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# **Gender-Based Violence: Victims, Activism and Namibia's Dual Justice Systems**

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## **Introduction**

The Constitution of Namibia promotes a wide range of fundamental human rights for all Namibians. This is in complete contrast to the colonial regime of South Africa, from which Namibia obtained independence in 1990. The advancement of women's rights and the increase in Namibian women's participation in the public sphere are among the many positive benefits of Namibian independence. Successive post-independence governments under the Swapo Party, have shown support for these goals by developing a raft of relevant policies and declarations through the United Nations (UN) the African Union (AU) and the Southern African Development Community (SADC). However, gains achieved are overshadowed by high levels of Gender-Based Violence (GBV) in relationships and non-partner sexual violence (WHO, 2013). This chapter contextualises GBV in Namibia and considers the experiences of GBV victims who, through activism and amidst the dual justice system, seek to access justice.

Namibia inherited two separate justice systems at independence; the formal statutory system based on Roman Dutch law and an informal, or traditional system. The constitution recognises both systems, although neither may contravene the constitution as the supreme law of the land (Amoo, 2008). This means that although the responsibility to enforce the

rights of victims of GBV primarily falls on the state's criminal justice system, in effect victims may engage with either or both systems. It is therefore important that this chapter locates victims of GBV in the context of the state and traditional justice.

Namibia's criminal justice responses to rape and domestic violence stem from the Combating of Rape Act 8 of 2000 and the Combating of Domestic Violence Act 4 of 2003. Our analysis will set out key points from both these acts and consider their implementation. In exploring GBV victims' experiences of traditional justice, we will focus on the processes and penalties in customary law for the gendered crime of rape. We will detail key contributions from victim led and victim focused activism in Namibia. Finally, we will conclude with recommendations about responding to victims of GBV in Namibia, from a victimology perspective.

In Namibia, as in many African countries, Traditional Authorities oversee everyday life, mainly in rural communities, including the allocation of land, and uses of natural resources (Keulder, 2010). The Traditional Authorities Act 25 of 2000 sets out Traditional Authorities' roles, including to "promote peace and welfare" and "supervise and ensure the observance of customary law" (Republic of Namibia, 2000: 4). Traditional Authorities have predominantly patriarchal structures, although notable examples of authorities with strong female leadership and participation are also in evidence (Ubink, 2011). Methods of ascending into traditional leadership vary. Whilst elections take place in some communities, family succession, or appointment from within the leadership network are more common processes (Hinz, 2016).

The term GBV is used here in recognition of its widespread usage in Namibian discourse. However, we recognise that GBV and Violence against Women (VAW) are often used interchangeably, most notably in the UN Declaration on the Elimination of Violence Against Women (see UN General Assembly, 1993). To clarify, this chapter exclusively considers women's experience of justice systems following violence perpetrated by men. Doing so does not diminish the importance of men and children who experience GBV; people who experience violence perpetrated by women; or hate crime such as homophobic and transphobic violence. In stating our interest in the experience of victims, we acknowledge that victims of GBV are not a homogenous group and experiences of justice may be influenced by a range of factors, including the context of the GBV perpetrated. By paying attention to women's experiences, we are responding to the reality highlighted by the Legal Assistance Centre (2017) that the vast majority of GBV victims in Namibia are women.

## **Namibia in Context**

Namibia's 824, 292 sq. km mass (almost four times the size of the United Kingdom) is one of the least densely populated countries in the world, with a population of 2.1 million in the 2011 census (Namibia Statistics Agency, 2016). The vast size, small population and inaccessibility of rural areas make the administration of justice a challenge: a void that is, in the main, filled by the traditional justice system. Courts in the statutory justice system are mainly restricted to large towns and cities, where Namibia's 400 lawyers are based (Solli, 2013). Although English is the official language, Namibia is a diverse country with around thirty local spoken languages and thirteen ethnic groups (Amoo 2014). Formal Criminal

Courts rely on interpreters to function, unlike Traditional Courts, which are usually operated in locally understood languages.

As German South West Africa, the country was controlled by Germany from 1884 to 1915, a period that included Germany's perpetration of genocide against Ovaherero and Nama people, from 1904 to 1908. South African occupation commenced in 1915, during the First World War, following which policies of apartheid entrenched widespread racial subjugation and separation until Namibia's independence in 1990. Since independence Namibia has successfully introduced multi-party democracy and has largely been enjoying peace and stability. Namibia ranks highly in Africa in relation to good governance, democracy and human rights (Melber, 2009). Namibia has a national police force, NamPol, which is approximately two thirds male and one third female (Legal Assistance Centre, 2017).

The World Bank raised Namibia's economic classification to an upper middle-income economy in 2011 (World Bank 2013, cited in Cairney and Kapilashrami, 2014). However, Namibia is one of the most economically unequal countries in the world with widespread absolute poverty. The wealthiest 5% of people control 70% of the Gross Domestic Product, with only 3% controlled by the poorest 55% of people (World Bank, 2016). The gender pay gap is smaller than elsewhere in the region, as women's Gross National Income (GNI) is estimated to be 68% that of men in Namibia, compared to 63% in Sub-Saharan Africa (United Nations Development Programme, 2016, cited in the Legal Assistance Centre, 2017). Unemployment in 2016 was estimated at 36%, though broken down by gender and geography show women's unemployment as being 44% rural and 34% urban, and men's as 34% rural

and 27% urban (Legal Assistance Centre, 2017). Female students in the University of Namibia outnumber males by two to one (University of Namibia, 2018).

Urban and rural differences as well as regional variations permeate many aspects of life in Namibia, including educational attainment, access to support services, cultural norms, poverty levels and HIV prevalence. HIV is a significant problem in Namibia, which peaked in 2002 at an estimated prevalence rate of 21.3% among 15-49 year olds (UNAIDS, 2004). The most recent estimate of HIV prevalence among the 15-49 age range is 14.5% for women and 9.5% for men (UNAIDS, 2017).

