

Constitutional democracy in Namibia

A critical analysis after two decades

Edited by
Anton Bösl, Nico Horn & André du Pisani

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Foreword

Peter H Katjavivi

Writing about global democracy and global justice in his book, *The idea of justice*, Professor Amartya Sen states the following:

Over hundreds of years, writers on justice in different parts of the world have attempted to provide the intellectual basis for moving from a general sense of injustice to particular reasoned diagnoses of injustice, and from there to the analyses of ways of advancing justice. Traditions of reasoning about justice and injustice have long – and striking – histories across the world.

The paradigms of *democracy* and *constitutionality* came from the European and Western tradition. Their meanings underwent substantial transformations and were shaped over the centuries. Despite different regional perceptions, they have become widely accepted as the leading concepts in political thinking on how a state is constituted and how a country is run.

Constitutionality refers to the state or nation being constituted by a (basic) law which lays down rules for the operations of a political system and government. Its code of rules provides normative guidance for the conduct of both government and the entire citizenry. Constitutions are an affirmation of the relevance of the rule of law. To prevent a constitution from being authoritarian, it must enjoy the support of the citizens by reflecting their values and virtues. Therefore, any modern constitution must enshrine democratic principles, processes and practices. Only a democratically motivated constitution enjoys the broad support of the citizens and can be considered a living constitution.

The Constituent Assembly of Namibia, elected in the country's first free, fair, and democratic elections in 1989, was tasked with drafting a constitution for the future independent state. It became the National Assembly – the first Parliament of Namibia – on 21 March 1990. This marked the transition from oppression to democracy, from the illegal South African occupation, with its racist system of laws, to the acknowledgement of the equal dignity and rights for all Namibians. In this context, the contribution of the United Nations in supervising and controlling the elections to ensure that they were free and fair, and international support in the endeavour to write a constitution for the new nation, should be acknowledged.

The Namibian Constitution is regarded as one of the most modern and progressive basic laws worldwide, with constitutional principles, a bill of rights, the separation of powers, and democratic order. After 20 years, Namibia's constitutional democracy is formally fully established. The Constitution is the supreme law of the land and the normative guideline for the entire citizenry and its government.

The past 20 years of constitutional democracy have brought political stability to the country. However, democratic values as inherent principles and premises of the Constitution need to be more fully developed and democratic procedures must be upheld at all times. Economic and social challenges also need to be met to live up to the economic and social rights enshrined in the Constitution.

Not only do 20 years mark a generation, they are also a good standpoint from which to evaluate the achievements of constitutional democracy in Namibia. This is the purpose of this publication. It includes contributions by some of the participants in the drafting of the Constitution who share their reflections on the process and the challenges they faced in this important and unique exercise. The various articles presented here examine Namibia's achievements and challenges over the past two decades.

As a member of the Constituent Assembly and participant in the drafting committee that crafted the Namibian Constitution, I welcome this publication as a timely initiative. It is my hope that this book will deepen the understanding of constitutional democracy, strengthen constitutionality and the rule of law, and contribute towards the ongoing promotion of democratic principles, processes and values in Namibia.

Professor Sen also states the following:

Democracy has to be judged not just by the institutions that formally exist but by the extent to which different voices from diverse sections of the people can actually be heard.

He points out that this way of seeing democracy can have an impact on the pursuit of it at the global level:

If democracy is ... seen ... in terms of the possibility and reach of public reasoning, the task of advancing – rather than perfecting – both global democracy and global justice can be seen as eminently understandable ideas that can plausibly inspire and influence practical actions across borders.



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Introduction

Anton Bösl, Nico Horn and André du Pisani

In both a legal and political sense, the constitution of a state embodies and reflects the fundamental principles according to which such state is constituted and governed, whether embodied in the law, custom or conventions.

Constitutions regulate and define the distribution of public power among the various institutions of state, whether central, regional or local. Constitutions usually determine the limits of governmental authority and regulate interactions between the state and the country's citizens. The notion of the *rule of law* implies a judiciary sufficiently independent of the legislature and the executive to ensure that the country is governed according to the principles of the constitution. A *constitutional democracy* exists when these rules and principles are followed consistently.

Two decades after Namibia's Independence, this collective volume draws together a number of scholars of law, politics, and history, as well as active and retired politicians, and as such, offers a rich and intellectually diverse tapestry of reflective analysis and ideas on the state of constitutional democracy and jurisprudence in Namibia. The various chapters have been organised under the rubric of three principal themes. In **Section I – Constitutional Democracy and Good Governance**, the historiography and construct of constitutional democracy and its implications for governance are explored. **Section II – The Genesis of the Constitution of the Republic of Namibia** discusses the genesis of the Constitution of Namibia, including its making, its regional and international context, and its antecedents. **Section III – Challenges within the Namibian Constitution** addresses the legal philosophy that infused the Constitution with meaning, and investigates the trajectory of constitutional development and its wider implications for state- and nation-building. Section III also focuses on a critical consideration of particular constitutional provisions and their formative role in a number of policy and legal domains, such as environmental rights and justice, the paradigm of equality and its actualisation, and a consideration of intellectual property rights.

In a contribution of philosophical and historical bent, **André du Pisani** offers a broad canvas that traces the genesis, evolution and implications of the construct of constitutional democracy. This chapter frames subsequent contributions to the book, and argues that the very notion of *democracy* is inherently contested and complex. Moreover, drawing on the ancestry of the Enlightenment and its core values, the writer forges a confluence between democracy and constitutionalism. The latter, constitutionalism, is a more recent construct and broadens the scope of democracy by providing it with an actualising potential that has implications for the practical conduct of politics and law. In liberal democracies such as Namibia's, one of the central purposes of a constitution is to

constrain government with a view towards protecting individual liberty and rights. The overriding purpose of law is that of enlarging freedom.

In a nuanced and wide-ranging contribution, mediated by recent history and considerations of culture and language, **Joseph Diescho** reflects on the vibrancy of the related concepts of *rights* and *constitutionalism* in Africa. Starting with a consideration of the concept of *Africa*, the author teases out the genealogy of rights, more especially from the 18th Century onwards, as informed by the spirit of the Declaration of Independence of the United States of America. Emphasising the narrative historiography of rights, the writer then proceeds to link the notion of *constitutionalism* with that of rights and poses the following question: Are rights foreign to Africa? Invoking a periodisation of Africa's history in terms of pre- and post-colonial eras, the chapter concludes that a culture of rights would not be adequately grounded unless and until Africans know who they are, and only once the related concepts of *restorative* and *social justice* are recognised and enacted as rights by virtue of their own qualifications as such. This chapter builds on and deepens some of the domain concerns raised in the volume's first chapter.

Henning Melber analyses the impact of the Namibian Constitution on the related projects of state- and nation-building, and illustrates how the Supreme Law enabled these projects to gain political currency. As a marker of the end of foreign rule and the beginning of self-government of the Namibian people under a common normative framework, the Constitution, for Melber, is the cornerstone of political transition and of a new republic. Because the Constitution represents the prevailing spirit and culture of its time, as well as the country's collective experiences, values, principles and aspirations, Melber describes the Supreme Law as not being perfect and cast in stone, but rather as being a framework and compass for all parts of society, providing structure and guidance for the ongoing process of nation-building.

Marinus Wiechers, one of three principal legal drafters of the Namibian Constitution, deals with how legality and legitimacy were reconciled in the Supreme Law. The writer shows how and why the Constitution was able to bridge the chasm between legality and legitimacy that characterised pre-Independence Namibia in terms of constitutionalism. The supportive research question of the contribution is that of how reconciliation between these two guiding concepts can be deepened in the future. The chapter concludes by identifying the most important factors that could undermine the legitimacy of the Namibian Constitution, and expresses the hope that, in future, its legitimacy will not become eroded and, finally, be destroyed.

Nico Horn considers the local antecedents to the Namibian Constitution. His consideration draws on one of the primary formative contexts to the drafting process. The writer shows how and why the Constitution was anchored on a number of historical compromises, including the 1982 Constitutional Principles, and how particular local and international interests and legal instruments provided a foundation for it. The chapter not only offers the necessary setting for a more interest-based and politically and historically grounded

understanding of the Constitution, but also resonates powerfully with the contribution by **Hon. Theo-Ben Gurirab**, current Speaker of the National Assembly and former Minister of Foreign Affairs, who draws on the regional and international contexts that spawned the spirit, normative grounding and core principles embedded in the Supreme Law. Gurirab sketches the genesis and political currency of the idea of *reconciliation* by locating it in the politics of the time and the richness of his memoirs. As one of the active participants in the drafting of the Constitution and the key diplomat on behalf of one of the most significant parties to the conflict and its subsequent resolution, in this chapter Gurirab offers many personal insights into the negotiated transition that culminated in Namibia's Independence in March 1990.

Hon. Hage Geingob graciously gave permission for one of his previously published works on the making of the Constitution to be reprinted in this volume. As the former Chairperson of the Constituent Assembly – the body that crafted the Constitution – and, subsequently, the country's first Prime Minister, his contribution offers a unique perception of the chemistry in and work of the constitution-making body. This chapter is of more than historical and political interest to the reader, for it serves as a lasting reference to a remarkable and edifying process that culminated in consensual agreement on the Constitution.

In similar vein, but from a different point of departure, **Dirk Mudge** – President of the official opposition, the Democratic Turnhalle Alliance (DTA) of Namibia at the time – offers his insights into the art of compromise and mutual acceptance that came to characterise the process of constitution-making. The writer also provides an impressionistic canvas on which he paints the contours of the country's recent constitutional history in broad strokes. Read together with the contributions by Gurirab and Geingob, this chapter greatly assists in understanding the complexities and historical compromises that characterised constitution-making in one of Africa's more recent democracies.

In his search for justice, **Manfred Hinz** questions not only legal positivism but argues from a legal anthropological and legal sociological perspective that law is not a monolithic code of rules. Instead, it is a mirror of a legally pluralistic society, informed by people, and generated as an expression of their concepts of *justice*. Therefore, Hinz pleads for normative pluralism which goes beyond state-created laws and their limits, and accommodates non-state codes, ethical norms, customs and, in particular, African customary law. In this way Hinz tries to bridge the gap between the spheres of (state) law and social norms, between legal positivism and living customary law, between legality and morality. In a first step, Hinz refers to Antony Allott's concept of *limits of law*, which provides the philosophical framework for an understanding of justice which is to be found beyond the law and also beyond the constitution. In a second step, Hinz exemplifies his position by referring to three Namibian cases in which the limits of (positivist) law became evident, and to the fact that laws can be valid but unjust. Hence, justice transcends laws and constitutions.

Stefan Schulz argues that the constitutional protection of the actual, intended or only desired behaviour of a person outside the ambit of a special fundamental right or freedom requires the recognition of a residual (negative) freedom, also called a *general freedom right* (GFR). The non-recognition of the GFR results in the possibility that the legislator – and, in its wake, the executive – may arbitrarily infringe on, restrict and violate the life spheres of individuals without any legal remedy for the individual affected. Such treatment does not recognise the individual as a recipient of rights but as an object, subjected to statutory mechanisms, and without a say in the matter. If Ronald Dworkin’s claim holds any appeal, i.e. that *democracy* is about governments “treating all members of the community as individuals, with equal concern and respect”, legal scholars would be well advised to keep an eye out for this residual freedom right in their constitutions. Schulz deals with the merits of the GFR and the issue of where to locate it in the norm text of the Namibian Constitution.

Lazarus Hangula critically discusses the state of certainty of Namibia’s boundaries from a historical, geodetical, political and constitutional perspective. Most of the boundaries with neighbouring countries have been satisfactorily clarified – some only few years ago. Boundary matters regarding the southern parts of Namibia at the Orange River have remained dormant, however, and are therefore unclear and uncertain. Whilst the English–German (Helgoland) Treaty of 1890 defined the boundary between Namibia and South Africa on the “north bank”, Article 1 of the Namibian Constitution – in line with international law – extends the boundary to the middle of the river. Hangula reminds us of the post-1994 discussions and the informal agreement between the then Presidents of the Namibia and South Africa, namely Nelson Mandela and Sam Nujoma, which acknowledged the “middle” of the river as being the boundary. Despite the setbacks there have been on the issue, Hangula encourages further endeavours to create necessary and lasting clarity on this uncertain boundary issue.

George Coleman and **Esi Schimming-Chase** remind us that the adoption of the Constitution created a paradigm shift from a culture of authority to a culture of justification. The authors begin with the pre-Independence Bill of Fundamental Rights that was ironically entered into law by the then State President of South Africa as an annexure to Proclamation R101 of 1985 which applied in Namibia at the time. While the then Supreme Court of South West Africa regarded the Bill as a constitution, almost all their judgments were eventually overturned by the South African Supreme Court of Appeal. Looking at the constitutional era in Namibia since Independence in 1990, the authors conclude that “endemic failure of justice still occurs in the lower courts”. In the same vein, the authors bemoan the fact that the courts still have a narrow view on what constitutes administrative action. Nonetheless, the failures mentioned here should not be seen as a negative approach by the authors. While they applaud the jurisprudential development in the country, they caution that problems concerning the administration of justice need to be addressed or the advances gained through jurisprudence may amount to nothing.

Discussing the complex understanding of *equality* as stipulated in Article 10 of the Namibian Constitution, **Dianne Hubbard** distinguishes between the concept, contours

and concerns of equality. The concept of equality is aimed at achieving substantive equality rather than formal equality, as a means to correct past wrongs. The contours of equality become clear through its judicial application. In this regard Hubbard shows that Article 10 has only been successful where it has been applied in conjunction with other constitutional provisions that help to define its meaning. Furthermore, she proves that the equality clause has been invoked in the name of sex, sexual orientation, economic status, social status and race. But although the paradigm of equality in the Constitution is premised on a break with the country's apartheid past, the equality clause has paradoxically seldom been used to challenge racial discrimination. As regards concerns about the equality clause, Hubbard lists some anomalies in Article 10's application. Her first concern is about the timing of the application of Article 10 to statute law as opposed to common law and customary law. Namibia seems to be unable to harmonise the timing of the invalidity of findings on the unconstitutionality of different forms of law, and of customary law in particular. Her second concern has to do with the two conflicting interpretations of the Constitution: a positivist vis-à-vis a value-based approach. Hubbard argues that the promise at Namibia's Independence was that the dignity and equality of all persons, and of minority and unpopular views, are to be respected. It is particularly the vulnerable and those who lack (political) power who need protection against discrimination the most – which protection only a constitution can provide. These values guide the application of the principle of equality, which – for Hubbard – is the foundation of Namibia's freedom.

In discussing Article 81 of the Namibian Constitution, **Francois Bangamwabo** begins by comparing a parliamentary democracy with a constitutional democracy. Since Namibia made a concerted choice for constitutional democracy, Article 81 cannot be interpreted to make Parliament a final court of appeal. Bangamwabo concludes that, whilst the legislature, by virtue of the said Article, is empowered to contradict the Supreme Court's decisions, this process has to be done lawfully and in line with other constitutional provisions. Consequently, Bangamwabo opines that Parliament can only contradict constitutional judgments if amends the Constitution at the same time.

