

# NAMLEX

## BACKGROUND INFORMATION

### TRANSFER PROCLAMATIONS

During the years 1977 to 1980, the administration of some South African statutes was transferred from South African government departments to the Administrator-General of South West Africa. Although a few of these transfers were made by Proclamations of the State President of South Africa, most were effected by "Transfer Proclamations" promulgated by the Administrator-General. Most of these Transfer Proclamations applied to all South African statutes administered by a specific South African government department. Exceptions to the general transfer of powers from the department in question were listed in the Transfer Proclamation. All of the Transfer Proclamations are listed for convenience in the index, in a category entitled "Transfer Proclamations".

#### The procedure for effecting transfers

Most of the individual Transfer Proclamations refer to the "General Proclamation", which is the Executive Powers Transfer (General Provisions) Proclamation, 1977 (AG 7/1977, as amended). This General Proclamation sets forth the mechanics of the transfer of powers.

Section 3(1) of the General Proclamation was the core of the administrative transfer. It stated that any reference to the "Minister", the "Minister of Finance", the "State President", "Parliament" or the "Government of the Republic" should be construed as a reference to the Administrator-General, while a reference to the "State" should be construed as *including* a reference to the Administrator-General. A reference to the "Republic" was to be construed as a reference to the territory of South West Africa, and a reference to the "*Government Gazette*" of the Republic was to be construed as a reference to the "*Official Gazette*" of the territory of South West Africa.

If a statute was completely exempted from the operation of section 3(1) of the General Proclamation, then the administration of the statute was not transferred to South West Africa.

Transfer proclamations which did not cross-reference the General Proclamation contained provisions which followed a similar pattern.

#### The effect of transfer proclamations on amendments and repeals

If the administration of a statute was transferred to South West Africa by the General Proclamation, section 3(5) of the General Proclamation (as inserted by AG 10/1978 and amended by AG 20/1982) had the effect of "freezing" the statute as it stood at the date of transfer.

Section 3(5) as amended states:

No Act of the Parliament of the Republic --

- (a) which repeals or amends any law -
  - (i) passed by Parliament and which applies in the Republic as well as in the territory; and
  - (ii) of which any or all the provisions are administered by or

under the authority of the Administrator-General or the Council of Ministers in terms of a transfer proclamation or any other law; and

(b) which is passed after the commencement of such transfer proclamation or other law

shall, notwithstanding any provision of a law referred to in paragraph (a) or any other law passed after the commencement referred to in paragraph (b) that the law referred to in paragraph (a) or any amendment thereof applies in the territory, apply in the territory, unless it is expressly declared therein or in any other law that it shall apply in the territory.

The effect was that blanket provisions predating the transfer – such as the frequently-used formula “This Act, and any amendment thereof, shall also apply in the territory of South West Africa” – no longer operated to make South African amendments to the Act automatically applicable to South West Africa. Amendments to the statute in South Africa subsequent to the date of the relevant transfer proclamation were applicable to South West Africa *only* if the amending act, or some other law passed subsequent to the date of transfer, *expressly* made the amendments applicable to South West Africa.

The same rule applied to repeals. If a statute which had been transferred to South West Africa was repealed in South Africa, the repeal was not applicable to South West Africa unless the repealing act *expressly* stated that it also applied to South West Africa.

### **The effect of transfer proclamations on rules and regulations**

The same principle applied to rules and regulations issued under a statute which had been transferred to South West Africa.

Section 3(4) of the General Proclamation states:

Any proclamation, regulation or rule which is issued or made after the commencement of any transfer proclamation by, or on the authority or with the approval of, the State President or the Minister under a law which at such commencement applies both in the territory and in the Republic, and which is published in the *Government Gazette* of the Republic, shall, notwithstanding the provisions of subsection (1), apply in the territory if such proclamation, regulation or rule or the notice by which it is so published, contains a statement that it was or is issued or made with the consent of the Administrator-General, and applies also in the territory: Provided that for the purposes of the application of such proclamation, regulation or rule in the territory, the provisions of subsection (1) [*the section which interpreted terminology in the relevant laws so as to effect the transfer*] shall apply.

The effect was that rules and regulations issued under South African laws applicable to South West Africa after the date of transfer did not apply to South West Africa unless this was explicitly stated. If subsequent rules and regulations were made applicable to South West Africa through this procedure, then their administration was transferred to South West Africa in the same way as that of the enabling act.

### **Additional information**

The transfer proclamations have never been repealed. However, they are currently relevant only where statutes which originated in South Africa are still applicable in independent Namibia, for the purpose of determining which amendments applied to South West Africa and thus remain in force in independent Namibia. Transfers of individual statutes are discussed in more detail under the NAMLEX entry for each such statute.

# GENERAL ISSUES

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## Authoritative text of laws

Article 65 of the Namibian Constitution provides that the two “*fair copies*” of a law provided to the Registrar of the Supreme Court by the Secretary of the National Assembly will constitute “*conclusive evidence*” of the contents of the Act in question.

### **Namibian Constitution, Article 65 – Signature and Enrolment of Acts**

(1) When any bill has become an Act of Parliament as a result of its having been passed by Parliament, signed by the President and published in the Gazette, the Secretary of the National Assembly shall promptly cause two (2) fair copies of such Act in the English language to be enrolled in the office of the Registrar of the Supreme Court and such copies shall be conclusive evidence of the provisions of the Act.

(2) The public shall have the right of access to such copies subject to such regulations as may be prescribed by Parliament to protect the durability of the said copies and the convenience of the Registrar’s staff.

The Assistant Registrar of the Supreme Court keeps two forms of “fair copies” at the Supreme Court Library: print versions of the *Government Gazettes* as well as the texts of the laws actually signed by the President and the Speaker. The librarian of the Supreme Court Library reports that both versions are obtained from the Speaker of the National Assembly, and that both are considered to be “fair copies”. Both the *Government Gazettes* and the signed statutes are accessible to the public as prescribed by the Constitution.

As of November 2013, the Supreme Court Library appeared to be in possession of all *Government Gazettes* published to date, but the signed statutes dated back only to 2004. The librarian of the Supreme Court was unsure where the signed statutes prior to 2004 are stored, but suggested that they could possibly be with the Chief Justice or in the National Archives.

## Fines in South African statutes expressed in pounds

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 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.)

This explains why the High Court in the case of *S v George* (CR 25/2010) [2010] NAHC 149 (12 October 2010) at para 8 noted that the legal conversion of a fine of 200 pounds in section 18(5) of the Children’s Act 33 of 1960 produced a value of N\$400.

# **BRIEF LEGAL HISTORY OF NAMIBIA**

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Prior to the colonial presence in Namibia, the laws in force were the customary laws of the various communities.

Germany first annexed portions of Namibia as a colony in 1884. The boundaries of the territory, which became known as German South West Africa, were set forth in agreements concluded in 1886 with Portugal and in 1890 with Great Britain. The territory was administered by German colonial officials, who initially issued only a small number of regulations. A Governor's Council representing the colonial settlers was established in 1908. This body was supplemented by a *Landesrat* comprising both elected and appointed members of the colonial community in terms of the **Verordnung of 28 January 1909**. This Territorial Council was primarily an advisory body with the power to change or modify the Governor's decisions.

German laws and administration were applied mainly in the central and southern parts of the country known as the "Police Zone". The northern areas of Namibia – including the Kaokoveld, Ovambo, Okavango and Caprivi areas – were not directly affected by German settlement.

German rule in Namibia effectively ended with the surrender of the German armed forces on 9 July 1915. Martial law was declared during the period of military occupation by South African forces in the **Proclamation of Martial Law, Proc. No. 5 of 1915**, dated 13 August 1915 (Official Gazette of the Protectorate of South West Africa in Military Occupation of the Union Forces No.1, repealed by the SWA Indemnity and Withdrawal of Martial Law Proclamation 76 of 1920, dated 31 December 1920). The legal measures taken during the period of martial law were ratified by **SA Proclamation 1 of 1921** (SA GG 1113). During the period of martial law, German laws remained in force with the exception of those which were specifically repealed. Administration was initially in the hands of a military governor, who was replaced by a South African administrator on 28 October 1915.