### **GBV against Women in Namibia**

The problem of GBV against women is a global pandemic (Bennett et al., 2000) and therefore not uniquely Namibian or African. In Namibia, over one third (35.9%) of women who ever had a partner report being subjected to violence by their partner, which includes 31% of women having experienced physical violence and 16.9% having experienced sexual violence (Garcia-Moreno et al., 2005). Several groups are identified as being at risk of GBV and vulnerable to intimate partner violence, including unemployed women and women with lower levels of education than their partners (Ministry of Health and Social Services, 2013). Matthews and von Hase (2013) recommend addressing GBV against sex workers as a priority, not least because of sex workers' testimonies that this problem is compounded by physical and sexual violence being meted out by police officers. It has also been noted that GBV against older women is under-researched in Namibia (Legal Assistance Centre, 2017).

Explanations for the various manifestations of GBV against women in Namibia are at an early stage. Current perspectives suggest a range of complex and interlinked socio-economic and political factors including:

- **Deeply held patriarchal power across cultures.** All ethnicities in Namibia have varying and entrenched levels of gender inequality in the form of patriarchy (Amoo, 2014, Ruppel, 2010). Manifestations range from the ‘patriarchal system of gender subordination’ on white Afrikaner farms (Sylvain, 2001) to a range of harmful cultural practices towards women in communities across several different ethnic groups (see McFadden and !khaxas, 2007; Ikhaxas, 2009; 2010). Namibia is ethnically and culturally diverse, and the relative paucity of research on how to address GBV across the range of different contexts warrants in-depth attention (see Ambunda and de Klerk, 2008).
- **The impact of colonial rule.** Patriarchal power is exacerbated by protracted colonial rule, firstly by Germany from the late 1800s, and then South Africa from 1915 to 1988. South Africa’s method of dealing with so called ‘tribal’ authorities in Namibia reduced the levels of female leadership previously in place. This increased women’s dependence on men and the subjugation of women (Becker, 1998; 2000). In addition, the violence of colonialism shaped pervasive violent masculinities in Namibia (Edwards-Jauch, 2016).
- **Gender-based violence arising from militarism and conflict.** Feminist scholarship has placed a spotlight on the use of rape to exert control in conflict contexts (Scanlon, 2008). This occurred during the Namibian liberation struggle prior to independence in

1990 as military forces on both sides committed atrocities, including rape (Akawa, 2014; Britton and Shook, 2014). Felton and Becker (2001) correlated high levels of gender-based violence with Namibian communities in which male gender roles had been strongly influenced by militarisation. Psychological effects of militarisation can include a process of moral exclusion and resultant destructive behaviours, especially towards those deemed as enemies (Opatow et al., 2005). Feminists warn of ‘a post conflict backlash’, where women may experience new forms of violence (Britton and Shook, 2014, Sjoberg, 2009).

- **Masculine anxiety and insecurity.** A range of factors contributing to this angst are identified by Edwards-Jauch (2016). She argues that the traditional image of male success, the ownership of land and cattle, has been fused with global capitalist expressions of wealth and luxury. The combined ideals of traditional and modern hegemonic masculinity contrast with a harsh reality for most Namibian men living amidst the structural violence of poverty and inequality. Hardship and social exclusion in Namibia contribute to men’s “existential doubt” (Tersbøl, 2006: 403).

Studies about attitudes to GBV in Namibia point to some significant changes in recent years. For example, the acceptance of the justification of wife beating in certain circumstances by 35% of women and 41% of men in 2008 reduced to 28% of women and 22% of men by 2013 (Ministry of Health and Social Services, 2008; 2013). The comparatively slower change in women’s attitudes could be attributed to entrenched patriarchy. In 2008 the opinion that domestic violence is a family matter which should not be shared with others in the community was expressed by 45% of research interviewees (Social Impact Assessment and Policy Analysis Corporation, 2008). This appears to be an ongoing issue, as in 2013, only 21% of women who experienced GBV disclosed it, and almost half of these turned to family



members, rather than other figures in the community (Ministry of Health and Social Services, 2013).

Disbelief in the concept of marital rape among urban and rural men and rural women was highlighted by LeBeau and Spence (2004). Another study capturing attitudes about rape by Ipinge et al., (2004) found that almost one quarter of research participants blamed the victim for rape, whilst a further 13% said the fault is shared between the rapist and the victim. Research with imprisoned male perpetrators of GBV revealed that the majority held the view that they are entitled to discipline female partners for disobedience (Van Rooy and Mufune, 2013). In a study by Chiremba (2015) imprisoned rapists expressed the misogynistic opinion that women enjoy sex, even when they resist, and the pervasive view that women were objects for sexual gratification was widely expressed by male prisoners of all offence types.

### **Victims' Experiences in Namibia's Dual Justice Systems**

Prior to independence, the two justice systems not only operated in isolation but also treated people, and therefore women subjected to GBV, completely differently. Now that both systems are required to uphold the supremacy of the Namibian constitution, they must implement measures to protect the human rights set out in the constitution. Significant progressive reform has undoubtedly been made, a process that has witnessed the introduction of progressive statutory GBV legislation, as well as the placing of the customary laws of various Traditional Authorities on written record for the first time. Despite such progress, challenges remain for women victims of GBV in both justice systems. In the criminal justice system there are gaps between the letter of the law, how it is interpreted and its

implementation. Furthermore, distance and inadequate resources restrict victims' access to support services. The remainder of this section summarises the key findings relating to each system.

### *Namibia's State Justice System*

Two major pieces of legislation, the Combating of Rape Act 8 of 2000 and the Combating of Domestic Violence Act 4 of 2003, were introduced to respond to GBV in Namibia. In the first decade following independence in 1990, women's groups, non-governmental organisations (NGOs), and several female politicians internally lobbied for improved laws to address GBV. During the same period the Namibian government repeatedly expressed commitment to address GBV in international discussions in SADC, the AU and UN.

