

Understanding the Law

What is a law?

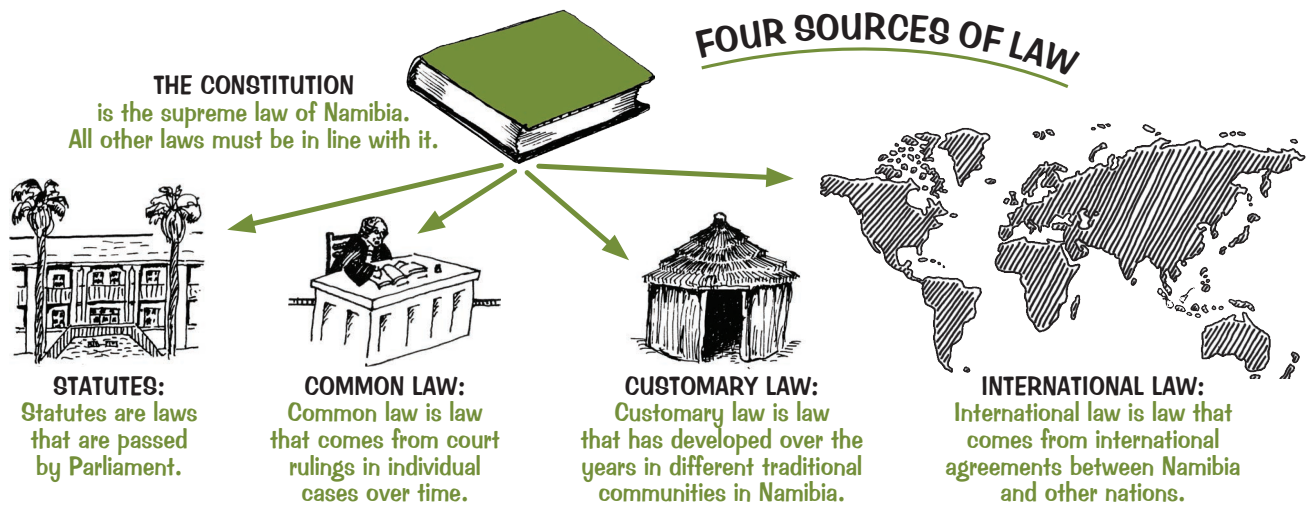
Laws are rules that all people in a society must follow. The Constitution sets out the sources of laws in Namibia. Laws are enforced by government and by the courts.

Four sources of law

The Namibian Constitution is the Supreme Law of Namibia. All other laws must be in line with the Constitution to be valid. There are four sources of law in Namibia: (1) statutes (2) common law (3) customary law and (4) international law. These four kinds of law are explained in more detail in the other factsheets in this series.

POLICY AND LAW

Government ministries and other government bodies are usually guided by a mixture of policy and law. There is an important difference between these two types of guidelines. A **policy** is a statement of principles or goals adopted by government. Policies state what government *intends* to do to address certain issues or problems, but they are not binding. A **law** contains binding rules which can be enforced by the courts. Laws are usually enacted to put policy into action.



Statutes are laws that have been passed by Parliament since independence, or laws that were passed by other legislative bodies before Namibian independence. Other terms for statutes are “legislation” and “Acts of Parliament”. Parliament can make changes, called “amendments”, to statutes which have already been passed.

Common law is the law developed over time through decisions in individual court cases. It is usually necessary to examine several court cases decided over time to understand the common law on any specific topic. Parliament can change a common law by passing a statute that says something different.

Customary law is the law that has developed over the years in different traditional communities in Namibia. It changes gradually over time as people change their ways of doing things. Customary law is often not written down, because the people in the community know how things are usually done in that community. Questions about customary law are usually decided by traditional courts, chiefs, headmen or other traditional leaders. Parliament can change a customary law by passing a statute that says something different.

International law generally refers to the rules which apply in relationships between nations. Namibia has joined together with other nations in some international agreements. These agreements are sometimes called “treaties” or “conventions”. Some examples of international agreements that Namibia has joined are the UN Convention on the Rights of the Child and the UN Convention on the Elimination of All Forms of Discrimination Against Women. The Namibian Constitution says that all international agreements which are binding on Namibia will be part of the law of Namibia, as long as they are consistent with the Constitution and any statutes passed by Parliament. ►

When Namibia was under the control of Germany and South Africa in the past, laws were made for Namibia by colonial authorities and courts. To ensure a smooth transition, the Namibian Constitution states that all the laws in force in Namibia at the time of independence remain in force until they are changed by Parliament or ruled unconstitutional by a Namibian court.