"South West Africa" became a Protectorate of South Africa pursuant to Article 22 of the Treaty of Versailles, which was signed on 28 June 1919 (see box below).<sup>1</sup>

## **Treaty of Versailles, Article 22**

"To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

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<sup>1</sup> The Treaty of Versailles can be accessed on the US Library of Congress website: [www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf](http://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf). The League of Nations was established by the first 26 clauses of the Treaty of Versailles, Thus, Article 22 of the Treaty of Versailles was repeated as Article 22 of the Covenant of the League of Nations. 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 46-ff.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.”

In Article 119 of the Treaty of Versailles, Germany renounced all rights and powers in its overseas colonies “in favour of the Principal Allied and Associated Powers”.<sup>2</sup> As a result, the mandatory powers for these colonies were selected by the Supreme Council of the Allied Powers. The Supreme Council allocated the mandate for South-West Africa to “His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa”.<sup>3</sup> The Mandate was confirmed by the Council of the League of Nations established by the Treaty of Versailles on 17 December 1920, in a document which also defined the terms of the Mandate (see box below).<sup>4</sup>

#### **Mandate for German South West Africa**

“The Council of the League of Nations:

*Whereas* by Article 119 of the Treaty of Peace with Germany signed at Versailles on June 28th, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions, including therein German South-West Africa; and

*Whereas* the Principal Allied and Associated Powers agreed that, in accordance with Article 22, Part 1 (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory aforementioned, and have proposed that the Mandate should be formulated in the following terms; and

*Whereas* His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

*Whereas*, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations;

Confirming the said Mandate, defines its terms as follows:

##### *Article 1*

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

<sup>2</sup> *Treaty of Versailles*, Article 119: “Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions.”

<sup>3</sup> See Dugard at 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.

<sup>4</sup> Mandate for German South West Africa, dated 17 December 1920. This document is reprinted in numerous secondary sources. The primary document could not be located online. See, for example, Dugard at 72-ff.

*Article 2*

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa, and may apply the laws of the Union of South to the territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

*Article 3*

The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on September 10<sup>th</sup>, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

*Article 4*

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

*Article 5*

Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

*Article 6*

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5.

*Article 7*

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate. The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

The present Declaration shall be deposited in the archives of the League of Nations. Certified true copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany.

Made at Geneva on the 17<sup>th</sup> day of December, 1920.”

Article 2 of the **Mandate for German South West Africa** is particularly relevant to this discussion. It states in pertinent part:

The Mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such modifications as circumstances may require.<sup>5</sup>

The **Treaty of Peace and South West Africa Mandate Act 49 of 1919** (SA GG 1000) gave effect to the Mandate. In general, this Act delegated administration of the territory of South West Africa to the Governor-General of South Africa, who was given both legislative and executive powers. The

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<sup>5</sup> Mandate for South West Africa, as confirmed by the Council of the League of Nations, 17 December 1920, reproduced in 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 72-74 (hereinafter “Dugard”).

Governor-General subsequently delegated administrative powers over the Territory to the Administrator of South West Africa, in *SA Proclamation 1 of 1921* (SA GG 1113). The Administrator was advised by an Advisory Council established in terms of SWA Advisory Council Proclamation 1 of 1921 (OG 50), which was amended by SWA Advisory Council Amendment Proclamation 51 of 1921 (OG 75).

The **Administration of Justice Proclamation 21 of 1919** ([OG 25](#)) introduced Roman-Dutch law to South West Africa.

In 1921 a Commission on South West Africa established by the South African government recommended that the Territory be administered as a “fifth province” of South Africa. However, for both political and economic reasons, the South African government did not act fully upon these recommendations. The *South West Africa Constitution Act 42 of 1925* (SA GG 1496) provided for the appointment of an Administrator and the election of an all-white Legislative Assembly and Executive Committee. The Legislative Assembly had the power to make laws and ordinances, except on certain matters which were “reserved” and remained under the legislative power of the South African government. These reserved matters included defence; railways and harbours; posts and telegraphs; matters pertaining to the courts; immigration; customs and excise; banking and currency; and “native affairs”. The Administrator had whatever administrative powers were delegated to him by the Governor-General in respect of these reserved matters.

In 1945-46, the League of Nations was replaced by the United Nations.<sup>6</sup> The Assembly of the League of Nations passed a resolution at its last meeting which anticipated the continuation of the mandates under the new dispensation. This resolution noted that, even though the League’s functions with respect to mandated territories would come to an end upon its dissolution, Chapters XI, XII and XIII of the Charter of the United Nations embodied principles corresponding to those set forth in Article 22 of the Covenant of the League of Nations. It also took note of “the expressed intentions of the members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates until other arrangements have been agreed upon between the United Nations and the respective Mandatory powers”.<sup>7</sup>

At this stage, South Africa began working to advance its desire to incorporate South West Africa into the Union of South Africa,<sup>8</sup> with a key political development being the National Party coming to power in South Africa on a platform of apartheid in 1948, followed by South Africa’s announcement that it would no longer submit reports to the United Nations on its administration of South West Africa.<sup>9</sup>

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<sup>6</sup> The Charter of the United Nations came into force on 24 October 1945. The League of Nations was voluntarily dissolved in 1946. See Dugard at 96-ff.

<sup>7</sup> Resolution of the League of Nations, April 1946, as quoted in Dugard at 96-97.

<sup>8</sup> In 1946, South Africa “consulted” the population of South West Africa on the question of incorporation. The white population expressed their wishes through their elected representatives in the Legislative Assembly while “consultation” with the rest of the population was conducted with “the different tribes as units” by means of meeting between tribal leaders and the government’s Native Commissioners. The South African government then approached the UN General Assembly to request permission for incorporation of the territory into South Africa, on the basis that the “low economic potential of the Territory and the backwardness of the vast majority of the population” made the goal of self-government unattainable. Official communication from South Africa as quoted in Dugard at 104-109. The UN General Assembly refused South Africa’s request and recommended that South West Africa be placed under Trusteeship pursuant to an agreement between South Africa and the UN. UN Resolution 65(1) of 14 December 1946, as reproduced in Dugard at 111. No new agreement was forthcoming, but South Africa continued to administer the Territory “in the spirit of the existing Mandate”. See the letter from the Legation of the Union of South Africa quoted in Dugard at 112-114.

<sup>9</sup> See communication reproduced in Dugard at 119-120. This issue remained unresolved despite an advisory opinion of the International Court of Justice dated 17 July 1950 which confirmed the continuing supervisory

Consequently, the *South West Africa Constitution Act 42 of 1925* was substantially amended by the *South West Africa Affairs Amendment Act 23 of 1949* (SA GG 4150). This Act gave South West Africa direct representation in the South African Parliament. The South West African Legislative Assembly (which was now constituted somewhat differently) continued to have legislative power over anything which was not a reserved matter. The South African Parliament was competent to legislate on matters reserved from the South West African Legislative Assembly, but the Governor-General no longer had law-making powers for the territory. The Administrator of South West Africa remained empowered to administer reserved matters, subject to the direction and control of the Governor-General of South Africa.

The *South West Africa Affairs Amendment Act 55 of 1951* (SA GG 4663) returned legislative power to the Governor-General, empowering him to make laws in respect of reserved matters by Proclamation in the *Government Gazette*, subject to the approval of the South African Parliament.

In a continued impetus towards centralisation, the *South West Africa Constitution Act 42 of 1925* was further amended by the *South West Africa Native Affairs Administration Act 56 of 1954* (SA GG 5302), which transferred administration of “native affairs” to the South African Minister of Native Affairs (later called the Minister of Bantu Administration and Development), who was competent to transfer certain powers to the Administrator of South West Africa in his capacity as a member of the Native Affairs Commission. To further complicate matters, at this stage the responsibility for matters affecting “Basters” and “Coloureds” remained with the Administration of South West Africa. Later the South African Department of Coloured, Rehoboth and Nama Relations took over the administration of affairs relating to these groups.