The Combating of Rape Act 8 of 2000 was seen as ground-breaking, not just within SADC, but on a global scale. The Act diverges from the old colonial technical description of rape as penetration by a penis without consent. Instead it carries a minimum sentence of 5 years imprisonment for a wide range of sexual acts defined as rape, including vaginal, anal and oral penetration, by a penis, other human or animal body part or any other object, under coercive circumstances (Republic of Namibia, 2000). In so doing, the Act recognises various forms of degradation in the crime of rape, and fully recognises male victims of rape. The Act prohibits marital rape. Bohler-Muller (2001) argues that a key quality of the Act is that it implicitly recognises rape as a crime of violence and power. It is also lauded for containing measures that minimise the re-victimisation of complainants in the criminal justice system, including

closed court proceedings and restrictions on questioning the complainant about her sexual history in court.

Several reviews have taken place of the 2000 Combating of Rape Act since 2006, mainly of services involved in responding to rape (see Ministry of Gender Equality and Child Welfare, 2012 below). The most comprehensive review was undertaken by the Legal Assistance Centre in 2006. This review, which tracked several hundred rape case files, noted that conviction rates in Namibia rose steadily since the legislation was introduced in 2000. Tracked files had a conviction rate of 18 percent (Legal Assistance Centre, 2006), which, even allowing for variations in recording methods, is higher than in European countries (see Jehle, 2012).

Two main concerns uncovered by the 2006 review relate to ineffective and negative responses from criminal justice agencies and attrition caused by complainant withdrawal in one third of reported rape cases (Legal Assistance Centre, 2006). Specific negative feedback about the police included unsympathetic attitudes towards women victims, the discouragement of reports of marital rape, and delayed responses to reports of rapes (Legal Assistance Centre, 2006). Additional problems included insufficient application of special measures in the Combating of Rape Act, such as not complying with closed court proceedings requirement, reduced reliability of trial evidence due to lack of language translation, and a lack of victim support, especially social work follow up (Legal Assistance Centre, 2006).

Delayed police responses particularly affected rural complainants, thus preventing some women victims from accessing medical examination, emergency contraception and post-exposure prophylaxis to reduce the risk of HIV transmission within the effectiveness deadline (Rose-Junius and Kuenzer, 2006). Beyond the serious health risks of pregnancy and HIV infection, these delays also have legal implications in terms of gathering forensic evidence for court. Recognising the distance rural complainants may be from police stations, both the Legal Assistance Centre (2006) and Rose-Junius and Kuenzer (2006) recommended ensuring that Women and Child Protection Units or WCPU (multi-sectoral teams now known as GBV Investigation Units) have dedicated vehicles to provide a timely response.

Statutory agencies have acknowledged shortcomings in their own services. The Ministry of Gender Equality and Child Welfare undertook a review of WCPU in 2012. This review highlighted a range of problems in WCPU responses to all forms of GBV, not just rape. The Ministry of Gender Equality and Child Welfare (2012) highlighted that WCPU staff made good use of the support services of local NGOs, where they existed. However, referrals between different sector staff in WCPU, such as from the police to social workers, or from either party to introduce victims to prosecutors, were not effectively carried out. The review did not identify why internal referrals were so weak but did highlight the lack of dedicated funding and other resources for WCPU as problematic. In another study on service responses to GBV, police officers in areas without access to social work support felt ill-equipped to provide the level of support required by victims of GBV (Mgbangson, 2015). The Legal Assistance Centre (2017) cited an interview with Inspector Zimmer from Windhoek WPCU in 2013, where she reportedly stated that WPCU were only dealing with cases of rape and serious assaults resulting in hospitalization. This goes against the vision that WPCU operates as a one stop service for all GBV cases. Shifting eligibility criteria are likely to confuse

victims in the immediate aftermath of a crime and risks shaking their confidence to report and seek support.

Returning our focus to withdrawal of rape cases, a follow up to the 2006 review by the Legal Assistance Centre (2009) found that the most cited reason for withdrawal was the arrangement whereby the alleged perpetrator would compensate the complainant in lieu of proceeding in the criminal justice process. This finding was based on the perceptions of informed community members in different parts of Namibia. However, there were regional variations as to whether this arrangement was thought to be reached in the Traditional Court (see the next section), or, directly and discreetly between the families of the complainant and alleged perpetrator.

In the absence of firm data on family-only negotiated arrangements, it is not possible to analyse the compensatory approach in depth, other than to highlight a concern that complainants may feel pressurised to accept financial compensation. We have already mentioned the stark levels of prevailing economic inequality in Namibia, which has the effect of compounding the risk that economically active perpetrators of rape would be able to buy their way out of facing the consequences of their actions. To overcome this, the Legal Assistance Centre (2009) recommended amending the Combating of Rape Act 8 of 2000 to explicitly prohibit coercive compensation. This measure would send out a strong message from the state that the perversion of justice will not be tolerated. However, it would be critical that criminal justice agencies have mechanisms in place to effectively detect and address coercive compensation at every stage in the criminal justice process for such an

amendment to be impactful. Given the shortcomings in implementing the 2000 Act already identified, the desired impact of the suggested amendment could not be assumed.

We now turn to some challenging issues affecting women victims of domestic violence.

Namibia introduced the Combating of Domestic Violence Act 4 of 2003, which radically changed the definition of domestic violence. The 2003 Act is assessed as progressive, because it recognises a range of violations that may be inflicted in the context of a domestic relationship, not just physical assault. It means that abusive acts such as harassment including stalking, threats, sexual assault, intimidation and economic and psychological abuse, can be addressed in legal proceedings under the Act (Beninger, 2014). A key component of the Act is the emphasis placed on protecting victims, and, as such, the Act grants complainants the right to seek and be issued with a protection order by the Magistrates Court against the alleged perpetrator. The protection order process is not contingent on prosecution and around 9 out of 10 complainants who apply for protection orders, opt not to prosecute (Beninger, 2014).

