Court Amendment Act, 2013 (Act No. 12 of 2013) amends the High Court Act, 1990 (Act No.16 of 1990) so as to give powers to the Judge President to make rules to regulate the execution of immovable property where such property is the primary home of the judgment debtor.

Rule 108 of the High Court Rules currently states that the registrar may not issue a writ of execution against immovable property unless there is a *nulla bona* return (certifying that a diligent search has found no other property which can be seized to satisfy the debt), and a court has declared the immovable property specifically executable on application by the creditor.¹²

This rule also states that, where the immovable property is the primary home of the judgment debtor, a court may not declare the property executable unless the execution debtor was personally informed of the intention to apply to have the immovable property declared executable and given an opportunity to provide reasons to the Court as to why such an order should not be made.

In the case of *Hiskia v Body Corporate of Urban Space*,¹³ the applicants challenged the corresponding procedure in the magistrates’ courts on the grounds that the relevant statutory provisions and rules authorised judgment for execution against immovable property to be entered by default, and a warrant of execution issued, by a clerk of the magistrate’s court without the supervision of a magistrate – thus lacking the safeguards provided by Rule 108 for execution against immovable property by the High Court. The High Court found the relevant provisions to be unconstitutional on the grounds that they violated the principle of equal protection under the law, since there is no rational reason for differentiating in this manner between litigants in the High

¹¹ <www.lac.org.na/laws/1933/og502.pdf>.

¹² *Nulla bona* is Latin for “no goods”.

¹³ *Hiskia and Another v Body Corporate of Urban Space and Others* 2018 (4) NR 1067 (HC).

Court and litigants in the magistrate's courts.¹⁴ The Ministry of Justice reports that legislation which would address execution of judgments in the magistrate's courts will soon be tabled in Parliament.

It is evident that the rules relating to execution against immovable property have been well-canvassed in respect of considerations of fairness.

Moreover, the 1932 Proclamation was, by its own terms, aimed at specific economic circumstances which have long since passed.

Recommendation:

This Proclamation appears to have been enacted to deal with a particular financial situation prevailing in 1933. Even if it is assumed to apply more generally, it is unnecessary given the attention to execution against immovable property in the High Court Rules and in the ruling of the *Hiskia* case. It is therefore obsolete and should be repealed.

The Magistrate's Court Act, 1944 (Act No. 32 of 1944) and/or the Rules of Court for the Magistrates' Courts should be amended to bring them in line with Rule 108(1)(a) and (b) of the Rules of the High Court, in accordance with the *Hiskia* case, and we understand this step to be underway.

¹⁴ The Court found Rule 12(1)(a) of the Rules of the Magistrates' Courts to be invalid with immediate effect. It found section 66(1)(a) of the *Magistrates' Courts Act 32 of 1944* as well as Rules 36 and 43 of the Rules of the Magistrates' Courts unconstitutional insofar as they permit the sale in execution of immovable property without judicial oversight. It provided that these provisions would remain in force until 31 August 2019 to give Parliament opportunity to correct their defects. No correction was forthcoming, so these additional provisions are also now invalid.

(3) Atmospheric Pollution Prevention Ordinance, 1976 (Ordinance No. 11 of 1976)

Summary:

This Ordinance¹⁵ provides for the prevention of air pollution with particular focus on public health. The Ordinance deals with the control of noxious or offensive gases; atmospheric pollution by smoke; dust control; and motor vehicle emissions. It provides for the establishment of control areas in order to control noxious or offensive gases or atmospheric pollution by smoke.

Amendments:

This Ordinance is affected by the Health Act, 1988 (Act No. 21 of 1988) which made it applicable to all of South West Africa.¹⁶

Notices:

The whole area of Namibia with the exception of East Caprivi, is proclaimed as a controlled area for the purposes of section 4(1)(a) of the Ordinance in Government Notice No. 309 of 1976.¹⁷

Current status:

This Ordinance has not been fully implemented as no post-independence regulations have been promulgated. According to a baseline review report by the Ministry of Environment and Tourism on waste management and pollution control legislation in Namibia, it was stated that the Atmospheric Pollution Ordinance, 1976 (Ordinance No.11 of 1976) is not only outdated but incomplete, as certain aspects of pollution control and waste management are not adequately addressed in the existing legislation.¹⁸

Recommendation:

Although the Atmospheric Pollution Ordinance, 1976 (Ordinance No. 11 of 1976) contains a number of relatively detailed provisions on air pollution, “most of the Ordinance is of no effect in Namibia and those parts of it which are in force are, generally speaking not administered”.¹⁹ Since it is not considered adequate and is not being actively applied, we recommend that it should be repealed.

¹⁵ <www.lac.org.na/laws/1976/og3555old.pdf>.

¹⁶ <www.lac.org.na/laws/1988/og5651.pdf>

¹⁷ <www.lac.org.na/laws/1976/og3571.pdf>.

¹⁸ *Baseline Review: Pollution Control and Waste Management Legislation on Namibia*, Ministry of Environment and Tourism, 2001, <http://download.nust.na/pub2/SOER/waste/F-Legislation_Baseline%20Review.doc> , section 4.2.1.

¹⁹ Id, page 19.

(4) Census of Dwellings Proclamation, 1945 (Proclamation No. 24 of 1945)

Summary:

This South West African Proclamation²⁰ makes provision for the taking of a census of dwellings. It provides that the “Administrator may from time to time and in such areas as he may determine and after notification in the *Gazette* appoint census officers for the purpose of taking a census of dwellings in the area so specified”.

Amendments:

None.

Current status:

This law was first superseded by the Statistics Act, 1976 (Act No. 66 of 1976) inherited from South Africa, which was applicable to Namibia until 2011. The Statistics Act 66 of 1976 was then repealed by the Statistics Act, 2011 (Act No. 9 of 2011) which is administered by the Namibia Statistics Agency. The Statistics Act provides for the development of the National Statistics System. It requires the Namibia Statistics Agency to cause a population and housing census to be taken every 10 years and to “collect, produce, analyze and disseminate statistics” from these censuses.²¹ It also authorizes the Director-General of Planning appointed under Article 32(3)(i)(dd) of the Namibian Constitution to make regulations for the effective taking of a population or housing census in Namibia, after consultation with the Board of the Namibia Statistics Agency.²² Thus, the Statistics Act deals comprehensively with official population and housing censuses.

The Namibia Statistics Agency has indicated that it agrees with this assessment.

Recommendation:

The Proclamation has been superseded by two successive general laws on statistics which cover population and housing censuses fully. It is therefore obsolete and should be repealed.

²⁰ <www.lac.org.na/laws/SWA/og1196.pdf>.

²¹ Statistics Act, 2011 (Act No. 9 of 2011), section 7(2)(d) and (g).

²² Id, section 58(1)(a) read together with definition of “Minister” in section 1.

(5) Commonwealth Relations (Temporary Provision), 1961 (Act No. 41 of 1961)

Summary:

This South African Act²³ was assented to on 26 May 1961 and commenced on 30 May 1961. It was intended to deal with the situation arising after 31 May 1961 because of South Africa's withdrawal from the Commonwealth of Nations.²⁴

Section 1 of the Act provided that references to any Commonwealth country in laws which were still in force in South Africa or the territory of South West Africa immediately before 31 May 1961 "shall not be affected by reason of the establishment of the Republic of South Africa or of the fact that the Republic is not a member of the Commonwealth".

Applicability to South West Africa:

Section 3 states "This Act shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel referred to in section three of the South West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951)." This wording does not seem to make amendments to the Act automatically applicable to SWA, but there were no amendments to the Act in South Africa prior to Namibian independence.

Amendments:

None

Current status:

This law is no longer relevant since Namibia is now a member of the Commonwealth.

Recommendation:

This Act has served its historical purpose and is irrelevant to independent Namibia, which is a member of the Commonwealth of Nations. It is therefore obsolete and should be repealed.

²³ <www.lac.org.na/laws/GGsa/sagg6700.pdf>.

²⁴ The Republic of South Africa Constitution Act 32 of 1961 transformed South Africa into a Republic with effect from 31 May 1961 – thus removing the Queen of England as South Africa's Head of State. South Africa gave the Conference of Commonwealth Prime Ministers formal notice of this change and requested permission to remain within the British Commonwealth. However, when this request encountered opposition based on South Africa's policy of apartheid, South Africa withdrew its application for membership in the Commonwealth. It renewed its membership after its democratic elections in 1994.

(6) Criminal Law Amendment Act, 1953 (Act No. 8 of 1953)

Summary:

This South African Act²⁵ was one of the notoriously repressive pieces of South Africa legislation aimed at stifling protests against apartheid.

Section 1 provides for enhanced penalties for any person who is convicted of an offence “which is proved to have been committed by way of protest or in support of any campaign against any law or in support of any campaign for the repeal or modification of any law or the variation or limitation of the application or administration of any law”.

Section 2 provides for similarly harsh penalties for incitement to such crimes:

Any person who

- (a) in any manner whatsoever advises, encourages, incites, commands, aids or procures any other person or persons in general; or
- (b) uses any language or does any act or thing calculated to cause any person or persons in general,

to commit an offence by way of protest against a law or in support of any campaign against any law, or in support of any campaign for the repeal or modification of any law or the variation or limitation of the application or administration of any law, shall be guilty of an offence...

Section 3 makes it an offence to solicit, accept or receive financial or other assistance for protest campaigns, by means of -

- (a) assisting any campaign (conducted by means of unlawful acts or omissions or the threat of such acts or omissions or by means which include or necessitate such acts or omissions or such threats) against any law, or against the application or administration of any law; or
- (b) enabling or assisting any person to commit any offence by way of protest against a law or in support of any campaign against any law or in support of any campaign for the repeal or modification of any law or the variation or limitation of the application or administration of any law; or
- (c) assisting any person who has committed any offence referred to in paragraph (b).

Section 4 provides a presumption that anyone accompanying two or more persons who are charged with offences committed during protests, or in support of any campaign for the cancellation or modification of any law, is presumed to have committed the same offence and would have the responsibility to prove his or her innocence; note that the requirement for this presumption to operate is only that the other persons have been *charged* with the stated type of offence, not that they have been *convicted* of such an offence.

The other provisions are additional procedural provisions relating to the primary offences.

²⁵ <www.lac.org.na/laws/GGsa/sagg5018.pdf>.

According to one commentator, this was one of a group of laws enacted by the South African Nationalist Party to protect the apartheid regime and “to maintain the social order by controlling so-called subversive organizations and seditious activities”; this particular law was aimed at combating the famous defiance campaign, in which thousands of people openly violated racially-restrictive laws, inviting arrest as a form of protest.²⁶

Another source describes this law as having introduced “fierce penalties for crimes that were committed by way of protest and similar penalties for encouraging protest crimes or organizing or assisting in campaigns to break laws by way of protest”; it states further that this law “broke the defiance campaign” and “effectively eliminated non-violent disobedience as a strategy for the disenfranchised in South Africa”.²⁷

Well-known anti-apartheid campaigner Elizabeth Landis describes this law as providing “extraordinary penalties for resistance to apartheid statutes”, as part of the apartheid state’s “repressive measures built into the administration of criminal justice”.²⁸

Applicability to South West Africa:

This Act was not made specifically applicable to South West Africa. However, section 8 indicates that the Act, or at least that section of it, applied to South West Africa by providing special instructions for the removal of “undesirable inhabitants” from the Territory of South West Africa. However, the status of the remainder of the Act in South West Africa is uncertain.

Transfer of administration to South West Africa:

The administration of this Act was transferred to SWA by the Executive Powers (Justice) Transfer Proclamation.²⁹ There were no amendments to the Act in South Africa after the date of transfer. The Act was repealed in South Africa by section 73 of the Internal Security Act 74 of 1982, which was not applicable to South West Africa.

Amendments:

The Second Law Amendment (Abolition of Discriminatory or Restrictive Laws for the Purposes of Free and Fair Election) Proclamation (AG 25/1989)³⁰ repeals sections 8 and 9 of this Act. Section 8 authorised the removal of non-South Africans who were convicted under the Act from the Union or the “Territory of South West Africa”. Section 9 made it possible to prohibit persons convicted under the Act from being present in particular areas.

²⁶ Lee W Potts, “Criminal Liability, Public Policy, and the Principle of Legality in the Republic of South Africa”, 73 *J. Crim. L. & Criminology* 1061 (1982), pages 1073-1074, 1080-1081.

²⁷ Anthony S Mathews, *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society*, University of California Press, 1986, page 52.

²⁸ Elizabeth S Landis, “South African Apartheid Legislation II: Extension, Enforcement And Perpetuation”, 71 *Yale Law Journal* 437 (1962), page 482.

²⁹ Executive Powers (Justice) Transfer Proclamation, AG 33/1979, dated 12 November 1979, as amended.

³⁰ <www.lac.org.na/laws/1989/og5758.pdf>.

Current status:

The post-independence Supreme Court case of *Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State* indicates that the Act was applicable to South West Africa, and remained in force in independent Namibia, by including it on a list of laws which authorised corporal punishment by judicial, quasi-judicial and administrative organs of the State.³¹ This case held that the reference to whipping in section 1 of the Act was unconstitutional: “It is declared that the imposition of any sentence by any judicial or quasi-judicial authority, authorising or directing any corporal punishment upon any person is unlawful and in conflict with Article 8 of the Namibian Constitution.”³²

Recommendation:

This law has a repugnant history as a tool of repression aimed at non-violent protest. It is not in line with the ethos of the Namibian Constitution, particularly Article 17(1) which gives all citizens the right to participate in peaceful political activity intended to influence the policies of Government, and Article 95(k) which declares that government will promote policies aimed at “encouragement of the mass of the population through education and other activities and through their organisations to influence Government policy by debating its decisions”. It is a relic of apartheid South Africa which has no place in independent Namibia and should be repealed.

³¹ *Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC), pages 83-84.

³² *Id.*, page 95.

(7) Crown Land Disposal Proclamation, 1920 (Proclamation No. 13 of 1920)

Summary:

This South West African Proclamation³³ must be understood in light of its historical background as a colonial tool to acquire land.

Successive colonial administrations in Namibia, as in South Africa, formally seized land which had been inhabited by indigenous groups by enacting laws that declared this land to be “Crown land”, and then setting aside some of the land for the “use and benefit” of “natives”.³⁴

The South African Administration enacted various laws to achieve this goal in South Africa, including the Crown Land Disposal Ordinance, 1903 (Transvaal).

In Namibia, colonial control passed from Germany to South Africa as a result of the Peace Treaty of Versailles concluded at the end of World War I. This Treaty established a Mandate for South West Africa allocated to “His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa”.³⁵ The Treaty of Peace and South West Africa Mandate Act, 1919 (Act No. 49 of 1919) gave effect to the Mandate by assigning administrative control of the territory of South West Africa to the Governor-General of South Africa, who was given both legislative and executive powers.³⁶

Section 4 of the Treaty of Peace and South West Africa Mandate Act authorised the Governor-General to apply certain laws concerning land to “South West Africa” by Proclamation – including “the Crown Land Disposal Ordinance 1903 of the Transvaal; and the Crown Land Disposal

³³ <www.lac.org.na/laws/1920/og29.pdf>.

³⁴ “German land policy with regard to the acquisition of land had been formulated in 1892, on the premise that, after the demarcation of so-called ‘native reserves’, the colonial authorities would gradually acquire by proclamation as Crown Land the remainder of the Territory.” A du Pisani, *SWA/Namibia: The Politics of Continuity and Change*, Johannesburg: Jonathon Ball Publishers, 1985, page 25.

“... [L]egal mechanisms were used by colonial powers aiming at dividing the land on the basis of [a] settler [-] native dichotomy. This was done by the initial declaration of the territory as crown land.” C Muenjo & C Mapure, “The Land Matters Report”, March 2010, page 20 (available at <http://landmatters.de/land_matters_report.pdf>, accessed 11 May 2020).

This colonial form of seizure is also highlighted in S Haring (CUNY School of Law), “The Constitution of Namibia and the ‘rights and freedoms’ guaranteed communal land holders: Resolving the inconsistency between Article 16, Article 100, and Schedule 5”, 12 (3) *South African Journal on Human Rights* 467 (1996), footnote 11 at page 469 and page 470, available at <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1293&context=cl_pubs>, accessed 20 May 2020.

³⁵ See John Dugard (ed), *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and The United Nations*, Berkeley/Los Angeles, California: University of California Press, 1973 at pages 69-70, citing the decision of the Supreme Council of the Allied Powers on 7 May 1919. The quotation is from the subsequent Mandate for German South West Africa which confirmed the decision of the Supreme Council of the Allied Powers.

³⁶ This Act can be found in South African Government Gazette 1000, dated 20 September 1919. See C Muenjo & C Mapure, “The Land Matters Report”, March 2010, pages 20-21.

Amendment Ordinance 1906 of the Transvaal”. The Act also provided that grants of title or interest in State land must take place pursuant to the listed laws, or else with the “authority of Parliament”.³⁷

The Crown Land Disposal Proclamation, 1920 (Proclamation No. 13 of 1920) gave effect to this authorisation by applying the Crown Land Disposal Ordinance, 1903 (Transvaal), as amended by the Crown Land Disposal Amendment Ordinance, 1906 (Transvaal), to South West Africa, with some minor modifications.³⁸

The Crown Land Disposal Ordinance, 1903 (Transvaal) was amended later in 1920 when the Governor-General of South West Africa delegated administrative power to the Administrator of South West Africa.³⁹

The effect of the application of this Ordinance to South West Africa was that “all land that was under the ownership of tribal groups became state land... The South African government thus expropriated the land even of concessionaire companies and declared all unallocated areas crown land.”⁴⁰

The Ordinance (as amended) empowered the Administrator-General:

- to dispose of Crown Lands within the Protectorate by grant, sale, lease or otherwise, provided that particulars of every such transaction were immediately published in the *Gazette*;
- to exchange Crown Land for other land if this was in the public interest;
- to resume for public purposes any land alienated under the Ordinance, upon payment of appropriate compensation;

³⁷ Treaty of Peace and South West Africa Mandate Act 49 of 1919, section 4:

(1) It shall be lawful for the Governor-General by proclamation to apply to the said territory, with such modifications as he may deem necessary having regard to the conditions obtaining therein the provisions of all or any of the following laws to wit: the Land Settlement Act 1912, the Land Settlement Act Amendment Act 1917, the Crown Land Disposal Ordinance 1903 of the Transvaal; and the Crown Land Disposal Amendment Ordinance 1906 of the Transvaal

(2) Save for the provisions. of sub-section (1) of this section, no grant of any title, right or interest in State land or minerals within the said territory or of any right or interest in or over the territorial waters thereof shall be made and no trading or other concessions shall be granted without the authority of Parliament.