On 27 October 1966, The UN General Assembly passed a resolution which formally revoked the mandate over South West Africa (reproduced in the box below).<sup>10</sup>

#### 2145. Question of South West Africa

*The General Assembly,*

*Reaffirming* the inalienable right of the people of South West Africa to freedom and independence in accordance with the Charter of the United Nations, General Assembly resolution 1514 (XV) of 14 December 1960 and earlier Assembly resolutions concerning the Mandated Territory of South West Africa,

*Recalling* the advisory opinion of the International Court of Justice of 11 July 1950,[1] accepted by the General Assembly in its resolution 449 A (V) of 13 December 1950, and the advisory opinions of 7 June 1955 and 1 June 1956 as well as the judgement of 21 December 1962, which have established the fact that South Africa continues to have obligations under the Mandate which was entrusted to it on 17 December 1920 and that the United Nations as the successor to the League of Nations has supervisory powers in respect of South West Africa,

*Gravely concerned* at the situation in the Mandated Territory, which has seriously deteriorated following the judgement of the International Court of Justice of 18 July 1966,

*Having studied* the reports of the various committees which had been established to exercise the supervisory functions of the United Nations over the administration of the Mandated Territory of South West Africa,

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function of the United Nations. See, eg, I Goldblatt, *History of South West Africa from the Beginning of the Nineteenth Century*, Cape Town: Juta & Co, 1971, at 250-255.

<sup>10</sup> UN General Assembly Resolution 2145 (XXI), dated 27 October 1966, available online at [www.refworld.org/docid/3b00f1da18.html](http://www.refworld.org/docid/3b00f1da18.html) or at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/004/48/IMG/NR000448.pdf?OpenElement>.

This development is discussed in detail in John Dugard, *The Revocation of the Mandate for South West Africa*, 62 (1) *American Journal of International Law* 78 (January 1968), available on a subscription basis at [www.jstor.org/stable/2197522](http://www.jstor.org/stable/2197522) and in André du Pisani, *SWA/Namibia: The Politics of Continuity and Change*, Johannesburg: Jonathan Ball Publishers, 1986 at 179-ff.

*Convinced* that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights,

*Reaffirming* its resolution 2074 (XX) of 17 December 1965, in particular paragraph 4 thereof which condemned the policies of apartheid and racial discrimination practised by the Government of South Africa in South West Africa as constituting a crime against humanity,

*Emphasizing* that the problem of South West Africa is an issue falling within the terms of General Assembly resolution 1514 (XV),

*Considering* that all the efforts of the United Nations to induce the Government of South Africa to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the well-being and security of the indigenous inhabitants have been of no avail,

*Mindful* of the obligations of the United Nations towards the people of South West Africa,

*Noting with deep concern* the explosive situation which exists in the southern region of Africa,

*Affirming* its right to take appropriate action in the matter, including the right to revert to itself the administration of the Mandated Territory,

1. *Reaffirms* that the provisions of General Assembly resolution 1514 (XV) are fully applicable to the people of the Mandated Territory of South West Africa and that, therefore, the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations;

2. *Reaffirms further* that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence;

3. *Declares* that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate;

4. *Decides* that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations;

5. *Resolves* that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa;

6. *Establishes* an *Ad Hoc* Committee for South West Africa-composed of fourteen Member States to be designated by the President of the General Assembly to recommend practical means by which South West Africa should be administered, so as to enable the people of the Territory to exercise the right of self-determination and to achieve independence, and to report to the General Assembly at a special session as soon as possible and in any event not later than April 1967;

7. *Calls upon* the Government of South Africa forthwith to refrain and desist from any action, constitutional, administrative, political or otherwise, which will in any manner whatsoever alter or tend to alter the present international status of South West Africa;

8. *Calls the attention* of the Security Council to the present resolution;

9. *Requests* all States to extend their whole-hearted co-operation and to render assistance in the implementation of the present resolution;

10. *Requests* the Secretary-General to provide all the assistance necessary to implement the present resolution and to enable the *Ad Hoc* Committee for South West Africa to perform its duties.

*145<sup>th</sup> plenary meeting,  
27 October 1966*

In 1967, the United Nations Council for South West Africa was created, with the duty to administer the Territory until its independence. The UN General Assembly resolution which created the council gave it power to “promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections

conducted on the basis of universal adult suffrage”.<sup>11</sup> However, South Africa prevented this body from exercising any powers inside the Territory.<sup>12</sup>

In 1968, the UN General Assembly proclaimed that “in accordance with the desires of its people, South West Africa shall be known as ‘Namibia’”, and accordingly renamed the United Nations Council for South West Africa as the United Nations Council for Namibia.<sup>13</sup>

Despite these international developments, South Africa continued to exercise law-making authority over South West Africa, with a view to implementing apartheid policies in the territory and to integrating administration of the Territory more closely with South Africa to make it virtually another province of South Africa.<sup>14</sup>

The *South West Africa Constitution Act 42 of 1925* was replaced by the *South West Africa Constitution Act 39 of 1968* (RSA GG 2036), which gave the South African government power to make laws in respect of an expanded list of reserved matters, including “Bantu affairs”; civil aviation; railways and harbours; employment in the public service; courts; postal and telephone services; police and the military; immigration control; customs and excise; and banking and currency. The SWA Administrator continued to have administrative power in respect of most of these matters, subject to the direction and control of the State President of South Africa, who had full powers to administer the territory “as an integral portion of the Republic”.

This legal regime was soon followed by the *Development of Self-Government for Native Nations in South West Africa Act 54 of 1968* ([RSA GG 2100](#)), which was designed to assist “native nations in the territory of South West Africa” to “develop in an orderly manner to self-governing nations and independence”. The “native nations” were identified as Damaraland, Hereroland, Kaokoland, Okavangoland, Eastern Caprivi, Ovamboland and any other land subsequently set aside for the use of native nations by the State President of South Africa. The Legislative Councils in the different “native nations” were to have legislative power over certain listed topics – including education; welfare; clinics; business, trade and industry; roads, sanitation and water supply; the administration of justice; and labour bureaux” – while Executive Councils in each “native nation” would have administrative power over these matters.

Soon afterwards, the *South West Africa Affairs Act 25 of 1969* ([RSA GG 2331](#)) gave South Africa even tighter legal and administrative control over South West Africa. Many items were added to the existing list of reserved matters, including arms and ammunition; explosives; “riotous assemblies”; prisons; immorality; publications control; water affairs; mining and minerals; forestry; agriculture; fishing; income tax; deeds; trademarks; the registration of companies; labour matters; marriage; the registration of births, deaths and marriages; various welfare issues; and matters relating to “Coloureds, Namas and Basters”. The South West African authorities could not enact legislation on any reserved matters without the permission of the State President of South Africa.

The United Nations Security Council repeatedly condemned South Africa’s illegal occupation and control of Namibia and pointed out that it viewed South Africa’s legal actions in and on behalf of Namibia to be illegal.<sup>15</sup> In particular, UN Security Council Resolution 276 (1970) declared the

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<sup>11</sup> UN General Assembly Resolution 2248 (S-V), dated 19 May 1967, reproduced in Dugard at 410-412 (quoted passage from paragraph 1(b)). This resolution set a target date of June 1968 for independence.

<sup>12</sup> See Dugard at 114. The UN Council for South West Africa tried to enter the Territory to take over its administration in April 1968 but was refused landing rights by South Africa. Dugard at 436; du Pisani at 189-90.

<sup>13</sup> UN General Assembly Resolution 2372 (XXII), 12 June 1968, available online at [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/2372\(XXII\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2372(XXII)).

<sup>14</sup> Dugard at 431-435; du Pisani at 184-189.

<sup>15</sup> See for example, UN Security Council Resolution 264 (1969) (reproduced in Dugard at 439-440; available online at [www.worldlii.org/int/other/UNSC/1969/3.pdf](http://www.worldlii.org/int/other/UNSC/1969/3.pdf)) and UN Security Council Resolution 269 (1969) (reproduced in Dugard at 440-441; available online at [www.worldlii.org/int/other/UNSC/1969/3.pdf](http://www.worldlii.org/int/other/UNSC/1969/3.pdf)).

continued presence of South Africa in Namibia to be illegal, and declared consequently that “all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid”.<sup>16</sup>

On 21 June 1971, the International Court of Justice issued an advisory opinion holding that the Mandate for South West Africa had been lawfully terminated, and that “the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately”.<sup>17</sup>

In the wake of this opinion and subsequent political developments, there was a movement in legal enactments towards the eventual independence of Namibia. Reflecting this change in orientation, the *South West Africa Constitution Amendment Act 95 of 1977* (RSA GG 5625) empowered the State President of South Africa to make laws for the territory of South West Africa “with a view to the eventual attainment of independence”.