A major review of the implementation of the 2003 Combating of Domestic Violence Act was conducted by the Legal Assistance Centre in 2012. The review notes the steady increase of the use of the Act since it became law but that 92% of complainants are from urban areas, (Legal Assistance Centre, 2012). Low reporting of domestic abuse by rural women (in contrast to rape) is attributed to the predominance of customary law in rural areas, as well as lack of awareness of rights under the Act among rural women. The lack of visibility of rural women in relation to domestic abuse is a theme to which we will return. Key issues from the 2012 Legal Assistance Centre review are summarised here;

- **Difficulties with interim and final protection orders.** Victims experienced difficulties with the process of applying for protection orders on complicated forms. Court staff were overstretched, and many were not trained in the protection order process. Police ineffectiveness in serving and enforcing protection orders; and occasional unsympathetic police attitudes were also identified.
- **High rates of attrition.** Two key aspects of attrition were highlighted: the withdrawal of one in five complainants between the interim and final protection order stages and, the extremely poor follow up of complainants who failed to appear at court. Poor follow up was attributed to the courts for failure to notify the police of most non-attendances, and to the police, for failing to follow up when notified of non-attendances by the courts.
- **Shortage of victim support services.** Findings here are similar to those already covered in relation to rape. The review recommended setting up volunteer run victim support services to guide domestic abuse complainants through the justice system.

Examples of ineffective criminal justice responses were provided by survivors of GBV were provided by Matthews and von Hase (2013). One survivor highlighted a number of failings that prolonged her GBV victimisation including: WCPU being unable to send somebody out following violent incidents, the police stating they could not find her husband to arrest him, and not being told about refuge provision until her fifth encounter with WCPU.

Testimonies from police officers provide insight into the problems faced by victims. These include having to place a victim in a custody area for her safety due to lack of refuge provision. Furthermore, officers report their inability to intervene when men are violent

towards partners who are unwilling to prosecute or seek a protection order (Mgbangson, 2015). Given the reliance on the victim to cooperate with the police, it is crucial to have clear measures to protect victims who are unwilling, or perhaps too frightened, to cooperate. This need has been identified and addressed in other countries. In 2001 the police in England and Wales in were guided to exercise their powers of arrest to prevent further violence towards victims unwilling to cooperate with an investigation (Hester, 2006). Such approaches may be appropriate for NamPol.

In sum, there are several barriers that negatively impact on the experiences of women victims of GBV in the criminal justice system. These comprise: unsympathetic encounters with inadequately trained criminal justice professionals, challenges in dealing with bureaucracy, language and literacy barriers, delays in criminal justice responses, low reports from rural women affected by domestic violence, lack of support to victims through the criminal justice process and the risk of being pressured to drop criminal proceedings by being offered compensation. Not only is there a gap between legislation and social transformation pertaining to GBV (Britton and Shook, 2014) but also there is a gap between the aims of the existing legislation and how it is interpreted and implemented. GBV disproportionately affects women, and women often find it more difficult than men to access justice (Stevens, 2001). Understanding how best to overcome these barriers in the Namibian context is imperative and gender-wise approaches to justice are crucial to the safety of women in Namibia.

### ***Namibia's Traditional Justice System***



Having considered the implementation of GBV law in the state justice system in Namibia we now turn our attention to customary law in traditional justice. As already mentioned, in contrast to Magistrates Courts, Traditional Courts are locally accessible in rural communities and the business of these courts is conducted in local languages. The number of Traditional Court sessions that take place annually is unknown, but Hinz (2008), estimates that it runs into several thousands. As with Criminal Courts, Traditional Courts place a fundamental emphasis on telling the truth, although the method of establishing the truth is distinct from Criminal Courts. Each Traditional Court has its own conventions, although they usually provide space for a wide variety of people to participate in the hearing proceedings including the involved parties, Traditional Court leaders, and the wider community (Ubink, 2011). The offence or conflict issue is discussed in depth, either until consensus is reached, or a referral to a higher level of traditional authority is required, due to lack of consensus (Peters and Ubink, 2015).

Traditional justice has an overarching emphasis on restorative justice and reparation rather than retribution. Omale (2012) argues that reconciliation and restoration of harmony in community relationships lie at the heart of the traditional African dispute settlement processes, rather than punishment for offences. Victim focused qualities of restorative justice include enabling victims to voice their feelings and opinions, have their experiences validated and participate actively in proceedings (Zehr, 2004). These qualities feature in customary proceedings in Namibia and Traditional Courts have been applauded for their “flexible, negotiable and participatory character” and for taking into account “the needs of victims, perpetrators and the community” (Peters and Ubink, 2015: 300). Whilst acknowledging the positive features of restorative justice, its suitability in cases of GBV is contentious. Feminist and victim advocates in Europe highlight that placing emphasis on restoration in violent

relationships may increase the risk for further victimisation (Gavrielides and Artinopoulou, 2013).

The approach to reparation in Traditional Courts in Namibia is similar to elsewhere in Africa. In addition to a public apology by the perpetrator, the sentencing procedures in Traditional Courts usually require the perpetrator to pay compensation to the victim (Solli, 2013). This is similar to the approach in western civil courts. This similarity between the Namibian traditional and western civil legal process does not extend to the profile of the participants. In Namibia the vast majority of Traditional Court users are impoverished people from rural areas, with limited access to other courts.

