

# Common Law

**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.

## THE HISTORICAL DEVELOPMENT OF NAMIBIA'S COMMON LAW

Some principles of Namibia's common law are based on "**Roman-Dutch law**", which refers to legal principles from ancient Roman times, as these principles were applied in the Netherlands centuries later. These legal principles were brought to South Africa and Namibia by the colonial settlers who came to South Africa in the 1600's. The common law was later influenced by principles of **English law** which were introduced as South Africa came under the control of England in the 1800s and 1900s. The South African legal system was applied to Namibia while Namibia was being governed by South Africa, and so became part of the legal system that Namibia inherited at independence.

Since independence, the common law has been further influenced by Namibian values, especially by those expressed in the **Namibian Constitution**. Art 66 of the Constitution says that the common law of Namibia which was in force on the date of independence remains in force, as long as it is not in conflict with the Constitution or any statutes. Art 66 also says that common law can be repealed or changed by Parliament as long as Parliament follows the Constitution.

## Advantages and disadvantages of common law

Why should some of Namibia's law be made by judges through decisions in individual court cases, instead of being made only by Parliament in the form of statutes?

**1 Advantage: Common law develops gradually over time, in light of a range of specific situations.** This means that common law is constantly adjusted and fine-tuned as new situations arise in real life.

**Disadvantage: Common law is reactive, not proactive.** Unlike Parliament, courts do not generally anticipate future situations. Courts make decisions only in the individual cases which are brought before them. They develop legal principles only in light of specific situations.

**2 Advantage: Common law is consistent and predictable.** The guiding principle of the common law is that similar cases should receive similar treatment. When a new situation comes before a court, the judge has a duty to look at similar cases which were decided in the past and to fit the new situation into the existing picture. This ensures that the law is fair. Courts depart from the principles of previous court decisions only if the case they are considering involves new issues that have not been decided by the courts before, or if the common law has become outdated because of changing social values. Consistency and predictability are important. People have to know what they can expect the courts to decide, so they will know in advance what is right and what is wrong or when they are likely to have to pay damages for something they have done.

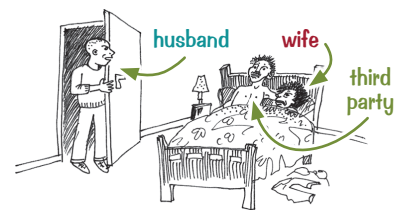
**Disadvantage: Common law can be overridden by legislation enacted by Parliament:** Parliament can pass a statute that changes a common-law rule – as long as the statute is in line with the Namibian Constitution. Statute law is less predictable than common law, but it is important for Parliament – which is accountable to the voters – to have the power to change rules of common law which do not reflect the views of the public.

**3 Advantage: Common law is flexible.** The enactment of new statutes by Parliament can take years. New statutes or amendments to existing statutes are usually a product of numerous stages of consultation and compromise between the views of different stakeholders. Yet even when a statute is carefully drafted, Parliament would never be able to imagine all the specific situations which that statute might cover in the future. In contrast, the courts can fine-tune the law immediately in a specific case, even where the case involves a set of facts which has never been considered by the courts before. The judge will look at the most similar cases which have been decided in the past and figure out how the relevant legal principles should be applied to the new situation.

**Disadvantage: Common law is less accessible to the public than statute law:** Statutes are sets of rules which are written down in a clear and structured way. Because common law is the product of court decisions made in different cases over long time periods, common law rules on specific issues can be harder for members of the public to locate and understand. People often have to consult legal practitioners to understand what the common law says about a specific topic. ►

**4 Advantage: The courts are impartial.** Members of Parliament represent political parties. Parliament might hesitate to make statutes on controversial issues because doing so might mean that they or their political party would get fewer votes in the next election. But judges must be politically impartial. Court decisions are based on legal principles which have been applied in the past, not on political considerations or the personal opinion of the judge who is deciding the case. **Disadvantage: Parliament is democratic.** Making new laws for the future is primarily the role of Parliament, and not the role of the courts – because Parliament is accountable to the voters. Judges are appointed, not elected, and they are chosen on the basis of their legal expertise, not on the basis of their political views. Judges are bound to follow the Namibian Constitution and the law. They are politically independent.

**Example:** An example of a situation where the common law in Namibia has recently evolved involves adultery. In the past, if one spouse committed adultery, the other spouse could bring a lawsuit against the third party for damages. The Supreme Court of Namibia decided in 2016 that this kind of court case no longer reflects the convictions of the community or public policy, which is now informed by Namibia’s constitutional values. The Supreme Court gave these reasons for its decision: (a) The possibility of claiming damages for adultery was originally available only to men, and arose long ago when wives were considered to be the property of their husbands. (b) In modern times, adultery is no longer viewed with the same degree of disapproval as in the past. (c) The common law rule did not make sense because the wronged spouse could get damages only from the third party and not from the adulterous spouse – even though both were involved in the wrongdoing. (d) This kind of lawsuit could injure the dignity and privacy of the adulterous spouse. (e) This kind of lawsuit could harm the children involved through embarrassing publicity or emotional trauma. The Supreme Court concluded that actions for damages for adultery will no longer be allowed in Namibia because they do not fit well with constitutional values such as equality between men and women in marriage and human dignity. Because the Supreme Court is the highest court in Namibia, this decision must be followed by all the lower courts in Namibia. Parliament could change the law by passing a statute that provides for lawsuits for damages in cases of adultery – as long as the courts did not decide that such a statute violates the Namibian Constitution.



## How to find out what the common law says

Common law rules come from written judgements in cases in Namibia’s High Court or Supreme Court. Court decisions are all public documents. They are useful because the judge who decides the case always provides the reasons for the decision as well as the outcome of the case. However, a person who wants to understand a common law rule will usually need to look at several court decisions over time. There are books with summaries of court cases on specific topics.

If there are no past court cases about a particular issue in Namibia, the courts might look at cases from other countries with constitutions or principles of government similar to those in Namibia. A member of the public who is trying to predict what the Namibian courts might decide in a new situation might want to read cases on similar issues from other countries.

Because the common law can be difficult to find and understand, people often get help from a lawyer to understand what the common law says.

The written judgments in the most important court cases decided in Namibia are contained in the **Namibian Law Reports** which are published as books several times each year. Most law firms and law libraries have these reports. They are also available online by subscription. All High Court and Supreme Court judgements are available on the website of the Namibian Superior Courts: [www.ejustice.moj.na](http://www.ejustice.moj.na). Some judgements are also available on the legal information websites Namibia Legal Information Institute (NamibLII: [www.namiblii.org](http://www.namiblii.org)) and Southern African Legal Information Institute (SAFLII: [www.saflii.org](http://www.saflii.org)). SAFLII also has court decisions from other countries in the region.

## Testing common law against the Constitution

Like other laws, **common law** must follow the Namibian Constitution. For example, the common law used to have a concept called marital power, which gave husbands certain legal powers over their wives in marriages in community of property. Because of marital power, the common law said that women married in community of property could not be sued in court – a person who had a dispute with a woman married in community of property had to sue her husband. The High Court found that the common law on marital power is unconstitutional because it constitutes sex discrimination. It also violates the constitutional promise that women and men must have equal rights during marriage. The Court decided that the common law rule on marital power became invalid when the Constitution came into force.

## Interpreting common law

Over time, court cases help to clarify the common law as courts apply the rules to specific situations. ■