**RSA Proclamation R.249 of 1977** (RSA GG 5756) abolished the SWA seats in the South African Parliament. The office of Administrator-General for SWA/Namibia was established by *RSA Proclamation 180 of 1977* (RSA GG 5719), and *RSA Proclamation 181 of 1977* (RSA GG 5719) empowered the Administrator-General to make laws for SWA/Namibia by Proclamation in the *Official Gazette*, as well as to repeal or amend laws passed by the South African Parliament insofar as they related to SWA/Namibia. At this stage, the administration of a number of laws was transferred from South Africa to South West Africa in terms of a series of transfer proclamations promulgated between 1977 and 1980.

In the meantime, external pressure on South Africa to allow the people of SWA/Namibia to determine their own future led to the Turnhalle Constitutional Conference in 1975. This initiative, which was organised along ethnic lines, was boycotted by SWAPO and some other political parties on the grounds that the process was irretrievably tainted by the prevailing climate of political repression.

The Turnhalle forum made recommendations for an “interim government”. Ignoring international opposition, in 1978 South Africa proceeded unilaterally with “internal” elections for a Constituent Assembly to draw up a constitution for an independent Namibia, pursuant to the **Constituent Assembly and Election Proclamation, AG 63 of 1978** (OG 3826). SWAPO and other parties boycotted these elections, which were marred by intimidation and propaganda and strongly criticised at an international level. In 1979, the **National Assembly Proclamation, AG 21 of 1979** (OG 3957) transformed this Constituent Assembly into a National Assembly with law-making powers. In addition, a Council of Ministers established in terms of the **Council of Ministers Proclamation, AG 19 of 1980** (OG 4174) was empowered to issue administrative directives to the Administrator.

In 1980, the **Representative Authorities Proclamation, AG 8 of 1980** (OG 4127) made provision for second-tier governmental authorities based on an ethnic division of the country into eleven “population groups”. The various second-tier authorities established pursuant to AG 8/1980 then assumed control over a number of issues, including communal land rights, education, health services and social welfare.

National legislative and executive authority reverted to the Administrator-General in 1983 after the

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UN Security Council Resolution 276 (1970) (reproduced in Dugard at 442-443; available online at [www.refworld.org/docid/3b00f2112b.html](http://www.refworld.org/docid/3b00f2112b.html)) declared the continued presence of South Africa in Namibia to be illegal, and declared consequently that “all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid” (paragraph 2).

<sup>16</sup> UN Security Council Resolution 276 (1970) paragraph 2 (reproduced in Dugard at 442-443; available online at [www.refworld.org/docid/3b00f2112b.html](http://www.refworld.org/docid/3b00f2112b.html)).

<sup>17</sup> The full text of the court’s opinion is available online at [www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf](http://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf). See also Dugard at 447-ff.

DTA (which was the “ruling party” in accordance with the results of the “internal elections”) resigned from the National Assembly and the Council of Ministers.

In 1985 there was another attempt at internal negotiations at a Multi-Party Conference which led to the formation of the so-called “Transitional Government of National Unity”. This new transitional arrangement, which was rejected by SWAPO as well as many other groups, was composed of a Legislative and Executive Authority established by **RSA Proclamation R.101 of 1985** ([RSA GG 9790](#)), complemented by a Constitutional Council established by the **Constitutional Council Act 8 of 1985** (OG 5103). This governing system incorporated a “Bill of Fundamental Rights and Objectives” annexed to *RSA Proclamation R.101 of 1985*.

In the meantime, international negotiations had resulted in the passage of **UN Security Council Resolution 435 of 29 September 1976**, which set forth a framework for free and fair elections to be held under international supervision. Faced with increasing criticism at an international level combined with pressure from the armed struggle led by SWAPO from exile as well as growing internal resistance, South Africa finally acceded to the United Nations plan for a transition to independence. Implementation of Resolution 435 began on **1 April 1989**. It left the administration of the electoral process in the hands of the South West African Administrator-General, subject to the “supervision and control” of the United Nations represented by the UN Special Representative and the United National Transitional Assistance Group (UNTAG).

During the implementation period, the Administrator-General took over the functions of the Transitional Government of National Unity, as well as the functions of the second-tier ethnic authorities in terms of the **Repeal of the Laws on the National Assembly, the Cabinet and the Constitutional Council Proclamation, AG 16 of 1989** (OG 5730), and the **Representative Authorities Powers Transfer Proclamation, AG 8 of 1989** (OG 5710).

Resolution 435 called for the “repeal of all remaining discriminatory or restrictive laws, regulations or administrative measures which might abridge or inhibit” the objective of a free and fair election. This objective was addressed by the **First Law Amendment (Abolition of Discriminatory or Restrictive Laws for purposes of Free and Fair Election) Proclamation, AG 14 of 1989** ([OG 5726](#)) and the **Second Law Amendment (Abolition of Discriminatory or Restrictive Laws for purposes of Free and Fair Election) Proclamation, AG 25 of 1989** ([OG 5758](#)).

Elections were held in November 1989, pursuant to the **Registration of Voters (Constituent Assembly) Proclamation, AG 19 of 1989** (OG 5740), the **Registration of Political Organisations (Constituent Assembly) Proclamation, AG 43 of 1989** (OG 5794), and the **Election (Constituent Assembly) Proclamation, AG 49 of 1989** (OG 5820), as amended by AG 59 of 1989 (OG 5846).

The role of the Constituent Assembly was determined primarily by the terms of UN Resolution 435, supplemented by the **Constituent Assembly Proclamation, AG 62 of 1989** (OG 5854). A Constitution was speedily adopted, and Namibia became an independent nation on 21 March 1990 with the **Namibian Constitution (GG 2)** as the Supreme Law. Article 140(1) of the Namibian Constitution provides: “Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.” Article 140 also provides transitional provisions in respect of pre-Independence laws.

Further details about the legal history of Namibia and the relevant political context can be found in 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 and A du Pisani, *SWA/Namibia: The Politics of Continuity and Change*, Johannesburg: Jonathan Ball Publishers, 1986.

## **LEGAL BACKGROUND OF SPECIFIC AREAS**

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South African laws which were made applicable to South West Africa sometimes contained particular references to certain portions of Namibia: the Eastern Caprivi Zipfel, Walvis Bay or the Rehoboth Gebiet. There are also a few specific references to these areas in South West African and Namibian legislation. The reason for this is the peculiar legal history of these three areas, which is briefly outlined here.

### **Caprivi Zipfel**

This area became a part of German South West Africa as a result of an agreement between Great Britain and Germany dated 1 July 1890, with the understanding that it would provide a corridor to the Zambezi River and thus to other areas in Africa which were under German control. It was subsequently named the Caprivi Zipfel (Strip) after the German Chancellor, Count von Caprivi.

The Caprivi Zipfel has had an unusual administrative history in comparison to other parts of Namibia. From 1922 to 1929, it was administered by the British High Commissioner of South Africa as if it were part of the Bechuanaland Protectorate (now Botswana). (See *SA Proclamation 12 of 1922*, *SA Official Gazette of the High Commissioner for South Africa* 1068, and *SA Proclamation 23 of 1922*, *SA Official Gazette of the High Commissioner for South Africa* 1076.) From 1929 until 1939, it was administered by the Administrator of South West Africa. *SA Proclamation 29 of 1929* (*SA Official Gazette of the High Commissioner for South Africa* 1466) repealed SA Proc. 23 of 1922 and provided that the Caprivi Zipfel would no longer be administered as if it were part of the Bechuanaland Protectorate as from 1 September 1929. *SA Proclamation 196 of 1929* (SA GG 1811) repealed SA Proc. 12 of 1922, provided that the Caprivi Zipfel would from 1 September 1929 be administered as part of the Mandated Territory of South West Africa, and authorised the Administrator to repeal or amend any laws in force in the Caprivi and to make new laws applicable to the area.