There is a diverse range of customary laws in Namibia reflecting the various Traditional Authorities and ethnicities that operate Traditional Courts (Stewart, 2008, Visser and Ruppel - Schlichting, 2008). Thus, there is no single uniform response to GBV in this complex, heterogeneous system, as shall be demonstrated. Furthermore, there are now two tiers of Traditional Court in Namibia, since the Community Courts Act 10 of 2003 set out the conditions by which some Traditional Courts may be granted the status of state-funded Community Courts. Such conditions include: having customary law ascertained (set out in a clear, specific and explicit manner), ensuring court recording processes are in place and undertaking to refer unresolved cases to Magistrates Courts, rather than to a higher level of the Traditional Authority as would have previously been the case (Ruppel and Ambunda, 2011). A total of 43 Traditional Authorities from 10 Namibian ethnicities went through the ascertainment process between 2010 and 2016. Researchers from University of Namibia documented the customary laws as provided by the Traditional Authorities. The

ascertainment project lead, Hinz (2016) explains that, although the ascertainment process makes most customary laws clear and certain in written form for the first time, it is within the gift of a Traditional Authority to change its customary law at any point it so decides.

Amoo (2008) notes that Community Courts have both civil and criminal jurisdiction, provided they do not impose custodial sentences. As already stated, the minimum sentence for rape in criminal law is 5 years imprisonment. It would therefore follow that Community Courts, which are lower than Magistrates Courts, should not be a setting for criminal proceedings for rape. This is because, in line with Article 66 of the Constitution, the application of customary law is only valid so long as it does not conflict with the Constitution or statutory law (Ruppel and Ruppel-Schlichting, 2011). In support of this point, it is the expressed opinion of the Legal Assistance Centre that Traditional Courts do not have jurisdiction to oversee criminal proceedings for rape, which must be addressed by the state under the 2000 Combating of Rape Act (Legal Assistance Centre, 2006). However, the Legal Assistance Centre contends that compensation proceedings for rape may be addressed in Traditional Courts. This must be in addition to, not in lieu of, state proceedings.

Below is a precis of the individual ascertained customary laws on rape from Nama, Ovaherero, Ovambanderu, and San people. This represents 17 of the 43 Traditional Authorities that had their laws ascertained and is the most recent group to do so (see Hinz and Gairiseb, 2016). We have organised details of the customary laws on rape into six classifications:

1. Not qualified to prosecute due to severity of crime, but with no further instruction.
2. Does not mention rape.

3. Various minimum and maximum amounts of compensation (usually described as heads of cattle or money equivalent) with a referral to the criminal justice system.
4. Various minimum and maximum amounts of compensation to be paid after the convicted perpetrator had served their state justice sentence.
5. Various minimum and maximum amounts of compensation with no mention of the state criminal justice system.
6. Distinct processes in place according to aspects of the victim's demography, which applied to two authorities. One authority had a compensation payment in place, except in relation to the rape of minors, which resulted in an automatic referral to the Magistrates Court. Another authority had an automatic referral to the police, except when rape was alleged within marriage. In this instance customary law stated the spouse was to be provided with information about counselling and would have to decide for herself whether to take further action.

The first classification cannot be confidently interpreted due to lack of detail. In other words, because the stated customary law does not explicitly instruct complainants to take their case to the criminal justice system, it is not possible to determine whether somebody victimised by rape will receive enough guidance to report the crime to NamPol with a view to a proceeding in a state criminal court. Similarly, the second classification does not provide insight into the likely response a rape complainant may receive, because no detail is provided.

The next two classifications, 3 and 4, suggest that a twin process of traditional compensation and criminal justice is being followed, as per the recommendation of the Legal Assistance

Centre. It is difficult to interpret why the 5<sup>th</sup> category of response sets out traditional justice compensation arrangements without also signposting to criminal justice. Mindful of the risk highlighted by the Legal Assistance Centre (2009) that compensation may be exchanged for dropping criminal proceedings, this failure to signpost to the criminal justice system is worrying as regards justice for victims of GBV.

The 6<sup>th</sup> classification alerts us to a duplicitous process that facilitates a criminal justice referral for some - in these cases minors and single women and denies a referral to others - adult women and married women. This suggests that some Traditional Authorities explicitly operate in ways that deny access to criminal justice to some women based on their age and marital status, contrary to the Namibian constitution which enshrines rights for all. Following the ascertainment process of the first group of Traditional Authorities to do so in 2010, Horn (2011) critiqued the lack of willingness of some authorities to relinquish hearing cases of rape. Based on the 2016 process summarised here, the issue appears ongoing and requiring action.

It is not clear why the state recognises Community Courts that operate contrary to criminal law. The Government of Namibia, according to its democratic mandate, is at the forefront of determining the exact circumstances and purpose for which customary law *may* be used and when criminal law *must* be used. The case for governmental oversight of the latter is clear and relates to the minimum sentence of five years for rape in criminal law. Additionally, given the low numbers of women from rural communities seeking justice via the Combating of Domestic Violence Act 2003, and the lack of explicit procedures for domestic violence in customary law, there is just as much need for clarity about the boundaries between customary

and criminal law in relation to domestic violence. At present, routes to effective justice for rural women who seek justice following domestic violence are unclear. The relationships between the government, the state system of criminal justice and traditional courts are complex and the boundaries between them are blurred. What is evident, is that women are unsupported in this complex mix of routes to justice and many fall between these systems.

Having considered the wording of customary law, we now move to the gendered practices of Traditional Courts. In most Traditional Authorities women are as equally entitled as men to bring a case to be heard in court. However, in some instances, the practice of requiring the approval of a male family member of the complainant, before proceeding with a case, has also been identified (Ubink, 2011, Becker, 1998). In one Traditional Authority the required male relative was specified as the woman's father, if unmarried, or her husband, if married (Peters and Ubink, 2015). The patriarchal restrictions of this procedure make access to justice for women victims impossible, especially when violence has been perpetrated by fathers or husbands.