(3) No land within the said territory now or hereafter set apart as a reserve for natives or coloured. persons shall be alienated save under the authority of Parliament: Provided that nothing in this section contained shall be deemed to prohibit the Governor-General, in respect of land contained in any such reserve, to grant individual title to any person lawfully occupying and entitled to such land.

³⁸ Section 1 of the Crown Land Disposal Proclamation, 1920 (Proclamation No. 13 of 1920) provides as follows: “Subject to the amendments set forth in the Schedule hereto the Crown Land Disposal Ordinance 1903 of the Transvaal, as amended by the Crown Land Disposal Amendment Ordinance 1906 of the Transvaal shall have effect in the Protectorate.” See also SK Amoo, *Property Law in Namibia*, Pretoria University Law Press, 2014, pages 17-18.

³⁹ This amendment was made by Proclamation 54 of 1920, published in South West Africa Official Gazette 41, dated 18 November 1920 <www.lac.org.na/laws/1920/og41.pdf>.

⁴⁰ C Muenjo & C Mapure, “The Land Matters Report”, March 2010, page 22; SK Amoo, *Property Law in Namibia*, Pretoria University Law Press, 2014, pages 17-18.

- to insert conditions in any grant or lease of Crown land deemed necessary to secure the beneficial occupation of the land, including a clause permitting a lessee to cut timber on Crown Lands for specified purposes;
- to set aside Crown Lands as reserves “for the use and benefit of aboriginal natives, coloured persons and Asiatics”, as well as for public purposes such as military or police purposes, railways or canals, bridges, churches, use by schools and other educational institutions, nature conservation areas, salt pans, cemeteries, libraries, museums, recreational areas;
- to make regulations for the conduct of the business of the Land Department, including regulations prescribing the duties of valuers, surveyors and inspectors employed by the Land Department and regulations for the establishment and proclamation of towns and the laying out and survey of erven in towns.⁴¹

The creation of “reserves” for specific population groups was taken forward under various pieces of colonial legislation which are no longer in force and need not be detailed here.⁴²

Amendments:

The Proclamation is amended by Proclamation No. 54 of 1920,⁴³ South African Proclamation No. 200 of 1950,⁴⁴ Ordinance No. 7 of 1951,⁴⁵ Ordinance No. 36 of 1958,⁴⁶ and Ordinance No. 17 of 1965.⁴⁷ It was repealed in respect of Walvis Bay, along with Ordinance No. 7 of 1951 (which inserted the words “all alienated Crown Land within the port and settlement of Walvis Bay”), by South African Proclamation No. 149 of 1982.⁴⁸

Current status:

Firstly, it is clear that “Crown land” is synonymous with “State land”. In South Africa, prior to Namibian independence, the Republic of South Africa Constitution Act, 1961 (Act No. 32 of 1961) provided that as from 31 May 1961 (when South Africa became a Republic), any reference to the “Crown” in any law in force in the Union of South Africa or in any other territory in respect of which Parliament is competent to legislate shall be construed as a reference to the Republic or the State President, as the circumstances may require.⁴⁹ Furthermore, the Deeds Registries Act, 1937 (Act No. 47 of 1937), a South African statute which is still applicable in Namibia, was amended in 1962 by the Deeds Registries Amendment Act, 1962 (Act No. 43 of 1962) to substitute “State

⁴¹ A more detailed description of the import of the amended law can be found in *Guidebook: Laws Relating to Immovable Property in Namibia*, Republic of Namibia, Ministry of Lands and Resettlement (compiled by P J Harmse), 2014, pages 22-26 (available at <<https://d-nb.info/1097631834/34>>).

⁴² See C Muenjo & C Mapure, “The Land Matters Report”, March 2010, pages 22-23; SK Amoo, *Property Law in Namibia*, Pretoria University Law Press, 2014, pages 18-ff.

⁴³ <www.lac.org.na/laws/1920/og41.pdf>.

⁴⁴ <www.lac.org.na/laws/GGsa/sagg4435.pdf>.

⁴⁵ <www.lac.org.na/laws/1951/og1601.pdf>.

⁴⁶ <www.lac.org.na/laws/1958/og2153.pdf>.

⁴⁷ <www.lac.org.na/laws/1965/og2634.pdf>.

⁴⁸ <www.lac.org.na/laws/GGsa/rsagg8344.pdf>.

⁴⁹ Republic of South Africa Constitution Act 32 of 1961, section 3(b).

land” for “Crown land” throughout (by a South African amending Act which is also applicable to Namibia).

Against this background, the question is whether any of the powers given to the State by the Crown Land Disposal Proclamation, 1920 are still necessary in independent Namibia.

One indicator is that no land transactions or reservations citing the Crown Land Disposal Proclamation have been gazetted since independence, which is one indicator that the law is no longer relevant.

Article 100 of the Namibian Constitution provides that all land which is “not otherwise lawfully owned” belongs to the State. Section 5(1) states:

All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.

The references to the Administrator-General in the 1920 Proclamation would now be construed as references to the President of Namibia.⁵⁰

The State as a landowner would appear to have the same rights as a private landowner, with respect to the ability to engage in transactions with State-owned land.⁵¹ Expropriation of land for public purposes is covered by Article 16(2) of the Namibian Constitution,⁵² read together with the Expropriation Ordinance, 1978 (Ordinance No. 13 of 1978).

Communal land is now governed by the Communal Land Reform Act, 2002 (Act No. 5 of 2002), which empowers the President by proclamation in the *Gazette*, with the approval of the National Assembly, to declare any defined portion of unalienated State land to be a communal land area and to alter communal land areas. This statute also provides for the allocation of various communal land rights.

⁵⁰ *Guidebook: Laws Relating to Immovable Property in Namibia*, Republic of Namibia, Ministry of Lands and Resettlement (compiled by P J Harmse), 2014, page 23.

⁵¹ SK Amoo, *Property Law in Namibia*, Pretoria University Law Press, 2014, page 208.

⁵² Article 16(2) of the Namibian Constitution states: “The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.”

The town planning issues referred to the 1920 Proclamation have been superseded by the Townships and Division of Land Ordinance, 1963 (Ordinance No. 11 of 1963) which was recently replaced by the Urban and Regional Planning Act, 2018 (Act No. 5 of 2018).

Many of the other functions for which land can be reserved under the 1920 Proclamation are now the province of local and regional authorities under the Local Authorities Act, 1992 (Act No. 23 of 1992) and the Regional Councils Act, 1992 (Act No. 22 of 1992), which both give authorities powers to conduct transactions involving land in connection with their powers.

The Land Tenure Act, 1996 (Act No. 32 of 1966) and the Agricultural (Commercial) Land Reform Act, 1995 (Act No. 6 of 1995) address the acquisition of land by the State for farming and resettlement purposes.

The Treaty of Peace and South West Africa Mandate Act, 1919 (Act No. 49 of 1919) was repealed by the Repeal of Obsolete Laws Act 21 of 2018. This means that the section of that law which provided that transactions in respect of State land must take place either under the specified laws, or pursuant to the authority of Parliament, is no longer in force.

In South Africa, the Crown Land Disposal Ordinance, 1903 (Ordinance No. 57 of 1903) (Transvaal) was repealed by the State Land Disposal Act, 1961 (Act No. 48 of 1961) (which did not apply to “South West Africa” and so did not effect a similar repeal there). This 1961 Act (as amended), which is still in force in South Africa, contains the following key provisions:

- it authorises the President to “sell, exchange, donate or lease any State land on behalf of the State”, to endorse certain restrictions on the title deeds of land transferred by the State and to amend or cancel any restrictions whereby a right in land was reserved to or acquired by the State;
- it provides that State land, after a period of 10 years from the date of commencement of the Act, cannot be acquired by prescription (similar to section 65(1) in Namibia’s Local Authorities Act, 1992 (Act No. 23 of 1992), which provides that no person may become the owner of any immovable property of a local authority council or of any right in such property by prescription);
- it includes a requirement that the President or someone authorised by the President must record transactions in State land appropriately in deeds of grant, in deeds in a deeds registry or in signed leases.⁵³

None of these provisions appear to be direct replacements for any of the powers in the Crown Land Disposal Ordinance, 1903 (Ordinance No. 57 of 1903) (Transvaal), so the route taken South Africa

⁵³ This South African Act also makes provision for the assignment of duties by the President and the relevant Minister, authority for the President to make “any regulations which he considers necessary or expedient for the achievement of the purposes and objects of this Act” and a provision on specific land in Foreshore, Cape Town.

does not suggest that there would be any problem with a repeal in Namibia which did not provide of a replacement law.

Recommendation:

This law has an objectionable origin as a mechanism for colonial acquisition of land. It does not appear to have been utilised in independent Namibia. The practical matters that it covers seem to be taken care of by the State's common-law powers as a property-holder and by a range of subsequent statutes. It should be repealed.

(8) Crown Lands (Trespass) Proclamation, 1919 (Proclamation No. 7 of 1919)

Summary:

This South West African Proclamation⁵⁴ provides for the prevention of trespass on Crown land. “Crown land” is not defined in the Crown Lands Trespass Proclamation, but it clearly refers to State land. As noted in the discussion of the Crown Land Disposal Proclamation above, the Republic of South Africa Constitution Act 32 of 1961 (prior to Namibian independence) equated references to the “Crown” with the Republic or the State President in any law in force in South Africa or in any territory for which the South African Parliament could legislate, and the Deeds Registries Act, 1937 (Act No. 47 of 1937) was amended in 1962 to substitute “State land” for “Crown land” throughout (and is applicable to Namibia).⁵⁵

Section 1 of the Proclamation (as amended) makes it a criminal offence to trespass on Crown land (more specifically, it applies to “unauthorised or unlawful loitering; or taking up temporary or permanent residence on such land”) – unless a Magistrate for the relevant district or some other authorised official has issued a permit authorising temporary residence.

Section 1*bis*, added in 1938, authorises the Administrator to make regulations setting fees for permits and for certain specific uses of Crown land.

Section 2 makes it an offence to cut, injure or remove trees, shrubs, bushes, timber, or grass from any Crown land without a permit from the military magistrate for that district.

Section 3 makes it an offence to “depasture” livestock on Crown land (specifically ostriches, horses, mules, donkeys, bulls, oxen, cows, heifers, calves, sheep, goats or pigs), without a permit from the military magistrate of that district.

Section 4 provides an exception for reasonable requirements relating to a journey across such land – stemming from a time when modes of travel were very different.

Section 5 makes it an offence to falsify a permit or to make use of a falsified permit.

Section 6 provides that the penalty for any offence under the Proclamation is a fine of up to fifty pounds (which is by law equated to 100 Namibian dollars⁵⁶) or imprisonment for up to six months “with or without hard labour”.

⁵⁴ <www.lac.org.na/laws/1919/og24.pdf>.

⁵⁵ See also *Guidebook: Laws Relating to Immovable Property in Namibia*, Republic of Namibia, Ministry of Lands and Resettlement (compiled by P J Harmse), 2014, page 21. .

⁵⁶ References to fines in South African statutes enacted prior to 1961 should be multiplied by 2 to obtain their South African rand/Namibian dollar value. The pound was the currency of the Union of South Africa from the time the country became a British Dominion in 1910 until it was replaced by the rand shortly before South Africa became a

Amendments:

This Proclamation is amended by Proclamation No. 4 of 1937,⁵⁷ Proclamation No. 31 of 1938,⁵⁸ and Proclamation No. 18 of 1948.⁵⁹

Current status:

It is not clear what official would be the modern-day successor of the military magistrate referred to in the Proclamation.⁶⁰ In any event, the permit system referred to in the Proclamation does not appear to be in use in independent Namibia.

It is quite likely that the Crown Lands (Trespass) Proclamation could be considered abrogated by disuse, as we have not been able to locate any indications that it has been in active use since Namibian independence.⁶¹

Trespass is prohibited by the Trespass Ordinance, 1962 (Ordinance No. 3 of 1962), which remains in active use. Section 1(1) of that Ordinance provides as follows:

Any person who without the permission -

- (a) of the lawful occupier of any land or any building or part of a building or of a person authorised by or on behalf of such lawful occupier to give permission; or
- (b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person, enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.

Section 2 sets the penalty for this offence as a fine not exceeding R1 000 or imprisonment for a period not exceeding one year or both such fine and such imprisonment.

Thus, trespass on State land for any reason (including the grazing of animals or the cutting of vegetation), as on privately-owned land, is covered by the Trespass Ordinance, which provides a more severe penalty than that of the Crown Land (Trespass) Ordinance and thus is likely to be a more effective tool to combat trespass.

Republic in 1961. The South African pound was replaced by the rand on 14 February 1961 in terms of the *Decimal Coinage Act 61 of 1959*, at a rate of 2 rand = 1 pound. (See also *South African Reserve Bank Act 90 of 1989*, section 15(2), and its predecessor, the *South Africa Reserve Bank Act 29 of 1944*, section 10A.) See also *S v George* (CR 25/2010) [2010] NAHC 149 (12 October 2010).

⁵⁷ <www.lac.org.na/laws/1937/og701.pdf>.

⁵⁸ <www.lac.org.na/laws/1938/og770.pdf>.

⁵⁹ <www.lac.org.na/laws/1948/og1357.pdf>.

⁶⁰ *Guidebook: Laws Relating to Immovable Property in Namibia*, Republic of Namibia, Ministry of Lands and Resettlement (compiled by P J Harmse), 2014, page 21.

⁶¹ The criteria for this status are discussed in *Hoho v The State* 2009 (1) SACR 276 (SCA), which would be persuasive albeit not binding authority in Namibia.

The trespass of animals on any land, including State land, is covered by the Trespass of Animals Ordinance, 1939 (Ordinance No. 16 of 1939) – which provides for impoundment of the trespassing animals as well as compensation to the landowner.

If a trespasser damaged State property – such as by the removal of vegetation – the criminal charge of malicious damage to property would also be available.

The State, like a private landowner, would also be able to bring legal action for eviction of a person present without permission on State property⁶² or a civil action for damage to State property.

It is forbidden by section 43 of the Communal Land Reform Act, 2002 (Act No. 5 of 2002) for anyone to “occupy or use” any communal land for any purpose other than pursuant to a right acquired in accordance with the provisions of that Act. This does not constitute a crime, but a Chief, a Traditional Authority or the relevant Communal Land Board may institute legal action for eviction of anyone who violates this prohibition.

In addition, local authorities are empowered by section 94(1)(ad) of the Local Authorities Act, 1992 (Act No. 23 of 1992) to make regulations on “the restriction, regulation and control of the use of common pasture and townlands, including a prohibition on the removal of soil, sand, clay, stones, gravel, firewood, vegetation or any other materials from such land”. The Local Authorities Act also surpasses the Proclamation in the sense that it authorizes local authorities to regulate various uses of public places, which include “any square, garden, park, recreation ground, show ground, rest camp or other open or enclosed space intended for the use, enjoyment or benefit of residents in a local authority area”.

Furthermore, the Nature Conservation Ordinance, 1975 (Ordinance No. 4 of 1975) authorises the relevant Minister to control game parks and nature reserves, including the power to “take such steps as will ensure the safety of the animal and plant life and fisheries in the game park or nature reserve and the conservation of the game park or nature reserve and the animals, vegetation and fish therein in a natural state”,⁶³ and to restrict rights of entry and residence, rights to pick any indigenous plant or to chop, cut or destroy any tree.⁶⁴ That Ordinance also empowers nature conservators, under specified conditions, to kill certain animals which are trespassing in game parks or nature reserves.⁶⁵ This Ordinance prohibits hunting on “any land, including communal

⁶² See, for instance, *The Government of the Republic of Namibia v Jansen* (I 2617/2010) [2013] NAHCMD 171 (20 June 2013).

⁶³ Nature Conservation Ordinance 4 of 1975, section 17(1) and (2)(b).

⁶⁴ *Id.*, section 18.

⁶⁵ *Id.*, section 21: “A nature conservator may at any time -

(a) kill any dog found in a game park or a nature reserve, other than any such dog which is in the lawful possession or under the lawful charge of an officer or a member of the security forces or which is being conveyed through such game park or nature reserve in accordance with the provisions of section 18;

land, owned by the State” without the permission of the Minister,⁶⁶ and it protects certain “protected plants” and “protected game” on all land regardless of ownership.⁶⁷

Recommendation:

The State as a land-owner has all the protections against trespass by persons or animals that are available to any private landowner, and there are special provisions which cover entry onto and use of various different kinds of State land and local authority areas – including protection for specified animals and vegetation and remedies for unauthorized occupation or use of communal areas. Thus, the Crown Lands (Trespass) Proclamation, 1919 appears to have no current function and should be repealed.⁶⁸

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- (b) kill any donkey, horse or other riding or pack-animal found in a game park or a nature reserve, other than any such donkey, horse or other riding or pack-animal which is in the lawful possession or under the lawful charge of an officer or a member of the security forces or which is being conveyed through such game park or nature reserve in accordance with the provisions of section 18, and may seize the saddles and bridles thereof, of any;
 - (c) with the consent of the Minister, kill any livestock or domestic animal found in a game park or a nature reserve, other than any such livestock or domestic animal which is in the lawful possession or under the lawful charge of an officer or which is being conveyed through such game park or nature reserve in accordance with the provisions of section 18.”

⁶⁶ Id, section 28.

⁶⁷ Id, in sections 26-27 and 73, for example.

⁶⁸ The Ministry of Lands and Resettlement’s Guidebook also comes to the conclusion that this law is obsolete. *Guidebook: Laws Relating to Immovable Property in Namibia*, Republic of Namibia, Ministry of Lands and Resettlement (compiled by P J Harmse), 2014, page 22.