Then, the *SA Eastern Caprivi Zipfel Administration Proclamation 147 of 1939* (SA GG 2664) provided that, as of 1 August 1939, the Eastern portion of the Caprivi Zipfel would cease to be administered as a part of South West Africa and would fall under the authority of the South African Minister of Native Affairs (later the Minister of Bantu Administration and Development). All laws in force in the Eastern Caprivi Zipfel immediately prior to that date were to remain in force until repealed, altered, amended or modified, and the High Court of SWA would continue to have jurisdiction. This Proclamation defined the Eastern Caprivi Zipfel as “that part of the Mandated Territory of South West Africa which lies to the East of longitude 21° East”.

The *South West Africa Affairs Amendment Act 55 of 1951* (SA GG 4663) gave the Governor-General of South Africa the power to make laws by Proclamation for the Eastern Caprivi, and to repeal or amend any other laws made applicable to the area, *except* for Acts of the South Africa Parliament made applicable to the Eastern Caprivi Zipfel after the date of the Governor-General’s empowerment. The 1951 Act also specified that no future Acts of Parliament and no Ordinances of the Legislative Assembly of South West Africa would be applicable to the Eastern Caprivi Zipfel unless “expressly declared to be so applicable”. (For the rest of the Territory of South West Africa, the Governor-General was empowered at this stage to make laws by Proclamation only in respect of matters for which the Legislative Assembly of South West Africa was not empowered to legislate.)

The *South West Africa Constitution Act 39 of 1968* (RSA GG 2036) made a similar distinction between the power of the State President of South Africa to make laws for the Territory of South West Africa in general, and his power to make laws for the Eastern Caprivi Zipfel. This Act also reiterated the requirement that legislation of the South African Parliament and the Legislative Assembly of South West Africa would be applicable to the Eastern Caprivi Zipfel only if this was expressly stated.

Thus, from 1939, administrative responsibility for the Eastern Caprivi Zipfel rested entirely with South Africa, with no authority over the area being delegated to the South West African administration.

Then, in 1977, when the *South West Africa Constitution Amendment Act 95 of 1977* (RSA GG 5625) transferred general administrative responsibility for the Territory from South Africa to the South West African administration, the Eastern Caprivi Zipfel was included without distinction.

The history of the Eastern Caprivi Zipfel is discussed in *Moraliswani v Mamili* (unreported judgement, Supreme Court of SWA, 1985/06/12).

### **Walvis Bay**

Britain annexed Walvis Bay in 1878, an act which was formalised by the Cape Colonial Parliament's *Walvis Bay and St. John's River Annexation Act 35 of 1884* and the accompanying *Proclamation of Annexation 184 of 1884*.

From 7 August 1884, the port and settlement of Walvis Bay was administered as part of the Colony of the Cape of Good Hope. At this stage, the Cape Governor was authorised to legislate for Walvis Bay by proclamation.

From 31 May 1910 to 1915, Walvis Bay was treated as part of the Province of the Cape of Good Hope of South Africa, and was considered part of the Union of South Africa for legislative and administrative purposes. During the occupation of South West Africa by Union forces in the course of World War II, the **Proclamation of Martial Law 5 of 1915** (OG 1) provided that all proclamations and martial law regulations issued in the Protectorate of German South West Africa would apply to Walvis Bay "on account of its contiguity to the Protectorate".

After the Mandate for South West Africa was established pursuant to the Peace Treaty of Versailles, the *South West Africa Affairs Act 24 of 1922* (SA GG 1252) gave the Governor-General of South Africa the power to set a date after which Walvis Bay would be administered "as if it were part of the mandated territory and as if inhabitants of the said port and settlement were inhabitants of the mandated territory". The Governor-General was also empowered to delegate his legislative powers for Walvis Bay to the Administrator of South West Africa for the purpose of bringing the laws of Walvis Bay into conformity with the rest of the territory. The act further provided that no future act passed by the Parliament of the Union of South Africa would apply to Walvis Bay *unless* this was specifically stated in the law, or the law was declared to be applicable to Walvis Bay by a Proclamation of the Governor-General.

The relevant date was set as 1 October 1922 by *SA Proclamation 145 of 1922* (SA GG 1266). This Proclamation also delegated all of the Governor-General's powers to make laws for Walvis Bay to the Administrator of South West Africa. The Administrator immediately enacted the **Walvis Bay Administration Proclamation 30 of 1922**, which repealed the South African laws in force in Walvis Bay and substituted the relevant South West African legislation. This Proclamation also provided that all future laws enacted by the Administrator for the territory would be automatically applicable to Walvis Bay, unless Walvis Bay was specifically *excluded*. Thus, from this date, Walvis Bay was treated as if it were part of the Territory of South West Africa.

The only legal distinction between Walvis Bay and the Territory of South West Africa was the requirement that laws made applicable to South West Africa by the South African Parliament applied to Walvis Bay only if this was expressly stated. This caused so much confusion that the *South West African Affairs Amendments Act 28 of 1944* (SA GG 3342) removed this special requirement, providing that all laws made applicable to South West Africa by the South African Parliament would automatically apply to Walvis Bay. Nevertheless, specific references to Walvis Bay continued to be included in some of the South African laws which were applied to South West Africa, even though they were no longer necessary.

The legal effect of treating Walvis Bay as a part of South West Africa during this period is discussed in *Rex v Offen* 1935 SA 4 (AD), affirming 1934 SWA 73, and *R v Akkermann* 1954 (1) SA 195 (SWA).

As pressure for an independent Namibia increased, South Africa took steps to tighten its hold on Walvis Bay, which was a strategic location in economic as well as military terms. Walvis Bay legally reverted to being administered as part the Cape Province of South Africa on 1 September 1977 in terms of the ***Walvis Bay Administration Proclamation, RSA Proclamation No. R.202 of 1977*** (SA GG 5731). This Proclamation provided that all laws in force in Walvis Bay prior to this date would remain in force, but that any future laws which became operative in the Cape Province would also apply to Walvis Bay. The State President of South Africa already had broad powers to legislate for South West Africa and Walvis Bay in terms of the *South West Africa Constitution Act 39 of 1968*, and he exercised these powers in a series of proclamations to bring Walvis Bay back in line with South Africa on key matters such as labour law, mining and minerals, race relations, pass laws, the judiciary, parliamentary and provincial representation and various economic issues.

This situation predictably caused a great deal of legal confusion and inspired international protest. The United Nations Security Council passed **Resolution 432 of 27 July 1978** declaring that the territorial integrity of Namibia must be assured through the “reintegration” of Walvis Bay.<sup>18</sup>

Although the **Namibian Constitution** explicitly stated that the national territory of Namibia includes the enclave, harbour and port of Walvis Bay, the resolution of the status of Walvis Bay was postponed as part of the negotiations around the independence process. According to the Supreme Court in *S v Redondo* 1992 NR 133 (SC), the Namibian legislature and courts were bound in terms of the Namibian Constitution to exercise jurisdiction over Walvis Bay from the date of Namibian independence “whatever difficulties there may be in the execution of such duties”. However, this case also held that the transitional provisions of the Constitution were intended to provide legal continuity in Walvis Bay as well as in the rest of Namibia. In other words, the laws in force in Walvis Bay at the date of independence remained in force until amended, repealed or declared unconstitutional, even if these were different from the laws in force in the rest of Namibia.

The full reincorporation of Walvis Bay into independent Namibian was achieved in 1994 in terms of the **Walvis Bay and Off-Shore Islands Act 1 of 1994 (GG 805)**. This Act provided that as from the effective date of reintegration, 1 March 1994, the laws immediately in force in Walvis Bay would cease to be applied, except insofar as specifically continued in terms of the present act, and that otherwise only the law of Namibia would henceforth apply. Specific provisions of the act then dealt with specific transitional matters. This had the effect of harmonising the laws in Walvis Bay with the laws in force in the rest of Namibia, while ensuring that no one was unfairly prejudiced by the change in legal regimes.

The legal history of Walvis Bay is discussed extensively in *S v Redondo* 1992 NR 133 (SC) at 143 and in L Berat, *Walvis Bay: Decolonization & International Law* (New Haven, Connecticut: Yale University Press, 1990).

### **Rehoboth Gebiet**

The Rehoboth Basters established a republic in 1870, prior to the formal colonisation of South West Africa by Germany. A constitution which came to be known as the **Paternal Laws** was adopted as a Constitution for the Baster people in 1872. The Paternal Laws provided for a supreme ruler known as a *Kaptein*, a Council (*Kapteinsraad*) of two citizens to assist the *Kaptein*, and a Parliament (*Volksraad*) consisting of a further two citizens.