Before the introduction of Community Courts Becker (2006) argued that there were many examples of gender balanced Traditional Courts in some authorities that competently hear rape cases and that rape survivors often feel more comfortable in traditional than in criminal proceedings. More recently, the female led Traditional Court run by Uukwambi Traditional Authority has been highlighted as demonstrating the potential for change in gendered practices within traditional systems (Ubink, 2018). These reports of gender balanced courts are encouraging. Peters and Ubink (2015) observe variations in levels of gendered participation across a range of Traditional Courts regarding levels of active participation in

discussion, court leadership and knowledge of the methods of negotiating compensation. They do however conclude that, where gender imbalances exist, they usually favour men (Ubink, 2011, Peters and Ubink, 2015). The gendered power differentials within Traditional Courts arguably reflect relationships in the communities where they operate. All of this reinforces our earlier point about the heterogeneity of the traditional system. Given that most gender imbalances in the system disadvantage women, the requirement on some women to have a male family member's approval to engage with the system and the questionable practice of some courts in responding to rape, we conclude that there are sections of the traditional system that deny access to justice for women victims of GBV.

Before moving on from traditional justice, we wish to address the role of culture in the quest to promote gender-wise justice in rural Namibia. Culture can be (mis)used as a reason for preventing change and it can be too easy to dismiss culture as being the antithesis of women's rights. We support the contention that:

“Most of what is understood as ‘culture’ in contemporary Africa is largely a product of constructions and (re)interpretations by former colonial authorities in collaboration with African male patriarchs”

(Tamale, 2008: 51)

In so doing, we recognise the fluidity of culture and the responsibility to support traditional authorities and communities in developing new traditions and customary laws. Traditional justice is the system of choice for most rural people, therefore it is incumbent on all who wish to promote women's rights in Namibia to view culture as the pathway rather than the barrier to women's justice. Justice is unlikely to be achieved otherwise. To that end, the importance of grass roots debate and activism to achieve change from the bottom up is pivotal.

## **Activism to Address GBV**

In this section we highlight notable achievements in respect of collaborative activism whilst acknowledging challenges that remain for GBV activists. Our experience and history of working with NGOs and GBV networks in Namibia to address human rights and GBV inform our review of activism to address it. As with many African countries seeking freedom from colonial rule in the mid to late 20<sup>th</sup> century, issues such as GBV were placed at the periphery of the struggle for independence (Hubbard and Solomon, 1995; Becker, 1995). Indeed, during the Namibian Independence Struggle, SWAPO (South West Africa's Peoples Organisation, the liberation movement that became the Swapo Party after independence) curtailed women's activism, which had grown in the 1980s, out of concern that it might detract attention from the ultimate goal of national independence. The opposing views between those who remained loyal to SWAPO and those who challenged the movement from a gendered perspective, resulted in a divided women's movement by the time Namibia became independent in 1990 (Akawa, 2014). This division continued in the years immediately following independence despite efforts to unify the women's movement across party political lines and between political parties and the NGO sector (Becker, 1995). These underlying tensions make the subsequent achievements of female activists working towards the development of legislation to address GBV especially significant.

### *Feminist Activist Groups and NGOs Addressing Violence against Women*

Given the side-lining of gender equality issues prior to independence, it is perhaps no surprise that Namibia's first organisation with a sole focus on violence against women - Women's Solidarity - was formed only in 1989. This was after the agreement was reached in



December 1988 to implement UN Resolution 435, for Namibia's independence. Women's Solidarity, alongside other NGOs set up at this time, the Legal Assistance Centre in 1988, and Sister Collective (which publishes the feminist magazine, Sister Namibia) in 1989, have been key in the response to violence against women since the formation of Namibia in 1990.

Women's Solidarity was originally intended to be the Namibian centre of the international Rape Crisis movement. Instead it became a service supporting women affected by all forms of GBV. As a feminist organisation directly supporting women victims of violence, Women's Solidarity has been vocal at highlighting instances when women have not been in receipt of legal redress. The organisation temporarily closed in 2004, due to lack of funding, and although it re-launched in 2006, the scale of activity was smaller than previously.

Although Women's Solidarity is the only explicitly feminist GBV victim support NGO in Namibia, other specialist NGOs provide support and therapeutic services for victims of GBV. These include Friendly Haven, a shelter for women and children fleeing violence run by the Ecumenical Social Diaconate Action and Regain Trust, an NGO providing psychological interventions for both victims and perpetrators of GBV. Counselling NGOs Philippi Trust Namibia and Lifeline / Childline Namibia and are both active in supporting people affected by GBV. Lifeline / Childline co-ordinates MenEngage Namibia, working men and boys to campaign against GBV.

Based on global level research Htun and Weldon (2012) argue that autonomous, non-governmental feminist mobilisation is pivotal to ensure effective policy and practice to address violence against women within individual countries. Outside of providing direct support services several feminist groups address GBV issues. The Women's Leadership

Centre regularly works with women victims to share their experiences and publishes collections of women's stories and poems as part of their commitment to challenging harmful cultural practices and oppression in communities (Andima and Tjiramanga, 2014). The feminist magazine *Sister Namibia* also provides a platform to women to share their experiences of victimisation and survival (see Feris, 2014). These groups recognise that victims of GBV are bearers of knowledge and can be powerful agents for social change (Stringer, 2014). A range of groups have contributed significantly to policy and practice developments in Namibia through their activism, as highlighted in examples below.

#### *The Multi Media Campaign on Violence against Women and Children*

The Multi Media Campaign on Violence against Women and Children (hereafter the Campaign) had NGO members from a wide variety of sectors such as women's rights, children's rights, HIV and AIDS, LGBT rights and those engaged in counselling. The Legal Assistance Centre, Women's Solidarity and the Sister Collective were particularly active NGO participants. Statutory members included representatives from the Law Reform and Development Commission, NamPol, and the Ministry of Women Affairs and Child Welfare (now the Ministry of Gender Equality and Child Welfare).