Testing laws against the Constitution

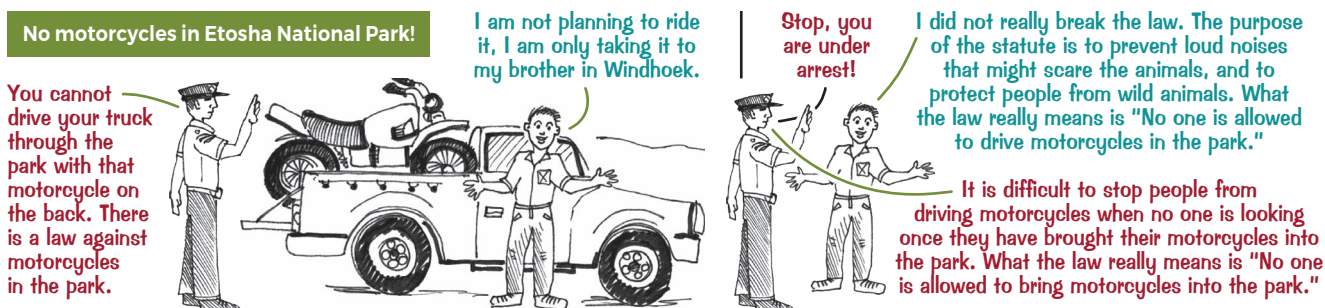
Any law that is in conflict with the Constitution is unconstitutional. It is the job of the courts to decide whether a law is unconstitutional. If a court rules that a law is unconstitutional, then that law is not valid and does not have to be followed any more.

For example, there are **statutes** saying that a person convicted of a crime can be punished by being struck with a cane. This is called “corporal punishment”. But the Constitution says that everyone must have respect for human dignity. It says that no persons can be punished in any way that is cruel, inhuman or degrading. So the Supreme Court ruled that the statutes which allow corporal punishment by state institutions are unconstitutional. This means that these statutes are invalid – they do not apply to people in Namibia anymore.

Any court can apply and interpret the law. But only the High Court and the Supreme Court can decide whether a law is consistent with the Constitution. The courts do not interpret a law or consider its constitutionality unless they are asked to do this by someone affected by the law or by the Attorney General. Courts can make better decisions about laws when they see them in action in a specific context.

Interpreting laws

Sometimes people disagree about what a law means. It is the job of the courts to interpret the law.



If a law can be interpreted in more than one way, the court will think about what was intended and then decide which interpretation is the correct one.

Criminal cases and civil cases

A **criminal** case is a case between the state and someone who has broken a law. A lawyer who represents the state in a criminal trial is called a prosecutor. The prosecutor tries to prove that the accused person is really guilty of committing a crime. If the person who is brought before the court is found guilty of committing a crime, then the court will decide on some form of punishment.

A **civil** case is a case between two persons who are in dispute. A civil case often involves a claim for money, but it could also be a request for a court order saying that a person must do something or stop doing something. For instance, a civil case can arise where there is a contract between two people or where one person has been damaged by the actions of another (such as an assault or a car accident).

Sometimes a single problem can lead to both a criminal and civil case. For example, suppose that you steal cattle from George. George could lay a charge of stock theft against you.

- If the state prosecutor thinks there's a chance that you're guilty of the crime, then the case will go to court. This would be a **criminal** case. It would be decided by a magistrate's court or the High Court, depending on the seriousness of the crime.
- If found guilty, George could demand that you pay him for the value of the cattle you stole. This would be a **civil** case. This case might be decided by a traditional court under customary law if you and George are from the same traditional community, or by a magistrate's court or the High Court. If the court decides in George's favour, it would order you to pay him for his loss.

Either or both criminal or civil case could take place - depending on what George and the state prosecutor decide.

DIFFERENT KINDS OF LAWYERS

“**Lawyer**” is a general term used to describe a person with a degree in the study of law. Lawyers who pass a test to show that they have the right knowledge and skills can be “admitted to practice” by the court if they are fit and proper persons. This means that they can give legal advice to members of the public and argue cases in court. These lawyers are called “**legal practitioners**”. Legal practitioners can appear in any court in Namibia, although they must have a certain amount of experience before they can argue cases in the Supreme Court.

There are two kinds of legal practitioners in Namibia, informally known as “**attorneys**” and “**advocates**”. Attorneys gave legal advice to members of the public and often handle court cases on their own. However, attorneys sometimes get assistance from advocates. An advocate is a legal practitioner who specialises in appearing in court, or in handling complex kinds of legal questions. Clients cannot consult advocates directly. Only attorneys can approach advocates for help. Then the attorney and the advocate will work together as a team. Legal practitioners who want to be advocates must serve a period of apprenticeship with an experienced advocate and then pass an extra test.

Another term to know is “**paralegal**”. Paralegals are not lawyers, but they have had some training in how to deal with everyday legal problems, such as labour matters and maintenance. Paralegals often give people advice on legal problems, but they cannot represent someone in court unless there is a law which makes special provision for this in certain kinds of cases. ■