Yvonne Dausab discusses the imperative tone of Article 144 of the Constitution. Taking the interrelatedness of all human rights into consideration, and the fact that the drafters of the Constitution opted for the direct application of international law in the legal system, she asks to what extent Namibia has remained true to its pledge to implement directly applicable international law within the framework of its municipal legislation. Dausab concentrates on the International Covenant on Civil and Political Rights (ICCPR). After a thorough discussion on the monist and dualist approaches to international law, the imperative tone of Article 144, and Namibian jurisprudence since Independence, Dausab concludes that the Namibian courts have made an effort to implement a monist approach anticipated by the wording of the Constitution. However, at the same time, there is a strong political force in Parliament insisting on the secondary place of international treaties vis-à-vis Namibian law. A case in point is the existence since 2006 of a Rome Statute Establishing the International Criminal Court Implementation Bill. She asks why Namibia still needs additional legislation in order to prosecute people under the Rome Statute. This Statute, and others like it, shows that there are different ways in which states make international law applicable to the municipal set-up. Dausab's article

challenges both the courts and the politicians to take Article 144 of the Constitution and our responsibilities under international law seriously.

Drawing on his experience as the country's first Director of Elections and subsequent Deputy Minister of Local and Regional Government, Housing and Rural Development, **Gerhard Töttemeyer** interrogates the nexus between the Constitution, democracy, and the electoral system. Given the centrality of the electoral process to democratic life, the contribution considers the principal challenges that face the management of elections in Namibia. He offers a number of specific recommendations on how to improve the process. Among these is his recommendation to amalgamate the Electoral Commission and the Delimitation Commission into one body. The author concludes by emphasising the secrecy of voting as integral to ensuring the legitimacy and integrity of elections.

Sam Amoo and North American researcher **Sidney Harring** look at the protection of intellectual property rights under Article 16 of the Namibian Constitution. To understand Article 16, they assert, one should remember that it was part of the political settlement initiated by SWAPO of Namibia as one of the major negotiating parties. Consequently, the property regime of Article 16 contradicts the non-discriminatory and equality clauses of Article 10 as well as the need for Affirmative Action in Article 13 to abolish the vestiges of apartheid. The authors also state that Namibia has always acknowledged international intellectual property rights. Since Independence, Namibia has acceded to modern international intellectual property rights regimes, particularly the Agreement on the Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement). However, focusing on cultural rights, communal land rights and other traditional rights, the authors argue that these rights are protected by international human rights law, which, in terms of Article 144 of the Constitution, automatically become part of Namibian law once a treaty is ratified. They also speculate that even constitutional rights such as freedom of expression (Article 21), cultural rights (Article 19), education (Article 20), and privacy (Article 19) protect traditional knowledge and intellectual property rights. Consequently, they conclude that, if the Namibian courts want to protect the intellectual property rights of the Namibian people, particularly those of the most vulnerable groups of society, then "all forms of property, movable or immovable" in Article 16 should be interpreted in such a way that it not only protects the traditional Euro-centred regime of intellectual property rights, but also the intellectual property rights emanating from the cultural and traditional rights of the Namibian people.

Fritz Nghiishililwa discusses Parker J's controversial judgment in the *Africa Personnel Services* case. He compares the new Namibian Labour Act, 2007 (No. 11 of 2007) (specifically the banning of labour hire) with modern developments in the international arena. Nghiishililwa gives special attention to the Australian set-up, known to be a model for many countries in the development of regulatory measures rather than an outright ban on labour hire or agency work. Comparing modern examples of agency work with the oppressive labour hire system of the apartheid era, generally known as the South West African Native Labour Association (SWANLA) system, Nghiishililwa concludes that regulated agency work has very little in common with modern agency agreements. He

consequently rejects the High Court's conclusion that labour hire can still be compared with a modern expression of slavery. While he does not deny that labour hire or agency work can easily be abused, Nghiishililwa opts for a regulatory framework rather than a labour hire ban to counter the abuses. Since Nghiishililwa's article was written before the appeal to the Supreme Court, the chapter ends with a short summary of the latter's recent unanimous judgment. The Supreme Court vindicated Nghiishililwa's position and declared section 128 of the Labour Act unconstitutional.

Although the Namibian Constitution has adopted a positive human rights framework and culture, and has established a new regime relating to the natural resources in the country, for **Oliver Ruppel**, after 20 years of Independence Namibia still faces several challenges that hamper the development of environmental justice and the explicit recognition of environmental (human) rights. Ruppel argues that the legal milieu in support of environmental rights and justice is still far from perfect. He firstly examines the categorisation and concept of *environmental rights* and *justice* in general, and then views the Namibian constitutional dispensation in that light. The article intends to establish whether and to what extent environmental (human) rights are explicitly or implicitly recognised in Namibia, demonstrating at the same time how human rights and the environment are interrelated and indivisible. Ruppel concludes with the hope that the Namibian courts will gradually clarify the substance of environmental rights and, hence, promote environmental justice.

Sacky Shanghala writes with insight on the constitutional changes since Independence in 1990, beginning with the so-called third term debate and including all the recent amendments. The author points out that a constitution, as a living document, cannot escape amendments if it needs to meet the ever-changing demands of a modern society. Even more thought-provoking than his discussion of the amendments is the author's peek into the future. Beginning with Article 1 of the Namibian Constitution, Shanghala asks if the federal powers of a Regional Council can be reconciled with a unitary state. Shanghala also raised the issue of dual citizenship and wonders if it should not be debated in the light of growing globalisation. Two controversial issues – abortion and gay rights – are mentioned almost in passing. It seems as if the author believes that the issues are not high on the agenda of civil society. Being a longstanding member of the staff of the Ministry of Justice, Shanghala comes up with an interesting evaluation of the roles of the Office of the Prosecutor-General (PG), the Office of the Attorney-General (AG), and the Ministry of Justice. While the Ministry seems to be winning ground in the debate as to who is the most prominent among these three role players, Shanghala points out that, in terms of the AG's mandate, most legal functionaries presently housed in the Ministry belong with the AG, constitutionally speaking. Shanghala also suggests that a PG totally independent from the AG makes neither practical nor governance sense. He sees a prosecutorial authority taken over by the AG's Office.

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Abbreviations

AU	African Union
CITES	Convention on the Illegal Trade of Endangered Species
DTA	Democratic Turnhalle Alliance (<i>DTA of Namibia</i> since Independence in 1990)
EPZ	export processing zone
HRDC	Human Rights and Documentation Centre
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
LAC	Legal Assistance Centre
MP	Member of Parliament
MPC	Multiparty Conference
NDP	National Development Plan
NGO	non-governmental organisation
NPF	National Patriotic Front
SADC	Southern African Development Community
SWA	South West Africa
SWAPO	South West Africa People's Organisation (<i>SWAPO Party of Namibia</i> since Independence in 1990)
TGNU	Transitional Government of National Unity
UK	United Kingdom
UN	United Nations
UNAM	University of Namibia
UNEP	United Nations Environment Programme
UNSC	United Nations Security Council
US(A)	United States (of America)
WCG	Western Contact Group
WTO	World Trade Organisation
ZANU-PF	Zimbabwe African National Union – Patriotic Front

SECTION I
CONSTITUTIONAL DEMOCRACY
AND GOOD GOVERNANCE

The paradigm of constitutional democracy: Genesis, implications and limitations

André du Pisani

Introduction

Today's constitutional democracies are products of the historical Enlightenment whose centre of gravity was 18th-century France, but which transected geography and time, in particular England, Scotland, and North America, where it reached its fullest contemporary realisation. The roots of these democracies lie in the scientific, political, and philosophical ideas of the 17th century.

Reference to *Enlightenment values* is an even larger matter, because this term not only denotes the ideas and ideals of the historical Enlightenment, but also those that underpin the paradigm of *constitutional democracy*, are derived from them, and are very much alive in defining a rational, liberal, scientifically-minded, rights-based, limited and accountable government and democratic outlook.¹

Because the historical circumstances are, of course, as different between the 17th and 18th centuries as those centuries are from the 21st (one major motor of that change having been the Enlightenment itself), *Enlightenment values* in today's sense have to be understood as the evolved descendants of – and not as identical to – the values of the historical Enlightenment. Nonetheless, the core values of the historical Enlightenment have endured and continue to ground today's notions of *constitutional democracy*, namely reason, tolerance, autonomy, limited government, conceptions of the rights of humankind, the application of scientific method to social and political thinking, and the democratic notion of *popular power*.

Democracy: Contested and complex

Democracy is an old word, but its meanings have always been contested and complex. It came into the English language in the 16th century, from the French *démocratie* and the Latin *democratia*, in turn being a translation of the Greek *demokratia*, from *demos* meaning “people” and *kratos* meaning “rule”.²

It is at once evident from the Greek *demokratia* that much depends on the meaning given to *people* and *rule*. In the Latin, *popularis potentia*, the idea of ‘community’, comes to the fore. Both the Greek and the Latin notions of *democracy* imply the notion of the primacy of popular power, the popular will, the consent of the governed and of law. Both

1 Grayling (2008:ix–x).

2 Williams (1976:82).

Thucydides and Aristotle, the latter more famously in his *Politics*, IV, saw *democracy* as “a state where the freemen and the poor, being in the majority, are invested with the power of the state”.¹ Yet much depends here on what is meant by *invested with the power*: whether it is ultimate sovereignty or, at the other extreme, practical and unshared power. Plato made Socrates say that –²

... democracy comes into being after the poor have conquered their opponents, slaughtering some and banishing some, while to the remainder they give an equal share of freedom and power.

Democracy is now often traced back to medieval precedents and given a Greek authority. But the fact is that, with only occasional exceptions, until the 19th century, democracy was a strongly pejorative term; and it is only since the late 19th and early 20th centuries that a growing number of political parties and tendencies have united in declaring their belief in it. This is the most striking historical fact – and one of the most significant events in recent political history.

Aquinas defined *democracy* as “popular power”, where the ordinary people, by force of numbers, governed (i.e. oppressed) the rich.³ This strong class sense remained the predominant meaning until the late 18th and early 19th centuries, and was still present in the mid-19th century argument. To this definition of the *people* as the “multitude” was added a sense of the consequent type of rule: a *democracy* was a state in which all had the right to rule and did actually rule; it was even contrasted⁴ with a state in which there was rule by representatives, including elected representatives. It was in this sense that the first political constitution to use the term *democracy* – that of Rhode Island in 1641 – understood it:⁵

Popular government; that is to say it is in the power of the body of freemen orderly assembled, or a major part of them, to make or constitute just Laws, by which they will be regulated, and to depute from among themselves such ministers as shall see them faithfully execute between man and man.

The last clause in the above sentence needs to be emphasised, since a new meaning of *democracy* was eventually arrived at by an alteration of the concept here embodied. In the case of Rhode Island, the people or the major part of them made laws in orderly assembly; the ministers ‘faithfully executed’ them.

This is not the same as the *representative democracy* defined by Hamilton in 1777.⁶ He was referring to the earlier sense of *democracy* when he observed that –

1 Aristotle (1948:4).

2 Ferguson (1970:25).

3 Aquinas (1965:54).

4 For example, by Spinoza; quoted in Wolfson (1983:108).

5 *Constitution of Rhode Island*, 1641.

6 Hamilton (1788/1987:303).

... when the deliberative or judicial powers are vested wholly or partly in the collective body of the people, you must expect error, confusion and instability. But a representative democracy, where the right of election is well secured and regulated, and the exercise of the legislative, executive and judicial authorities are vested in select persons, may justly be pronounced the very definition of tyranny.

It is from this modified North American use that a dominant modern sense developed. Jeremy Bentham (1748–1832), for example, formulated a general sense of *democracy* as “rule by the majority of the people”, and then distinguished between *direct democracy* and *representative democracy*, recommending the latter because it provided continuity and could be extended to large societies. These practical arguments are, of course, serious and in many circumstances decisive.

The second principal change has to do with interpretation of *the people*. There is a significant history in the various attempts to limit ‘the people’ to certain qualified groups: freemen, owners of property, the wise, white men, men, and so on. Where *democracy* is defined by a process of election, such limited constitutions can be claimed to be ‘democratic’: the mode of choosing representatives is taken as more important than the proportion of ‘the people’ who have no part in this process. The development of democracy is traced through institutions using this mode rather than through the relations between all the people and a form of government. This interpretation is orthodox in most accounts of the development of English democracy. Indeed *democracy* is said to have been ‘extended’ stage by stage, where what is meant is clearly the right to vote for representatives rather than the old (and, until the early 19th century, normal English) sense of “popular power”. The distinction became critical in the period of the French Revolution of 1789. Burke was expressing an orthodox view when he wrote that “a perfect democracy” was “the most shameless thing in the world”.⁷

For Burke and many other thinkers of his time, *democracy* was taken to be an ‘uncontrolled’ popular power under which, among other things, minorities (including especially the minority which held substantial property) would be suppressed or oppressed. *Democracy* was still a revolutionary or at least a radical term in the mid-19th century, and the development of the idea of *representative democracy* was at least in part a reaction to this, but above all the practical reason for extent and continuity.

It is from this point in the argument that two contemporary meanings of *democracy* can be seen to diverge. In what is left of the socialist tradition, *democracy* continues to mean “popular power”: a state in which the interests of the majority of the people are paramount and in which those interests are practically exercised and controlled by the majority. In the liberal tradition, *democracy* means the open election of representatives and certain conditions such as democratic rights, including freedom of speech, conscience and assembly; the separation of powers; the rule of law; and the supremacy of the constitution – all of which maintain space for non-violent political argument.

7 Burke ([1790] 1968).

In the 20th century the virtues of *democracy* have been widely proclaimed by politicians of different ideological bent – liberals, conservatives, socialists, communists, anarchists and even fascists. No wonder that, in the words of British philosopher Bernard Crick, “democracy is perhaps the most promiscuous word in the world of public affairs”.⁸ As the attractions of other ideologies have faded, and the merits of global capitalism have been called into question, *democracy* has emerged as one of the most enduring principles in the postmodern political landscape.⁹

The lineage of *democracy* goes back to the classical, if imperfect, model of democracy, based on the *polis*, or city state, of ancient Greece, and particularly to the system of rule that developed in the largest and most powerful its city-states, Athens. The form of direct democracy that operated in Athens during the 4th and 5th centuries Before Contemporary Events (BCE) had considerable impact on later philosophers and thinkers such as Jean-Jacques Rousseau (1712–1778) and Karl Marx (1818–1883).

What made the Athenian democracy so remarkable was the level of political activity of some of its citizens. Not only did they participate in regular meetings of the Assembly, but they did so in large numbers, prepared to shoulder the responsibility of public office and decision-making. However, participation was restricted to Athenian-born males over 20 years of age. Slaves (the majority of the population), women and foreigners had no political rights whatsoever. In this light, the Athenian *polis* could be seen as the very antithesis of the democratic ideal.

When democratic ideals were revived in the 17th and 18th centuries, they appeared in a form very different from the classical direct ‘democracy’ of ancient Greece. In particular, *democracy* was seen less as a mechanism through which citizens could participate in political life, and more as a device through which citizens could protect themselves from arbitrary government power, hence *protective democracy*. This view appealed particularly to early liberal thinkers whose concern was, above all, to create the widest realm of individual liberty. The desire to protect the individual from arbitrary government power was arguably the earliest of all democratic sentiments. As Aristotle responded to Plato, “*Quis custodiet custodias?*” (“Who will guard the guardians?”).

The same concern with unchecked power was taken up in the 17th century by the English philosopher John Locke (1632–1704), who argued that the right to vote was based on the existence of natural rights and, in particular, on the right to property. If government, through taxation, possessed the power to expatriate property, citizens were entitled to protect themselves by controlling the composition of the tax-setting body: the legislature. In other words, *democracy* came to mean a system of ‘government by consent’, operating through a representative assembly.¹⁰

8 Crick (1993:12).

9 Heywood (1997:66).

10 Locke himself was not a democrat by modern standards, as he believed that only property owners should vote – on the basis that only they had natural rights that could be infringed by government.

The more radical notion of *universal suffrage* was advanced from the late 18th century onward by utilitarian theorists such as Jeremy Bentham and James Mill (1773–1836). The utilitarian case for democracy is based on the need to protect or advance individual interests.