The Campaign was active in the 1990s and early 2000s advocating for laws on rape and domestic violence. Britton and Shook (2014) argue that NGO input was pivotal in informing the comprehensive, progressive and tough anti-rape content of the 2000 Combating of Rape Act. NGOs were aligned with international networks addressing GBV with access to information on good practice developments from other countries, which strengthened their lobbying of the Namibian government. When the Combating of Rape Bill was circulated for

consultation in 1999, the Campaign took out adverts in the national newspapers and brought 20 NGOs together to provide a single set of recommendations for improvement, which were mostly incorporated into the 2000 Act (Legal Assistance Centre, 2007).

In 2003, the Campaign organised a demonstration to coincide with the opening of Parliament, calling for urgency in pushing through domestic violence legislation. Although a member of the Campaign, NamPol would not permit the Campaign to demonstrate directly outside Parliament and the High Court refused the Campaign's urgent application to overturn NamPol's decision. When the women and children protesting opted instead to gather outside the nearby Supreme Court, a stand-off with armed NamPol officers ensued. Legal Assistance Centre (2012) noted the irony that this tense situation was taking place, whilst President Nujoma was addressing Parliament and making positive statements about the forthcoming domestic violence legislation. The Campaign ceased soon after the 2003 Act was introduced, having achieved its goal to change the law. However, with hindsight, the ending of the Campaign may have been premature, given the gap between GBV laws and their implementation, as detailed earlier in the chapter. Changing attitudes about GBV is a longer term process than changing laws, a point which is borne out in relation to a significant series of events that started in 2013.

### *The 'Mini-Skirt' Protest*

Women's activism in Namibia has been responsive to issues pertaining to GBV, a recent notable example being activists' responses to the so-called 'mini-skirt' ban in 2013. In January 2013, one newspaper reported that a large group of around 40 girls and young women in Rundu, in the north of Namibia, were arrested over the Christmas holidays for

wearing 'hot-pants'. There were conflicting media reports about whether they were in custody for breaching public decency or for their own safety. Media reports of a follow up interview with the head of NamPol, Police Inspector General Sebastian Ndeitunga, magnified the attention focused on this incident (see Shinovene, 2013). Although the Inspector General later said he was misquoted, he was reported to have said that young people should dress in line with tradition by wearing modest clothes, and as well as linking modern revealing clothing to the upsurge of GBV, suggested that further arrests for public indecency could follow.

Women's Solidarity made contact with individual women who expressed their anger at this example of victim blaming and together they set about organising a protest to denounce it. The 'mini-skirt protest' took place in Zoo Park in the capital city, Windhoek on 23 February 2013 and was attended by several hundred members of the public. The event was widely supported by a range of NGOs and political representatives and extensively covered by newspaper, broadcast and social media. The speechmakers denounced victim blaming and challenged Namibians to level the blame for sexual violence with the perpetrators. The similarity between the 'mini-skirt protest' and SlutWalk is notable. This transnational protest movement started off as a single event in Canada on 3 April 2011 following comments by a Toronto Police officer to students that to deter sexual assault they should avoid dressing like sluts. Although sparked by similar attitudes, both protests are distinct from each other. An informal coalition emerged from the initial protest gathering which became the Coalition against Gender Based and Sexual Violence. The Zoo Park protest turned out to be the first in a series of events that both continued and extended beyond the mini-skirt issue.

### *The Coalition against Gender Based and Sexual Violence*

The Coalition against Gender Based and Sexual Violence (hereafter, the Coalition) is made up of Women's Solidarity, Sister Namibia, as well other groups not previously mentioned.

These are Victims 2 Survivors (a GBV self-help group), Namibian Women's Health Network (a women's HIV self-help organisation), Her Liberty Namibia (a female student group challenging GBV), the Media Institute for Southern Africa (an organisation promoting democracy through independent media) and individuals from the arts and media. The purpose of the Coalition is to raise awareness of the need to address GBV.

The Coalition organised a mini-skirt themed fashion show and the funds raised were used to run GBV awareness sessions with women. Throughout 2013 and 2014 the Coalition organised an extensive range of events including a 'Take Back the Night March', which set off from the home of Eleanor Diergaardt, a young woman who was killed by her step-father (see Tibinyane, 2014). Other events: a flash mob to address the issue of bystander intervention, testimonies of GBV survivors and a prayer vigil for imprisoned perpetrators, also received positive media coverage. The Coalition set itself an ambitious goal of organising a monthly event, with all members expected to lead on a rotational basis. However, by 2015 the Coalition's momentum was negatively affected by a lack of resources to sustain collective activism, in addition to the core work of each member group. The Coalition's main achievements include bringing activists together across groups, organisations and generations, and impacting national conversations about GBV, particularly rape. Although currently less active in relation to events organising, the cross organisational structure of the Coalition still exists.

### *Challenges Facing Activism against GBV*

We highlight are two main challenges facing activism against GBV here; lack of sustainable funding for GBV support services and the challenge of maintaining and developing collective activism against GBV. The closure of Women's Solidarity in 2004 demonstrates the precarious situation of GBV support services in Namibia. NGOs, and indeed many government programmes are heavily reliant on international funding, making them vulnerable to changes in the priorities of international donors (Britton and Shook, 2014). These changes may be because donors opt to prioritise GBV elsewhere, particularly in highly indebted poor countries. Major international donors prioritise funding for HIV programmes in Namibia because of the devastating impact of this problem. Funding for GBV interventions are incorporated into donor led HIV programme plans (see for example, President's Emergency Fund for AIDS Relief, 2018). On one hand this is purposeful given that HIV is an outcome of GBV (Jewkes et al, 2010). However, it is important to provide funding to address GBV and its causes in their own right, not just because of their impact on HIV prevalence.