(9) Cultural Promotion Ordinance, 1980 (Ordinance No. 9 of 1980)

Summary:

This South West African Ordinance⁶⁹ provides for the promotion of culture in relation to the “White population group in South West Africa”.

It provides, among other things, for the funding of "cultural organizations", which are defined in section 1 as “anybody of persons the common and exclusive aim and object of which is to preserve, develop, aid or extend the culture, or any facet thereof, of one or more of the language groups of the White population group in South West Africa”.

It also provides for a Cultural Advisory Board with the function of making recommendations as to how “the culture of the White population group in South West Africa can best be preserved, developed, aided, and extended by means of information cultivation” about art, music, literature, adult education and leisure activities (section 6(a)).

The Ordinance also seems to have covered certain library services for all “population groups”. It created a new division in the “Administration for Whites” which assumed responsibility for library services previously administered by the South West African administration. The Administration for Whites reportedly provided library services for other groups on an agency basis, with these libraries originally being operated by municipalities with financial support from the Administration for Whites. Administrative functions in relation to libraries were later returned to the Administration for Whites.⁷⁰

Amendments:

This Ordinance was amended by the Libraries Ordinance, 1981 (Ordinance No. 4 of 1981) (now repealed).⁷¹

Current status:

Article 19 of the Namibian Constitution, guarantees the right to culture. It states that:

Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of the Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

⁶⁹ <www.lac.org.na/laws/1980/og4159.pdf>.

⁷⁰ D Simon, “Aspects of Urban Change in Windhoek, Namibia, During the Transition to Independence, thesis submitted to the University of Oxford for the Degree of Doctor of Philosophy”, January 1983, pages 481-482, available at <<https://pdfs.semanticscholar.org/ccfb/00c9986c67be9745207a08fd8c367ae6ea0d.pdf>>.

⁷¹ <www.lac.org.na/laws/1981/whi2.pdf>.

A law which promotes the culture of a particular racial group would clearly be an outrageous violation of the constitutional guarantee of equality before the law and the prohibition on discrimination on the basis of race in Article 10 of the Constitution.

The fact that this law is aimed at Whites”, who were the advantaged cultural group before Independence, means that there is no possible applicability of the provision for affirmative action in Article 23(2) of the Constitution for legislation “providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices”. Moreover, Article 23(1) of the Constitution states: “The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited...”.

This Ordinance appears to be nothing more than a perpetuation of the ideology of apartheid, even though it is now dormant.

With respect to library services, the Namibia Library and Information Service Act, 2000 (Act No. 4 of 2000) covers the Namibia Library and Information Service and its constituent libraries, as well as the National Library and the Namibia Library and Information Council. Constituent libraries are defined in section 1 to include any library established and funded by the State for a community; a government office, agency or ministry; a school; a college of education; and any other institution or place which was declared to be a constituent library by the minister responsible for education.

In addition, section 30(1)(k)(vii) of the Local Authorities Act 1992 (Act No, 23 of 1992) empowers local authority councils “to establish, carry on and maintain” libraries,⁷² and to enact regulations for their “regulation, control and use”.⁷³

Recommendation:

This Ordinance is patently discriminatory on the grounds of race. Its only general function, the administration of libraries, is comprehensively covered by other legislation. It should be repealed. Should Parliament wish to make provision for the general promotion of Namibian cultures in all their diversity, we recommend that this be done with a new law rather than building on this artefact of Namibia’s apartheid past.

⁷² Local Authorities Act 23 of 1992, section 30(1)(k)(vii).

⁷³ Id, section 94(1)(r)(iii).

(10) Ex-Volunteers Assistance Proclamation, 1945 (Proclamation No. 2 of 1945)

Summary:

This South West African Proclamation⁷⁴ covers grants and loans to “ex-volunteers” who rendered certain military services in World War II.

The Proclamation defined an “ex-volunteer” in section 1 to mean any person domiciled or resident in South West Africa who had served during that war in one of the listed services, and who was discharged or released from service under circumstances which, in the opinion of a Board appointed for this purpose, made him or her deserving of a grant or a loan under the Proclamation; the relevant services were:

- (i) any force or service established by or under the South Africa Defence Act, 1912 (Act No. 13 of 1912.), but excluding the National Reserve of Volunteers, the Physical Training Battalion, the Youth Training Brigade and the Junior Cape Corps;
- (ii) the Women's Auxiliary Defence Corps established by regulation 30 of the National Emergency Regulations promulgated by Proclamation No. 287 of 1939 (Union);
- (iii) a full-time Unit of the Union Defence Forces, attached to the Physical Training Battalion for remedial treatment;
- (iv) full-time service in any of the naval, air or land forces of the Allied Nations.⁷⁵

Amendments:

The Proclamation is amended by Proclamation No. 14 of 1945,⁷⁶ Proclamation No. 19 of 1945,⁷⁷ Proclamation No. 25 of 1946,⁷⁸ Proclamation No. 23 of 1948,⁷⁹ and Proclamation No. 20 of 1949).⁸⁰ These amendments all concern matters of detail regarding the loan scheme, without altering the overall scheme.

Current status:

The stated purpose of this Proclamation was to assist ex-volunteers with their “re-instatement in civilian life”.⁸¹ Since World War II ended in 1945, 75 years ago, this mechanism has long ago completed its purpose.

Recommendation:

⁷⁴ <www.lac.org.na/laws/1945/og1166.pdf>.

⁷⁵ Ex-Volunteers Assistance Proclamation, 1945 (Proclamation No. 2 of 1945), section 1.

⁷⁶ <www.lac.org.na/laws/1945/og1186.pdf>.

⁷⁷ <www.lac.org.na/laws/1945/og1192.pdf>.

⁷⁸ <www.lac.org.na/laws/1946/og1273.pdf>.

⁷⁹ <www.lac.org.na/laws/1948/og1364.pdf>.

⁸⁰ <www.lac.org.na/laws/1949/og1423.pdf>.

⁸¹ Preamble of the Proclamation.

This Proclamation created a mechanism for extending grants and loans to persons who performed certain military services during World War II. It has served its purpose and has no ongoing effect. It should therefore be repealed.

(11) Finance and Audit Ordinance, 1926 (Ordinance No. 1 of 1926), section 24D

Summary:

Only section 24D of this South West African Ordinance remains in force. This section provides that the government may pay a reward to informers whose information assists in law enforcement relating to illegal dealing in precious stones or metals. This reward may be up to one-third of the revenue accruing to the State from the sale of the precious stone or metal, or from the seizure of the money in the illicit purchase. Section 24D reads as follows:

Rewards to informers in respect of precious metals and precious stones

24D. (1) Notwithstanding anything in any law, any person (other than a person in the service of the Administration or of the Government of the Union of South Africa) upon whose information, any precious stone or precious metal or any money paid in respect of the illicit purchase of any precious stone or precious metal is seized under any law, may, at the discretion and under the written authority of the Commissioner of the South African Police be paid out of the revenues accruing to the Administration from the sale of such precious stone or metal or from the seizure of such money, a monetary reward not exceeding one third of the amount realized by such sale or of such money seized, as the case may be.

(2) Every such payment shall be made by the Accounting Officer of the Administration by way of refund from the revenue in question as paid into the Administration Account in terms of sub-section (3) of section eleven, as substituted by section 1 of Ordinance 8 of 1928.

Article 140(4) and (5) of the Namibian Constitution have the effect that references in the Ordinance to the “Administration”, the “Government of the Union of South Africa” and the “Accounting Officer of the Administration” are deemed to be “a reference to the President of Namibia or to a corresponding Minister, official or institution in the Republic of Namibia”.⁸²

Amendments:

The Ordinance was extended to the Rehoboth Gebiet by Proclamation No. 12 of 1930. Section 24D was inserted by Ordinance No. 42 of 1952, where it was originally numbered 24bis. It was amended and renumbered as 24D by Ordinance No. 28 of 1969. The State Finance Act, 1982 (Act 1 of 1982) repealed all of the Ordinance except sections 24D and 26A. The Tender Board of Namibia Act, 1996 (Act No. 16 of 1996) repealed section 26A, leaving only section 24D in force.

⁸² The Namibian Constitution provides as follows in Article 140(4) and (5):

(4) Any reference in such laws to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia or to a corresponding Minister, official or institution in the Republic of Namibia and any reference to the Government Service Commission or the government service, shall be construed as a reference to the Public Service Commission referred to in Article 112 hereof or the public service of Namibia.

(5) For the purposes of this Article the Government of the Republic of South Africa shall be deemed to include the Administration of the Administrator-General appointed by the Government of South Africa to administer Namibia, and any reference to the Administrator-General in legislation enacted by such Administration shall be deemed to be a reference to the President of Namibia, and any reference to a Minister or official of such Administration shall be deemed to be a reference to a corresponding Minister or official of the Government of the Republic of Namibia.

Current status:

Attempts to obtain comment from Nampol were unsuccessful.

Recommendation:

This Ordinance should be retained for now, since we could not confirm whether or not it is still used in practice.⁸³ However, it would make sense to move the sole provision on rewards which remains in this law to the Criminal Procedure Act, 1977 (Act No. 51 of 1977) or its successor, to consolidate laws on criminal matters.

⁸³ One 1998 press report suggested that it was in use after independence. See Werner Menges, “Namibia: Informers in N\$8m gem deal are richly rewarded”, *The Namibian*, 27 February 1998: “Two British police informers, who accompanied the two professional diamond dealers to Namibia on the pretence of arranging a diamond transaction, will receive a reward of about N\$495 000 each after N\$2,975 million paid for the gems was declared forfeited to the State.”

(12) Finance and Financial Adjustments Acts Consolidation, 1977 (Act No. 11 of 1977)

Summary:

This South African Act⁸⁴ consolidates a number of previous laws dealing with a variety of financial matters. Only section 9 was made applicable to South West Africa. It deals with the exemption of “Bantu [later amended to read Black] governments, assemblies, councils and authorities” from the payment of duties, fees and other taxes.

Several other sections of the Act concerned specific financial transactions relevant to South West Africa, but these sections were not made applicable to South West Africa as laws and have no ongoing relevance.

- Section 5 requires the Administration of South West Africa to pay a contribution toward certain pensions.
- Section 21 concerns the continued applicability to South West Africa of certain regulations with financial implications under laws which have since been repealed.
- Section 41 allows money owed on a loan from the Administration of South West Africa to a magistrate of Rehoboth to be used for the promotion of the welfare of the residents of the “Rehoboth Gebiet”.
- Section 47 requires that the Revenue Fund of South West Africa repay amounts that were paid into it from inactive Post Office Savings Accounts under a previous South West Africa Ordinance.

Applicability to South West Africa:

The Act was not generally applicable to South West Africa. The only portion of the Act made applicable to South West Africa was section 9, which was made explicitly so applicable by section 9(2) which states “This section and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel.” Section 9 was not amended in South Africa prior to Namibian independence.

Amendments:

Certain terms in the Act were amended by the Native Laws Amendment Proclamation, 1979 (Proclamation AG No. 3 of 1979). The only change relevant to section 9 is the substitution of the term “Black” for the term “Bantu”.

Current status:

This law applies only to “Bantu [later amended to read “Black”] governments” which no longer exist in Namibia’s current constitutional dispensation.

Recommendation:

⁸⁴ <www.lac.org.na/laws/GGsa/rsagg5443.pdf>.

This law is a relic of the division of government responsibilities along ethnic lines prior to Namibian independence. It has no current function and should be repealed.

(13) Indecent or Obscene Photographic Matter Act, 1967 (Act No. 37 of 1967)

Summary:

The primary purpose of the Act⁸⁵ is summarised in section 2(1):

Any person who has in his possession any indecent or obscene photographic matter shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand Rand or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.⁸⁶

Applicability to South West Africa:

Section 4A states “This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel.”

Transfer of administration to South West Africa:

The administration of this Act was transferred to South West Africa by the Executive Powers (Justice) Transfer Proclamation.⁸⁷

Amendments: The following pre-independence South African amendments were applicable to South West Africa:

- General Law Amendment Act, 1969 (Act No. 101 of 1969)⁸⁸, which only inserted the section that made the law applicable to South West Africa;
- Publications Act, 1974 (Act No. 42 of 1974),⁸⁹ which provided some exceptions to section 2(1) but which were insufficient to save that section from constitutional invalidity in the case discussed below.

The Indecent or Obscene Photographic Matter Amendment Act, 1985 (Act No. 4 of 1985)⁹⁰ amended the Act to extend the meaning of “cinematograph film”.

There have been no amendments to the law since independence.

Current status:

In the 1998 *Fantasy Enterprises* case,⁹¹ the High Court of Namibia considered the constitutionality of section 2(1) of the Act.

⁸⁵ <www.lac.org.na/laws/GGsa/rsagg1689.pdf>.

⁸⁶ *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs & Another; Nasilowski & Another v Minister of Justice & Others* 1998 NR 96 (HC).

⁸⁷ Executive Powers (Justice) Transfer Proclamation, AG 33 of 1979, dated 12 November 1979, as amended.

⁸⁸ <www.lac.org.na/laws/GGsa/rsagg2464.pdf>.

⁸⁹ <www.lac.org.na/laws/GGsa/rsagg4426.pdf>.

⁹⁰ <www.lac.org.na/laws/1985/og5093.pdf>.

⁹¹ *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs & Another; Nasilowski & Another v Minister of Justice & Others* 1998 NR 96 (HC).

The key problem identified by the Court was the definition of “indecent or obscene photographic matter”, as photographic matter which depicts “sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature”.⁹²

The Court identified the following problems with the scope of this definition:

- the definition captures “a virtually limitless range of expressions” and could include innocent matter such as commercial advertising; serious work of art and movies; a television documentary treating safe-sex and the causes of AIDS; an illustrated public-service brochure about sexual assault or a photograph of persons of the same gender in a tender embrace;
- section 2(1) criminalises unsolicited and innocently acquired possession of the defined materials for a short time period;
- no distinction is made regarding the maturity, personality or profession of persons who might come into possession of such photographic matter; “historians, medical practitioners or psychiatrists are treated with the same sweeping brush as juveniles or children”;
- the prohibition does not differentiate between degree or purpose; for instance, it treats the sexual abuse of children for pornographic purposes in the same way as a portrayal of sexual intercourse by consenting adults for educational purposes;
- the law makes no distinction between possession for private purposes and for purposes of commercial exploitation;
- the prohibition “covers much which is intrinsic and commonplace in daily life”.

The Court declared section 2(1) to be unconstitutional on the grounds that this section, combined with the relevant definition, was too broad and sweeping to be a reasonable limitation on the freedom of speech and expression. The Court held further that the remainder of Act is not severable from the unconstitutional provision, meaning that the entire Act was invalidated by the judgment.

Recommendation:

The entire law is effectively inoperative as a result of the High Court ruling in the *Fantasy Enterprises* case and so should be repealed.

⁹² Indecent or Obscene Photographic Matter Act 37 of 1967, section 1.

(14) Indemnity Proclamation, 1923 (Proclamation No. 8 of 1923)

Summary:

This South West African Proclamation⁹³ was intended to indemnify all members of the public service for acts commanded, carried out, advised and/or ordered after 15 May 1922 and prior to the date on which this Proclamation took effect which was on 2 February 1923.

This meant that no action, indictment or any other legal proceedings were to be brought or instituted in a court of law in the territory of South West Africa against the Administrator, any police officer or any other member of the public service in relation to measures taken for the prevention, suppression of disturbance and maintenance of good order and government of the Territory.

The Proclamation was triggered by government concerns about liability for the extreme measures taken by the South West Africa Administration to suppress the Bondelswarts Rebellion in 1922. The Bondelswarts, a nomadic Nama group, resisted the imposition of an increased dog tax and refused to turn over five men whom police were trying to arrest for failure to comply with the tax – along with other grievances. With assistance from the South African Government, the South West African Administration countered this rebellion on 29 May 1922 by means of military response that included ground troops, cannon, machine-guns and aerial bombing. It has been estimated that fatalities numbered 100, including some women and children. This Indemnity Proclamation was an attempt to shield the government officials involved in this brutal response from liability.⁹⁴

Amendments:

None.

Current status:

This law applies only to certain acts by public servants between 1922 and 1923 – which is 97 years ago. In practical terms, the Proclamation has no ongoing effect. It is highly unlikely that anyone old enough to be a public servant 97 years ago is still alive. Furthermore, section 18 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) places a time limit of twenty years on the right to

⁹³ <www.lac.org.na/laws/1923/og103.pdf>.

⁹⁴ See, for example, Gavin Llewellyn MacKenzie Lewis, “The Bondelswarts Rebellion of 1922”, Thesis submitted for the Degree of Master of Arts of Rhodes University, 1977, available at <<https://core.ac.uk/download/pdf/145055572.pdf>>; Trevor R Getz, “Smuts and the Politics of Colonial Expansion: South African Strategy in Regard to South-West Africa [Namibia] and the League of Nations Mandate: c. 1914-1924”, thesis submitted for the Degree of Master of Arts in the Department of History at the University of Cape Town. 1997, particularly page 122 footnote 29, available at <https://open.uct.ac.za/bitstream/item/9690/thesis_hum_1997_getz_tr.pdf?sequence=1>; A du Pisani, *SWA/Namibia: The Politics of Continuity and Change*, Johannesburg: Jonathon Ball Publishers, 1985, pages 93-95; Marion Wallace, *A History of Namibia*, Jacana, 2011, pages 223-224.

institute a prosecution for any offence, measured from the time when the offence was committed, unless some other period is expressly provided by law. Also, any civil claim in respect of acts that took place during that time period would have long prescribed.

Furthermore, a direction issued under the Amnesty Proclamation, AG 13 of 1989 applied the amnesty provisions of that Proclamation to persons “who, while they were members of the South African Police, the South West African Police, the South African Defence Force, including the South West African Territory Force, in the performance of their duties and functions in the territory have performed or failed to perform any act which amounts to a criminal offence”.⁹⁵

Recommendation:

This law’s origin is an odious one, as it was designed to protect government officials from being answerable for the use of extreme force against a specific indigenous group. It has no ongoing practical effect. It is thus recommended that this Proclamation be repealed in its entirety.