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<sup>18</sup> Available at [http://repository.un.org/bitstream/handle/11176/68837/S\\_RES\\_432%281978%29-EN.pdf?sequence=2&isAllowed=y](http://repository.un.org/bitstream/handle/11176/68837/S_RES_432%281978%29-EN.pdf?sequence=2&isAllowed=y) and <http://digitalarchive.wilsoncenter.org/document/118227>.

In 1885, the first *Kaptein* of the Rehoboth Gebiet signed a treaty with the German colonial authorities which guaranteed the political autonomy of the Rehoboth Basters. Despite the existence of this treaty, the German Imperial Government made several laws which were applicable in Rehoboth and involved itself in administration of the area to some degree. Nevertheless, the governing structures set forth in the Paternal Laws continued to operate.

After South Africa acquired the Mandate for South West Africa in terms of the Peace Treaty of Versailles, an agreement was reached in 1923 giving a limited form of self-government to the Rehoboth community. This Agreement described the boundaries of the “Rehoboth Gebiet” (subsequently altered by the Rehoboth Gebiet Affairs Proclamation 9 of 1928, the Rehoboth Gebiet Boundaries Amendment Proclamation 22 of 1941, and the Rehoboth Gebiet Boundaries Amendment Proclamation 36 of 1954); acknowledged the right and title of the Rehoboth community to the land which they then occupied; and gave the *Volksraad* law-making powers for the area, provided that the assent of the Administrator of South West Africa was obtained for all laws enacted. Laws passed for South West Africa as a whole were henceforth to be applicable to the Rehoboth Gebiet only if specifically extended to the area. This agreement was ratified and confirmed in **Proclamation 28 of 1923**.<sup>19</sup>

The 1923 Agreement was rejected by a majority of the Basters, who demanded complete independence. As a result of this dissension, two *Volksraads* were elected and the opposing sections of the community recognised different persons as *Provisional Kapteins*. As a consequence of this dispute, all the powers which had vested in the *Kaptein* and the *Volksraad* under the 1923 Agreement were transferred by the Administrator to the Magistrate of the Rehoboth District in terms of the **Rehoboth Affairs Proclamation 31 of 1924**. This move was disregarded by a section of the community, which proceeded to hold new elections for another *Volksraad* and a *Kaptein*. A direct confrontation ensued, which was suppressed by the police and the defence force without bloodshed.

At this stage, the South African government appointed a Commission of Inquiry to make recommendations on the status of the Rehoboth Gebiet. Reporting in 1928, this Commission advised that the Magistrate of Rehoboth should retain the powers transferred to him in 1924, acting on the advice of an Advisory Council consisting of members of the Rehoboth Baster Community. An Advisory Board was established by the **Rehoboth Gebiet Affairs Proclamation 9 of 1928**.

However, from this point forward there was a gradual transfer of powers back to the Rehoboth Community, who continued to insist on their right to self-government. The basic 1924 assignment of authority to the local Magistrate remained in place until 1961, when the powers and duties set forth in the 1923 Agreement were transferred from the Magistrate and the Advisory Council back to the *Kaptein*, the *Kapteinsraad* and the *Volksraad* in terms of the **Rehoboth Gebiet Affairs Ordinance 20 of 1961** ([OG 2320](#)).

The restoration of powers culminated in the **Rehoboth Self-Government Act 56 of 1976** (RSA GG 5095), which granted self-government to the citizens of the “Rehoboth Gebiet”. This Act made new provision for the election of a *Kaptein* and a Legislative Council, and the appointment of a *Kaptein’s* Council by the *Kaptein*. The *Kaptein’s* Council and the Legislative Council together constituted a Legislative Authority which was empowered to make laws on a wide range of specified matters, but the assent of the State President of South Africa was required for all laws passed by the Legislative Authority. The Act also provided that no laws made applicable to South West Africa after the commencement of the Act (including laws enacted by the South African Parliament as well as laws enacted by the Legislative Assembly of South West Africa) would be applicable to the Rehoboth Gebiet if they related to the specified matters over which the Rehoboth Legislative Authority had been given control.

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<sup>19</sup> Repealed by the Community Courts Act 10 of 2003 ([GG 3044](#)).

However, from time to time, laws applicable to other parts of the territory of South West Africa were made explicitly applicable to the Rehoboth Gebiet.

During the implementation of Resolution 435, all the powers, duties and functions of the Kaptein's Council were transferred to the Administrator-General of South West Africa in terms of the **Government of Rehoboth Powers Transfer Proclamation, AG 32 of 1989** (OG 5783).

The **Namibian Constitution** repealed the *Rehoboth Self-Government Act 56 of 1976* in its entirety, making the Rehoboth Gebiet an integral part of Namibia.

As a legacy of the various manifestations of the “self-government” of Rehoboth, there were several matters in respect of which the laws that applied to the Rehoboth Gebiet after independence were not the same as those that apply to the rest of Namibia. For example, until the **Deed Registries Act 14 of 2015** came into force, the *Registration of Deeds in Rehoboth Act 93 of 1976* maintained a separate registry for deeds in the Rehoboth Gebiet while the registration of deeds for the rest of Namibia falls under the *Deeds Registries Act 47 of 1937*. Another example is the **Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941**, which until 2005 applied to the administration of estates of members of the Rehoboth Baster Community, while the estates of other persons in Namibia were governed by the *Administration of Estates Act 66 of 1965*.

The history of the Rehoboth Gebiet is discussed in *Rehoboth Bastergemeente v Government of the Republic of Namibia & Others* 1996 NR 238 (SC).

# PROMULGATION

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It is a well-established principle of Roman-Dutch law that no statute is of any force or effect unless it has been duly promulgated. Several cases have considered how this principle applied to South West Africa during the period prior to Independence.

Section 12(1) of the **SWA Interpretation of Laws Proclamation 37 of 1920** ([OG 35](#)), read together with the definition of “Gazette” in section 1, states that the meaning of the words “commencement” and “taking effect” in any law is the day when the law was first published as a law in the Gazette of the Territory of South West Africa, unless some other day for coming into operation is fixed by or under the law in question.

Section 44(1) of the *South-West Africa Constitution Act 42 of 1925* (SA GG 1496), which preserved the right of administration and legislation by proclamation that had been reserved to the Governor-General of South Africa under the **Treaty of Peace and South West Africa Mandate Act 49 of 1919** (SA GG 1000), provided:

Any such proclamation by the Governor-General or of the Administrator (ie under delegated authority from the Governor-General) shall, before it has the force of law in the Territory, be published in the Official Gazette thereof.

Case law has considered the issue of publication of various legal enactments in light of this underlying regime.

In *R v Offen* 1935 AD 4, the Court (per Van den Heever J) held that promulgation in South West Africa was *not* required in the case of a Union Act in force in the Union which applies to the “mandated territory” by its own terms. This case found that the Customs Tariff and Excise Duties Amendment Act 36 of 1925 was applicable to South West Africa without local promulgation by virtue of the statement in section 38(1) of that Act that “The Mandated Territory of South West Africa shall, for the purposes of the collection of customs and excise duties, be regarded as a part of the Union.” This holding was subsequently followed in a number of cases.

The case of *Faul v SA Railways & Harbours* 1949 (1) SA 630 (SWA) dealt with a different situation. The question in this case was whether certain amended provisions of the *South African Railways and Harbours Service Act 23 of 1925* were applicable in South West Africa. A South African law, the *South-West Africa Railways and Harbours Act 20 of 1922*, transferred the railways and harbours in South West Africa to the Governor-General of South Africa. This Act provided that these railways and harbours were to be controlled, managed and worked by the Railway Administration of South Africa as part of the South African railways and harbours system. Section 3(4) of this Act provided that certain SA statutes – including the *South African Railways and Harbours Act 28 of 1912* – were to be applied in respect of the said railways and harbours in South West Africa to the same extent as they applied to the railways and harbours of South Africa. Furthermore, the Governor-General of South Africa was empowered to apply to South West Africa from time to time the whole or any part of the provisions of any other law in force in South Africa relating to railways and harbours. However, Briebner J stated:

It will be noticed that power is given to ‘apply’ any such law, which suggests that no such Act of the Union would be of force within the Territory unless applied by some formal act on the part of the Governor-General, applying such Act to the railways and harbours in the Territory.