We now turn to the challenges of sustaining collective activism as experienced by Coalition. The problem of burn out is not unique to women's collective GBV activism in Namibia and can affect all social movements (della Porter and Diani, 2006). It does however point to the need for infrastructure support for collaborative victim led and victim focused activism by women's groups. Not only could it help strengthen collective activism, but potentially increase its reach across the fourteen regions of Namibia. Although various multi-agency GBV action planning meetings are co-ordinated by Ministry of Gender Equality and Child Welfare, this does not address the problem of burn out for women's activism groups. This is

because attending co-ordination meetings is time and resource intensive for women's groups, an outlay for which they are not reimbursed. Furthermore, given the earlier cited benefits of autonomous feminist activism, it is important that grassroots activism sets its own agenda and organises its own campaigns, such as the events organised by the Coalition. In the early post-independence phase, Hubbard and Solomon (1995) noted the challenges of conceptualising the women's movement in Namibia, due to the loose and fluid connections between actors. Given that this is a key feature of both past and present activism in Namibia Hubbard and Solomon's analysis appears to have ongoing relevance.

### **The Potential Contribution of Victimology: Challenges and Possibilities**

This chapter has shown that the content of state legislation addressing rape and domestic violence is victim focused and has detailed the implementation gap between the letter of the law and its application. We have problematised the low numbers of rural domestic violence cases in the formal criminal justice system. Whilst acknowledging the significance of the traditional justice system, we have drawn attention to the need for clarity from the state about the legal scope of Traditional Courts, particularly in relation to rape. We have argued that the gendered practices of some Traditional Courts are counterproductive to the application of gender-wise justice. We have shown that culture, often used to justify such unequal gendered practices, is fluid, and does not need to stand in the way of gender justice. We have presented examples of how activism has contributed to formal law making in Namibia, and the national conversation about GBV, particularly by challenging victim blaming.

We begin our reflection on the potential contribution of victimology by advocating for up to date victim centred primary research on the experiences of women victims of GBV in both

justice systems. Previous research by the Legal Assistance Centre informs our understanding of issues in the formal justice system, such as delayed responses following rape and inadequate enforcement of protection orders demanding action. Primary research with victims would enhance insight into the implications of these problems from victims' perspectives. It would also ensure that pertinent issues, like complainant withdrawal, are informed by those with the most expertise, the complainants. Resultant research findings would thus have the potential to improve the responsiveness of future victim-focused measures to victims' needs.

There are several important methodological considerations to be taken on board in conducting primary research with victims in Namibia. Firstly, victimology researchers need to be completely open to engaging with state criminal law, customary law, and the systems that administer both. Otherwise victimology would be restricted to a partial application and relevance in Namibia. Thus, complex issues around accessing victims in both systems need to be worked through sensitively and ethically. The dearth of primary research with GBV victims in the traditional justice system particularly needs to be addressed. A bespoke approach is needed to research such a complex, varied and localised traditional justice system. We suggest that training and utilising peer researchers could be a useful way to address this challenge.

Next, it is crucial that victimological enquiry is approached in a way that is appropriate to Namibia as a place. The reality that the modern discipline of victimology is dominated by theoretical perspectives from Europe and North America (Saponaro, 2013) prompts scholars, such as Peacock (2013) to argue for an African victimology that is culturally and contextually



relevant. We argue that, as a minimum, it is vital to engage openly and sensitively with peoples' world views and be cognisant of how views are influenced by place. There are practical challenges to undertaking large-scale victimology research in Namibia.

Criminology and therefore victimology, is not a core discipline in Namibian higher education. The subject of criminal justice is taught at higher level alongside correctional services studies and policing studies. This is not insurmountable but is important to bear in mind when drawing on human and academic resources. A further constraint, which causes concern, is the earlier mentioned shortage of resources to respond to the needs of victims of GBV in Namibia. Researchers must approach their task with this ethical consideration in mind, to guard against building false hope of increased provision, whilst recognising that research *may* help build a case for increased resource allocation.

An enabling factor for victimology research in Namibia is that the sharing of testimonies by women who have been harmed by GBV already takes place in women's organisations and groups. This means there is a foundation on which to build. Such powerful testimonies need to be told, as Kirchhoff (2013: vii) attests; "avoiding silencing is part of 'victim truth'". We recommend that the expertise of organisations such as Women's Solidarity, the Women's Leadership Centre and Victims 2 Survivors are utilised and remunerated in future endeavour. This will require political will and a long term commitment to tackling and resourcing GBV from both Government and importantly, international donors. The precedent exists in relation to HIV programming in Namibia and GBV should be addressed with similar urgency and resource allocation.

We contend that victimology insights can contribute to practice improvements in Namibia and recommend the introduction of victimology as a core subject in the training of criminal justice practitioners. Doing so would underscore the importance of addressing the earlier mentioned shortcomings in criminal justice practice that increase risks to the safety of GBV victims. Whilst victim focused training should not be an alternative to ensuring the services are resourced to meet the demands they face, it is important that practitioners are able to understand the human cost to victims when denied the processes promised by law.

Our final recommendation is to set up an observation scheme covering GBV court proceedings in both the state and traditional hearings in Namibia. There are precedents for this approach from academia (see Smith and Skinner, 2012) and from practice, utilising members of the general public as observers, by Durham et al. (2017). Such a scheme has the potential to benefit several areas, as it would address the prevailing lack of knowledge about GBV processes in various Traditional Courts and would identify when processes promised by legislation are not being implemented in formal state courts. The expertise to oversee such a scheme in Namibia exists in the Legal Assistance Centre, should resources be allocated.

In conclusion, substantial progress has been made in developing progressive legislation to address GBV in the criminal justice system, even though further implementation improvements are required. Activists have been important in advocating for such improvements and highlighting where responses have fallen short. Although a young country, in terms of independence, democracy, and constitutional law-making, Namibia has chosen to protect its traditions and customary law. The ascertainment of various customary laws should be the start of a process to ultimately ensure that Traditional Courts deal with

GBV in line with the constitution, which also requires addressing both the legal scope and gendered practices in the traditional system. Set against this backdrop, if victimology was embraced as a discipline in Namibia, it has the potential to contribute to the overall goal of improving the response to women violated by GBV, by informing victim centred research processes and practice in both justice systems in Namibia.

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