However, to justify democracy on protective grounds is to provide only a qualified endorsement of democratic governance. In short, *protective democracy* is but a limited and indirect form of democracy. In practice, the consent of the governed is exercised through voting in regular and competitive elections. Thereby the accountability of those who govern is assured. *Political equality*, therefore, in technical terms, is understood to mean “equal voting rights”. If the right to vote was a means of defending individual liberty, it was imperative that liberty should also be safeguarded via the creation of a separate executive, legislature and judiciary, and by the maintenance of basic human rights and freedoms, such as freedom of expression, freedom of assembly and movement, and freedom from arbitrary arrest.

The argument for *developmental democracy* was first made in the liberal writings of John Stuart Mill (1806–1873). For Mill, the central virtue of democracy was that it promoted the “highest and harmonious” development of individual capacities. As a result, Mill proposed the broadening of popular participation, arguing that the franchise should be extended to all but those who are illiterate. In the process, he suggested – radically, for his time – that suffrage should also be extended to women. In addition, he advocated strong and independent local authorities in the belief that this would broaden the opportunities available for holding public office.¹¹

The confluence of democracy and constitutionalism

By and large, modern constitutionalism is a product of the 18th century, more particularly of the American Constitution. In his celebrated tract, *The rights of man*, published in 1795, Thomas Paine famously wrote: “Government without a Constitution is Power without Right”.¹² More recently, with successive waves of democratisation, constitutional questions have moved to the centre of many political debates.

Traditionally, constitutions were seen as important for two principal reasons. Firstly, they were believed to provide a description of government itself, a framing of key public institutions and their roles. Secondly, they were regarded, perhaps wrongly, as the keystone of liberal democracy, even its defining feature. Sadly, neither view is

11 Following Plato, Mill did not believe that all political opinions were of equal value. Consequently, he proposed a system of plural voting: unskilled workers would have a single vote, skilled workers two votes, and graduates and members of the learned professions five to six votes. However, his principal reservation about democracy was derived from the more typical liberal fear of what Alexis de Tocqueville (1805–1859) famously described as “the tyranny of the majority”.

12 Paine (1795).

correct. While constitutions may aim to lay down a framework in which government and political activity is conducted, few have been entirely successful in this respect. Similarly, although the idea of *constitutionalism* is closely linked to liberal values and precepts, there is nothing to prevent a constitution being undemocratic or authoritarian.

Despite the above observations, constitutions are important for they lay down certain meta-rules for the operations of the political system. Ultimately, they embody rules that govern the government itself. Just as government establishes ordered rule in society at large, one of the key purposes of a constitution is to bring stability, predictability and order to the actions of government.

The idea of a code of rules providing guidance for the conduct of government has an ancient lineage. These codes originally drew on the idea of a higher moral power, often religious in character, to which worldly affairs were supposed to conform.¹³

Constitutions are a relatively recent development. Although the evolution of the British Constitution is sometimes traced back to the Bill of Rights of 1689 and the Act of Settlement of 1701, or even to the Magna Carta (1215), it is more helpful to think of constitutions as a late 18th-century phenomenon. The ‘age of constitutions’ was initiated by the enactment of the first ‘written’ constitutions: the Constitution (Declaration of Independence) of the United States of America in 1787, and the French Declaration of the Rights of Man and the Citizen in 1789.

The enactment of a constitution marks a major breach in political continuity, usually resulting from an upheaval such as a war, an extended liberation struggle, a revolution, or national independence. In this sense, constitutions are primarily a means of establishing a new political order following the rejection, collapse or failure of an old order.

Constitutions can be classified in many different ways. These include the following:

- The form of the constitution and status of its rules (whether the constitution is written or unwritten, or codified or uncodified)
- The ease with which the constitution can be amended (whether it is rigid or flexible)
- The degree to which the constitution is observed in practice (whether it is an effective, nominal or a façade constitution), and

13 Egyptian pharaohs acknowledged the authority of Maát or “justice”. Chinese emperors were subject to Tién or “heaven”, while Jewish kings conformed to the Mosaic Law, and Islamic caliphs paid respect to Shari’a law. Not uncommonly, ‘higher principles’ were also enacted in ordinary law, as seen, for example, in the distinction in the Athenian constitution between the *nomos* (decrees that could only be changed by a special procedure) and the *psephismata* (decrees that could be passed by a resolution of the Assembly). However, such ancient codes did not amount to constitutions in the modern sense, in that they generally failed to specify provisions relating to the authority and responsibilities of the various institutions, and rarely established authoritative mechanisms through which provisions could be enforced and breaches of the fundamental law punished.

- The content of the constitution and the institutional architecture that it establishes (whether it is, for example, monarchical or republican, federal or unitary, or presidential or parliamentary).

Traditionally, considerable emphasis has been placed on the distinction between *written* and *unwritten* constitutions. This was wrongly thought to draw a distinction between constitutions that are enshrined in law and ones that are embodied in custom and tradition.¹⁴

Every constitution, then, is a blend of written and unwritten rules, although the balance between these varies significantly. In states such as the Federal Republic of Germany and France, in which constitutions act as state codes, specifying in considerable detail the powers and responsibilities of political institutions, the emphasis is clearly on codified rules. The US constitution is, however, a document of only 7,000 words which confines itself, in the main, to broad principles. Other constitutions, while not entirely unwritten, place considerable emphasis on conventions. For example, the ability of United Kingdom (UK) ministers to exercise the powers of the Royal Prerogative (technically, the monarch's powers) and their responsibility, individually and collectively, to Parliament is based entirely on convention.

The global trend, however, is to favour the adoption of written and formal rules. Not only has the number of unwritten constitutions diminished, but also, within them, there has been a growing reliance on legal rules.

More helpful than the written/unwritten distinction is the contrast between *codified* and *uncodified* constitutions. A *codified* constitution, like that of the Republic of Namibia, is one in which key constitutional provisions are collected together within a single legal document, popularly known as a *written constitution* or *the constitution*. The significance of codification includes, among other advantages, the following:

- Firstly, in a codified constitution, the document itself is authoritative in the sense that it constitutes 'higher' or 'basic' law, indeed, the highest law of the land. True to the notion of *constitutional democracy*, the constitution binds all political institutions, including those that enact ordinary law. Thus, the existence of a codified constitution enables a hierarchy of laws. In unitary states, such as Namibia, the constitution stands above any statute law made by the national legislature. In federal states such as the Federal Republic of Germany, there is a third tier in the form of 'lower' state or provincial laws.

¹⁴ This system of classification has now been largely abandoned. Only three liberal democracies (Israel, New Zealand and the United Kingdom) continue to have unwritten constitutions, together with a few non-democratic states such as Bhutan, Oman and Saudi Arabia. Moreover, the classification has always been misleading: no constitution is entirely written in the sense that all its rules are formal and legally enforceable. Few constitutions, for instance, specify the roles of, or even mention, political parties and interest groups. Similarly, no constitution is entirely unwritten in the sense that none of its provisions have any legal substance, all of them being conventions, customs or traditions.

- Secondly, the legal status and integrity of the codified document is ensured by the fact that at least certain provisions are entrenched. For example, Chapter 3 of the Constitution of the Republic of Namibia deals with fundamental human rights and freedoms.
- Finally, the logic of codification dictates that, as the constitution sets out the duties, powers and functions of government institutions in terms of ‘higher’ law, it must be *justiciable*, meaning that all political institutions (inclusive of Parliament, the executive, the Ombudsman, Regional and Local Government, the Public Service Commission, the security sector and the National Planning Commission in Namibia, for example) have to be subject to the authority of the courts, and in particular a Supreme or Constitutional Court. This provision substantially enhances the importance of judges, particularly of senior judges, who become, in effect, the final arbiters of the constitution, and thereby acquire the power of judicial review.¹⁵

The few *uncodified* constitutions in the world have a different character. The British Constitution, for instance, draws on a variety of sources. Chief among these are statute law, which is made by Parliament; common law; conventions; and various works of authority that clarify that Constitution’s unwritten elements. The absence of a codified constitution implies, most importantly, that the legislature enjoys near-sovereign authority. It has the right to make or unmake any law: no body has the right to override or set aside its laws. By virtue of their legislative supremacy, the UK Parliament and the Knesset in Israel are able to function as the ultimate arbiters of the constitution.

Namibia, in common with most other countries, has a codified constitution. The strengths of a codified constitution include the following:¹⁶

- Major governance principles and key constitutional principles are entrenched, safeguarding them from interference from the government of the day.
- The power of the legislature is constrained, limiting its sovereignty.
- Non-political judges are able to ensure that constitutional provisions are being upheld by public institutions.
- Individual liberty is generally more securely protected, and
- They have considerable educational value, in that they embody the core values and overall goals of the political system.

Some constitutional scholars, however, also emphasise the drawbacks of codification. These include the following:¹⁷

15 Chapter 9 of the Namibian Constitution that deals with the Administration of Justice, particularly in Article 79(2), vests the Supreme Court with the authority to interpret, implement and uphold the Constitution and the fundamental human rights and freedoms guaranteed thereunder.

16 In addition to provisions on citizenship (Chapter 2), the Namibian Constitution also provides for entrenched Fundamental Human Rights and Freedoms (Chapter 3), and for Principles of State Policy (Chapter 11).

17 See e.g. Finn (1991).

- Codified constitutions can be more rigid, and may therefore be less responsive to fast-changing social conditions.
- With a codified constitution, constitutional supremacy resides with non-elected judges rather than with publicly accountable politicians.
- Constitutional provisions grounded in custom and convention may be more widely respected because they have been endorsed by history and not ‘invented’.
- Constitutions endorse one set of values and principles in preference to others, meaning that, in culturally diverse societies, they may precipitate conflict.

An *effective* constitution is one that fulfils two basic criteria. Firstly, in major respects at least, the practical design and operations of government correspond to the provisions of the constitution. Secondly, this occurs because the constitution has the capacity, through determined means, to limit governmental power.

An effective constitution, therefore, requires not merely the existence of constitutional rules, but also the capacity of those rules to constrain government and establish robust constitutionalism. All constitutions can be violated to a greater or lesser extent; the real issue, thus, is the significance, nature and regularity of such violations. Some constitutions are *nominal* in the sense that they accurately describe government and the principles according to which it should behave, but fail to limit government in any meaningful sense.

Constitutions can also be classified in terms of their content and, specifically, by the institutional structure they underpin. This enables a number of distinctions to be made. For example, constitutions have traditionally been classified as either *monarchical* or *republican*. In theory, the former invest constitutional supremacy in a dynastic ruler, while in the latter political authority is derived from the people. The emergence of constitutional monarchies, has, however, effectively transferred supremacy to representative institutions. A more useful distinction is that between *unitary* and *federal* constitutions. The key defining element here is the concentration of sovereignty in a single national body and its division between two distinct levels of government.

A more recent approach is to distinguish between *parliamentary* and *presidential* constitutions. The key here is the relationship between the executive and the legislature. In *parliamentary* systems, at least in theory, the executive is derived from and accountable to the legislature; in *presidential* systems, the two branches of government function independently on the basis of a separation of powers.

Constitutionalism, in a narrow sense, then, is the practice of limited government ensured by the existence of a constitution. Constitutionalism, in this limited sense, be therefore said to exist when government institutions and processes are effectively constrained by constitutional provisions. More broadly and usefully, *constitutionalism* is a set of political values and aspirations that are anchored on the desire to protect liberty through the establishment of internal and external checks on government power. In this sense,

constitutionalism is a key aspect of political liberalism:¹⁸ the latter is typically expressed in the form of support for constitutional provisions that achieve this goal, for example, by way of a codified constitution, a Bill of Rights, a separation of powers, the rule of law,¹⁹ and decentralised authority.

Constitutions constitute states; as such, they have a number of important functions. These include –

- empowering states
- establishing unifying values and societal goals
- enhancing government stability
- protecting basic freedoms and rights, and
- legitimising political regimes.

Although the popular argument about constitutions is that they limit government power, a more foundational function is that they mark out the existence of states and make claims concerning their sphere of independent authority. The creation of new states, such as was the case in Namibia two decades ago, is invariably accompanied by the enactment of a constitution. Indeed, it can be argued that such states really only come into being once they have a constitution.

In allocating functions and powers amongst the various institutions of government, constitutions act as institutional charts. As such, they formalise and regulate the relationships between political institutions and provide a key mechanism through which conflicts can be adjudicated and resolved. This is precisely why constitutions go hand in hand with institutional design and organisation. Complex patterns of social and political interaction can only be maintained if all concerned know and respect the ‘rules of the game’.

In liberal democracies, such as Namibia, one of the central purposes of a constitution is to constrain government with a view towards protecting individual liberty. This is why constitutions can be regarded as mechanisms for establishing and maintaining *limited government*.²⁰ In the Namibian case, for example, the Constitution determines the relationship between the state and the individual citizen, marking out the respective

18 *Liberalism* is an ideology based on a commitment to individualism, freedom (liberty), toleration and consent. Contemporary liberalism differs from classical liberalism in important respects that need not concern us here.

19 The doctrine and practice of the rule of law entails the principle that the law should ‘rule’ in the sense that it establishes a framework to which all conduct and behaviour (both private and public) conform, applying equally to all the members of society, be they private citizens or government officials. Thus, the rule of law is a core liberal-democratic principle, embodying ideas like *constitutionalism* and *limited government*. In continental Europe it has specifically been enshrined in the German concept of the *Rechtsstaat*, a state based on law. In the US, the rule of law is closely linked to the status of that country’s constitution as ‘higher’ law and to the doctrine of ‘due process’. In the UK, on the analysis of Dicey ([1885] 1939), it is seen to be rooted in common law and to provide a viable alternative to a codified constitution.

20 The notion of *limited government* implies government operating within constraints, usually imposed by law, a constitution, or various institutional checks and balances.

spheres of government and personal freedom. This is done principally by defining civil rights and freedoms, through the means of a Bill of Fundamental Rights and Freedoms.²¹ The impact of liberal constitutionalism, as embodied in the Namibian Constitution, for example, regards fundamental rights and freedom as universal and draws a distinction between *negative* and *positive* rights. *Negative* rights are of liberal bent in that they prevent the state from encroaching upon the individual, and as such they mark out a sphere of government *inactivity*. *Positive* rights include economic, social and cultural rights, such as the right to education and sustainable development. However, positive rights have caused controversy because they are linked to the expansion, not contraction, of government, and because their provision is dependent upon the economic and social resources available to the state in question.

In addition to empowering states and protecting freedom, and laying down a framework for government, constitutions invariably embody a broader set of political values, ideals and goals. This is why constitutions cannot be neutral: they are always entangled, more or less explicitly, with ideological priorities.²²

The drafters of constitutions therefore seek to invest their political regime with a set of unifying values, a sense of ideological purpose, and a language that can be used in the conduct of politics. In many cases, these aims are embodied in preambles to constitutions which often function as statements of national ideals. In the case of Namibia, these ideals include a commitment to “the inherent dignity and the equal and inalienable rights of all members of the human family” as “indispensable for freedom, justice and peace”.²³

The final function of a constitution is to help build legitimacy. This explains the widespread use of constitutions, even by states with constitutions that are merely nominal or a complete façade. This legitimisation process has two key dimensions. Firstly, the existence of a constitution is almost a prerequisite for a state’s membership of the international community and for its recognition by other states. More significant, however, is the ability to use a constitution to build legitimacy within a state through the promotion of respect and compliance amongst the population. This is possible because a constitution both symbolises and disseminates the values of the governing elite, and invests the governmental system with a cloak of legality. In some cases, veneration for the constitution is promoted – either as a document of historical importance, a symbol of national purpose and identity, or both – as in the case of Namibia.