The SA *South-West Africa Railways and Harbours Act 20 of 1922* was promulgated in the *Government Gazette* of the Union of South Africa in 1922 and in the *Official Gazette* of the Territory of South West Africa in 1923.

The SA *Railways and Harbours Act 28 of 1912* was subsequently amended substantially in South Africa by *Act 23 of 1925* and other amending Acts, but none of these amending Acts were gazetted in South West Africa or made applicable to the Territory by means of a proclamation by the Governor-General of South Africa, or by the Administrator of South West Africa.

The *Faul* case supported the holding in *Offen*, but distinguished the situation which was before it. The *Faul* case agreed with *Offen* that South African legislation can be applied to South West Africa without being published in the Official Gazette of South West Africa in two situations:

- 1) if the Territory of South West Africa is “for the purposes of the particular Act, deemed to be part of the Union” or
- 2) if the expression “the Union” is defined to include the Mandated Territory.

Briebner J noted that “the practice has been to publish these Acts in the *Gazette* of the Territory”, but agreed with *Offen* that this is not a legal requirement.

However, the *Faul* case further held that where South African legislation is to be made applicable to South West Africa **by a Proclamation** of the Governor-General of South Africa or **by a Proclamation** of the Administrator of South West Africa under delegated authority (by virtue of the powers conferred by section 2 of the *Treaty of Peace and South West Africa Mandate Act 49 of 1919*), it can only have the force of law within the Territory of South West Africa if it is published in the Official Gazette of South West Africa in terms of section 44(1) of the *South-West Africa Constitution Act 42 of 1925*.<sup>20</sup> The Court stated:

So if the particular Act of the Union deals specifically with the Mandated Territory, it must be promulgated in the Official Gazette of the Territory before it can bind the inhabitants therein. Legislation is ordinarily territorial in its operation, and does not bind persons resident beyond the territorial boundaries of the law-giver, since such legislation cannot be made effective while the persons affected are resident abroad. . . . The Union Parliament has authority to legislate extra-territorially, but such legislation cannot be binding upon residents of a foreign territory except by convention or in the case of the Mandated Territory by promulgation of the legislation in the Gazette of the Territory.

The position in light of both *Offen* and *Faul* was summarised in *Faul* as follows:

The Mandated Territory occupies a peculiar position: on the one hand it is a foreign country territorially vis-à-vis the Union, on the other hand, the Union Parliament has power of legislation in respect thereof, but the operative effect of such legislation within the Territory is not dependent upon conventions or treaty or international law, but upon promulgation of the legislation within the Mandated Territory, or upon the Union Act incorporating the Mandated Territory as part of the Union Territory.

The *Faul* case accordingly concluded that the amendments to the *Railways and Harbours Act 28 of 1912* at issue in the case before it were **not** applicable to South West Africa.

A potential conflict with this line of cases arises from section 22(5) of the *South West Africa Affairs Amendment Act 23 of 1949* which provided that:

Notwithstanding anything to the contrary contained in the Interpretation Act, 1910 (Act 5 of 1910) an Act of Parliament which is expressed to apply in the territory shall not have the force of law in the Territory until it has been published in the Official Gazette of the Territory.

One way to read this provision is that all Acts of Parliament applied to South West Africa after 1949 must have been published in the Official Gazette of South West Africa in order to have the force of

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<sup>20</sup> There is a typographical error in the reported *Faul* case. It refers to section 44(1) of “Act 26 of 1925”, but Act 42 of 1925 was clearly the intended reference.

law in the Territory of South West Africa. However, this interpretation is not supported by the case law. Cases dealing with enactments after 1949 continued to follow the approach set forth in *Offen*.

For instance, the principle that no publication of a Union Act is necessary in the Territory where the Act declares that for the purposes of the Act the Territory of South West Africa shall be deemed to be part of South Africa, or defines South Africa as including the Territory of South West Africa, was followed in *R v Grundlingh* 1954 (4) SA 235 (SWA). This case held that local promulgation was not required for the 1953 repeal of a regulation issued under a South African law, the *War Measures Act 13 of 1940*, to be valid in South West Africa.

The principle was also endorsed in *R v Ntoni en 'n Ander* 1961 (3) SA 507 (SWA), which held that local promulgation was not necessary to make 1954 and 1957 amendments to the *Medical, Dental and Pharmacy Act 13 of 1928* applicable to South West Africa, in light of section 99(1) of the Act which stated:

The Governor-General may, by proclamation in the Gazette, extend this Act, with such modifications of an administrative character as he may deem necessary to the mandated territory of South West Africa, and thereafter and subject to any modifications as aforesaid, that territory shall, for all purposes of this Act, be deemed to be a province of the Union.

The same approach was taken in the Namibian case *Gemfarm Investments (Pty) Ltd v Trans Hex Group Ltd & Another* 2009 (2) NR 477 (HC), which addressed the issue of whether the South West Africa Patents and Designs Proclamation 17 of 1923 upon which the plaintiff relied for registration of its patent had been repealed by the South African *Patents Act 37 of 1952*. Maritz J provided the following analysis

[18]... The Union Parliament, although it had the power to legislate for the Territory (as Van den Heever J held in an extensive judgment on this issue in *R v Offen* 1934 SWA 73), initially applied only a few of its statutes to the Territory. Those related mainly to transnational matters such as customs (Acts 35 of 1921 and 36 of 1925), railways (Act 20 of 1922), harbours (the administration of the port and settlement of Walvis Bay by Act 24 of 1922), public servants in the administration (Act 27 of 1923), on matters of constitutional importance to the Territory (the South West Africa Constitution Act 42 of 1925) and the like. The primary responsibility to legislate on general matters applicable to the Territory was initially borne by the Administrator whose Proclamations, like that of the Governor-General, had to be published in the *Official Gazette*, before acquiring the force of law (see s 44(1) of Act 42 of 1925).

[19] The need to publish Union statutes in the Territory before they obtained the force of law was a matter already raised and thoroughly argued in *Offen*'s case. Both in the court a quo and on appeal (reported as *R v Offen* 1935 AD 4) it was held, in keeping with judicial thinking at the time, that publication of the law in question (the Customs and Excise Amendment Act 36 of 1925) in the *Union Gazette* sufficed because, although the port and settlement of Walvis Bay was being administered 'as if it were part of the mandated territory and as if the inhabitants of the said port and settlement were inhabitants of the mandated territory' (under s 1(1) of Act 24 of 1922), it nevertheless remained part of the territory of the Union of South Africa. Wessels CJ quoted s 38(1) of Act 36 of 1925 and continued:

'Sec. 38 of that Act reads as follows: "(1) The mandated territory of South-West Africa shall, for the purpose of the collection of customs and excise duties, be regarded as a part of the Union." If that is so, then Union legislation which is valid Union legislation ipso facto applies to the mandated territory and is in force in Walvis Bay and sub-sec. (3) provides specifically that the provisions of the Act shall apply to Walvis Bay, "which for the purposes of this section shall be deemed to be a part of the mandated territory." It is perfectly clear from that sub-section that it makes the Act applicable to Walvis Bay on promulgation in the Union Gazette, not as part of the Union territory only but as part of the Union territory which is deemed to be part of the mandated territory. There is therefore no need for it to be

promulgated in the mandated territory if it is a Union Act of force in the Union and therefore of force in mandated territory and Walvis Bay.’ [At 7 – Eds.]

This approach was followed (again in respect of legislation applicable in Walvis Bay) in *R v Akkermann* 1954 (1) SA 195 (SWA) at 196F – H.

[20] The matter again received scrutiny by Brebner J in an instructive judgment about the judicial thinking at the time in *Faul v SA Railways & Harbours* 1949 (1) SA 630 (SWA)....

[21] In *R v Grundlingh* 1954 (4) SA 235 (SWA) at 236 it was confirmed that no publication of a Union Act is necessary in the Territory where the Act declares that for the purposes of the Act the Mandated Territory shall be deemed to be part of the Union and, in *R v Ntoni en ‘n Ander* 1961 (3) SA 507 (SWA), that it is also not necessary in those instances where the ‘Union’ is defined in an Act as including the Territory.