⁹⁵ AG Government Notice 16 of 1990 <www.lac.org.na/laws/1990/og5894.pdf> issued in terms of Amnesty Proclamation, AG 13 of 1989 <www.lac.org.na/laws/1989/og5725.pdf>.

(15) Importation of Cement Ordinance, 1963 (Ordinance No. 24 of 1963)

Summary:

This South West African Ordinance⁹⁶ authorises the government to prohibit or regulate the import of cement, cementitious material or slag by notice in the Official *Gazette*.

Amendments:

None.

Current status:

The Ordinance appears to have been superseded by post-independence legislation.

In general, the Import and Export Control Act, 1994 (Act No, 30 of 1994) authorises the Minister of Trade and Industry, “whenever it is necessary or expedient in the public interest”, to issue a notice in the *Government Gazette* that prohibits the import or export of specified goods entirely, or allows import or export only in accordance with a permit issued by the Minister.⁹⁷ No notices relating to cement have been located, but the option to regulate the import cement under this Act exists.

In addition, “Cement Regulations” governing the product characteristics and production methods of cement, packaging and labelling requirements and certain requirements for cement importers have recently been issued in terms of the Standards Act, 2005 (Act No. 18 of 2005).⁹⁸ With respect to import, these regulations require any natural person or legal entity that wishes to import cement must ensure that the cement complies with the requirements of the relevant Namibian Cement Standard. If the cement to be imported complies with this standard, the importer can be issued with a three-year licence which serves as authorisation to a foreign cement manufacturer to import cement products into Namibia. The licence can be cancelled if the cement falls below the required quality.⁹⁹ An importer must register the manufacturing facility where the cement is made to ensure conformity with the relevant standard; it is a criminal offence to import cement from an unregistered facility.¹⁰⁰ There is special provision for imports where a mutual recognition agreement exists between the Namibian regulator and a certification or regulatory body in the country of origin of the cement.¹⁰¹

The Ministry of Industrialisation, Trade and SME Development advised that this law should be

⁹⁶ <www.lac.org.na/laws/1963/og2493.pdf>.

⁹⁷ Import and Export Control Act 30 of 1994, section 2.

⁹⁸ These Cement Regulations were initially set out in GN 259/2019 <www.lac.org.na/laws/2019/6993.pdf>, which was repealed and replaced by GN 45/2020 <www.lac.org.na/laws/2020/7125.pdf>.

⁹⁹ Regulation 3(1), which refers to the standard NAMS/EN 197-1:2014- Composition, specifications and conformity criteria for common cements; regulation (5)(b), (6) and (7)l regulation 6(4)-(8).

¹⁰⁰ Regulation 4(1) and (4).

¹⁰¹ Regulation 8.

repealed, as the import and export of goods will be comprehensively governed under the forthcoming International Trade Management Bill, which will regulate Namibia's international trade in a manner consistent with its undertakings under the Southern African Customs Union Agreement.

Recommendation:

This Ordinance should be repealed as it has been superseded by the general authority to regulate the import of goods under the Import and Export Control Act, 1994 (Act No, 30 of 1994) and, more specifically, by the Cement Regulations issued under the Standards Act, 2005 (Act No. 18 of 2005) which address the quality control of imported cement. In addition, import and export will be regulated generally under the proposed International Trade Management Bill.

(16) Karakul Pelt Export Duty Amendment Proclamation, 1939 (Proclamation No. 34 of 1939)

Summary:

This South West African Proclamation¹⁰² regulates the export of karakul pelts. It provides that every exporter of Karakul pelts shall pay an export duty fee on every Karakul pelt exported, and that no Karakul pelt shall be exported from South West Africa except under an export permit issued by an Export Official of the district from which the export takes place. It also requires record-keeping in the form of transfer certificates whenever Karakul pelts are bought from a producer, and these transfer certificates must be produced when applying for an export permit, along with information about the value of the pelts. Unauthorised export is a criminal offence.

The Proclamation is referred to an “Amendment” Proclamation because it repeals and replaces an earlier Proclamation, the Karakul Pelt Export Duty Proclamation, 1939 (Proclamation No. 21 of 1939) – even though it does not actually “amend” that earlier law.¹⁰³

Amendments:

The Proclamation was amended by:

- Ordinance No. 5 of 1941,¹⁰⁴ which extends the time period allowed for producing a sale account in respect of a particular consignment of Karakul pelts;
- Ordinance No. 7 of 1943,¹⁰⁵ which adds an explanation on how to treat insurance proceeds in respect of a lost, damaged or destroyed consignment in calculating sales value;
- Ordinance No. 7 of 1953,¹⁰⁶ which adjusts fees and changes some of the procedures regarding valuation of pelts and the production of sales accounts;
- Ordinance No. 13 of 1957,¹⁰⁷ which adjusts fees; and
- Ordinance No. 9 of 1965,¹⁰⁸ which also adjusts fees.

Current status:

The Proclamation has been superseded by the Karakul Pelts and Wool Act, 1982 (Act No. 14 of 1982) which establishes a South West African Karakul Board (now called the Karakul Board of Namibia) and provides for control over the classification, sale, marketing, packing, import and export of karakul pelts or wool, as well as the imposition of levies.

¹⁰² <www.lac.org.na/laws/1939/og801.pdf>.

¹⁰³ See Karakul Pelt Export Duty Amendment Proclamation 34 of 1939, section 2.

¹⁰⁴ <www.lac.org.na/laws/1941/og897.pdf>.

¹⁰⁵ <www.lac.org.na/laws/1953/og1755.pdf>.

¹⁰⁶ <www.lac.org.na/laws/1941/og897.pdf>.

¹⁰⁷ <www.lac.org.na/laws/1941/og897.pdf>.

¹⁰⁸ <www.lac.org.na/laws/1965/og2614.pdf>.

The Karakul Board of Namibia falls under the Ministry of Agriculture, Water and Land Reform, which controls Karakul breeding and sales in Namibia and charges an export fee.

Recommendation:

The matters covered by the Karakul Pelt Export Duty Proclamation 34 of 1939 are now regulated by the Karakul Pelts and Wool Act, 1982 (Act No. 14 of 1982), so the Proclamation should be repealed.

(17) Land Titles Proclamation, 1921 (Proclamation No. 2 of 1921)

Summary:

This Proclamation¹⁰⁹ makes provision for the issue of registered title to certain lands in the territory, on application, to persons or companies in possession of land that was “lawfully acquired” -

- (a) by concession or agreement from the German colonial government which was not cancelled or repudiated by the Concessions Modification and Mining Law Amendment Proclamation, 1920;
- (b) from any person or Company who acquired the land as described in (a); or
- (c) “from any Native Chief or Tribe”.

It provided a mechanism for obtaining Certificates of Registered Title in respect of such land from the Registrar of Deeds

If a land concession or agreement was cancelled by the Concessions Modification and Mining Law Amendment Proclamation 1920, this Proclamation provided a procedure for obtaining a Certificate of Registered Title to the land with the consent of the Administrator.

On the other hand, Certificates of Registered Title could be cancelled in certain circumstances, when the applicable conditions were not followed, with the land reverting to the State

The *Report of the Administrator of South-West Africa for the year 1921* summed up the law this way:

By Proclamation No. 2, authority was given for the issue of registered titles in respect of certain claims to land, such as, for example, land which had been acquired from a Concession Company before the latter's rights had been cancelled by the Concessions Proclamation, 1920.

Cancellation of Title under the Provisions of Section 3 of the Land Titles Proclamation. — During the year sixteen titles, involving an area of 86,070 hectares, were cancelled. Eleven titles were cancelled owing to non-fulfilment of the condition of purchase requiring personal occupation and proper development. (In five of these cases the late German Government had instituted proceedings for cancellation of title prior to the outbreak of war.)

Three titles were cancelled owing to non-occupation and non-development or at the wish of the purchasers who found that they were unable to carry on farming operations owing to lack of capital.

Two titles to plots in the Keetmanshoop District were cancelled owing to the purchasers not having complied with the building clause contained in their deeds of sale.

The value of the land which has been reserved by the Government is approximately £10,000.¹¹⁰

¹⁰⁹ <www.lac.org.na/laws/1921/og50.pdf>.

¹¹⁰ *Report of the Administrator of South-West Africa for the year 1921*, Union of South Africa, page 3 available at <www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1715/AD1715-28-1-1-001-jpeg.pdf>.

Amendments:

This Proclamation was amended and affected by the following:¹¹¹

- Land Titles Amendment Proclamation, 1922 (Proclamation No. 14 of 1922) (amendment to application procedure)¹¹²
- Rehoboth Gebiet (Extension of Laws) Proclamation, 1930 (Proclamation No. 12 of 1930) (extended the applicability of the Proclamation to the Rehoboth Gebiet)¹¹³
- Rehoboth Affairs Proclamation, 1937 (Proclamation No. 1 of 1937) (amendments relating to applicability to Rehoboth)¹¹⁴
- Rehoboth Affairs Amendment Proclamation, 1942 (Proclamation No. 6 of 1942) (amendments relating to applicability to Rehoboth)¹¹⁵
- Lands Titles Proclamation, 1921, Amendment Proclamation, 1949 (Proclamation No. 3 of 1949) (amendments which, amongst other things, required that applications for Certificates of Registered Title for land other than that in Rehoboth must be submitted by 15 December 1949)¹¹⁶
- Registration of Deeds in Rehoboth Act, 1976 (Act No. 93 of 1976) (which repeals section 1(d) and *7bis*, both of which concern the applicability of the Proclamation to land in the Rehoboth Gebiet).¹¹⁷

See also the RSA General Law Amendment Act, 1975 (Act No. 57 of 1975), which authorizes the issue of title to land in the Rehoboth Gebiet in terms of the Proclamation.¹¹⁸

Current status:

This Proclamation appears to have no ongoing function. The timeframe for application for Certificates of Registered Title under the law in areas other than Rehoboth is long past, and the provisions of the law relating to Rehoboth have been removed. Moreover, the crux of the law seems to be securing title to land acquired through concessions in the German colonial era.

Recommendation:

This law should be repealed since it seems to have no current function. Repealing the law would not affect land titles acquired and registered under the Proclamation, or subsequent transactions involving such land.

¹¹¹ A consolidated version of the law with all of the amendments incorporated is available at www.lac.org.na/laws/annoSTAT/Land%20Titles%20Proclamation%20%20of%201921.pdf.

¹¹² www.lac.org.na/laws/1922/og84.pdf.

¹¹³ www.lac.org.na/laws/1930/og365.pdf.

¹¹⁴ www.lac.org.na/laws/1937/og696.pdf.

¹¹⁵ www.lac.org.na/laws/1942/og939.pdf.

¹¹⁶ www.lac.org.na/laws/1949/og1406.pdf.

¹¹⁷ www.lac.org.na/laws/GGsa/rsagg5183.pdf.

¹¹⁸ www.gov.za/sites/default/files/gcis_document/201505/act-57-1975.pdf.

(18) Marketing Act, 1968 (Act No. 59 of 1968)

Summary:

This South West African Act regulates the production and sale of agricultural products, as well as the grading and standardisation of such products. It also establishes various boards and control bodies.

Amendments: There are thirteen amendments to this Act, namely:

- Marketing Amendment Act, 1969 (Act No. 52 of 1969) (RSA)
- Marketing Amendment Act, 1979 (Act No. 69 of 1970) (RSA)
- Marketing Amendment Act, 1971 (Act No. 78 of 1971) (RSA)
- Marketing Amendment Act, 1972 (Act No. 68 of 1972) (RSA)
- Marketing Amendment Act, 1968 (Act No. 59 of 1968) (RSA)
- Marketing Amendment Act, 1973 (Act No. 31 of 1973) (RSA)
- Marketing Amendment Act, 1974 (Act No. 73 of 1974) (RSA)
- Marketing Amendment Act, 1975 (Act No. 38 of 1975) (RSA)
- Marketing Amendment Act, 1976 (Act No. 50 of 1976) (RSA)
- Marketing Amendment Act, 1977 (Act No. 109 of 1977) (RSA)
- Marketing Amendment Act, 1980 (Act No. 19 of 1980) (SWA)
- Meat Industry Act, 1981 (Act No. 12 of 1981) (SWA)
- Karakul Pelts and Wool Act, 1982 (Act No. 14 of 1982) (SWA).¹¹⁹

Current status:

The Meat Industry Act, 1981 (Act No. 12 of 1981) repealed the Act in South West Africa “in so far as it relates to controlled products”, which are defined by Act No. 12 of 1981 as “livestock, meat or meat products”.

The Karakul Pelts and Wool Act, 1982 (Act No. 14 of 1982) repealed the Act and any scheme in operation thereunder, “insofar as it relates to karakul pelts or wool”.

This Act thus remains in force only with respect to the production and sale of agricultural products *other than* livestock, meat and meat products and karakul pelts or wool, as well as the grading and standardisation of such products.¹²⁰

No notices have been issued in terms of the Act since independence, which could indicate that it is dormant.

Recommendation:

¹¹⁹ A consolidated version of the law is available at www.lac.org.na/laws/annoSTAT/Marketing%20Act%2059%20of%201968.pdf.

¹²⁰ *Namibian Agriculture Marketing And Trade Policy And Strategy*, Ministry of Agriculture, Water and Forestry, 2011, <<http://extwprlegs1.fao.org/docs/pdf/nam188595.pdf>>, at paragraph 1.2.1 lists “the major acts that define the legal framework for the agricultural sector relating to agriculture marketing and trade”. The Marketing Act is not included on this list, but the document notes that the list is “not exhaustive”.

Attempts to obtain comments from the Agronomic Board were unsuccessful. Therefore, this Act should be retained for now, since we could not confirm whether or not it is still used in practice.

(19) National Supplies Procurement Act, 1970 (Act No. 89 of 1970)

Summary:

This South African Act¹²¹ empowers the Minister of Economic Affairs to procure goods and services whenever the Minister deems it “necessary or expedient for the security of the Republic... without having recourse to the State Tender Board or the State Procurement Board.”¹²² It also provides for the establishment and administration of a National Supplies Procurement Fund for this purpose.¹²³

It further allows the Minister to demand the production or supply of goods or services whenever “the Minister deems it necessary or expedient for the security of the Republic”,¹²⁴ and to confiscate illegally-acquired goods or suspend illegally-acquired services “without legal process”.¹²⁵

This law was apparently inspired by concerns about international sanctions and boycotts; it has been described as a “sanctions-busting” piece of legislation.¹²⁶ A South African government official was quoted as saying that, while the measures applied equally to local and foreign companies, foreign businesses were the primary focus in order “to thwart outside interference” in South Africa’s affairs. The South African Government was also concerned that local subsidiaries of foreign corporations might come under increasing political pressure to avoid dealing with government bodies. One news report observed that the law could in theory also be invoked “to force foreign companies to produce arms and other military equipment in defiance of the embargo imposed by the United Nations” during that era, although government officials denied that this was their intention.¹²⁷

A 1980 United Nations report provides the following description of the role of the law:

In November 1977, following the imposition by the Security Council of a mandatory arms embargo under Chapter VII of the Charter of the United Nations (resolution 418 (1977) of 4 November 1977), South Africa activated the wartime provisions of the National Supplies Procurement Act (No. 89 of 1970), which empower it to compel and control the production of strategic goods on a wartime basis. The provisions give the South African Government wide powers over the production of raw materials and finished products, provide for the inspection of premises and the seizure of goods and impose secrecy with respect to the production of strategic goods. In announcing the

¹²¹ <www.lac.org.na/laws/GGsa/rsagg2898.pdf>.

¹²² Section 2.

¹²³ Section 12.

¹²⁴ Sections 3-4.

¹²⁵ Section 5.

¹²⁶ “South Africa Country Procurement Assessment Report: Refining the Public Procurement System”, Volume II, The World Bank, February 2003, page 7, available at <<http://documents.worldbank.org/curated/en/701321468104350958/pdf/multi0page.pdf>>.

¹²⁷ John F Burns, “[South Africa invokes production powers](http://www.nytimes.com/1977/11/12/archives/new-jersey-pages-south-africa-invokes-production-powers-foreign.html)”, *The New York Times*, 12 November 1977, available at <www.nytimes.com/1977/11/12/archives/new-jersey-pages-south-africa-invokes-production-powers-foreign.html>.

application of these measures, Mr. Chris Heunis, the South African Minister for Economic Affairs, made it clear that the aim of the Government was partly to prevent foreign companies from controlling the operation of their subsidiaries in South Africa, should they attempt to forbid local production of strategic equipment.¹²⁸

Applicability to South West Africa:

Section 1 of the Act defines “Republic” to include “the territory of South West Africa”. Section 19 states “This Act and any amendment thereof shall apply also in the territory of South West Africa, including that part of the said territory known as the Eastern Caprivi Zipfel. Therefore this statute also remains in force in the Republic of Namibia, by virtue of Article 140 of the Namibian Constitution.

Transfer of administration to South West Africa:

The relevant Transfer Proclamations are the Executive Powers (Industries) Transfer Proclamation,¹²⁹ and the Executive Powers (Commerce) Transfer Proclamation.¹³⁰ Both of these transfer proclamations specifically excluded this Act, meaning that the administration of the Act was not transferred to South West Africa.

Amendments:

The Act was altered by several amendments in South Africa which were also applicable to “South West Africa”:

- *Finance Act, 1973 Act (Act No. 63 of 1973)*,¹³¹ which provides compensation for certain losses;
- *General Law Amendment Act, 1974 (Act No. 29 of 1974)*,¹³² which excludes facilities and certain goods from being liable to seizure under a court order and provides that such goods shall not form part of an insolvent person’s assets;
- *National Supplies Procurement Amendment Act, 1974 (Act No. 89 of 1974)*,¹³³ which further regulates the Minister’s appointment of officials, inspectors and controllers and provides for the determination of their powers and functions and the disposal of certain moneys;
- *National Supplies Procurement Amendment Act, 1975 (Act No. 54 of 1975)*,¹³⁴ which regulates the Minister’s powers in respect of goods and provides for the liability of employers for acts or omissions of their employees, managers or agents;

¹²⁸ “Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples”, Volume I, United Nations General Assembly, Official Records: Thirty-third Session Supplement No.23 (A/33/23/Rev.1), available at [<https://undocs.org/pdf?symbol=en/A/33/23/Rev.1%5BVOL.I%5D\(SUPP\)>](https://undocs.org/pdf?symbol=en/A/33/23/Rev.1%5BVOL.I%5D(SUPP)).