Having chronicled the genesis and evolution of *constitutional democracy* as well as some of its principal implications and limitations, the last part of the chapter focuses on how well Namibia has been doing in upholding the precepts of a *constitutional democracy* over the past two decades.

21 Chapter 3 of the Namibian Constitution, entitled “Fundamental Rights and Freedoms”, provides for a justiciable Bill of Rights. See also Diescho (1994:56–57).

22 Heywood (1997:280).

23 Republic of Namibia (1990:1).

Namibia as a constitutional democracy – A brief note

From the above brief exposition, it is evident that Namibia mirrors most of the features of a liberal constitutional democracy. These include a codified constitution that frames the nature of the country's public institutions, such as the assembly, the executive, judiciary and security system. The Namibian Constitution is the basic law of the land, and available evidence and research suggest that the judiciary has hitherto been manifestly independent with little proof of executive interference.²⁴ This, however, does not mean that the judiciary has entirely escaped public attacks on its functioning and some of its rulings, as illustrated by the recent labour hire case.²⁵

The Namibian Constitution has acquired the status of a symbol of national purpose, nationhood and identity formation. This was evident at the 20th anniversary of the acceptance of the Constitution during the February 2010 celebration of Constitution Day. While the Constitution is by no means beyond criticism, no single political party in the country has called for its abolition. The drafting and acceptance of the Constitution by consensus remains one of the most significant events of the past two decades.

Research findings in four rounds of the national AfroBarometer Survey also consistently indicate widespread acceptance of the Constitution, with over 60% of Namibians expressing their support for its core provisions such as free political activity, a free press, and freedom of association and assembly.²⁶ In addition to the findings of these surveys, there is ample evidence in the print media in the form of readers' letters and SMSs²⁷ in *The Namibian* newspaper, for example, that Namibians generally value the liberal ideals and ideas embodied in the Constitution.

For a constitutional democracy to work effectively, however, other formal and informal requirements need to be met. These include the capacity of the courts to develop and practise a coherent and enlightened jurisprudence, steering a balanced course between justifiable limitations of the enshrined rights and the equality and socio-economic rights of all citizens, promoting a deliberative democracy, and making jurisprudence more accessible, particularly to marginal communities and the poor. There is also the important matter of the functioning of the criminal justice system itself – for justice delayed is justice denied. The last aspect, delaying justice, is a matter of serious concern in Namibia.

The logic of a constitutional democracy implies a judicialisation of politics. This is almost inevitable. Whereas, in the past, politics were fought amongst political parties and, to a lesser extent, in Parliament and in other political arenas, the new terrain has become the courtroom. The Namibian judiciary has, especially in the past five years,

24 See e.g. Horn & Bösl (2008).

25 *Africa Personnel Services (Pty) Ltd v The Government of the Republic of Namibia & Others*, No. A4/2008.

26 See Research Facilitation Services (2008:9–11).

27 Messages sent by cell phones via the short message service (SMS).

delivered rulings with wide political implications, for example in matters of labour hire, press freedom and defamation.

Grinding poverty makes it difficult for many Namibians to possess the means to address their grievances by way of meaningful participation in the polity. Without meaningful poverty reduction and greater socio-economic equality, constitutional democracy may arguably be more difficult to sustain than over the first two decades of independence.

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The concepts of *rights* and *constitutionalism* in Africa

joseph diescho

Introduction

Ideas stem from practice, and practice comes from life lived by people. A *concept*, from the Latin word *conceptus*, is an abstract idea pointing to a class of objects grouped together to formulate a universe, a body of thought, and so paint a general picture of what can be publicised to a people who bear general knowledge or feelings about the particular situation in question. The existence and acceptance of such an idea enables the consumers thereof to internalise it as reality, to a lesser or greater extent. For instance, even though people have never physically seen God, the concept of an Almighty Creator as an old, bearded male with a deep voice, who is extremely kind-hearted, yet stern, is frequently accepted and passed on to later generations. A concept changes over time as people experience life and acquire existential knowledge, some of which may contradict long-held 'truths' about a phenomenon such as God. A concept must of necessity carry with it easy to comprehend, easy to transmit, and easy to reproduce articulations with a minimal chance of becoming watered down or linked to one individual person or group.

A *concept* is, therefore, a central idea that generates and facilitates an understanding: a reference point which guides the participants in a particular conversation to share a similar axis of leverage pertaining to the subject matter at hand, and from which they can derive a common understanding and/or appreciation of the outcome of the exchange. A concept summons the sense of a common treatment of a phenomenon, so that all parties to the conversation share similar agreements and/or disagreements. For instance, when people across the globe discuss the concept of *death*, they all experience a similar understanding of what it is and what it is caused by, because they recall similar experiences of and with death – and they fear it, or internalise attitudes towards it.

Some concepts function better than others, while some endure longer than others. In this sense, the concepts of *rights* and *constitutionalism* do not evoke the same feelings amongst people; therefore, they are likely to exhibit dissimilar appreciations of what these notions represent, and perhaps require of them. What is right for a Swede may not be right for a Kenyan, and the other way round. What is right for Europe might not be right for Africa, while what is right for Israel is invariably not right for Palestine – and so it goes: sensibilities differ most of the time, and even clash sometimes. To begin with, to speak of *Africa* as one universal body of people, with one monolithic collection of experiences and one set of aspirations unique only to them, is a misnomer, so that this Africa remains elusive because the worlds, both past and present, of the people called *Africans* are as similar as they are existentially dissimilar amongst most Africans.

The concept of *Africa*

You are not a country, Africa
You are a concept,
Fashioned in our minds,
each to each,
To hide our separate fears,
To dream our separate dreams ...¹

The presupposition of Abioseh Nicol's assertion is that the Africa we know today is the creation of, and an outcome of, European imagination and adventurism. The Africa we know generally was recreated by European potentates in their own image, so that the political systems that exist in most of Africa today remain the outcome of those colonial business architectures. In other words, most of what we have accepted as *African* is either what was told by others to and about Africans, or deals with how Africans imitate other civilisations to become relevant. In this conundrum, and as Africans try to be other than they are, the dearth of leadership remains the most constant common denominator in and of the African condition in so far as the spectre of leadership is concerned.

What we know today as *Africa* is a consequence or creation of three main historical trajectories, none of which is the doing of the very people known today as *Africans*. Firstly, *African* is the ascription of the inhabitants of the continent – the land mass that broke away from the rest of the planet – later to be assigned to some people of a darker hue amongst human civilisations. It so happens that the African land mass has been endowed with resources that the human race needs for survival and for posterity – for better or for worse. The inhabitants of this land mass, for reasons not too clear, happen to share the same developmental features in their economies and exhibit similar tendencies in their treatment of political power and wealth.

Secondly, the permanent dwellers on the African continent today have been subjected to the process of socio-political and economic colonialism perpetrated by uninvited visitors, from the western part of Europe in the main, who came to the continent with the sole purpose of extracting its resources for the development of their own countries' economies.

Thirdly, the people who are commonly known collectively as *Africans* never described themselves as *Africans*: others called them by that term. Even today, the majority of the dwellers on the continent see themselves more as disparate communities rather than post-colonial nation states, as the African political elites in power claim. It is problematic, therefore, to speak with authenticity about a universal African experience. Rights, as such, in Africa, need to be considered against the background of romantic theorising, which is at best speculation.

¹ Nicol, cited in Mazrui (1987).

The concept and genealogy of *rights*

The debate(s) about rights generally and human rights specifically comprise a relatively new terrain of political discourse not only in Africa, but also in the whole (democratic) world. Only in 1791–1792 did Thomas Paine publish *The rights of man*² in response to Edmund Burke's criticism of the French Revolution, and both publications appeared only after the Declaration of Independence in the United States of America, which stated rather boldly how self-evident it was that all men (sic) were created equal and endowed by their Creator with inalienable rights, amongst which were life, liberty and the pursuit of happiness.³ It can be argued that what is known in the body of literature as the concepts of *rights* and, later, *constitutional democracy* owe much of their development to the mid-1792 period of the American Revolution. Thus, the United Nations Declaration of Human Rights, adopted on 10 December 1948, a few years after the end of the infamous World War II, is a multinational expression of the spirit of the United States Declaration of Independence of 1776. After this, in hot pursuit of freedom from European colonialism and the search for national independence, one after the other – but also collectively – African nations borrowed and adopted numerous treatises and documents which sounded like constitutions, as well as programmes echoing the spirit of human rights.⁴

Antecedents of 'the rights of man' in precolonial Africa are very meagre, and the discourse was healthier when it did not turn on Africans themselves as culprits, and when the violation or denial of rights was the sin of the foreign colonial representatives. This is the case because the literature on constitutionalism commences with post-WWII decrees by which members of (nation) states were to be governed.

A history of constitutionalism

The same narrative regarding the history of rights applies to the history and trajectory of the evolution of constitutional rule and democracies. According to CF Strong,⁵ the real foundations of constitutional systems of government were not a common feature of governments till the latter-day experiences with European immigrants who fled from oppressive political systems in Europe to inhabit the colonies of North America, which, as the USA, later spearheaded the fervent pursuit of rights and democracy across the globe.

The same, however, cannot be said about constitutionalism, when the concept is stretched to cover even the unwritten ground rules by which preliterate societies governed themselves. The phenomenon of a constitution stretches far beyond written documents or Acts of Parliament or congressional proclamations known as constitutions, for constitutionalism in one form or another, as a system of ground rules, has existed whenever and wherever human beings have eked out a coexistence on the basis that

2 Henkin (1978).

3 Preamble, *Declaration of Independence*, 1776.

4 Center for the Study of Human Rights (1992).

5 Strong (1972).

such rules had to be known clearly if peace and harmony were to accompany such coexistence. For as long as people *qua* humans or persons have needed guidelines to govern their society – be it a feudal set-up, a tribal system, or a post-conflict arrangement to guarantee uniform adherence and peace – there has been a constitution. In other words, *constitutionalism* is not merely the existence of written documents bound in expensive leather; rather, it comprises a common understanding and acceptance of what is acceptable, honourable, despicable, or worthy of rewarding, let alone permitting of leadership in a given society. As Thomas Aquinas opined, “*Cognitum est in cognoscente per modum cognoscentis*”, meaning that human beings perceive the world as it has been constituted for them through what they learn from, in and of society. Constitutionalism, as a sphere that has generated interest in virtually all systems of government, is older than the new era of the battle for human rights, while, in the case of Africa, human rights were treated as synonymous with freedom or political independence. Thus, it can be asserted that, in the context of the struggle for national liberation, constitutionalism was peripheral to freedom and independence. The struggles for freedom from colonial rule in Africa were, without exception, waged for self-rule and democracy. Yet the connection between democracy and the rule of law was not made by freedom seekers, as it ought to have been. The understanding of *democracy* during the liberation struggle was restricted to the desire to end racial and colonial oppression and to take over power. In political terms, *democracy* – in the minds of the liberation leaders – meant what the first President of Ghana, Kwame Nkrumah, so strikingly expressed as follows:⁶

Seek ye first political independence, and the rest will be added unto it.

Are rights foreign to Africa?

One of the most unfortunate realities in the African post-colonial condition is the extent to which the old Africa reasserts itself in new and often more painful ways, in that the leaders of both pre- and post-colonial Africa are similar in their disdain for the rights of the common persons who are not of ‘royal’ families, i.e. *royal* in a sense that transcends blood relationships and refers to the holder of political power over the life and death of the common people.

Another part of the African condition is the dissimilarity between the language expressing the search for the rights of African people in colonial times, and the refusal of the same rights to the same African people today – invariably by the same cohorts of leaders. Before political independence, the so-called freedom fighters were the most vociferous campaigners for rights; yet as soon as they attained the goal of political freedom, once they got into power, they became the most aggressive and consistent offenders against rights – the very rights for which they fought and risked their lives. For African leaders, there is a dangerous incongruence between the fight against oppression and the tendency to impede the rights of others. It is in this context that the very people who fought colonial rule, ostensibly for freedom, are the first, once in power, to suggest that the concept of *rights* is a foreign one with which the same former oppressors seek to restore colonial

6 Melady (1961:133).

rule. Such new leaders soon become despots and tin-pot tyrants who generally turn their marvellous countries into banana republics.

The preoccupation with political power becomes such a psychosis of power in Africa that there is hardly any difference between the lives of the ordinary people before and after the attainment of independence. This illness becomes so entrenched in Africa's leaders that they internalise the falsehood that, without them, the countries which they liberated will cease to exist. In the process, African leaders cease being leaders of their countries as they become very dangerous to its citizens: so much so that they even forget that they made lofty promises either to their own people or in terms of the agreements they sign in the name of the rights of all people. Consider the most recent example of the African contradictions in the context of the New Partnership for Africa's Development (NEPAD) as the driver of the African Union's development and democratisation agenda. An essential component of NEPAD was the African Peer Review Mechanism (APRM), a system that was agreed to by many states. Yet the moment that system turned a critical eye on some of the signatory states, they rejected it forthrightly. In the words of the then Prime Minister, Theo-Ben Gurirab, here is what the Namibian government thought of the APRM:⁷

... the mechanism was something that should confine itself strictly to economic matters, and leave political matters to the AU, and that it be consigned to the dustbin of history as a sham. I see it as a misleading new name for the old discredited structural adjustment fiasco ... Neo-colonialism ... which is what the PRM is ... [it] is a killer disease we must run away from ...

President Thabo Mbeki's South Africa, which was the main driver of NEPAD, also rejected the APRM when it raised mild criticism against South Africa in respect of good governance and the xenophobic signs in the body politic of that country. In its response, the South African government argued that it was unique in comparison with the rest of the continent because of apartheid, and tried, in vain, to persuade the drafters of the review to change it to suit South Africa.⁸

The argument must, therefore, be advanced that the concept of *rights* – be they human rights, property rights, or any of those enumerated during the evolution of the notion – cannot be foreign to Africa, because current native dwellers of the African continent, by virtue of being members of the human family, are as entitled to rights as any other people. Just as others do, they have obligations and responsibilities towards other members of their communities or countries where they are full citizens.

Theorists are correct in asserting that rights, as they are presently being cast, did not constitute an integral part of political life in precolonial African societies. Rights were indeed circumscribed and were exercised along existing patterns of authority and power, in which the largest segment of the society did not possess any rights other than those granted benevolently by the ruler and/or members of his/her family. In other words, members of the family who were accorded power and authority by hereditary right

7 Melber, cited in *The Namibian*. 7 April 2003; Melber (2005).

8 Boyle (2007).

possessed more privileges than any other subject. Human rights per se did not have the currency that they enjoy today, whereby it is held that all people, by virtue of their being human, and citizens, possess or are at least entitled to the same rights, privileges and obligations, and to exist under the rule of law.

It is submitted, therefore, that the main obstacles or challenges to the respecting of human rights in Africa do not inhere in traditional African values, but rather in new and compelling circumstances that arise from the long nights of subjugation and dehumanisation that comprised the season of colonial rule. A rights orientation should, therefore, only assist African countries in their genuine quest for fulfilling the imperatives of nation-building and, in the end, enable them to deal with the contradictions and trappings of power and privilege.

In his seminal treatise, *The African origin of civilization: Myth or reality*,⁹ Cheikh Anta Diop offers no enlightenment as to the situation of rights in Africa before the various colonial episodes. He is eloquent in describing an Africa with a civilisation, with cultures that were stable in strong communities, but says nothing about how they acquired and exercised their rights in relation to other persons. Here, Paulin Hountondji¹⁰ opines that this style of theorising about Africa renders Africanists guilty of seeing the continent only in ethnological or anthropological terms, thus setting Africans apart from other civilisations that offer more objective analyses of the vicissitudes of human life and democracy.