[22] Counsel for the plaintiff, pointing out that the date of commencement of the 1952 Act was 1 January 1953, drew the court’s attention to s 22(5) of the South West Africa Affairs Amendment Act 23 of 1949, which was in force at the time, and provided as follows:

‘Notwithstanding anything to the contrary contained in the Interpretation Act, 1920 (Act 5 of 1910) an Act of Parliament which is expressed to apply in the territory shall not have the force of law in the Territory until it has been published in the Official Gazette of the Territory.’

He argues that the section found expression in many subsequent Acts of the Union Parliament promulgated around that time which provided, in express terms, that they would apply to the Territory or that they might be rendered applicable to the Territory by Proclamation of the Governor-General (such as s 13 of the Railways & Harbour Acts Amendment Act 45 of 1952, s 25 of the Boxing & Wrestling Control Act 39 of 1954, s 17 of the Archives Act 22 of 1953, s 180 of the Water Act 54 of 1956, s 52 of the Friendly Societies Act 25 of 1956 and s 153 of the Defence Act 44 of 1957).

[23] Measured by any of the criteria in the cases of *Offen*, *Faul*, *Akkermann*, *Grundlingh* and *Ntoni* or by s 22(5) of the South West Africa Affairs Amendment Act 23 of 1949, there is nothing in the language of [the South African *Patents Act 37 of 1952*] which either expressly or by necessary implication indicates that the Union Parliament intended to apply its provisions to the Territory: the Territory is not included in the definition of the ‘Union’; the Act does not contain a provision to the effect that the Territory is deemed to be part of the Union for purposes of the Act; and it has not been applied to the Territory by proclamation of either the Administrator or the Governor-General. An allegation in the exception to the effect that the 1952 Act ‘was promulgated in a *Gazette* of the territory’ remained unsubstantiated. No reference was made in argument to the *Official Gazette* referred to and I have not been able to find any.

[24] Ultimately, the excipients are left to rely on the definition of ‘Union Act’ in s 18 of [the South West Africa Patents and Designs Proclamation 17 of 1923] and on s 11(1) of the Interpretation Proclamation, 1920. The phrase ‘and any amendment thereof’ in the definition section of [the South West Africa Patents and Designs Proclamation 17 of 1923]<sup>21</sup> must, given the reasoning by Brebner J in *Faul*’s case, be understood to refer to an amendment of the 1916 Act which is of application in the Territory – having been promulgated or, at least, published in the *Official Gazette*. Clearly, the Union Parliament would have been entitled to insert a provision in [the South African *Patents Act 37 of 1952*] to the effect that it does not repeal or amend [the *Patents, Designs, Trade Marks and Copyright Act 9 of 1916*], to the extent that the latter may apply in the Territory. Such a provision would have put the matter beyond the pale. However, given the provisions of s 22(5) of the South West Africa Affairs Amendment Act 23 of 1949 and the absence of any provision in [the South African *Patents Act 37 of 1952*] evidencing an intention that it should apply in the Territory, the Union Parliament was entitled to assume that it would not apply. It was therefore not necessary to include such a provision. The same reasoning applies,

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<sup>21</sup> “‘Union Act’ shall mean the Union Patents, Designs, Trade Marks and Copyright Act, 1916 (Act No. 9 of 1916) and any amendment thereof”.

*mutatis mutandis*, to s 11(1) of the Interpretation Proclamation, 1920. The subsection's reference to a law which 'repeals and re-enacts, with or without modifications, any provisions of a former law', by necessary implication refers to a repeal and re-enactment applicable in the Territory, ie the territory within which the Interpretation Proclamation applies.

[26] ...For these and the other reasons mentioned earlier, I find that [the South African *Patents Act 37 of 1952*] did not apply to the Territory....

New legislative and administrative arrangements for SWA were introduced in 1968. The ***South West Africa Constitution Act 39 of 1968*** (RSA GG 2036) provided for different sources of legislative power over South West Africa, each with different rules about promulgation.

Firstly, The Legislative Assembly for South West Africa established by this Act (section 11) was given legislative authority in the territory, except in respect of a list of specific topics (section 22). The legislative enactments of the Legislative Assembly for the territory were referred to as "ordinances" (section 21). Section 29 required the Administrator of South West Africa to cause every ordinance assented to by him or by the South African State President to be published in the *Official Gazette of South West Africa*, and provided that any such ordinance shall come into operation on the date of its first publication in the *Official Gazette*, unless the ordinance itself provides that it shall come into operation on a specified date or on a date to be fixed by notice.

Secondly, in terms of section 37, the South African Parliament retained legislative powers in respect of South West Africa in regard to matters on which the Legislative Assembly was not authorised to legislate. Section 37(5) provided that publication of South African Acts and subordinate legislation in the *Government Gazette* of South Africa would be ***deemed*** to be publication in the *Official Gazette* of South West Africa:

The publication in the *Gazette* of any Act of Parliament, or of any proclamation, notice, regulation, rule or order, or of anything done, under or in pursuance of such an Act, shall for all purposes be deemed to be publication thereof in the *Official Gazette*, unless the publication in the *Gazette* contains an indication to the contrary.

Thirdly, section 38 of this Act empowered the State President to make laws for South West Africa "by proclamation in the *Gazette* and in the *Official Gazette*" in relation to any matter on which the Legislative Assembly of South West Africa was not authorised to legislate.

Fourthly, this Act established an Administrator of South West Africa with administrative powers over matters in respect of which the Legislative Assembly was ***not*** authorised to legislate, and an Executive Committee with administrative powers in respect of South West Africa over matters in respect of which the Legislative Assembly was authorised to legislate. The Act is silent on promulgation requirements connected to these administrative powers.

Section 20 of the ***South West Africa Affairs Act 25 of 1969*** ([RSA GG 2331](#)) defined certain "scheduled matters" in respect of which the State President of South Africa was empowered "by proclamation in the *Gazette*" to make provisions of South African laws applicable to South West Africa, or to repeal, amend or modify provisions of any law in force in the territory. The State President was similarly empowered to amend or modify any provision of any law of the territory relating to the expropriation of land or other property for public purposes. No requirement of promulgation in the *Official Gazette* of SWA is referred to here. Furthermore, section 19(2)(e) of that Act provided:

(2) Unless the State President by proclamation in the *Gazette* otherwise declares in any particular case, or unless it would in any particular case obviously be inappropriate, and subject to the provisions of the South-West Africa Bantu Affairs Administration Act, 1954 (Act No. 56 of 1954), **for the purposes of any law in force in the territory at the commencement of this Act, in as far as it relates to any scheduled matter, any reference in such law –**

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- (e) **to the *Official Gazette* of the territory shall be construed as a reference to the *Gazette*.**<sup>22</sup>

The *South West Africa Constitution Amendment Act 95 of 1977* (RSA GG 5625) amended section 38 of the *South-West Africa Constitution Act 39 of 1968* to authorise the State President of South Africa to “make laws for the territory with a view to the eventual attainment of independence by the said territory, the administration of Walvis Bay and the regulation of any other matter”, “by proclamation in the *Gazette*”.

In summary, prior to 1968, the courts were of the view that the following rules on promulgation applied in respect of South West Africa:

- 1) A South Africa Act would apply to South West Africa without publication in the *Official Gazette of South West Africa* if the Territory was expressly included in the Act as part of the Union (by definition or by a deeming provision).
- 2) Where a South African Act could be applied to South West Africa by a proclamation of the Governor-General of South Africa or by a Proclamation of the Administrator of South West Africa under delegated authority, this was effective only if published in the *Official Gazette of South West Africa*.

After 1968, new legislative and administrative arrangements for South West Africa altered the rules on promulgation:

- 1) Ordinances enacted by the Legislative Assembly for South West Africa and assented to by the Administrator of South West Africa or by the South African State President were effective only if published in the *Official Gazette of South West Africa*.
- 2) All other South African Acts, subordinate legislation and proclamations applicable to South West Africa made by the South African Parliament or the State President were **not** required to be published in the *Official Gazette of South West Africa* to be effective, so long as they were published in the *Government Gazette of South Africa*.

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<sup>22</sup> Emphasis added.