¹²⁹ Executive Powers (Industries) Transfer Proclamation, AG 5/1978, dated 30 January 1978.

¹³⁰ Executive Powers (Commerce) Transfer Proclamation, AG 28/1978, dated 28 April 1978.

¹³¹ [<www.lac.org.na/laws/GGsa/rsagg3948.pdf>](http://www.lac.org.na/laws/GGsa/rsagg3948.pdf).

¹³² [<www.lac.org.na/laws/GGsa/rsagg4220.pdf>](http://www.lac.org.na/laws/GGsa/rsagg4220.pdf).

¹³³ [<www.lac.org.na/laws/GGsa/rsagg4520.pdf>](http://www.lac.org.na/laws/GGsa/rsagg4520.pdf).

¹³⁴ [<www.lac.org.na/laws/GGsa/rsagg4754.pdf>](http://www.lac.org.na/laws/GGsa/rsagg4754.pdf).

- *National Supplies Procurement Amendment Act, 1976 (Act No. 70 of 1976),*¹³⁵ which empowers the Minister of Economic Affairs to regulate the supply of certain services;
- *National Supplies Procurement Amendment Act, 1979 (Act No. 73 of 1979),*¹³⁶ which empowers the Minister to prohibit the disclosure of information regarding any goods or services, or any statement or rumour that purports to convey such information;
- *Finance Act, 1980 (Act No. 21 of 1980),*¹³⁷ which repeals section 14 (2) and (4) of the Act on advances and guarantees;
- *National Supplies Procurement Amendment Act, 1982 (Act No. 31 of 1982),*¹³⁸ which replaces certain obsolete expressions and provides for the exercise and performance of functions of the Minister of Economic Affairs by the Minister of Industries, Commerce and Tourism;
- *National Supplies Procurement Amendment Act, 1988 (Act No. 25 of 1988),*¹³⁹ which alters the designation of the responsible Minister and Director-General and makes further provision for the Minister to prohibit the disclosure of certain information.

The Act was also amended in South Africa prior to Namibian independence by the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989). However, the portions of Act No. 9 of 1989 which amended Act No. 89 of 1970 came into force only on 1 April 1990, after Namibian independence.¹⁴⁰ Therefore these amendments were not applicable to South West Africa.

Current status:

Procurement in general in Namibia is now governed by the Public Procurement Act, 2015 (Act No. 15 of 2015) which regulates the procurement of goods, works and services.¹⁴¹ This Act makes provision for “emergency procurement”:¹⁴²

Emergency procurement

33. (1) A public entity may procure goods, works or services using the direct procurement method in cases of emergency.

(2) The scope of the emergency procurement is, as far as possible, limited to the period of the emergency, so that appropriate competitive procurement methods may be utilised after the conclusion of the emergency period.

(3) For the purposes of this section, “emergency”, includes a situation where -

- (a) the country is either seriously threatened by or actually confronted with a natural disaster, catastrophe, or war;

¹³⁵ <www.lac.org.na/laws/GGsa/rsagg5129.pdf>.

¹³⁶ <www.lac.org.na/laws/GGsa/rsagg6516.pdf>.

¹³⁷ <www.lac.org.na/laws/GGsa/rsagg6915.pdf>.

¹³⁸ <www.lac.org.na/laws/GGsa/rsagg8083.pdf>.

¹³⁹ <www.lac.org.na/laws/GGsa/rsagg11215.pdf>.

¹⁴⁰ See Legal Succession to the South African Transport Services Act 9 of 1989, section 37(2) read with section 3(1). The date referred to in section 3(1) was set by Republic of South Africa Government Notice 578/1990 (RSA GG 12364) as being 1 April 1990.

¹⁴¹ This Act replaced the previous Tender Board of Namibia Act, 1996 (Act No. 16 of 1996).

¹⁴² Public Procurement Act 15 of 2015, section 33; see also section 27(1)(a)(vi).

- (b) life or the quality of life or environment may be seriously compromised; or
- (c) the condition or quality of goods, equipment, building or publicly owned capital goods may seriously deteriorate, unless action is urgently and necessarily taken to maintain them in their actual value or usefulness.

The Act also makes provision for execution of procurement by a public entity in the case of “an emergency such as a natural disaster which calls for immediate action”; in such a situation, the Minister responsible for finance may authorise a public entity to procure goods, works or services exceeding the normal threshold for the public entity.¹⁴³

In South Africa, the National Supplies Procurement Act is currently still in force, but set to be repealed in its entirety by the Public Procurement Bill, 2020.

Recommendation:

The provisions on emergency procurement in the Public Procurement Act, 2015 (Act No. 15 of 2015) suffice to cover situations where exceptions need to be made to the normal procurement processes, without the unsavoury political overtones which gave rise to the National Supplies Procurement Act, 1970 (Act No. 89 of 1970). The 1970 Act should be repealed in its entirety.

¹⁴³ Id, sections 34(h) and 41.

(20) Natives Minimum Wage Proclamation, 1944 (Proclamation No. 1 of 1944)

Summary:

This South West African Proclamation¹⁴⁴ provides for the payment of minimum wages to “natives”. It defines a native as any person other than a European.¹⁴⁵ It was amended shortly after it was first enacted, to provide that, instead of coming into force on a fixed date, it would come into effect upon “a date to be fixed by the Administrator by proclamation in the *Gazette*”.¹⁴⁶ Due to opposition from white settler employers, it never came into effect – even though it provided for very low minimum wages.¹⁴⁷

This law seems to have been intended to regulate the notorious contract labour system which took place under colonial rule. This system has been succinctly described by the Namibian Supreme Court:

Constrained by the economic necessity to find work, the only feasible employment option available to them was via the contract labour system. An all-important cog in that system was the employers’ recruitment and placement agencies which, in 1943, amalgamated into the South West Africa Native Labour Association and, notoriously, became known as “SWANLA” until 1972 when it was abolished after the “Owambo strike” and replaced by an “employment bureaux-system”. Subject to some variations in the recruitment and placement practices both before and after the three decades under the SWANLA-system, the placement procedure under the latter system comprised essentially the following: Once they have offered themselves for recruitment to SWANLA, they were - (a) classified (depending on their health and physical fitness) in one of four categories (A, B, C or D) and given tags reflecting their classification which they had to wear around their wrists or necks; (b) registered with the authorities for purposes of securing an official permit to work in proclaimed areas; (c) if permitted to work as a “togt” or casual labourer, provided with a metal badge which had to be prominently displayed on their person at all reasonable times and on which their individual registration numbers were recorded and, in each instance, also the name of the proclaimed area to which they were limited; (d) placed in the employ of employers who had placed labour requisitions with SWANLA and (e) signed contracts of employment at a

¹⁴⁴ <www.lac.org.na/laws/1944/og1088.pdf>.

¹⁴⁵ Natives Minimum Wage Proclamation 1 of 1944, section 1.

¹⁴⁶ Proclamation 5 of 1944 (available at www.lac.org.na/laws/1944/og1092.pdf), promulgated on 26 January 1944; the original Proclamation, promulgated on 3 January 1944, was signed on 24 December 1943 and was to come into force on 1 January 1944. Natives Minimum Wage Proclamation 1 of 1944, section 13.

¹⁴⁷ Robert J Gordon, “The Impact of the Second World War on Namibia”, 19 (1) *Journal of Southern African Studies* 147, March 1993 (Special Issue: Namibia: Africa’s Youngest Nation), page 157, available at <www.jstor.org/stable/2636962>:

Officials were aware of the intolerably low wages paid to Black workers and in late 1943 passed the Native Minimum Wage Proclamation but because of settler opposition this proclamation was never put into effect.

“Report of the Committee on South West Africa to the General Assembly”, United Nations, Official Records: Ninth Session Supplement No. 14 (A/2666) New York, 1954, paragraph 121, available at <<https://digitallibrary.un.org/record/712118?ln=en>>:

The Committee notes that the Native Minimum Wage Proclamation (Proclamation No. 1 of 1944), providing for very low wages, has not been put into force.

minimum wage which, at stages, could be for a period of up to two years at a time without any leave.¹⁴⁸

Amendments:

This Proclamation was amended by the Native Minimum Wage Amendment Proclamation, 1944 (Proclamation No. 5 of 1944) (changing its stated date of coming into effect to an indefinite date to be set by notice in the *Gazette*).¹⁴⁹

Current status:

Minimum wages are now provided for by section 13 of the Labour Act 2011 (Act No. 11 of 2007). The Minister for Labour has the power to issue wage orders to decide the remuneration and working conditions for employees in a particular industry or area after considering the recommendations of a Wage Commission, which is a tripartite body (with representation from both trade unions and employers' organizations as well as government). For example, a Wage Order which sets a minimum wage and supplementary minimum conditions of employment for domestic workers is currently in place.¹⁵⁰

Recommendation:

The Natives Minimum Wage Proclamation is clearly discriminatory on the basis of race, as it only regulates the wages of "natives" ("non-Europeans") and excludes other races. It is thus a violation of the guarantees of non-discrimination and equality before the law in Article 10 of the Namibian Constitution, as well being a vestige of the oppressive contract labour system, which was a defining feature of the pre-Independence era.

The Proclamation has no current effect, having never come into force. A comprehensive, non-discriminatory scheme for setting minimum wages by sector is in place in the Labour Act, 2007. The Proclamation should therefore be repealed.

¹⁴⁸ *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others* 2009 (2) NR 596 (SC) , paragraph 3, footnotes omitted. Footnote 26 to this passage references the Proclamation under discussion – but as it never came into force, it in fact did nothing to ameliorate the low wages paid to contract labourers.

¹⁴⁹ <www.lac.org.na/laws/1944/og1092.pdf>.

¹⁵⁰ Government Notice 258 of 2017 <www.lac.org.na/laws/2017/6428.pdf>, which repeals Government Notice 258 of 2014 <www.lac.org.na/laws/2014/5638.pdf>, as amended by Government Notice 53 of 2016 <www.lac.org.na/laws/2016/5978.pdf>.

(21) Promotion of the Density of Population in Designated Areas, 1979 (Act No. 18 of 1979)

Summary:

This South West African Act¹⁵¹ provides for the designation of certain areas for the promotion of population density and farming activities. Persons who farmed in the designated areas were eligible for assistance in terms of the Agricultural Credit Act, 1966 (Act No. 28 of 1966), primarily in the form of loans for purposes related to safeguarding or stimulating the farming industry, and eligible to buy or lease State property suitable for farming purposes.¹⁵²

The underlying purpose of this law, as explained to the South African Truth and Reconciliation Commission, was to encourage white farmers to stay and farm in border areas by providing loans to them. These farms were reportedly managed according to directives from the South African Defence Force (SADF), with the farmers being expected to make themselves available to carry out reconnaissance and to provide intelligence. The South African government thus blurred the distinction between military structures and the civilian farming community in this part of “South West Africa”.¹⁵³

The role of the law was described this way in an uMkhonto we Sizwe (MK) Operations Report:

In 1979 the Promotion of Density of Population in Designated Areas Act, No. 87, was passed in an attempt to stem the exodus of white farmers from border areas, and increase the number of farmers in these areas to serve as the first line of defence against the infiltration of guerrillas from neighbouring states. At least R100m was made available over a period of five to six years for the provisions of loans to such farmers, and for the construction of strategic roads and airstrips in these areas.

The Act stipulated that loans be given on condition that farms were managed according to SADF directives, and that all white farmers in the areas had to undergo military training, be members of the regional and area commandos, and make themselves available to the SADF and Department of National Security to carry out reconnaissance and intelligence tasks whenever called on to do so. All were linked into the Commando system of part-time SADF forces and the military radio network known as MARNET. Many farm buildings were constructed in such a way as to constitute a chain of defence strongholds along the borders ready to be used by the SADF whenever necessary.

¹⁵¹ <www.lac.org.na/laws/1979/og4052.pdf>. The Act was brought into force on 1 January 1980 by AG 38 of 1979 <www.lac.org.na/laws/1979/og4059.pdf>.

¹⁵² The Act makes reference to “assistance” as defined in section 1 of the Agricultural Credit Act, 1966 (Act No. 28 of 1966), which in turn refers to assistance under sections 10 and 11 of that Act. Section 10 covers loans, “compromises” and the sale or lease of State land. Section 11 provides, at the State’s discretion, for transfers of liability for repayment from one person to another and for the consolidation of amounts owed to the State in terms of the Act.

¹⁵³ Truth and Reconciliation Commission, Amnesty Committee, statement by Advocate Berger on behalf of applicants Iphiwe Nyanda (Am 6231/97), Solly Zacharia Shoke (Am 5303/97), Dick Mkhonto (Am 5304/97) as reported in the decision in their case <www.justice.gov.za/trc/decisions/2000/ac20111.htm>; see also the transcript available at <http://sabctrc.saha.org.za/documents/amntrans/white_river/54147.htm>.

The Act stipulated that the SADF was empowered to enter any property in the designated area to demolish or erect military facilities or any other structure without the consent of the owner.¹⁵⁴

Another overview can be found in a 1980 document published by the well-known anti-apartheid group, the International Defence and Aid Fund:

In March, 1978[,] Deputy Defence Minister Mr. Coetsee announced the recommendations for a “ring of steel”, including the establishment of fortified strong points where farmers would be able to spend their nights, going out onto their farms during the day. According to Mr. Coetsee, the country’s borders could be secured by a “chain of protected villages doubling as military bases”. The recommendations also included plans to recruit young whites who have recently finished their military service into government-assisted “co-operative farming ventures” These farmer-recruits are obliged to live in a “compulsory occupation area”, between 30km and 50km wide, along the northern borders. [A]t the end of April 1979 the Minister of Agriculture announced plans for a scheme involving interest-free loans and other “perks” such as two-way radios to lure farmers to the border regions. The scheme which will cost R65m to R80m in over a six-year period, has been authorised in the Density of Population in Designated Areas Act 1979. In return for these incentives the farmers, who according to a government spokesman, “will be our first line of defence”, must have their properties occupied and managed according to government approval. If they refuse they will be fined.¹⁵⁵

Amendments:

The Act was amended by Administrator-General Proclamation, 1985 (Proclamation No. 30 of 1985),¹⁵⁶ which provided for grants and subsidies to persons farming in designated areas.

Current status:

The purpose of this law has no relevance in independent Namibia. Any incentives to settle in any particular areas of Namibia should be crafted afresh, without building on this apartheid-era law which arose from a desire to frustrate the struggle for liberation.

The Agricultural Credit Act, 1966 (Act No. 28 of 1966) which in the Act incorporates by reference was repealed in Namibia by the Agricultural Bank Amendment Act, 1991 (Act No. 27 of 1991).¹⁵⁷

It should be noted that section 16(1)(y) of the Income Tax Act, 1981 (Act No. 24 of 1981) provides for tax exemptions for “occupation allowances” provided in relation to the pursuit of farming

¹⁵⁴ “uMkhonto we Sizwe (MK) Operations Report” reproduced in the archives compiled by Pdraig O’Malley in “The Heart of Hope - South Africa’s Transition from Apartheid to Democracy” at <https://omalley.nelsonmandela.org/omalley/index.php/site/q/031v02424/041v02730/051v02918/061v02985.htm> and also quoted in the transcript referred to in the previous footnote. uMkonto we Sizwe was the armed wing of the ANC (the South African analogue to PLAN).

¹⁵⁵ “The Apartheid War Machine: The strength and deployment of the South African Armed Forces”, IDAF Fact Paper on Southern Africa No. 8, International Defence & Aid Fund, 1980, pages 67-68 (footnotes omitted). The IDAF was based in London.

¹⁵⁶ www.lac.org.na/laws/1985/og5060.pdf.

¹⁵⁷ www.lac.org.na/laws/1991/329.pdf.

operations in designated area under the Promotion of the Density of Population in Designated Areas Act, 1979.¹⁵⁸

Recommendation:

This Act was a tool in South Africa's opposition to the liberation struggle in Namibia and has no role in independent Namibia. It should be repealed, along with section 16(1)(y) of the Income Tax Act, 1981 (Act No. 24 of 1981) which references it.

¹⁵⁸ That paragraph states:

- (y) an amount received or accrued as an occupation allowance in relation to the pursuit of farming operations in an area which is a designated area as contemplated in the Promotion of the Density of Population in Designated Areas Act, 1979 (Act 18 of 1979).

(22) Promotion of the Economic Development of National States Act, 1968 (Act No. 46 of 1968)

Summary:

This South African Act¹⁵⁹ was originally entitled the “Promotion of the Economic Development of Bantu Homelands Act”. It provides for the establishment of development corporations to carry out the economic development of homelands (“national states”).

The purpose of the Act was to provide for the establishment of development corporations, so as to carry out economic development of homelands, accompanied by the “controlled introduction of White capital” by making it possible for Whites to act as agents or contractors for the various development corporations.¹⁶⁰

Further details are unimportant given that the idea of ethnic homelands was a cornerstone of apartheid, which has been repudiated in independent Namibia.

Applicability to South West Africa:

Section 32 states “This Act and any amendment thereof also apply in the territory of South-West Africa, including that portion of the said territory known as the Eastern Caprivi Zipfel and mentioned in section 3 of the South-West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951).”

Transfer of administration to South West Africa:

The relevant transfer proclamation is the Executive Powers Transfer Proclamation.¹⁶¹ However, this Act is excluded from transfer by section 3(2)(b), meaning that the administration of the Act was not transferred to South West Africa.

Amendments: The following pre-independence South African amendments were applicable to South West Africa -

- Black Laws Amendment Act, 1974 (Act No. 70 of 1974) (originally called the “Bantu Laws Amendment Act”),¹⁶² which makes provision for development corporations to indemnify persons against losses in respect of agreements for industrial, commercial, financial, mining or other business undertakings in a “Bantu homeland”;
- Black Laws Amendment Act, 1976 (Act No. 4 of 1976) (originally called the “Bantu Laws Amendment Act”),¹⁶³ which extends the powers of the Bantu Investment Corporation, provides

¹⁵⁹ <www.lac.org.na/laws/GGsa/rsagg2054.pdf>.