Equally, in his two books in which he sets the tone that what we know of Africa is a colonial dictionary, VY Mudimbe¹¹ does not offer any helpful insights into the conditions in precolonial Africa with respect to the rights of its people. He offers some insights into what led to the pathological psyche of the African personality, so subjected to dehumanising practices that, in the end, the very notion of *Africa* as a whole is hazy in the minds of many Africans who had internalised nationhood as more important than their Africanity – if there is such a phenomenon or quality like Africanity.

There is still debate about whether, and if so, to what extent, traditional African societies recognised and protected human rights for all their citizens. This debate concerns the recognition or denial that traditional African culture was or is compatible with human rights, or that there was some or other African conception of *human rights* – consistent with the African context, but not with the universality that so-called Western norms of rights contain now, embodied in the International Bill of Human Rights and the like.

Issa Shivji's attempt to settle this matter is helpful when he asserts the following:¹²

9 Diop (1974).

10 Hountondji (1983).

11 Mudimbe (1988, 1994).

12 Shivji (1989:16).

There is very little written by Africanists, and even less by Africans themselves, on the philosophical and conceptual foundations of human rights in Africa. In other words, one can hardly talk of the African philosophy of human rights ...

On one level, this proposition has merit in so far as it seeks to express the rejection of a kind of cultural imperialism that has become increasingly unacceptable, and that must indeed be guarded against in human rights discourses if headway is to be made in Africa. This is because, to a large extent, Shivji's assertion reflects a historical situation perceived through the prisms of the developed Western nations. Inadvertently, it also provides a basis for the expansion of international human rights norms. At the same time the proposition – that international human rights are not universal but Western, and that there is an African notion of *human rights* that is not ultimately consistent with international norms – is problematic and hard to countenance. This often offers an apology or an excuse for Africa's poor human rights record, on the watch of once-revolutionary African leaders, although we ought to accept that Africa should not be held to standards that are culturally incompatible with the African majority and which they had no part in establishing. Importantly, to deny the universality of human rights may effectively destroy the meaning and the value of the entire concept. It should be emphasised here that the real significance of international human rights lies in the fact that they are universal in nature and appeal.

Against this background, it becomes pertinent to delineate from the outset the periods or historical epochs that led to the growing debates in the evolution of the political realities in Africa today as regards these two distinct but not mutually exclusive phenomena, namely human rights on the one hand, and constitutionalism in the general discourses about democratisation in post-colonial Africa on the other. These periods are the pre- and post-colonial Africas, since they present different characteristics that are important in appreciating the locations of rights in particular and of constitutionalism in general.

Before one ventures into the terrain of comparing the notions of *rights* in Africa to those in the Western world, one needs to point out that, even in the so-called developed democracies today, the concept of *rights* arrived very late in the existences of those nations. That is, they, too, went through long and dark periods when citizens either did not know about their rights, as they did later, or simply did not possess them. The political orders of the time did not lend themselves to the objective understanding and/or appreciation of rights in the way we presently relate to them. Hence, this led to the Universal Declaration of Human Rights, adopted on 10 December 1948.

Precolonial Africa

Like any older, pre-capitalist socio-political order anywhere in human civilisation, precolonial Africa comprised – for want of a better word – feudal and subsistence-based communities living under basic existential conditions and the attendant realities. In the main, there was one ruler or family or clan, holding its position for hereditary reasons or by means of sheer conquest in one way or the other, who ruled by decree, with

unfettered powers over all. Consequently, those who did not belong to the family through consanguinity were considered less than fully human, thus possessing proscribed rights in all spheres, including life and death. They were considered and treated as subjects with more obligations than rights, and were expected to serve and/or satisfy the ruler or his/her representatives. The ruler exercised absolute powers and rights over the well-being of his/her subjects at all times, including the right to life and obligation to die.

As in the days of old, when a King, Emperor or Pope wielded absolute power, Africa had the same disposition: and debates about rights were non-existent.

Then came the reconfiguration of Africa's patterns of authority and roles by the epoch of slavery and colonialism. This phase destroyed the identity of Africans and disfigured the self-understanding that they had enjoyed prior to the total onslaught by colonial rule and all its apparatuses. The essential part of colonial rule anywhere in Africa was divide and rule, whereby the colonial potentates were hell-bent on sowing discord amongst people in all sorts of ways with the aim of weakening them and rendering them vulnerable so that they would in turn seek protection from their colonial masters.

Post-colonial Africa

Throughout the colonial experience, the foreign white rulers assumed the powers of demigods together with the responsibilities of giving and taking away human rights. Their African subjects could – and, for the most part, were permitted to – enjoy the role of obedience to the master!

In this process, ordinary Africans were treated as non-persons and were continually dehumanised to the extent that they, in turn, internalised the feeling that they were not quite as human as their masters, unless the latter said so. What we know as human rights today became, to all intents and purposes, privileges that would be granted and/or withdrawn by the colonial administrators at the slightest provocation, in order to enlist cooperation and collaboration.

The person who survived the colonial experience was a wounded beast with one central preoccupation: to end foreign and colonial oppression and subjugation, but who perhaps inadvertently assumed the role of the oppressor in turn. The quest to end foreign domination had very little to do with the desire or striving for human rights as such, or even with democratic constitutional rule. In fact, it had more to do with replacing the old masters with the new local ones, while the oppression of the majority continued and became more painful: now the perpetrators of the pain were local people who had stood against such infliction of pain before, when the wrongdoers were foreigners. This quest was, arguably, not even about improving the humanity of society as such in former colonial territories. Abdullahi Ahmed An-Na'Im and Francis Deng turn to Rhoda Howard, who offers a consolation:¹³

13 Howard (1984); An-Na'Im & Deng (1990:3).

[T]he African concept of human rights is actually a concept of human dignity, of what defines the inner (moral) nature and worth of the human person and his or her proper (political) relations with society ... Dignity can be protected in a society that is not based on rights ...

This is precisely where the African *problématique* with human rights lies: the extension of this logic is to say that Africans, by virtue of being African, are more communalistic than individualistic; therefore, it is what is good for the community that matters, and the individual is and has to be sacrificed in the interest of the community. Thus, African political systems after independence become more oriented towards relegating human rights – which are by nature based upon what is inherently good for the individual – to the common good, and that common good is best known to and ought to be protected by the leader, often referred to as the *Perfect Man*, the *Big Man*, or the *Strong Man*.

The outcome of the colonial experiences that provided the new breed of African rulers, the so-called liberation leaders, was that they usually acquired exactly the habits of oppression from their alter egos, their cruel oppressors, from whom they had masterfully learned the art. Both the oppressors and the new oppressive political elite had one thing in common: they were the only free humans, whilst the rest were required to show gratitude for the benevolence of the harbingers of freedom and independence.

What this means is that, in the Africa before and just after colonisation, the concept of *rights* assumed the character of a zero-sum game: one was either the giver or the seeker of rights, and the two were mutually exclusive. The giver of rights was the ruler, and the seeker the subject – who was always perceived as being inferior to the giver. The concept of *rights* presupposes that people, as human beings, are entitled to rights, regardless of their relationship with the ruler. This was clearly not the case in Africa before and often after the attainment of political independence. In this regard, Shivji¹⁴ offers the advisory that, in the main, the Africans who championed human rights did so when they saw them as a mechanism – or, to be blunt, an ideology – with which to fight oppression and colonialism, and, thus, were not to be perpetuated after freedom had been attained.

Human rights and constitutionalism in an independent Africa

It should be stated that African societies, as confined nation states today, are as much creatures of Western nation states as nation states in the West are. They are new realities in human civilisation that have replaced the systems that existed before the advent of democracy or representative government. Thus, the new systems of government in post-colonial Africa have to be subjected to the same scrutiny of rights and obligations as their counterparts elsewhere. The contradictions that accompany power – or, for that matter, the absolute power that African leaders are wont to wield – are no different from the situation in 18th-century France when King Louis XVI stated boldly that he was the state.¹⁵

14 Shivji (1989).

15 The French King Louis XIV (1638–1715) proclaimed “*L’etat, c’est moi*” (“I am the state”).

The European philosopher Alphonse Carr warned that “*Plus ça change, plus c’est la même chose*” (“the more things change, the more they stay the same”). Change came to Africa with the attainment of independence without real change in the enjoyment of human rights. The faces of the rulers change(d), but not much else.

The political power that was visited upon European societies throughout most of the centuries, interspersed with outbursts of agitation for rights – such as the Renaissance, the Reformation and the French Revolution, not to mention the flight of citizens across the oceans to establish what became the United States of America – were all indicators of a lack of rights amongst citizens. This is pretty much the situation in which Africa finds herself right now. Hence, the Kenyan novelist Ngugi waThiong’o opines as follows:¹⁶

This Kenya, this Africa, you eat someone or you get eaten. You sit on someone or someone sits on you.

The African-American journalist, Keith Richburg, made the following observation:¹⁷

In Africa things stay the same until they fall apart.

What about *ubuntu*?

There have been volumes and volumes of writings on *ubuntu* as the African way of exercising humanity in contradistinction with the ways practised by other nations and civilisations. This is a fallacious assumption which cannot be sustained if one considers the life experiences of African people at the hands of their leaders. The experience with African leadership does not accord *ubuntu* a clean bill of health. *Ubuntu*, in essence, collapses in the face of private property and the expansion of communities and even countries to encompass those with whom there are no blood relationships. Greed, avarice, selfishness, lack of a sense of social justice, heartlessness, cruelty and sheer indifference are the result.

Firstly, there is nothing in the African condition that places Africans on a higher plane of human compassion than others. If reference is made to the human-made tragedies that visited the peoples of Africa, such as the slave trade, it is soon realised that influential African people, chiefly political leaders, participated in the selling of their subjects to foreign powers. There could have been no prolonged trajectory of trading in humans if some African leaders had not participated in or had not benefited from it. As in any form of oppression, the oppressed always participates in it. The infamous system of apartheid would not have lasted to the extent that it did without the acquiescence of millions of black people who opportunistically chose to behave in particular ways in order to survive or gain materially from a system that was so horrendous towards their own members.

Secondly, a sound and sustainable argument cannot be advanced that Africans suffered inhuman acts only with the arrival of, and at the hands of, European colonial

16 Wa Thiong’o (1991:291).

17 Richburg (1998:244).

administrations. In the Africa of old, the kings or rulers wielded unfettered power over their subjects – as they did over their animals and land possessions. The masses of Africa never knew freedom until independence, since royal, ethnic, tribal, and a whole host of other taboos proscribed their freedoms and imposed more obligations upon them to serve their rulers. This is not unlike what happened elsewhere in the world.

Thirdly, upon becoming free, African leaders are invariably more hurtful to their own people than the cruel administrators who did not look, speak, and behave like them. The whole notion of *ubuntu* is about treating other human beings in ways different from non-human entities such as animals, plants and possessions. In this sense, all civilisations have their own brand of *ubuntu*, even though they do not as closely delineate their terms with humanity – as Africans for the most part do. It should also be stated that, invariably, African leaders in post-independence Africa are the worst offenders against the rights of their peoples. Their obsession with holding power permanently, their inability to empathise with the people they purport to govern, their levels of greed and avarice – to the extent that they fleece the resources of their poorer citizens, and their unfettered arrogance as regards power cannot be the bases upon which *ubuntu* can be sustained.

Human rights as a universal ideal

At some point, Africans ought to embrace a culture of rights as being necessary and permanent – and not merely an ideal that is romanticised when matters are favourable to spokespersons for the quest for rights.

Even though rights are universal, some societies exercise them in better ways than others. There should still be self-evident truths that govern rights in Africa in such a manner that they constitute a new reality that offers African citizens a centre to which to return when disagreement looms large. The acceptance in most of Africa that it is normal that you must either eat someone or be eaten cannot be permitted any longer because this is a shallow and demeaning understanding of Africans as inhabitants of a jungle where only the fittest survive.

Constitutionalism as a necessary precept

It would appear that, for Africa to embrace the tenets of the rule of law and appreciate the necessity of judicial independence, more of a premium ought to be placed on the concept of a *social contract* between the governor and the governed. Greater importance should be accorded to the parallel between moral reasoning and political justification, as was expounded by the great social contract theorist Thomas Hobbes, who cautioned that human beings left to their own devices without a moral compass would be hurtful to others. According to this theory, human beings are by nature constantly at war with others: *Bellum omnium contra omnes* (“the war of all against all”). The argument here is that people need social pacts to guide their conduct vis-à-vis one another in order to achieve mutual advantage.¹⁸

18 Hobbes (1651/1996).

Scholars of constitutional theory concur that the edifice of constitutional democracy is founded on the subordination of the exercise of governmental power to established legal rules such as the constitution and acts of legislation, in a context where the premise is that all human beings are equal and deserve decent treatment as persons.

Central to this concept of *government* under such rules is the need to secure space for citizens' liberties through the establishment of a legal cordon around that space. The idea of a public space is rooted in the need to keep the state at bay in this way, in the belief that the scope of arbitrariness is drastically reduced and the autonomy of the individual preserved by a constitutional regime in which acts of government are based on predetermined rules – to curb arbitrariness of discretion and to be observed consistently by the wielders of political power in a given socio-political and legal system. *Constitutional democracy*, such as the one African peoples pray for, is the “antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law”.¹⁹

At stake for most African states today is the uncoupling of executive from legislative powers, and judicial powers from both. In laying the tenets for this school of thought, the 18th-century French philosopher, Montesquieu, advocated in the strongest terms that the three distinct spheres of power contained in one person or body of persons would breed tyranny. Montesquieu argues as follows:²⁰

When a legislative power is united with executive power in a single person or in a single body of magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to the executive power, the judge could have the force of an oppressor.

This understanding, in essence, lays the foundation of administrative justice and constitutes the basis for the government of the people, for the people, and by the people. Africa needs an order wherein the rule of law, checks and balances, and an independent judiciary are not only enshrined in the constitutions of states, but also appreciated and observed by all at all times. This, at the very least, is essential for creating both the necessary as well as the sufficient conditions for the sustainable socio-economic and political development of this great, yet not altogether happy, continent.

Restorative justice as a right

Perhaps what Africa needs, given her unjust experiences before and after colonialism, is restorative justice. This is based upon the acceptance that things went badly both pre- and post-colonialism in Africa.

19 Nwabueze (1973:1).

20 Montesquieu (1989:157).

Restorative justice is a theory of justice that emphasises repairing the harm caused or revealed by criminal behaviour. It is best accomplished through cooperative processes that include all stakeholders.

To all intents and purposes, Africa cannot boldly make the claim that she has made sufficient progress towards what can be called *restorative justice*. Generally, Africa mustered enough energy, strength and conviction to expunge foreign rule without displaying the same vigour in restoring justice towards the African peoples who were continually deprived of their basic rights.

The need for social justice

Africa cannot and will not move towards a better world unless considerable and deliberate efforts are made towards social justice in all spheres of life. There is a need to restore dignity in her people.

Social justice is a theory that refers to the application of the ideal of justice on a social scale in a given society. The term itself appeared in the rights lexicon around 1800, and before the publication of *The Federalist Papers*,²¹ before the work by Edward Gibbon on the history, decline and fall of the Roman Empire. The moral theologian, John A Ryan, who initiated the arguments concerning a living wage, later elaborated on the concept of *social justice*. Another theologian, Father Charles Edward Coughlin, employed the term *social justice* in his works, following President Roosevelt's New Deal in the 1930s.