¹⁶⁰ AJ Christopher, *The Atlas of Apartheid*, Routledge, 1994, page 90.

¹⁶¹ Executive Powers Transfer Proclamation (AG 3/1977) dated 28 September 1977, as amended.

¹⁶² <www.lac.org.na/laws/GGsa/rsagg4486.pdf>.

¹⁶³ <www.lac.org.na/laws/GGsa/rsagg5012.pdf>.

for guarantees in connection with certain loans, and empowers the Bantu Investment Corporation to be a shareholder in a development corporation;

- Promotion of the Economic Development of National States Amendment Act, 1977 (Act No. 80 of 1977) (originally called the “Promotion of the Economic Development of Bantu Homelands Amendment Act”),¹⁶⁴ which amends the expression “Bantu”;
- Black Laws Amendment Act, 1978 (Act No. 12 of 1978 (originally called the “Bantu Laws Amendment Act”),¹⁶⁵ which regulates the indemnification of certain persons against loss in respect of an industrial, commercial or financial undertaking in a Bantu homeland;
- Laws on Co-operation and Development Amendment Act, 1980 (Act No. 3 of 1980),¹⁶⁶ which regulates the lending power of development corporations and corporations established under the Act;
- Finance Act, 1980 (Act No. 21 of 1980),¹⁶⁷ which repeals section 4A;
- Laws on Co-operation and Development Amendment Act, 1983 (Act No. 102 of 1983),¹⁶⁸ which empowers the State President to amend any proclamation in respect of which a development corporation has been established;
- Laws on Co-operation and Development Amendment Act, 1984 (Act No. 83 of 1984),¹⁶⁹ which provides for the dissolution and disposal of assets and liabilities of the Corporation for Economic Development Limited, and regulates certain indemnities given by the Corporation, as well as regulating the financing of development corporations and corporations established under the Act;
- Laws on Development Aid Second Amendment Act, 1986 (Act No. 105 of 1986),¹⁷⁰ which provides for the continued existence of the South African Development Trust Corporation Limited;
- Development Aid Laws Amendment Act, 1988 (Act No. 53 of 1988),¹⁷¹ which extends the powers of the South African Development Trust Corporation Limited.

Current status:

The Act has no relevance in an independent Namibia founded on the principles of equality and based on rights that were “for so long been denied to the people of Namibia by colonialism, racism and apartheid”.¹⁷² It violates Article 10 of the Namibian Constitution on equality before the law and the promise that there will be no discrimination on the basis of race or ethnic origin, and Article 23’s prohibition of the “practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long”.

¹⁶⁴ <www.lac.org.na/laws/GGsa/rsagg5595.pdf>.

¹⁶⁵ <www.lac.org.na/laws/GGsa/rsagg5916.pdf>.

¹⁶⁶ <www.lac.org.na/laws/GGsa/rsagg6906.pdf>.

¹⁶⁷ <www.lac.org.na/laws/GGsa/rsagg6915.pdf>.

¹⁶⁸ <www.lac.org.na/laws/GGsa/rsagg8868.pdf>.

¹⁶⁹ <www.lac.org.na/laws/GGsa/rsagg9310.pdf>.

¹⁷⁰ <www.lac.org.na/laws/GGsa/rsagg10451.pdf>.

¹⁷¹ <www.lac.org.na/laws/GGsa/rsagg11323.pdf>.

¹⁷² Preamble, Namibian Constitution.

The Ministry of Industrialisation, Trade and SME Development advised that this Act is obsolete and has been superseded by the Namibia Industrial Development Agency Act, 2016 (Act No. 16 of 2016) which establishes a body corporate called the Namibia Industrial Development Agency.¹⁷³ With regard to economic development, some of the objects of the Agency are targeted towards the development of key industrial and business infrastructure, entering public-private partnerships for fostering economic transformation and implementing business incentives and support schemes which would contribute towards industrialisation.

Recommendation:

This law implemented apartheid policies aimed at granting Blacks rights and freedoms only within the confines of designated homelands and is therefore contrary to the most cherished values of the Namibian Constitution, which prohibits racial discrimination and the practice and ideology of apartheid. Its economic development objectives are addressed in other legislation which applies more generally. The Act should be repealed in its entirety.

¹⁷³<www.lac.org.na/laws/annoSTAT/Namibia%20Industrial%20Development%20Agency%20Act%2016%20of%202016.pdf>.

(23) Protection of Fundamental Rights Act, 1988 (Act No. 16 of 1988)

Summary:

This Act¹⁷⁴ provides for the protection of fundamental rights of persons, which also includes the right not to be forced or influenced to take part in educational boycotts, boycotts of public services or worker stay-aways¹⁷⁵ - thus being aimed at forms of popular protest against the apartheid regime. Over 30 students had been charged under the Act by the end of 1988. An urgent application was brought in the Windhoek Supreme Court on 24 October 1988 to have the Act declared invalid.¹⁷⁶

The initiator of the court action was the Namibia National Students Organisation (NANSO), along with its general secretary Ignatius Shixwameni. Other applicants were the Mineworkers Union of Namibia, the Namibian Food and Allied Workers' Union, the Metal and Allied Namibian Workers' Union and the Namibian Public Workers' Union. The principal affidavit was made by Shixwameni, who had himself been charged under the Act.¹⁷⁷

¹⁷⁴ <www.lac.org.na/laws/1988/og5586.pdf>.

¹⁷⁵ J Redgment, et al, "Current legal developments", *The Comparative and International Law Journal of Southern Africa*, 21(3), 432-469 (<www.jstor.org/stable/23247662>). This prohibition was contained in section 2:

- (1) Any person who, without any lawful reason, in any manner whatsoever, uses or publishes any language or does any act or thing with intent to induce or to persuade any other person or persons in general
 - (a)
 - (i) to impede, interrupt or stop in any manner the functions or activities of or at any educational institution;
 - (ii) to abstain, temporarily or permanently, from attending any class or lecture at any educational institution where such person is admitted as a pupil or student or from participating in any other lawful activity at such educational institution;
 - (iii) to obstruct or to attempt to obstruct, in any manner, any other person admitted as a pupil or student to any educational institution from attending any class or lecture at such educational institution or from participating in any other lawful activity at such educational institution;
 - (b)
 - (i) to stay away, temporarily or permanently, from his place of employment, or to refuse to perform or refrain from performing his duties;
 - (ii) to obstruct or to attempt to obstruct, in any manner, any other person from attending his place of employment or from performing his duties;
 - (c)
 - (i) to abstain from making use of or receiving any public service, of whatever nature, rendered by the State or any person, whether to him in particular or persons generally, and which he normally makes use of or receives or may make use of or receive;
 - (ii) to obstruct or abstain any other person from making use of or from receiving any of the public services referred to in subparagraph (i);
 - (d) to boycott any undertaking or industry or undertakings or industries generally or to impede or interrupt in any manner the business ordinarily carried on by any undertaking or industry, or not to make use thereof,

shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

(2) The provisions of subsections (1)(b) and (d) shall not apply in relation to anything that any employers' organisation or trade union registered under the Wage and Industrial Conciliation Ordinance 35 of 1952 may lawfully do or not do under that ordinance, as the case may be.

(3) If in any prosecution in terms of subsection (1), it is proved that any person has done any act or acts constituting an offence in accordance with the provisions of that subsection, it shall be deemed to have been done by him without lawful reason, unless the contrary is proved.

¹⁷⁶ "Repression by Law", *Index on Censorship magazine*, Issue 4, 1989
<<https://journals.sagepub.com/doi/pdf/10.1080/03064228908534623>>.

¹⁷⁷ Ibid.

In this case, reported as *Namibia National Students' Organisation and Others v Speaker of the National Assembly for South West Africa and Others*, a full bench of the Supreme Court of SWA/Namibia declared section 2 of the Act invalid on the grounds that it contradicted entrenched rights such as freedom of expression and freedom of assembly, which were protected by the Bill of Fundamental Rights appended to the South West Africa Legislative and Executive Authority Establishment Proclamation, 1985 (Proclamation No.101 of 1985). The majority opinion by Justice Hendler held that it is clear that the section in question “creates criminal offences for activities which in democratic societies have been perfectly acceptable and legal”, while section 2(3) which created a reverse onus ran counter to the right to a fair trial.¹⁷⁸

Amendments:

AG Proclamation 14 of 1989¹⁷⁹ repeals section 2 of the Act, which had already been found invalid, and amends the penalties for offences relating to violence, injury, damage, harm, loss or detriment in section 3(e) of the Act.

Current status:

This Act as it originally stood did not in fact protect fundamental rights as its name suggested, but rather infringed rights which are now protected by the Namibian Constitution, including the right to participate in peaceful political activity intended to influence the composition and policies of the Government (Article 17). The key substantive provision remaining in the law concerns the use of violence, force, restraint or threats of harm to influence a person to participate in a boycott or a stay-away.¹⁸⁰ There are sufficient criminal penalties available under other laws (both common law

¹⁷⁸ *Namibia National Students' Organisation and Others v Speaker of the National Assembly for South West Africa and Others* 1990 (1) SA 617 SWA, page 627. The only part of section 2 which the Court left in place was a penalty which was originally incorporated by reference into section 3 for the purposes of that section.

¹⁷⁹ <www.lac.org.na/laws/1989/og5726.pdf>.

¹⁸⁰ Section 3 reads as follows, as amended:

“Any person who, by himself or by any other person, directly or indirectly, makes use or threatens to make use of any violence, force or restraint, or inflicts or threatens to inflict any injury, damage, harm or loss, upon or against, or does or threatens to do anything to the detriment of, any other person, or his next of kin, on account of such other person

- (a) attending or having attended any class or lecture at any educational institution where he is admitted as a pupil or student or, participating or having participated in any other activity at J such educational institution;
- (b) calling on or having called on any undertaking or industry to transact any business of whatever nature or for any other lawful purpose;
- (c) making use or having made use of any public service referred to in para (c) of ss (1) of s 2;
- (d) attending or having attended his place of employment in order to perform his ordinary duties, or
- (e) intending
 - (i) to attend any class or lecture at any educational institution where he is admitted as a pupil or student or, to participate in any other activity at such educational institution;
 - (ii) to call on any undertaking or industry to transact any business of whatever nature or for any other purpose;
 - (iii) to make use of any public service referred to in para (c) of ss (1) of s 2; or
 - (iv) to attend his place of employment in order to perform his ordinary duties,

shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.”

and statute law) to address the use of force or threats to influence behaviour in general, and thus no need for a law which specifically ties that behaviour to forms of political protest.

Recommendation:

This Act was part of government efforts to stifle political protest during the pre-Independence era and plays no role in independent Namibia. It should be repealed.

(24) Railways and Harbours Pensions Amendment Act (Act No. 26 of 1941)

Summary:

This South African Act¹⁸¹ provides for annuities and gratuities for certain servants of South African Railway Administration on their retirement, along with gratuities for dependents of certain deceased former servants of the Railway Administration.

Applicability to South West Africa: Section 8A, which was inserted by the Railways and Harbours Pensions Further Amendment Act, 1974 (Act No. 45 of 1974), states “This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel.”

Transfer of administration to South West Africa: The relevant Transfer Proclamation is the Executive Powers (Transport) Transfer Proclamation.¹⁸² However, the Act was excluded from transfer by section 3(2)(a) of the General Proclamation, which is the Executive Powers Transfer (General Provisions) Proclamation, 1977 (AG 7/1977, as amended).¹⁸³ This provision of the General Proclamation exempted from transfer “those provisions of any law ... which provide for or relate to ... pension rights and privileges or any other conditions of service of any person who is, or is engaged for employment, in the service of the State or the Government of the Republic or any of its departments in terms of that law or any other law”. Thus, the administration of the Act was *not* transferred to South West Africa, and amendments to the Act continued to apply until the date of Namibian independence. This means that the administration of the Act was not transferred to South West Africa.

Amendments:

The following pre-independence South African amendments were applicable to South West Africa. The amendments to the principal Act were not substantial apart from a few amendments to definitions such as emoluments, general manager and several insertions and substitutions which concerned matters of substance (described below):

- Railways and Harbours Acts Amendment Act, 1944 (Act No. 23 of 1944)¹⁸⁴
- Railways and Harbours Acts Amendment Act, 1959 (Act No. 44 of 1959)¹⁸⁵

¹⁸¹ <www.lac.org.na/laws/GGsa/sagg2904.pdf>.

¹⁸² <www.lac.org.na/laws/1978/og3717.pdf>.

¹⁸³ Executive Powers Transfer (General Provisions) Proclamation, 1977 (Proclamation AG. 7 of 1977), <[www.lac.org.na/laws/annoSTAT/TP/Executive%20Powers%20Transfer%20\(General%20Provisions\)%20Proclamation,%20AG%20of%201977%20\(General%20Proclamation\).pdf](http://www.lac.org.na/laws/annoSTAT/TP/Executive%20Powers%20Transfer%20(General%20Provisions)%20Proclamation,%20AG%20of%201977%20(General%20Proclamation).pdf)>. If the administration of a statute was transferred from South Africa to South West Africa, section 3(1) of the General Proclamation provided the core of the administrative transfer by providing which SWA officials would step into the shoes of which SA officials. Section 3(5) of the General Proclamation had the effect of “freezing” the statute as it stood at the date of transfer; after a transfer, South African amendments applied to South West Africa only if the amending Act stated this explicitly.

¹⁸⁴ <www.lac.org.na/laws/GGsa/sagg3338.pdf>.

¹⁸⁵ <www.lac.org.na/laws/GGsa/sagg6237.pdf>.

- Railways and Harbours Acts Amendment Act, 1962 (Act No. 62 of 1962),¹⁸⁶ which provides a scale of annuities or gratuities with regard to a person's period of service;
- Railways and Harbours Acts Amendment Act, 1965 (Act No. 6 of 1965)¹⁸⁷
- Second Railways and Harbours Acts Amendment Act, 1971 (Act No. 85 of 1971)¹⁸⁸
- Railways and Harbours Pensions Further Amendment Act, 1974 (Act No. 45 of 1974),¹⁸⁹ which provides that pensions cannot be ceded or attached in execution and that the Act applies to South West Africa;
- Second Railways and Harbours Acts Amendment Act, 1976 (Act No. 89 of 1976)¹⁹⁰
- Railways and Harbours Acts Amendment Act, 1980 (Act No. 67 of 1980)¹⁹¹
- Railways and Harbours Acts Amendment Act, 1981 (Act No. 29 of 1981),¹⁹² which makes the provisions of the principal Act also applicable to staff transferred from Iscor to the South African Railways;
- Second Railways and Harbours Acts Amendment Act, 1981 (Act No. 60 of 1981)¹⁹³
- South African Transport Services Amendment Act, 1982 (Act No. 6 of 1982)¹⁹⁴
- South African Transport Services Amendment Act, 1985 (Act No. 44 of 1985).¹⁹⁵

The last six amending Acts listed were all repealed by the Repeal of Obsolete Laws Act, 1981 (Act No. 21 of 1981).

Current status:

The South African Railway Administration is no longer operational in Namibia and has been replaced by Transnamib Holdings. At independence, railways fell under the National Transport Corporation Act, 1987 (Act No. 21 of 1987),¹⁹⁶ which was replaced after independence by the National Transport Services Holding Company Act, 1998 (Act No. 28 of 1998).¹⁹⁷ This 1998 Act provides for the incorporation of a holding company to undertake transport services. Transnamib is part of this Holding Company. According to NAMFISA, Transnamib has a retirement fund that was fully registered in the year 1994.

The Pensions Funds Act, 1956 (Act No. 24 of 1956) provides for the registration, incorporation, regulation and dissolution of pension funds.

¹⁸⁶ <www.lac.org.na/laws/GGsa/rsagg253.pdf>.

¹⁸⁷ <www.lac.org.na/laws/GGsa/rsagg1050.pdf>.

¹⁸⁸ <www.lac.org.na/laws/GGsa/rsagg3202.pdf>.

¹⁸⁹ <www.lac.org.na/laws/GGsa/rsagg4434.pdf>.

¹⁹⁰ <www.lac.org.na/laws/GGsa/rsagg5179.pdf>.

¹⁹¹ <www.lac.org.na/laws/GGsa/rsagg7039.pdf>.

¹⁹² <www.lac.org.na/laws/GGsa/rsagg7475.pdf>.

¹⁹³ <www.lac.org.na/laws/GGsa/rsagg7753.pdf>.

¹⁹⁴ <www.lac.org.na/laws/GGsa/rsagg8039.pdf>.

¹⁹⁵ <www.lac.org.na/laws/GGsa/rsagg9708.pdf>.

¹⁹⁶ <www.lac.org.na/laws/1987/og5439.pdf>.

¹⁹⁷ <www.lac.org.na/laws/1998/1961.pdf>.

Recommendation:

This law has already been recognised as obsolete while this research was underway. Given that NAMFISA as the insurance sector regulator has no knowledge of this law, it is unlikely that it is playing any active role in Namibia. It is recommended that it should be repealed.

(25) Railways and Harbours Special Pensions Act, 1955 (Act No. 36 of 1955)

Summary:

This South African Act¹⁹⁸ provides for the calculation or recalculation of the benefits paid or payable to certain former members of the several Railways and Harbours pension and superannuation funds, or their dependants, on the basis of amounts in excess of the actual pensionable emoluments of such former members while they were members of the said funds. It applied only to persons who died or retired before October 1953 and who were receiving pensions under the Railways and Harbours Service Act, 1912 (Act No. 28 of 1912), or the Railways and Harbours Superannuation Fund Act, 1925 (Act No. 24 of 1925). In fact, the 1955 Act refers to the “principal Act”, which it defines in section 1 as “the Railways and Harbours Service Act, 1912 (Act No. 28 of 1912), or the Railways and Harbours Superannuation Fund Act, 1925 (Act No. 24 of 1925), whichever may be applicable”.