Later on, the Green Party Movement in Germany, Sweden and the United States made use of social justice as one of its Four Pillars.²² One of the maxims held by the Green Party Movement's protagonists concerning social justice is that great disparities in wealth and influence are caused by the perversion of, or total lack of, socio-political institutions that should prevent the strong from plundering the weak. Social justice is, in essence, a call for social equality and economic justice as cornerstones of society with respect to establishing social cohesion and stability. It is a general rejection of discrimination based upon race, class, gender, culture or ethnicity, and the view that social change is possible only when there is cohesion based upon the acceptance of the greatest number

21 *The Federalist Papers* refers to documents reflecting the positions written by mainly the protagonists James Madison, Alexander Hamilton, John Jay and Isaac Kramnick, at a time when furious arguments were raging about the best way to govern America. *The Federalist Papers* had the immediate practical aim of persuading New Yorkers to accept the newly drafted Constitution in 1787. In this they were supremely successful, but their influence also transcended contemporary debate to win them a lasting place in discussions of American political theory. Acclaimed by Thomas Jefferson as "the best commentary on the principles of government which ever was written", *The Federalist Papers* make a powerful case for power-sharing between state and federal authorities and for a constitution that has endured largely unchanged for 200 years.

22 The other three pillars are Ecological Wisdom, Grass-roots Democracy, and Non-violence. See http://en.wikipedia.org/wiki/Four_Pillars_of_the_Green_Party; last accessed 17 September 2010.

of the people in the community, who are accorded equal opportunities and are assisted by others and the state.

Social justice also invariably leads to debates regarding *redistributive justice*, whereby wealth is distributed in order to benefit the less well-to-do in society since the well-to-do have an obligation to assist the vulnerable members of the community and, in so doing, reduce the possibilities of conflict, indifference and violence in society. This way of thinking leads to campaigns for Basic Income Grants is in the case in Namibia, where influential personages such as Bishop Zephania Kameeta have started a campaign towards its roll-out nationwide.

The way forward

Africans, as individual persons, communities, organisations, nations and continentally, ought to (re)define, first of all, who they are: not only in relation to what was visited upon them by colonial forces, but also in terms of what it is that they consider was undermined by colonial experiences, and upon which they can base a better future for themselves and their future generations.

Conclusion

Constitutions – sound ones, like transparent elections, neither make democracy nor guarantee peace, stability, or even sustainable economic development for Africa. The only sufficient guarantee for Africa to move along the pathway of real development for all her people is a new culture and new ethos of rights for all. In his first address to Africa, the US President Barack Obama²³ put this in the following manner:

First, we must support strong and sustainable democratic governments. As I said in Cairo, each nation gives life to democracy in its own way, and in line with its own traditions. But history offers a clear verdict: governments that respect the will of their own people are more prosperous, more stable, and more successful than governments that do not.

This is about more than holding elections – it's also about what happens between them. Repression takes many forms, and too many nations are plagued by problems that condemn their people to poverty. No country is going to create wealth if its leaders exploit the economy to enrich themselves, or police can be bought off by drug traffickers. No business wants to invest in a place where the government skims 20 per cent off the top, or the head of the Port Authority is corrupt. No person wants to live in a society where the rule of law gives way to the rule of brutality and bribery. That is not democracy, that is tyranny, and now is the time for it to end.

In the 21st century, capable, reliable and transparent institutions are the key to success – strong parliaments and honest police forces; independent judges and journalists; a vibrant private sector and civil society. Those are the things that give life to democracy, because that is what matters in peoples' lives.

23 Obama (2009).

Here, President Obama spoke of rights: the rights that most Africans lack in spite of the attainment of political independence decades ago. In the Africa of today, we remain divided along all manner of schisms, the most potent one being political-party loyalty, which, in essence, counts for little more than an opportunistic licence to fleece the meagre resources of the people who need them most. Such loyalty does so by enforcing bogus allegiance to amorphous political party leaders that stomp the ground and dispense largesse although their policies do not translate into programmes that can change the lives of ordinary people – except for those who know how to benefit from political patronage.

Africa as a continent and the African people as part of the human family must have observed that the trajectory of political independence in the last 53 years has brought with it the good, the bad and the ugly in the context of rights as desired by the greatest number of the people who inhabit the continent – rich in resources and ideas and even the will to be humane to others. There is also a great reservoir of polarities and contradictions in the practice of rights by Africans and the adherence to constitutional orders for which the formerly oppressed Africans so zealously fought and even sacrificed their lives. In others words, come independence, African rulers became the worst offenders of the people's rights and liberties, and the quickest violators of the very constitutions to which they had appended their signatures. Like other human civilisations, Africans have both good and bad stories in the realms of rights and constitutional systems of governance, and it will take time for the real Africa to emerge.

The history of the human race is strewn with the struggle for rights and some predictability with regard to the rules that govern the greatest number of people in a given living and shared space. As such, the concept of *rights* is not as new as its opportunistic opponents argue when it suits them – just as Africans are by no means unique from other members in the human family. *Rights*, as the body of accepted precepts that account for good human relations and good governance, are necessary conditions for peace, stability and sustainable development for and in Africa. Equally, *constitutionalism* – as the body of accepted rules within which ordinary citizens navigate their lives in relation to other people on the one hand, and the ruling elite on the other – is not strange to Africa. Africans had rules that guided them and assisted those who presided over disputes to interpret and adjudicate over norms and behaviours that occurred outside the range of acceptance.

What is new in both rights and constitutionalism, however, is their codification in the form of laws and written constitutions. Just as other nations struggled through their own experiences to move feudalism or other relatively undemocratic systems of government to better, agreed-upon systems that had rules and were more rights-based, so must Africa endure the growing pains of maturing from traditional styles of government based upon relationships with some primordial tendencies to rights-based systems of governance. In doing so, Africa will not be copying other civilisations, but will be borrowing intelligently, as it were, from the experiences of others. For Africans are not exceptions in the human family: they, too, need to deal with the ills to which constitutional democracies attempt to find solutions.

Boesl and Diescho opine as follows:²⁴

To protect the inviolability of human dignity worldwide is the ultimate objective of the concept of human rights. Human rights are considered and officially accepted as universal – regardless of their genesis or cultural manifestation.

The great challenge for Africa, therefore, is to move along with the rest of the world as it continues to grapple with making life more meaningful and better for all, to the extent that every person expects to be treated with dignity and respect – as s/he is expected to treat others, in a milieu that is transparent and equitable. Africa cannot continue to countenance the double standards of believing in and fighting for human rights and democratic constitutions for their countries only to attain political power in order to oppress others and suppress freedom while they trample on the very constitutions which they, at one point or another, took part in drafting in some form. Rights and constitutional democracy are just as good and necessary for Africa as they are for any other nation or people.

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The impact of the Constitution on state- and nation-building*

Henning Melber

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside.¹

Following such a fundamental normative concept as suggested by the highest judge during the early years of Namibian Independence, as quoted above, the Constitution that was drafted and adopted as the final step towards national sovereignty 20 years ago was supposed to symbolise much more than a mechanical act. It transcended the pragmatic meaning of a mere formal prerequisite to meet the agreed components defined in the United Nations Security Council Resolution 435 of 1978. The transition to independence required agreement by all parties involved on such a Constitution guiding the Republic of Namibia from its Independence Day. But the adopted document was more than a formal obligation: it defined the ultimate normative framework as a foundation for Namibian society and its principal values. It is a document neither drafted for the day, nor for opportunistic purposes. It is a codex which demands respect, and against which those in political power have to be measured and judged. It provides a reference point for those taking the oath as political office-bearers and civil servants on duty in the public interest. It is not only a legal, but also a moral and ethical compass and anchor.

As such a normative framework, with all its limitations reflecting the interests of those involved in the controlled change towards independence, it was far from perfect. But it served to instil an identification with a common state and nation that took responsibility for self-governance within a defined and codified legal environment, reflecting the best possible compromise under the given circumstances. Namibia was widely applauded and respected for the installation of this constitutional democracy.

Namibia's Constitution as a state- and nation-building tool

The introductory and concluding passages of the Preamble to the Constitution of the Republic of Namibia testify to this fundamental meaning and concept of *constitutional democracy* in the following clauses:

* This article is dedicated to the memory of Hans-Erik Staby (1935–2009).

1 Ismael Mahomed, then Chief Justice of Namibia and later Chief Justice of South Africa as quoted in Sachs (2009:7).

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status;

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;

Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid; ...

Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic.

Namibia's Constitution symbolically and materially represented the end of foreign rule and the beginning of self-government by the Namibian people under a common normative framework drafted by the elected representatives of all citizens entitled to vote. It set standards by means of "transition through constitutionalism"² and was adopted without any opposing vote by all 72 members of the Constituent Assembly as a result of negotiations. The 66 men and 6 women elected by the Namibian people represented 7 parties, and had been mandated through general elections under the supervision of the United Nations Transition Assistance Group (UNTAG) in November 1989.

The Preamble agreed upon, as the introductory statement indicates, represents much more than a mere expression of the prevailing spirit articulating respect and recognition of the democratic future ahead in a particularly historic moment. It also embodies the human rights culture guiding the international normative standards of the time as the valid criteria applicable to governing the Namibian nation by the authorities of its state agencies. As the Namibian High Court stated,³ the Preamble was beyond this moment an important internal aid to the construction of the subsequent provisions and, hence, must be considered a substantive point of reference with exemplary value – a value which should not be compromised.⁴

Constitutions are –⁵

... primarily about political authority and power within a state; where it is located, and how it is conferred, distributed, exercised and limited among the separate organs of the state and in relation to its subjects.

As provided by Article 24(a) of the 1966 United Nations International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976, –⁶

2 A term coined by Erasmus (2000).

3 *Kauesa v Minister of Home Affairs*, 1994, Case No. A125/94, unreported, pp 67, 106–107.

4 Cf. Naldi (1995:11).

5 Austin (2009:10).

6 For a recent introduction to the relevance of the ICCPR as a global normative framework, particularly for the human rights values enshrined in constitutions at a national level, see Tomuschat (2008).

[e]very citizen shall have the opportunity ... to take part in the conduct of public affairs either directly or through freely chosen representatives.

This principle, as Reginald Austin elaborates, –⁷

... forms the basic relationship between citizens and state. When it is set out in a national constitution, it results in a contract between a government and its people.

The status of most written constitutions is that they are “the highest law of the land”, overriding all ordinary legislation. Thus, the creation and reform of a national constitution is vital for lasting peace, good governance and stability of a state and should ideally be an honest expression of a national consensus. This underlines the importance of the requirement of Article 24 (a) of the Covenant that citizens participate “directly or indirectly” in public affairs, a critical part of which is the constitutional process.

Once adopted, a constitution is not cast in stone. But as a document codifying essential values and norms, it should be considered and respected as a paradigmatic guiding formula, which clearly should survive opportunist temptations. This is why legal frameworks normally protect a constitution from being changed merely because the government of the day would like to enact new rules of the game according to its preferences. Therefore, many countries, including Namibia, have empowered the elected parliamentary representatives to be able only to change constitutional clauses and principles based on a two-thirds majority of parliamentary votes – if the constitution can be changed at all.⁸ This serves to ensure that such changes reflect the will of the overwhelming majority of the people. By assumption, it is also assumed that, in a democracy, this requires a wide coalition of representatives from a panorama of different political parties elected into Parliament.

The Constitution in a dominant-party environment

As a result of National Assembly elections held in November 1994, and ever since the second legislative period beginning on 21 March 1995, this assumption of a pluralist parliamentary democracy based on coalition politics has been confronted with a political reality that turned Namibia into a “single-dominant-party system”.⁹ The former anti-colonial liberation movement, the South West Africa People’s Organisation (SWAPO), now the ruling SWAPO Party of Namibia,¹⁰ obtained an influence over the institutions of the state as a result of its political dominance. They turned Namibia into a de facto one-party state by obtaining a two-thirds majority of votes and, hence, the legal authorisation not only to govern alone, but also to change the Constitution single-handedly. In all

7 Austin (2009:10).

8 Chapter 3, entitled “Fundamental Human Rights and Freedoms” and comprising Articles 5 to 25, is protected against change. As Article 25(1) stipulates, “... Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedom conferred by this Chapter”.

9 Cf. Keulder et al. (2000).

10 Hereafter *SWAPO Party*.

National Assembly elections since then,¹¹ the SWAPO Party consolidated its hegemonic status by almost identical proportions, amounting to around 75% of the votes cast. This gives new meaning to the slogan born during the anti-colonial struggle that “SWAPO is the nation and the nation is SWAPO”. But the question remains whether this equation, promoted as the antithesis to racist minority rule under apartheid and settler colonialism, is truly democratic, notwithstanding the overwhelming dominance SWAPO has obtained by means of general elections. After all, the slogan excludes a quarter of the electorate represented by other parties and all those who did not vote.

Therefore, the guiding principles for state- and nation-building might need to be based on more than the mere arithmetic of a formal legality – seen as an entitlement executed by a two-thirds majority of votes among the electorate. While this, technically and in compliance with legal provisions, enables a change of laws and most constitutional clauses without any further consensus-building, the execution of such power is not the same as legitimacy built on a wider consensus. By building the foundations of the independent Republic of Namibia upon a constitutional state to which provisions on the supremacy of the Constitution testify, democracy in Namibia is “not intended to be unqualified majority rule”.¹² To this end, the Namibian Constitution enshrined a concept that seeks to integrate and secure fundamental freedoms – also for those not represented in the echelons of political power – and keeps them protected from any abusive interference by those elected.

Under the given proportional relations, this protection is a difficult task, since the legislative is assumed to control the executive as well as maintain the independence of the judiciary, as the three pillars of democratic accountability, transparency and autonomy. But given that three quarters of the elected representatives of the people entitled to vote are of the same party, they are often not only Members of Parliament (and tasked to execute control over the executive), they also hold political office, either in ministerial rank or as deputy ministers. As members of the legislative body, parliamentarians are required to simultaneously control themselves as members of the executive. This is tantamount to a mission impossible and discredits parliamentary control over the executive.¹³

Such a tempting constellation brings to life the warning of the British Lord Acton that “power tends to corrupt; absolute power corrupts absolutely”.¹⁴ Notwithstanding such potential threats to truly all-encompassing notions of state- and nation-building, Namibian lawmakers from SWAPO have largely resisted giving in to this temptation. Indeed, only once so far, in 1999, has a constitutional change been implemented – against the votes of

11 November 1999, November 2004, and November 2009. The results of the latter were still the subject of a legal dispute in the Namibian High Court at the time of writing this chapter, after nine opposition parties objected.

12 Erasmus (2000:86).

13 Cf. Melber (2005).

14 http://en.wikipedia.org/wiki/John_Dalberg-Acton,_1st_Baron_Acton#cite_note-3; last accessed 6 February 2010. Notably, this statement was made in the context of a society considered to be one of the historical midwives of political systems, with a degree of popular participation and institutionalised checks and balances commonly qualified as democracy.

all opposition parties – which provided the first Head of State an exceptional third term in office. This was a hotly debated issue with direct consequences in the arena of political contestation, as it contributed to the formation of the first political opposition party with roots of its founders in the upper ranks of the SWAPO Party. Since then, a decade later, the Constitution has remained untouched.

At the end of 2007, however, a new opposition party was founded by some former members of the SWAPO Party leadership that had broken away. This has provoked an increasingly antagonistic and hostile political climate. It has also contributed to the SWAPO Party's growing intolerance of deviating views, and has prompted new desires to make use of its dominance to change the rules and seek political compliance among all higher ranks of the public service representing the state authorities. Civil servants would then be directly responsible to a party and its political programme, and not to an oath taken to serve the wider interest of a society. This places the independence of a civil service under threat and reflects similar tendencies and desires as those who increasingly question and attack the autonomy of the judiciary.

Politics and the rule of law

Political office-bearers in ministerial ranks have occasionally articulated frustration over court rulings they considered against their political-ideological orientation and conviction. If constitutional principles were referred to as an argument for certain legal decisions taken in the Namibian judicial system, these arguments were not always met with respect. At times, the rule of law was implicitly seen to be the law of the rulers. With the heated political climate and polarisation building up ahead of the National Assembly and Presidential elections in November 2009, voices articulating the tendency to change laws according to the desire of those in political power and control were on the increase.

In a joint press conference just ahead of the elections, the SWAPO Party Youth League (SPYL) President, Elijah Ngurare, and the Secretary-General of the National Union of Namibian Workers (NUNW), Evilastus Kaaronda, launched a vendetta against all those in senior positions in the civil service, the management of state-owned enterprises and the top echelons of the SWAPO Party, who were suspected of being 'unreliable elements' for not being staunch enough in their party loyalty. The SPYL and NUNW leaders suggested that a strict process of scrutinising candidates for their political reliability should be implemented to ensure that only 'trustworthy' party cadres filled such positions in the higher ranks of government, the civil service, and other state-controlled authorities. This narrow definition of politically acceptable servants to the people included diplomats representing the Republic of Namibia internationally, who, in the SPYL and NUNW leaders' view, were loyal only to the Head of State. During the course of their lengthy reasoning they made the following categorical statement:¹⁵

If laws prevent this from happening, we cannot be held back by laws we can change, as simple as that.

15 Ngurare & Kaaronda (2009).

Such public statements are cause for serious concern. Not only do they imply that laws are merely changed to suit the government of the day, they also suggest that a legal framework is only as functional as its degree of compliance with the political ideology of a specific party. Revisiting the Preamble of the Namibian Constitution, however, –

... [civil] rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary[.]

In contrast, the conception that leading political office-bearers and other party loyalists are articulating evidences little – if any – respect for an overarching normative framework such as the Constitution if it does not meet a party’s own political interests. This does not bode well for Namibia’s democratic future, unless these temptations are uncompromisingly rejected by the highest representatives of Namibian society in defence of the country’s fundamental democratic principles.

The responses to the latest landmark ruling of the Namibian Supreme Court, delivered on 14 December 2009 – almost 20 years to the day after the Constitutional Assembly convened, are of particular interest.¹⁶ The appeal case by the largest labour hire company in Namibia had challenged the constitutionality of section 128 of the Labour Act,¹⁷ which prohibited any form of labour hire. In its conclusion, the Supreme Court overruled an earlier affirmative High Court judgment by declaring that Article 21(1)(j) of the Constitution – which is part of the fundamental freedoms set out in Chapter 3 and provides that “all persons have the right to ... practise any profession, or carry on any occupation, trade or business” – entitled the labour hire company to its business, subject to adhering to the legal provisions. The Supreme Court put it as follows:¹⁸

... the prohibition of the economic activity defined by s. 128(1) in its current form is so substantially overbroad that it does not constitute a reasonable restriction on the exercise of the fundamental freedom to carry on any trade or business protected in Article 21(1)(j) of the Constitution and, on that basis alone, the section must be struck down as unconstitutional.

In an important subsequent qualification, it was stressed that this ruling did not imply the absence of any legal restrictions regulating the form of business. Instead, the Supreme Court, in stating –¹⁹

... that the freedom protected by Article 21(j) does not imply that persons may carry on their trades or businesses free from regulation, [did] not find it necessary for purposes of this appeal to determine by which measure regulative legislation in the area of private economic activity falls to be assessed. The prohibition of a particular trade or business does not regulate how it

16 Appeal Judgment in the Supreme Court of Namibia, *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*, Speaker of the National Assembly, Chairperson of the National Council, President of the Republic of Namibia, Case No. SA 51/2008.

17 No. 11 of 2007.

18 *Africa Personnel Services (Pty) Ltd* at 90[91].

19 (*ibid.*:95[97].

may be carried on but precludes it from being carried on at all. Thus, the prohibition in this instance seeks to remove – not regulate – the business of an agency service provider from the protection of Article 21(1)(j).

In a press statement following the verdict, the Minister of Labour and Social Welfare made the following comment:²⁰

The Supreme Court has spoken. As a nation built on the rule of law, the Namibian Government respects the final authority of the Supreme Court to interpret the Namibian Constitution. However, Government would be remiss if it did not exercise its constitutional right to voice its disagreement with the Court's judgment.

... I remind you that Article 81 of the Namibian Constitution provides as follows[:]
“A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.”

I therefore wish to assure the Namibian nation that our Ministry will not allow the Supreme Court's judgment to divert it from its duty to protect the most marginalised and vulnerable workers in our country. In light of the Supreme Court's judgment, the Government is more determined now than ever before to pursue the goals of dignity and justice for employees working in the labour hire system. I hereby pledge that our Ministry, after studying the Court's judgment in the fullest detail and implication, will prepare legislation that will put an end to the practice of labour hire as we know it today, in accordance with Constitutional requirements, and will create a strong administrative framework to enforce such legislation.

In contrast to this relatively measured response, the SWAPO-affiliated NUNW's reaction to the ruling was indicative of the current polarisation within Namibian society and the hegemonic aspirations of some political activists, who seem to place the party ideology above constitutional principles. Kaaronda, the NUNW Secretary-General, described the ruling as a “slap in the face”, a “calculated political move”, and as “counter-revolutionary”, “anti-people”, “insensitive” and “humiliating”. His statement concluded as follows:

It is clear that the time has come for the complacent and ignorant functionaries of the judiciary to be dismissed as they clearly have no clue of, nor do they respect[,] the suffering endured by our people enslaved by the labour hire system. [The NUNW] outwardly rejects this ruling in its entirety [and we call on our members] to equally reject this unpatriotic and reactionary ruling.

According to Kaaronda, the Supreme Court had forced the NUNW “to declare war against its ruling”. The NUNW stated that it would not tolerate such a system “just because it economically benefits some of the judges, whether directly or indirectly”.²¹

In a response, Senior Council Raymond Heathcote, President of the Society of Advocates of Namibia, urged the trade union leader to retract his statements, and asked the Prosecutor General to charge Kaaronda with contempt of court. He qualified Kaaronda's statements as “outright defamatory, contemptuous, and a threat to the independence

20 Ngatjizeko (2009).

21 Shejivali (2009a).

of the judiciary”²² In a separate statement, the Legal Assistance Centre (LAC) agreed with the Society of Advocates. LAC Director Norman Tjombe welcomed the Supreme Court’s differentiation between the protection of a fundamental constitutional right and the need for strict legal restrictions prohibiting the abuse of enshrined freedoms. He added that, while judges were not above reproach, a balance had to be struck between –²³

... healthy comments on judgments and outright contemptuous statements against the courts. To call for the dismissal of judges simply because one disagrees with their verdict is a serious threat against the independence of the judiciary without which a constitutional democracy cannot function.

Notwithstanding such voices of concern, the trade union leader remained stubbornly convinced of his position and, at another press conference in response to the criticism of his statement, he declared that only “over his dead body” would he apologise for his stance.²⁴ Instead, he announced that the NUNW would request the Head of State to transform the judiciary. He asked why, after having obtained independence for their country, the people of Namibia should accept what the courts had to say. He refused to be silenced through intimidation and asked why the judiciary had not changed to reflect the values of those he referred to as “our people”.²⁵

Against the backdrop of such these views, the words of caution articulated at a human rights workshop only three years after Independence by the then Under-Secretary for Legal Affairs at the Ministry for Foreign Affairs come to mind. As he then observed, –²⁶

[i]t is ironic that[,] although we have a widely admired Constitution, the organizations which are supposed to provide the officials who will protect this constitution, namely our political parties, are the most undemocratic institutions in the country.

His concerns were echoed and confirmed by the sceptical but profound reflections that a scholar of law in temporary service at the University of Namibia had to offer after more than a decade into Namibia’s independence, in his comparison with experiences in Zimbabwe. The scholar drew the following conclusion:²⁷

... betterment and enhancement of constitutionalism after independence is partly inhibited by relationships and practices that were carried over from the process of liberation itself. As a result, some fundamentals of constitutionalism appear to be irreconcilable with some lessons learnt and practices observed during the liberation struggle. Some lessons learnt in the liberation process may, themselves, not be favourable to the furtherance of diversity, political pluralism and respect for, and sustenance of, a human rights culture.

22 Heita (2009).

23 Shejvali (2009b).

24 De Bruyn (2009).

25 (ibid.).

26 Pickering (1995:107).

27 Bukurura (2003:44).

But the ultimate question that remains is this: Does the Constitution serve and impact upon state- and nation-building that has democracy and the protection of civil liberties for all as its goal, and does it serve as a beacon for the “one Namibia, one nation” that stands for “unity in diversity”?²⁸ As generally observed, the trends in African states seem to suggest that the executive continues to dominate society:²⁹

Though democracy might have become the only game in town in many countries, the rules of the game are often not that democratic yet.

Thus, we should jealously guard the achievements obtained at Independence against any individual or collective assaults by those who mistakenly believe that the political legitimacy obtained by a majority among the electorate entitles them to change the rules of the game – the same rules that provided them with access to this political legitimacy in the first place.

Conclusion

It seems appropriate to recall what the Supreme Court stated in its controversial but pioneering ruling in the protection of the fundamental freedoms envisaged in Chapter 3 of the Namibian Constitution. In its landmark judgment, the Supreme Court assessed the purpose of freedom as defined in Article 21(1)(j) –³⁰

... not only by referring to its history and background but also by looking forward at its objectives. The Constitution, after all, is not a memorial of a bygone era but an ever-present compass, its constituent parts carefully composed of our People’s collective experiences, values, desires, commitments, principles, hopes and aspirations, by which we seek to navigate a course for the future of our Nation in a changing and challenging world.

Despite all the limitations Namibia’s Constitution might have, it is the only relevant framework to which all sections of society can refer and should respect. It is the fundament for consolidating legitimate sovereignty in a democratic state that serves all people, and thereby continues to build the nation.

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28 Both slogans were part of the established SWAPO rhetoric during the ‘struggle days’ and continued to be employed by the ruling party after Independence.

29 Austin (2009:11).

30 *Africa Personnel Services (Pty) Ltd* at 46[42].

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The Namibian Constitution: Reconciling legality and legitimacy

Marinus Wiechers

With the adoption of the Namibian Constitution 20 years ago, the illegitimate but apparently legal regime that had previously existed in the country became converted into a state legal order that enjoyed full legitimacy. After decades of strife, legality and legitimacy were reconciled.

This article first investigates the causes and extent of the breach between legality and legitimacy that existed in the pre-Independence era, and shows how this breach was overcome by the Namibian Constitution. The section that follows raises the question of whether, in the 20 years following its adoption, the Constitution has maintained and will in future continue to maintain its original force – not only to reconcile legality and legitimacy, but also to strengthen such reconciliation.

Legality and legitimacy

Legality

Often, *legality* and *legitimacy* are used as synonyms.¹ However, that they are synonymous is not quite true. Although intrinsically related to *legality*, *legitimacy* is a much broader concept; it certainly finds its roots in the notion of *legality*, but it embraces much more. Whereas *legality* denotes lawfulness and describes an act in accordance with the law, *legitimacy* implies a sentiment or conviction that such an act is not only in accordance with the law, but also in accordance with laws that are at the same time just, equitable and reasonable. In essence, the concept of *legitimacy* raises political and moral judgments. Stated differently, one could say that *legality* relates to the law as it is, and *legitimacy* to the conviction that the law as it is, is also good, acceptable and, above all, worthy to be adhered to.

Legality, if taken literally, would simply mean that an act that complies with the existing law is by definition legal and, therefore, lawful. Thus, an act – even if it finds its justification in an unjust or oppressive law – would still, in positivist thinking, bear the stamp of legality. To Hans Kelsen, the famous legal philosopher, law is a command that must be followed in order to create legal certainty.² If that legal command is unjust and unfair, it has to be changed by law reform or challenged in the political arena.

1 Max Weber, quoted by Carl Schmitt (1932:14): “*Legalität kann als Legitimität gelten*” (“legality can hold true as legitimacy”; translation M Wiechers).

2 The Kelsian doctrine was elaborated by him in his numerous books and writings of which his *Theory of pure law* (1951) is probably the most definitive.

This extreme positivistic approach is often found in autocratic and oppressive regimes, including post-independence African states.³

In countries where sovereignty is vested in Parliament, such as in South Africa before 1994, by way of a simple majority Parliament can pass harsh and unjust laws that have to be applied by the courts. To counterbalance the harshness of unjust laws and their effects, the doctrine of the rule of law was enunciated. This doctrine postulates a higher law which precedes and governs parliamentary laws and other forms of state regulation. This higher law can be derived from principles of natural law – or, in the case of England, be found in such historical documents as the Magna Carta, the Petition of Right, Habeas Corpus Acts, the Declaration of Rights, the Bill of Rights and the Act of Settlement, as well as great judgments of the past. The rule of law, according to its protagonists, implies respect for human rights, the protection of personal freedoms, equality before the law, and the absence of arbitrary government. The problem with the rule of law doctrine was that it is imprecise and always subjected to the vicissitudes of parliamentary legislation. This led to the famous observation by W Ivor Jennings that –⁴

[t]he truth is that the rule of law is apt to be rather an unruly horse ... If analysis is attempted, it is found that the idea includes notions which are essentially imprecise, including post-independence African states.

Regardless of its imprecise content and precarious application, the rule of law doctrine nevertheless – and especially in South Africa – kept the quest for the protection of human rights alive and served as a potent weapon to criticise and oppose unjust laws and the abuse of governmental power.⁵

With the adoption of constitutions as fundamental laws, first in Namibia in 1990 and in South African in 1994, the propagation of the doctrine of the rule of law subsided and very few, if any, learned writings on that subject are to be found. The reason for this is obvious: the Namibian and South African Constitutions incorporated all those principles that were previously enunciated as rule of law principles, and elevated them beyond the tyranny of a parliamentary majority.⁶ The rule of law became replaced by the notion of *legality*. *Legality*, in this sense, means that the Constitution has become the supreme law and all laws and governmental actions are now subjected to its principles and rules. It can

3 See Prempeh (2006:1239, 1280): “The primary function of the typical African constitution installed between 1960 and 1990 was to provide a Kelsenian positivistic cover for regimes of insecure and dubious legitimacy”.

4 Jennings (1959:60).

5 In South Africa there was an abundance of books and articles on the rule of law. Two seminal works were by Mathews (1971) and Dugard (1978). For an overview of English and South African writings on the rule of law, see Wiechers (1981:135–156).

6 Dyzenhaus (2006:734, 739): “It might still seem that the rule of law has no independent role to play in legal discourse after a Constitution such as South Africa’s is entrenched, since the rights and liberties guaranteed by the Constitution not only include all the substantive content of the rule of law, but also much more besides”.

safely be said that the adoption of a higher law in the form of a written constitution was the final triumph of the rule of law.

Legitimacy

As explained above, *legitimacy* denotes an overall conviction that the existing laws which give concrete form to the principle of legality are worthy of adherence.

Because *legitimacy* relates to the perceptions and convictions of governments as well as peoples and individuals, it may well be treated as a sociological concept to be dealt with by using sociological, political science, economic and psychological methodologies.⁷ But this does not mean that legitimacy is a terrain that falls outside the scope of legal thinking. Because legitimacy is so intimately related to legality, and because legality constitutes the parameters within which legitimacy functions, it is also necessary to analyse the concept of *legitimacy* from a juristic perspective.