The South African Law Reform Commission gives the following comment on this law:

In this Act [the Railways and Harbours Special Pensions Act, 1955] the meaning assigned to certain phrases and terms refers to a statute that has been repealed, creating an erroneous impression that this [repealed] Act is still in force. These terms or phrases are: “basic sum”, “beneficiary”, “dependent” and “principal Act”. In terms of section 1 (the definition clause), ‘basic sum’ means the actual benefit payable to a dependant of a deceased former member under...or section thirty-one or thirty-two of the Railways and Harbours Superannuation Fund Act, 1925 (Act 24 of 1925). Further, it states that “‘beneficiary’ in relation to a former member who has died, means any relative of such former member, referred to in ... or section thirty-three of the Railways and Harbours Superannuation Fund Act, 1925 (Act 24 of 1925)”. Lastly, it provides that “‘principal Act’ means...or the Railways and Harbours Superannuation Fund Act, 1925”. Act 24 of 1925 was repealed by the Railways and Harbours Superannuation Fund Act 39 of 1960. References to this Act should therefore be deleted.¹⁹⁹

Applicability to South West Africa:

Section 8 states “This Act shall apply to the Territory of South West Africa”. The only amendments to the Act in South Africa prior to Namibian independence – the Railways and Harbours Pensions Amendment Act, 1956 (Act No. 22 of 1956) and the Railways and Harbours Act Amendment Act, 1957 (Act No. 34 of 1957) – are both expressly applicable to South West Africa.

Transfer of administration to South West Africa:

The relevant Transfer Proclamation is the Executive Powers (Transport) Transfer Proclamation AG, 1978 (Proclamation No. 14 of 1978).²⁰⁰ However, the Act was excluded from transfer by

¹⁹⁸ <www.lac.org.na/laws/1955/og1915.pdf>.

¹⁹⁹ South African Law Reform Commission, Project 25, Statutory Law Revision: Legislation administered by the Department of Transport, Discussion Paper 114, May 2008, section 2.8, available at <www.justice.gov.za/salrc/dpapers/dp114.pdf>.

²⁰⁰ <www.lac.org.na/laws/1978/og3717.pdf>.

section 3(2)(a) of the General Proclamation,²⁰¹ which exempted “those provisions of any law ... which provide for or relate to ... pension rights and privileges or any other conditions of service of any person who is, or is engaged for employment, in the service of the State or the Government of the Republic or any of its departments in terms of that law or any other law”. This means that the administration of the Act was not transferred to South West Africa.

Amendments: The following pre-independence South African amendment applied to South West Africa-

- Railways and Harbours Pensions Amendment Act, 1956 (Act No. 22 of 1956),²⁰² which provides for member contribution on amounts in excess of their actual pensionable emoluments;
- Railways and Harbours Acts Amendment Act, 1957 (Act No. 34 of 1957),²⁰³ which provides a recalculation of benefits.

Current status:

The pensions affected by this Act are those payable under these “principal laws”: The Railways and Harbours Service Act, 1912 (Act No. 28 of 1912) or the Railways and Harbours Superannuation Fund Act, 1925 (Act No. 24 of 1925).

In Namibia, no repeal of the **Railways and Harbours Service Act, 1912** has been located; however, this Act does not seem to have been applicable to South West Africa generally, but only for a specific purpose. It is one of a list of laws referred to in the Railway Management Proclamation, 1920 (Proclamation No. 70 of 1920) as being applicable “so far as capable of application” and have “force and effect” within South West Africa for the purpose of the management of railways and harbours in South West Africa by the Railways and Harbours Administration of the Union of South Africa (hereinafter called the Railway Administration).²⁰⁴ That purpose has fallen away now that the Railway Administration plays no further role.

The **Railways and Harbours Superannuation Fund Act, 1925** was repealed in South Africa by the Railways and Harbours Superannuation Fund Act, 1960 (Act 39 of 1960), which was made expressly applicable to South West Africa.²⁰⁵

²⁰¹ Executive Powers Transfer (General Provisions) Proclamation, 1977 (Proclamation AG. 7 of 1977), <[www.lac.org.na/laws/annoSTAT/TP/Executive%20Powers%20Transfer%20\(General%20Provisions\)%20Proclamation,%20AG%207%20of%201977%20\(General%20Proclamation\).pdf](http://www.lac.org.na/laws/annoSTAT/TP/Executive%20Powers%20Transfer%20(General%20Provisions)%20Proclamation,%20AG%207%20of%201977%20(General%20Proclamation).pdf)>. If the administration of a statute was transferred from South Africa to South West Africa, of the General Proclamation had the effect of “freezing” the statute as it stood at the date of transfer; after a transfer, South African amendments applied to South West Africa only if the amending Act stated this explicitly.

²⁰² <www.lac.org.na/laws/GGsa/sagg5679.pdf>.

²⁰³ <www.lac.org.na/laws/GGsa/sagg5882.pdf>.

²⁰⁴ <www.lac.org.na/laws/1920/og46.pdf>.

²⁰⁵ Railways and Harbours Superannuation Fund Act 39 of 1960, section 61: “This Act shall apply also in the Territory of South-Application of West Africa.” This Act was repealed in South Africa by the Railways and Harbours Pensions

Recommendation:

This Act has no current function in Namibia since it interprets two other pieces of legislation which are no longer in force in Namibia. It is not clear if the Act actually remains in force in Namibia since it has no independent effect, but it can safely be repealed to leave no doubt about its status.

Act 35 of 1971, which was made expressly applicable to South West Africa and remained in force in Namibia until it was repealed by the Repeal of Obsolete Laws Act 21 of 2018.

(26) Shop Hours Ordinance, 1939 (Ordinance No. 15 of 1939)

Summary:

This South West African Ordinance²⁰⁶ originally governed shop hours and certain working conditions of shop assistants. The original name of the Ordinance was the “**Shop Hours and Shop Assistants Ordinance**”.

Section 2 of the Act defines shop as “any place set apart temporarily or permanently for the sale of movables by wholesale or retail and whether by auction or not and shall include a hairdresser's or barber's [salon], a cafe and refreshment room, and a daily public market, but shall not include any hotel or bar where intoxicating liquors are sold for consumption on the premises or any bottle store”.

The Ordinance covers **hours of opening and closing for shops**, but provides a list of businesses which are exempted from these rules. It also provides for hours of work for shops (other than chemists).

The Ordinance also initially covered **working hours, wages and conditions of employment of shop assistants**. Section 2 originally defined “shop assistant” in racial terms, as “*any European person* employed by any other person in or about a shop, but shall not include a manager or department manager, a domestic servant, timekeeper or caretaker, or any person employed for cleaning purposes, packing or delivery of goods or for the prevention of fire, or any traveller”.²⁰⁷ Section 8(3) included a provision prohibiting evening work by young females:

(3) No female assistant under the age of 16 years shall be employed in or about any shop after six o'clock in the evening.

Section 12 limited employment as a shop assistant to persons over age 14. The Ordinance provided for police to serve as shop inspectors to monitor compliance, and included penalties for violation of the Ordinance. It gave the Administrator authority to make regulations relating to the Ordinance.

Amendments:

The Ordinance was amended as follows:

- Ordinance No. 4 of 1940 amends the list of businesses exempted from the rules on hours of business;
- Proclamation No. 34 of 1950 added a new section 11*bis* authorising the Administrator to exempt shopkeepers in any particular trades from complying with the provisions on the hours of work of shop assistants (repealed by the Conditions of Employment Act 12 of 1986);

²⁰⁶ <www.lac.org.na/laws/1939/og796.pdf>.

²⁰⁷ Emphasis added.

- Proclamation No.50 of 1950 amended the Ordinance in respect of permissible trading on Sundays;
- Ordinance No. 10 of 1952 added a new section *2bis* exempting shop assistants covered by other labour-related legislation from the provisions on wages and minimum conditions of employment (repealed by the Conditions of Employment Act 12 of 1986);
- Ordinance No. 5 of 1957 amended the Ordinance to make it lawful, despite the provisions on opening and closing hours, to serve customers who were already in the shop at the closing hour during the fifteen minutes following the closing hour;
- Ordinance No. 39 of 1957 amended the Ordinance to provide for the appointment of public servants as Shop Inspectors (repealed by the Conditions of Employment Act 12 of 1986), and provided for powers of entry for monitoring purposes;
- Ordinance No. 4 of 1959 amended the definition of “shop assistant” to remove the reference to “Europeans”, thus making the law applicable to shop assistants of all races, and adding a provision authorising the Administrator to alter or amend the opening and closing, either generally, or for particular areas, or for particular trade or businesses, by notice in the *Official Gazette*;
- The Conditions of Employment Act, 1986 (Act No. 12 of 1986) deleted the definitions of “shop assistant” and “shop inspector”, and repealed section *2bis* and sections 8-18 of the Ordinance insofar as they relate to working hours, wages and minimum conditions of employment. This Act also changed the title of the law to the “Shop Hours Ordinance”.

After the amendments made by the Conditions of Employment Act, 1986, this Ordinance contains only provisions on operating hours of certain shops. The Ordinance as amended is available online.²⁰⁸

Current status:

In general, Namibian labour laws have been consolidated. At independence, Namibia inherited the Factories, Machinery and Building Work Ordinance 34 of 1952, the Wage and Industrial Conciliation Ordinance 35 of 1952, the Occupational Diseases in Mines and Works Act 78 of 1973 and the Conditions of Employment Act 12 of 1986 as well as a number of ethnic- and race-based laws relating to employment. These were all repealed by the Labour Act 6 of 1992. This was followed by the Labour Act 15 of 2004, which was brought only partially into force. Both the Labour Act 6 of 1992 and the Labour Act 15 of 2004 were repealed by the Labour Act 11 of 2007, which is still Namibia’s principal labour law.

However, although the law seems outdated, the question is why none of the previous consolidated labour laws repealed it in its entirety. The current Labour Act covers permissible working hours, but it does not address the hours that shops may be open. The Ministry of

²⁰⁸ A consolidated version of the law with all of the amendments incorporated is available on the LAC website. Link forthcoming.

Industrialisation, Trade and SME Development recently upon consultation advised that this law currently falls under their priority list of labour laws to be amended and should therefore be retained.

Recommendation:

The law's racist origins are obnoxious, but it was amended in 1959 to remove all references to race. The Ministry of Industrialisation, Trade and SME Development confirms that the amended law still has ongoing relevance and should not be repealed. Given the law's brevity and its discriminatory history, the LRDC will suggest to the Ministry that it might be advisable to replace this law in future with a new law on the topic that is not rooted in colonial history.

(27) Small Settlements Commonages Subdivision Proclamation, 1926 (Proclamation No. 13 of 1926)

Background:

Under German colonial rule, German farmers were encouraged to settle in Namibia, and provided with incentives to this end. One strategy to advance this policy was the granting of small plots of farmland to German settlers (*Kleinsiedler*) in areas where rain was more abundant – such as near Okahandja and in the Waterberg area. The plan was that these German settlers would grow wheat, fruit and vegetables to provision the towns in the colony. These areas were called *Kleinsiedlungen* (“small settlements”).²⁰⁹

After South Africa took over the Mandate for South West African in the wake of World War II, after an initial period which saw the deportation of many German residents, government policy began to encourage German settlement in the belief that this would contribute to stability and productivity. Several mechanisms were employed to support immigration to South West Africa by German farmers and craftsmen²¹⁰ - notably the negotiation of the 1923 London Agreement between South African and Germany wherein South Africa agreed to provide British citizenship to German settlers who remained in South West Africa and made assurances about the use of the German language in South West Africa.²¹¹

The first manifestation of South Africa’s new accommodating approach towards the German community in the post-war era was in the form of British citizenship offered in terms of the London Agreement of 1923, concluded between the German and South African governments... Most Germans accepted the citizenship offer, but concerns about their status in the mandate territory were reinforced when it became evident that South Africa attempted to secure numerical preponderance for the Union section through a comprehensive land settlement programme and the relocation of the Angola Boers in 1928. The entente initiated by the South Africans after 1920 contributed to improved relations between the three white groups evidenced in a brief period of German control of the local legislative assembly, German participation in local official

²⁰⁹ Jakob Zollmann, “Becoming a Good Farmer—Becoming a Good Farm Worker: On Colonial Educational Policies in Germany and German South-West Africa, Circa 1890 to 1918” in D Matasci M Jerónimo & H Dores (eds), *Education and Development in Colonial and Postcolonial Africa*, Global Histories of Education, Palgrave Macmillan, 2020, unpaginated online version available at <https://link.springer.com/chapter/10.1007/978-3-030-27801-4_5>.

²¹⁰ Daniel Joseph Walther, *Creating Germans Abroad: Cultural Policies and National Identity in Namibia*, Ohio University Press, 2002, pages 113-ff.

²¹¹ See, eg, Richard Dale, *The Namibian War of Independence, 1966-1989: Diplomatic, Economic and Military Campaigns*, Mcfarlane, 2014, pages 26-27. The London Agreement included a clause stating that the Administration of South West Africa “will give every facility for free use of the German language and will raise no objections to the use of the German language in public offices, and in correspondence with these offices, who will reply, whenever possible, in the same language”. London Agreement, point 2, as quoted in Hans-Voiker Gretschel, “The status and use of the German language in independent Namibia: Can German survive the transition?” in Martin Pütz, ed, *Discrimination Through Language in Africa?: Perspectives on the Namibian Experience*, Walter de Gruyter, 1995, page 302.

commissions, and promises to consider the status of German as an official language. The local administration also extended financial support to German schools.²¹²

However, by 1929, relationships between the different sectors of the white community had begun to deteriorate,²¹³ with attitudes about German settlement being further affected by the rise of Nazi influence in “South West Africa”.²¹⁴

Summary:

This South West African Proclamation²¹⁵ provides for the sub-division of commonages assigned to small settlements established by the German administration, as well as the procedures for the allocation of such sub-divisions.

The Administrator was to act only upon receipt of a petition from at least three-fourths of the three-fourths of the registered owners of the “lots” (*Parzellen*) in any Small Settlement (*Klein-Siedlung*). The Administrator could then authorize the subdivision of any commonage assigned to that Small Settlement into sections equal to the number of the lots in that Small Settlement, excluding any portions of the commonage required for public purposes. The sub-divided commonage sections were then to be allocated to the lot owners.

The sub-division and allocation were to be carried out by a committee composed of:

- (a) a member of the Land Board constituted under the Land Settlement Act, 1912, (Act No. 12 of 1912), (to be appointed by the Administrator);
- (b) the magistrate of the district in which the commonage in question is situated;
- (c) a qualified land surveyor appointed by the Administrator; and
- (d) two owners of land elected by the lot owners in a manner prescribed by the Administrator by regulation, and approved by the Administrator.²¹⁶

The allocation of commonage sections was to be published in the *Official Gazette*. Particulars were published in respect of the Omaruru District in Government Notice 15 of 14 January 1931²¹⁷ and in respect of the Osona Small Settlements in the Okahandja district in Government Notice 22 of 4 February 1931.²¹⁸

Amendments:

None.

²¹² Christo Botha, “Internal colonisation and an oppressed minority?: The dynamics of relations between Germans and Afrikaners against the background of constructing a colonial state in Namibia, 1884-1990, 2 *Journal of Namibian Studies* 7 (2007), pages 17-18 (footnote omitted).

²¹³ *Id.*, page 19.

²¹⁴ Marion Wallace, *A History of Namibia*, Jacana, 2011, pages 240-241.

²¹⁵ <www.lac.org.na/laws/1926/og205.pdf>.

²¹⁶ Regulations were promulgated in Government Notice 21 of 17 February 1927.

²¹⁷ Official Gazette of South West Africa 402.

²¹⁸ Official Gazette of South West Africa 403.

Current status:

This Proclamation appears to have been designed to augment the land-holdings of a particular group of white settlers in light of the political goals of the era when it was enacted. It plays no role in independent Namibia.

Recommendation:

The Proclamation is an historical relic with no current relevance and should be repealed.

(28) State Repudiation (Cultura 2000) Act, 1991 (Act No. 32 of 1991)

Summary:

This Act²¹⁹ provides for the repudiation of certain actions taken under laws in force prior to independence by the Government, Minister or official of the republic of South pursuant to Article 140(3) of the Namibian Constitution.²²⁰

Amendments:

None.

Current status:

The effect of Article 140(3) of the Constitution was first tested in the case of *Cultura 2000 & another v Government of the Republic of Namibia & Others*²²¹

The Representative Authority for Whites established under Proclamation AG 8 of 1980 donated R4 million to Cultura 2000, an organisation established to preserve ‘white culture’. The Representative Authority for Whites made a further soft loan of R4 million to Cultura 2000, which the Administrator-General converted into a donation three weeks before Independence.

The State Repudiation (Cultura 2000) Act, 1991(Act No. 32 of 1991) was then enacted to nullify the action of the former administration for Whites in order to recover the R8 million. The High Court of Namibia declared the Act invalid and unconstitutional stating that Article 140(3) did not authorise the government to recover anything.

However, the Supreme Court on appeal partly overturned the High Court’s ruling and stated that nothing in Article 140(1) or 140(3) prevents the Namibian Government from repudiating any act or action of the previous government.²²² In response to the High Court ruling, Mahomed CJ stated the following:

..... An interpretation of art 140(3) which limits its potential operation only to acts by the previous Administration which were “uncompleted” would not give to the clear words of the article a construction which is “most beneficial to the widest possible amplitude” ...

²¹⁹ <www.lac.org.na/laws/1991/334.pdf>.

²²⁰ “Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of south Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government service commission shall be deemed to have been done by the Public service commission referred to in Article 112, unless it is determined otherwise by an Act of Parliament”.

²²¹ 1993 (2) SA 12 (Nm)

²²² *Government of the Republic of Namibia & Another v Cultura 2000 & Another* 1993 NR 328 (SC).

There is nothing in the ordinary meaning of the word “repudiation” which justifies giving to that expression the limited construction which found favour in the Court a quo. To “repudiate” means simply “to disown; to refuse to acknowledge; to refuse to recognise the authority of”.

This is exactly what s 2(1) of the Act seeks to do. It simply gives power to Parliament to disown or turn its back upon acts perpetrated by the previous Administration before the independence of Namibia, whether such acts were at the time of their perpetration lawful or unlawful.

The State Repudiation Act 2000 Act 32 of 1991 was therefore declared null and void, save for section 2(1) read with sections 1 and 7 which still remains in force.

Recommendation:

Since the majority of the Act was declared unconstitutional and it relates only to the Act 2000 which originated as a racist organisation that would be an unlawful body in post-Independence Namibia, the Act is therefore obsolete and should be repealed.

(29) Sunday Trading Proclamation, 1919 (Proclamation No. 12 of 1919)

Summary:

This South West African Proclamation²²³ regulates trading on Sunday, Christmas Day, and Good Friday – including exemptions for certain goods and services.

Amendments: The following amendments have been made:

- Sunday Trading Amendment Proclamation, 1919 (Proclamation No. 16 of 1919);
- Sale of Motor Spirit and Accessories for Motor Vehicles and Water-raising Appliances (Removal of Restrictions) Ordinance, 1928 (Proclamation No. 14 of 1928);
- Sunday Trading Amendment Ordinance, 1935 (Ordinance No. 15 of 1935)
- Sunday Trading Amendment Proclamation, 1944 (Proclamation No. 24 of 1944)
- Sunday Trading Amendment Ordinance, 1948 (Ordinance No. 10 of 1948)
- Sunday Trading Amendment Proclamation, 1950 (Proclamation No. 50 of 1950)
- Conditions of Employment Act, 1986 (Act No. 12 of 1986), by repealing portions of the amendments in Proclamation 50 of 1950.²²⁴

The Proclamation as it currently stands is available online.²²⁵

Current status:

Sections 21 and 22 of the Labour Act, 2007 (Act 11 of 2007) address hours of work on Sunday and public holidays.

Section 21 provides that an employer must not require or permit an employee to perform work on a Sunday, except for:

- (a) urgent work;
- (b) carrying on the business of a shop, hotel, boarding house or hostel that lawfully operates on a Sunday;
- (c) performing domestic service in a private household;
- (d) health and social welfare care and residential facilities, including hospitals, hospices, orphanages and old age homes;
- (e) work on a farm required to be done on that day;
- (f) work in which continuous shifts are worked; or
- (g) any activity approved by the Permanent Secretary in terms of subsection (4) [work approved for this purpose on application by the employer].

Section 22 provides a similar provision with regard to work on public holidays.

²²³ <www.lac.org.na/laws/1919/og24.pdf>.

²²⁴ Note that the Conditions of Employment Act 12 of 1986 erroneously refers to Proclamation 50 of 1950 as the “Shop Hours and Shop Assistants Amendment Proclamation”. Its correct name is the “Sunday Trading Amendment Proclamation”.

²²⁵ A consolidated version of the law with all of the amendments incorporated is available on the LAC website. Link forthcoming.

Sections 21 and 22 of the Labour Act also cover pay for work on Sundays and public holidays. If an employee is required to work on a Sunday the employer must pay double that employee's hourly basic wage for each hour worked or, if the employee ordinarily works on Sunday, the employer must pay the employee's daily remuneration plus the hourly basic wage for each hour worked. With regard to public holidays, an employee required to work on a public holiday that falls on an ordinary working day is entitled to his or her normal daily remuneration plus the normal basic wage rate for the hours worked. If the public holidays fall on a day other than an ordinary working day, the employee must receive double his/her hourly basic wage for every hour worked.

However, although the Labour Act covers *work* on Sundays and public holidays, it is silent on permissible *trading* hours on Sundays and public holidays. In other words, provided that an employer complies with rights of employees regarding work on Sundays and public holidays, there is nothing in the Labour Act which forbids trading on those days.

The Public Holidays Act, 1990 (Act No. 26 of 1990) identifies 12 days as public holidays, but does not address what this means for business or trading. If the Proclamation still has any practical function, it should be noted that it restricts business activity on only two of the 12 public holidays identified by the Public Holidays Act.

The LRDC's first report on obsolete laws recommended that this Proclamation should be repealed in its entirety,²²⁶ but it was not included in the Repeal of Obsolete Laws Act, 2018 (Act No. 21 of 2018).

The Ministry of Industrialisation, Trade and SME Development when recently consulted advised that this law should be retained as the Ministry is currently amending some provisions of this Proclamation to reflect current trading practices.

Recommendation:

This Proclamation is in the process of being amended. Its repeal is therefore not recommended.

²²⁶ *Report on the Repeal of Obsolete Laws Project*, LRDC 25, 2014, section 23.

(30) Temporary Employees Pension Fund Act, 1979 (Act No. 75 of 1979)

Summary:

This South African Act²²⁷ provides for pensions and other benefits to certain temporary employees and their dependents.

Applicability to South West Africa:

Section 9A (added by RSA Proclamation R.217 of 1979) states “This Act and any amendment thereof shall apply also in the Territory of South West Africa, including the Eastern Caprivi Zipfel.” This section also provides special definitions for “revenue” and “Government” in regard to South West Africa.

Transfer of administration to South West Africa:

The relevant transfer proclamation is the Executive Powers (Social Welfare and Pensions) Transfer Proclamation AG 11, 1977.²²⁸ However, section 3(c) of the transfer proclamation provided that section 3(1) of the General Proclamation²²⁹ shall not apply to “the provisions of any law relating to any pension or provident fund or scheme which is administered by the Minister of Social Welfare and Pensions or is otherwise controlled by him ...” Therefore, the administration of the Act was not transferred to South West Africa, although the Act did apply to the territory.

Amendments:

The following pre-independence South African amendments were applicable to South West Africa –

- Pension Laws Amendment Act, 1986 (Act No.106 of 1986)²³⁰
- Pension Laws Amendment, 1988 (Act No. 89 of 1988)²³¹

Current status:

The South African Government Pensions Administration Authority website contains the following explanation of the Temporary Employees Pension Fund (TEPF) in South Africa:

The TEPF was established in 1979 to provide pensions for temporary employees in the employ of the public service, public entities and associated institutions. The TEPF is regulated by the Temporary Employees Pension Fund Act, 1979 (Act No. 75 of 1979) and its regulations.²³²

²²⁷ <www.lac.org.na/laws/GGsa/rsagg6518.pdf>.

²²⁸ <www.lac.org.na/laws/1977/og3675.pdf>.

²²⁹ Executive Powers Transfer (General Provisions) Proclamation, 1977 (Proclamation AG. 7 of 1977) <[www.lac.org.na/laws/annoSTAT/TP/Executive%20Powers%20Transfer%20\(General%20Provisions\)%20Proclamation,%20AG%207%20of%201977%20\(General%20Proclamation\).pdf](http://www.lac.org.na/laws/annoSTAT/TP/Executive%20Powers%20Transfer%20(General%20Provisions)%20Proclamation,%20AG%207%20of%201977%20(General%20Proclamation).pdf)>.

²³⁰ <www.lac.org.na/laws/GGsa/rsagg10452.pdf>.

²³¹ <www.lac.org.na/laws/GGsa/rsagg11411.pdf>.

²³² Government Pensions Administration Authority website, “Temporary Employees Pension Fund (TEPF)”, undated, available at <www.gpaa.gov.za/tepf.html>.

The Act is still in force in South Africa, where it does not appear to fall within the ambit of the general Pensions Funds Act, 1956 (Act No. 24 of 1956).²³³ In South Africa, in 2011, the South African Law Reform Commission recommended amendment, but not repeal, of this law.²³⁴

In Namibia, NAMFISA reports that it is unaware of this law.

Recommendation:

Given that NAMFISA has no knowledge of this law, it is unlikely that it is playing any active role in Namibia. It is recommended that it should be repealed.

²³³ See Government Pensions Administration Authority, “Strategic Plan 2020/2021-2024/2025”, available at <<https://static.pmg.org.za/GPAA - Strategic Plan Strategic Plan 2020-2025.pdf>>; *Eastman v Temporary Employees Pension Fund and Another*, “Determination in terms of Section 30M of the Pension Funds Act of 1956, Tribunal of the Pension Funds Adjudicator. Case No: PFA/WE/177/99/NJ, available at <www.pfa.org.za/Determinations/PRE%202003/662B3E91-2B86-4CE3-9F43-E85161F3DE17.pdf>.

²³⁴ South African Law Reform Commission, *Report on Legislation Administered by National Treasury*, Project 25 Statutory Law Revision, October 2011, page 161, available at <www.justice.gov.za/salrc/dpapers/dp114.pdf>.

(31) Travelling Privileges Ordinance, 1980 (Ordinance No. 14 of 1980)

Summary:

This South West African Ordinance²³⁵ authorises the Executive Committee to determine travelling privileges for employees and teachers.

Section 1 defines “employee” as “an employee referred to in section 1 of the Administration Employees Ordinance, 1957 (Ordinance No. 17 of 1957), and “teacher” as “a teacher referred to in section 1 of the Education Ordinance, 1975 (Ordinance No. 21 of 1975).

Section 1(1) of the Administration Employees Ordinance, 1957 (which is no longer in force) states:

The Administrator may appoint such employees as he deems necessary for the efficient administration of museums, game reserves, schools, school hostels, hospitals, roads, and building works in the Territory. For the purposes of this Ordinance “employee” means a person in the service of the Administration who is not a member of the Public Service as defined in section one of the Public Service Act, 1923 (Act 27 of 1923), or a teacher as defined in Section one of the Education Proclamation 1926 (Proclamation 16 of 1926).

This category of employees also covered persons employed for nursing service or midwifery service outside a hospital.²³⁶

Section 2 of the Ordinance provides that the Executive Committee shall from time to time determine the travelling privileges to be granted to employees and teachers of the Administration of South West Africa.

Amendments:

None.

Current status:

This law appears to have been superseded by the provisions of the Public Service Act, 1995 (Act No. 13 of 1995) which now apply to all State employees. This view was confirmed by the Ministry of Industrialisation, Trade and SME Development.

Recommendation:

This law has no current relevance and should be repealed.

²³⁵ <www.lac.org.na/laws/1980/og4164.pdf>.

²³⁶ See Public Health Proclamation Amendment Ordinance, 1958 (Ord. 35 of 1958), section 2.

(32) War Damage Insurance and Compensation Act, 1976 (Act No. 85 of 1976)

Summary:

This South African Act²³⁷ establishes a War Damage Fund for state insurance schemes against the risk of war damage, and for compensation for war damage on conditions determined by the Minister of Finance.

“War damage” includes damage to specified property arising from “any hostile action directed against the security of the Republic”, and from attempts by the security forces of the Republic or any of its allies to suppress such hostile action, but only if the Minister of Finance declares these defensive actions to have caused war damage.

Applicability to South West Africa: Section 12 states “This Act and any amendment thereof shall apply also in the territory of South West Africa.” Although amendments in South Africa would have thus been automatically applicable to South West Africa, there were no amendments to the Act in South Africa prior to Namibian independence.

Transfer of administration to South West Africa: The administration of the Act does not appear to have been transferred to South West Africa. In any event, since there were no amendments to the Act in South Africa prior to Namibian independence, the issue of transfer does not affect the content of the Act.

Amendments:

This Act has not been amended as it applies in Namibia.

Current status:

This Act appears to remain in force in South Africa, and many South African insurance companies make reference to funds established under this law in current documents.²³⁸

In 2011, in South Africa, the South African Law Reform Commission recommended amendment, but not repeal, of this law.²³⁹

²³⁷ Government Gazette of the Republic of South Africa 5175.

²³⁸ See, for example, the following examples which appeared in response to an Internet search for references to the law: Old Mutual, “iWyse General Terms and Conditions”, 2015, available at <www.oldmutual.co.za/docs/default-source/personal-solutions/iwyze/iwyze-benefits/downloads/generaltermsandconditions.pdf?sfvrsn=2>; SASRIA Soc Ltd, “Standing Charges And Working Expenses Wording”, 2020, available at <www.sasria.co.za/wp-content/uploads/2020/02/Annexure-9-Standing-Charges-Working-Expenses.pdf>; Standard Bank, “AIG Personal Protection for Mastercard Titanium Credit Card Holders”, 2020, available at <www.standardbank.co.za/static_file/South%20Africa/PDF/Terms%20and%20Conditions/MC_South_Africa_Titanium_Cards_Terms_and_Conditions_2020.pdf>. Many other examples could be listed.

²³⁹ South African Law Reform Commission, Report on Legislation Administered by National Treasury, Project 25 Statutory Law Revision, October 2011, pages 144-145, 255, available at <www.justice.gov.za/salrc/dpapers/dp114.pdf>.

In Namibia, NAMFISA reports that it is unaware of this law. We also contacted several private sector companies which deal with insurance; only Alexander Forbes responded, stating that it is also unaware of this law.

Recommendation:

Given that NAMFISA as the insurance sector regulator as well as the private company Alexander Forbes both have no knowledge of this law, it is unlikely that it is playing any active role in Namibia. It is recommended that it should be repealed.

(33) Water Research Act, 1971 (Act No. 34 of 1971)

Summary:

This South West African Act provide for the promotion of research in connection with water affairs; for that purpose, to establish a Water Research Commission and a Water Research Fund; and to provide for matters incidental thereto.

Amendments:

There are three amendments to this law, namely:

- Water Research Amendment Act, 1974 (Act No. 16 of 1974)²⁴⁰
- Water Research Amendment Act, 1975 (Act No. 37 of 1975)²⁴¹
- Water Research Amendment Act, 1977 (Act No. 106 of 1977).²⁴²

Current status:

This law appears to be superseded by the Research, Science and Technology Act, 2004 (Act No. 23 of 2004), which provides for the promotion, co-ordination and development of research, science and technology in Namibia and establishes the National Commission on Research, Science and Technology and the National Research, Science and Technology Fund. This Act does not deal specifically with water affairs, but covers every sector of the economy where research and funding for research are needed - including water research and funding for water-related research.

An individual opinion submitted by an official at the Ministry of Agriculture, Water and Land Reform recommended that the Water Research Act be repealed, stating that the *Research, Science and Technology Act, 2004* covers all the requirements for water research.

Recommendation:

The Water Research Act appears to have been superseded by the more comprehensive Research, Science and Technology Act, 2004 (Act No 23 of 2004) and so should be repealed.

²⁴⁰ <www.gov.za/sites/default/files/gcis_document/201504/act-16-1974.pdf>.

²⁴¹ <www.gov.za/sites/default/files/gcis_document/201505/act-37-1975.pdf>.

²⁴² A consolidated version of the Act is available at
<www.lac.org.na/laws/annoSTAT/Water%20Research%20Act%2034%20of%201971.pdf>.

SUMMARY TABLE OF LAWS

LAW	RECOMMENDATION: REPEAL	RECOMMENDATION: RETAIN
1. Acquisition of Shares in Rössing Uranium Limited Proclamation 1985 (AG No. 31 of 1985)	Repeal	
2. Amendment of Execution (Mortgaged Properties) Proclamation, 1933 (Proclamation No. 6 of 1933)	Repeal	
3. Atmospheric Pollution Prevention Ordinance, 1976 (Ordinance No. 11 of 1976)	Repeal	
4. Census of Dwellings Proclamation, 1945 (Proclamation No. 24 of 1945)	Repeal	
5. Commonwealth Relations (Temporary Provision), 1961 (Act No. 41 of 1961)	Repeal	
6. Criminal Law Amendment Act, 1953 (Act No. 8 of 1953)	Repeal	
7. Crown Land Disposal Proclamation, 1920 (Proclamation No. 13 of 1920)	Repeal	
8. Crown Lands (Trespass) Proclamation, 1919 (Proclamation No. 7 of 1919)	Repeal	
9. Cultural Promotion Ordinance, 1980 (Ordinance No. 9 of 1980)	Repeal	
10. Ex-Volunteers Assistance Proclamation, 1945 (Proclamation No. 2 of 1945)	Repeal	
11. Finance and Audit Ordinance, 1926 (Ordinance No. 1 of 1926), section 24D		Retain
12. Finance and Financial Adjustments Acts Consolidation, 1977 (Act No. 11 of 1977)	Repeal	
13. Indecent or Obscene Photographic Matter Act, 1967 (Act No. 37 of 1967)	Repeal	
14. Indemnity Proclamation, 1923 (Proclamation No. 8 of 1923)	Repeal	
15. Importation of Cement Ordinance, 1963 (Ordinance No. 24 of 1963)	Repeal	
16. Karakul Pelt Export Duty Amendment Proclamation, 1939 (Proclamation No. 34 of 1939)	Repeal	
17. Land Titles Proclamation, 1921 (Proclamation No. 2 of 1921)	Repeal	
18. Marketing Act, 1968 (Act No. 59 of 1968)		Retain
19. National Supplies Procurement Act, 1970 (Act No. 89 of 1970)	Repeal	
20. Natives Minimum Wage Proclamation, 1944 (Proclamation No. 1 of 1944)	Repeal	
21. Promotion of the Density of Population in Designated Areas, 1979 (Act No. 18 of 1979)	Repeal	

22. Promotion of the Economic Development of National States Act, 1968 (Act No. 46 of 1968)	Repeal	
23. Protection of Fundamental Rights Act, 1988 (Act No. 16 of 1988)	Repeal	
24. Railways and Harbours Pensions Amendment Act (Act No. 26 of 1941)	Repeal	
25. Railways and Harbours Special Pensions Act, 1955 (Act No. 36 of 1955)	Repeal	
26. Shop Hours Ordinance, 1939 (Ordinance No. 15 of 1939)		Retain
27. Small Settlements Commonages Subdivision Proclamation, 1926 (Proclamation No. 13 of 1926)	Repeal	
28. State Repudiation (Cultura 2000) Act, 1991 (Act No. 32 of 1991)	Repeal	
29. Sunday Trading Proclamation, 1919 (Proclamation No. 12 of 1919)		Retain
30. Temporary Employees Pension Fund Act, 1979 (Act No. 75 of 1979)	Repeal	
31. Travelling Privileges Ordinance, 1980 (Ordinance No. 14 of 1980)	Repeal	
32. War Damage Insurance and Compensation Act, 1976 (Act No. 85 of 1976)	Repeal	
33. Water Research Act, 1971 (Act No. 34 of 1971)	Repeal	