However, such an analysis is not an easy task: there are many divergent views and approaches, all of them correctly touching on elements which foster legitimacy. To some, the main source of legitimacy is the quality of the state and the government's fulfilment of its moral obligations and responsibilities.⁸ Others find the sources of legitimacy in the collective racial, historical and religious convictions of the population.⁹ Yet others consider elections, namely the direct participation of voters in the affairs of government, as the dominant factor giving concrete form to the concept of *legitimacy*.¹⁰

Peter Badura, in his seminal work on the German Constitution, views *legitimacy* as the principled acceptance and justification of the state's political rule or dominance, coupled with the legality of public authority.¹¹ State rule or political dominance ("*staatlicher*" and "*politischer Herrschaft*") should be founded on the principles of the sovereignty of the people and on state values and aims ("*staatliche Werte*" and "*Ziele*"), as well as on the limitations and tasks of the state ("*Grenzen und Aufgaben des Staates*").¹² A constitution, in order to be legitimate, should not only assure legality, effectiveness and orderliness ("*Planmässigkeit*"); it should also connect political dominance with the

7 See Chantebout (1995:19).

8 Töttemeyer (2006:63).

9 See Hotterman (1989:177): "*De legitimerende theorie rust in een concept waarbij de bevolking niet opgevat word als een aantal individuen, maar gezien word als een collectiviteit die enkele bindende waarden verteenwoordigt, zoals ras, historische voorbeschikking of religieuze opvattingen*" ("The legitimising theory is based on a concept that the population should not be regarded as a number of individuals, but be seen as a collectivity that represents some binding values, such as race, historical preordination or religious convictions").

10 See Katz (1996:44).

11 Badura (1986:9): "*Legitimität bedeutet die in Prinzipien begründete Anerkennung und Rechtfertigung politische Herrschaft und der Legalität öffentliche Gewalt*" ("Legitimacy means the principled recognition of political dominance and the legality of public authority").

12 (ibid.).

individual's social norms and aspirations.¹³ In short, to this learned author, the realisation and task fulfilment of the constitutional state is the essence of democratic legitimacy.¹⁴

It can be concluded that legitimacy not only strengthens the application of the principle of legality, but is at the same time an essential prerequisite. Laws that are perceived to be illegitimate will lose their force of persuasion and may lead to resistance and even open revolt. The reasons for illegitimacy are manifold. Basically, however, they all imply bad governance which, in turn, can be related to a non-adherence to the constitution and a neglect of the needs and aspirations of the people, which in a democratic state would also include the rights and aspirations of ethnic and political minorities.

Legality and legitimacy in Namibia before 1990

On 17 December 1920, the Council of the League of Nations entrusted the administration of South West Africa as a C-mandated territory to South Africa. In *R v Christian*,¹⁵ the South African Appeal Court held that sovereignty over the territory was vested in the mandatory. South African sovereignty over the territory led the South African Government and Parliament to assume full authority for the administration of South West Africa. As a start, Act 49 of 1919 gave the Governor-General and his representative, the Administrator for the territory, plenary powers of administration. Act 42 of 1925 introduced limited self-rule, but Act 39 of 1949 brought a change and expanded South African rule.¹⁶ Act 38 of 1968, together with Act 25 of 1969, took the incorporation of the territory as a fifth South African province a step further and also made the South African Government's Bantustan policies applicable in South West Africa. Again, this incorporation has to be understood in the light of international developments. The rejection of the Liberian and Ethiopian claims by the International Court of Justice in 1966, as well as the United Nations General Assembly's revocation in the same year of the mandate held by South Africa over the territory of South West Africa, made the South African Government even more determined to govern South West Africa as an integral part of its Republic.

But, in 1977, when it became apparent that the independence of South West Africa was unavoidable, the South African Parliament passed Act 95 of 1977, which gave the State President full power to rule the territory by Proclamation. The most important of these were Proclamations R180 and R181 of 1977, which instituted the Office of Administrator-General and invested him with legislative and executive powers. In 1977, the State President issued a Proclamation to terminate direct representation of the

13 (ibid.:7).

14 (ibid.:9), where he quotes the dictum of the Constitutional Court, BVerfGE 62, 1/43: "*Nach dem Grundgesetz bedeutet verfassungsmässige Legalität zugleich demokratische Legitimation*" ("In terms of the Constitution, constitutional legality simultaneously means democratic legitimacy").

15 1924 AD 101.

16 The 1949 Act was a direct result of South Africa's view that the mandate had lapsed upon the demise of the League of Nations. This Act also introduced direct South West African representation in the South African Parliament.

territory in the South African Parliament.¹⁷ This state of affairs, with the Administrator-General representing the South African State President and having plenary legislative and administrative powers, remained up to Namibia's independence in 1990.

From this cursory overview of South African rule in the former South West Africa,¹⁸ it is abundantly clear that laws and law enforcement took prominence in the territory. Legality, in the strict positivistic sense of law as a command, reigned supreme.¹⁹

However, during that same time, the legitimacy of the South African laws and regulations eroded more and more. Many factors contributed to this breach between the legality of the system and its legitimacy. The most important reason for the decline in legitimacy was that South Africa and the white government in the territory, instead of promoting the interests and well-being of all the peoples in it, inflicted policies of racial subjugation upon blacks. This was perceived by the majority of the peoples of Namibia as a violation of the sacred trust of civilisation, and inevitably led to their questioning the legitimacy of South African laws and their application.

Another concomitant and contributing factor to the decline of legitimacy was the obstinacy of the South African Government to accept the continuation of the mandate and the supervisory authority of the United Nations. The refusal of South Africa to acknowledge the United Nations' role resulted in six cases before the International Court of Justice; in the General Assembly revoking the mandate in 1966; and in a resolution by the Security Council declaring South Africa to be in illegal occupation of Namibia.²⁰

The stigma of unlawfulness, the worldwide condemnation of this illegal occupation, and the armed resistance on Namibia's northern borders finally destroyed all vestiges of legitimacy of South African rule over the territory – not only amongst members of the international community, but also amongst the majority of the people inside the country.

The Namibian Constitution – reconciling legality and legitimacy

It would be a gross oversimplification to say that the adoption of the Namibian Constitution reconciled legality and legitimacy in one fell swoop. The Constitution, as Prof. Gretchen

17 R 249 of 1977.

18 For a more comprehensive account of the years of South African rule, see Carpenter (1989/1990:22–27); Du Pisani (1986); O'Linn (2003:Ch.4). Namibian constitutional and political developments during the pre-Independence years raised considerable interest in South Africa because many of these developments were quite correctly seen as precursors of what is also to come in that country. See Wiechers (1981:444–502).

19 In some court cases, the legislative powers of the South African Parliament over the territory, after the UN had revoked the mandate, were unsuccessfully challenged. See e.g. *S v Thuhadeleni & Others* 1969 (1) SA 153 (AD) and O'Linn (2003:219).

20 In 1966, the General Assembly changed the name of South West Africa to *Namibia*. The South West Africa cases were to become the most protracted and voluminous litigation in international adjudication. See Dugard (2005:478) for a brief legal chronology; see also Dugard (1973).

Carpenter rightly pointed out,²¹ “did not fall out of the sky: it is the product of many years of negotiation and political growth”. It was precisely during the pre-Constitution years that a process of restoration of legitimacy occurred, parallel to the gradual decline of the legitimacy of South African rule over the territory, which eventually culminated in the legitimacy of the Constitution.

The following can be considered as benchmarks in the process of restoring legitimacy by stimulating democratic expectations and faith in a future, independent Namibia, as well as hopes for the country to become a fully accepted member of the international family of nations after the adoption of a constitution that accommodated the aspirations of all the people:

- The Turnhalle Constitution, 1977
- The elections, 1978
- The Multi-party Conference, 1994
- The Transitional Government of National Unity, 1985
- Proclamation 101, 1995, which introduced the Windhoek Declaration of Basic Principles and the Bill of Fundamental Rights²²
- The Constitutional Council mandated by the National Assembly in 1985 to draw up a Constitution for an independent Namibia
- Free and fair elections under United Nations supervision, 1989, with a participation rate of almost 97% of the population,²³ and
- The drafting of the Namibian Constitution and its unanimous acceptance by the Constituent Assembly.²⁴

Professor Carpenter’s concluding remarks as regards the process of restoring legitimacy need to be endorsed here:²⁵

It can be said that the various conferences, elections and constitutions in Namibia helped to turn an exceptionally unsophisticated, politically backward population into one which is, today, politically ‘streetwise’ and aware. Many of the principles which have been incorporated in

21 Carpenter (1989/1990:63).

22 The application of this Bill of Fundamental Rights arose in a number of cases and no doubt reinforced faith in the independence of the courts and a Bill of Rights per se. For a discussion of these cases, see O’Linn (2003:245–280). Noteworthy were *S v Angula* 1986 2 SA 540 (SWA) and *Cabinet of the Transitional Government of the Territory of SWA v Eins* 1988 3 SA 369 (A).

23 See Katz (1996:44), who is of the opinion that elections are one of the most important factors in giving concrete form to the concept of legitimacy.

24 See Ihonvbere (2004:239, 252): “The process of constitution-making is critical to the strength, acceptability and legitimacy of the final product”. See also Geingob (2003:22), who states that the acceptance – as suggested by Mr Dirk Mudge of the DTA – on 12 December 1989 of the South West Africa People’s Organisation (SWAPO) draft as a working document which combined the most important elements of the other parties’ proposals contributed much to the success of the constitutional deliberations. Also, it must be stressed that the appointment of three South African lawyers to do the drafting reinforced the idea of a home-grown constitution, not devised by foreign legal experts.

25 See Carpenter (1989/1990:63).

the Constitution grew from ... immature early efforts. It must be conceded that SWAPO,²⁶ the most powerful party in Namibia at present, did not participate in these early negotiations and came in only towards the end, but the success achieved by the Democratic Turnhalle Alliance, in particular, in breaking down racial barriers in politics, contributed greatly to the spirit of compromise which played such an important part in the widespread acceptance which the Constitution ultimately achieved.

Also, in the process of restoring legitimacy, the role of the international community by its adoption of Security Council Resolution 435 in 1978 should be emphasised. Resolution 435, fortified by the Constitutional Principles,²⁷ guided the whole process of Namibian independence and assured its support and final acceptance by the family of nations.

Finally, the Constitution had to reconcile the illegitimacy of the former South African rule with the legality of the new order. This was achieved in an anomalous manner. On the one hand, the Constitution accepted all the laws and enactments as well as governmental appointments and actions of the previous regime as having full legal force in as far as they were compatible with the Constitution;²⁸ on the other hand, it declared that —²⁹

[n]othing contained in this Constitution shall be construed as recognising in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia.

How does one explain this glaring anomaly of accepting the legal force of previous laws and governmental actions while, at the same time, declaring them to be invalid? The explanation is that the law as a rational instrument in the hands of the legislature can presume a factual state of affairs to have legal force and effect without accepting the validity of such state of affairs.³⁰ This presumption, introduced by the Constitution, is a clear manifestation of the latter's evolutionary and non-revolutionary character.

26 See Naldi (1995:8): "However, by this time SWAPO had in great measure abandoned the Marxist rhetoric typical of many national liberation movements and adopted a pragmatic socialism, including endorsement of a mixed economy".

27 See Wiechers (1989/1990:1); see also O'Linn (2003:378).

28 Articles 140 and 141 of the Constitution.

29 Article 145(2).

30 Strictly speaking, Article 142(2) contains a contradiction in terms. The laws and actions of the South African Government should have been declared illegitimate and not invalid since the foregoing Articles 140 and 141 expressly declare them to be legally valid. In constitutional theory, this presumption of legality can be explained as a manifestation of what German theorists would label as the "*normative Kraft des Faktischen*" ("the normative force of a factual state of affairs"). In the two Namibian cases that dealt with Article 145(2), namely *Minister of Defence, Namibia v Mwandighi* 1992 (2) SA 355 (NmS) and *Government of the Republic of Namibia v Cultura* 2000 1994 (1) SA 407 (NmS), the theoretical basis of the legality/invalidity anomaly was not fully explored.

The Constitution and its future legitimacy

The Namibian Constitution bears all the hallmarks of a constitutional democracy, namely it provides for the recognition and enforcement of fundamental human rights and freedoms, the separation of powers, judicial independence, a multiparty system, and regular elections.³¹ At the time of its adoption, the Constitution enjoyed the highest degree of legitimacy since it contained the promise of a future state conforming to all the tenets of constitutionalism.³² But as former Chief Justice Ismail Mahomed warned, —³³

[t]he realisation of this promising future cannot, however, be guaranteed by the eloquence of the Constitution. ... It needs *inter alia* the widespread dissemination of a pervading human rights culture to support the values and institutions of the Constitution; organs of civil society active in its defence; media emphatic to its objectives; a vigilant Bar ready to identify transgressions of the Constitution to ventilate more specific issues arising from its more generalised aspirations, and to bring the discipline of the law and the scholarship of the international community to bear on their solution; academic inputs to bring vision and perspective to the debate; and a judiciary sensitive to and knowledgeable on such issues.

In short, what Chief Justice Mohamed so vividly propagates is that the values and institutions of the Constitution should constantly and vigilantly be defended. Such continuing defence is certainly essential to safeguard not only the legality, but also the legitimacy of the Constitution.

However, the Constitution is not a historical monument which has to be defended by drawing a cordon of protective measures around it. A constitution is a living institution. While its legitimacy must certainly be defended and fortified, at the same time it could be detrimentally influenced and undermined by a number of factors which, if not identified in time, could lead to its disaffection and eventual ruin.

Factors which might have negatively influenced the legitimacy of the Namibian Constitution during the past 20 years and may undermine its future legitimacy

African constitutionalism

A strong conviction previously held that the failure of many African constitutions was due to the fact that they introduced concepts of *democracy*, mainly from Western sources, which were foreign to traditional African constitutionalism. For instance, Henry

31 These features ensured that the Constitution conformed to the prescriptions of the Constitutional Principles.

32 Prempeh (2006:1239, 1280) observes that Africa abounds with constitutions without constitutionalism. This is certainly not true in the case of the Namibian Constitution.

33 In his foreword to Naldi (1995).

J Richardson III questioned the soundness of the Constitutional Principles that eventually supplied the basis of the Namibian Constitution, arguing that —³⁴

[c]learly, the text of the Phase I guidelines raises doubts that in their particulars, and even in some cases their outline, a newly independent African state would have freely adopted them. They are more a balancing of outside interests than an expression of the constitutive expectations of the people in the territory.

In the same vein, Yash Ghai is of the opinion that, in Africa, —³⁵

[t]he ideology of constitutionalism had only the most slender of appeals to the rulers and the ruled. Legitimacy comes from other sources, and some of these sources are antithetical to the rule of law.

Manfred O Hinz also expresses his doubts by stating that —³⁶

[w]hen Namibia gained independence in 1990, the approval of the Constitution on the part of the population did not go beyond an understanding of the constitution as purely a symbol for the liberation won through the struggle.

What constitutes African constitutionalism is not very clear. It is generally said that Western ideologies of constitutionalism are universal in the sense that the human rights of all persons are universally recognised on a basis of equality, whereas African constitutionalism is relativistic, and claims that these rights depend on the culture and context of the society.³⁷ Stated differently, it means that human rights emanate from a collective source and do not appertain to each and every person individually. It is said that individual rights not coupled to duties towards the collectiveness may lead to anarchy. To some, the protection of human rights and liberties is subservient to the interests of the state, and more particularly, in the management of natural resources. JB Ojwang puts it as follows:³⁸

A notion of constitutionalism, which assumes the immutable, accrued rights of the *self*, would not be well matched to the general African context. The African context is in the first place a context of *creation*, of *construction* of larger rights and liberties, through orderly and well-conceived management of national resources – rather than a *defence* of a fully developed, well-founded and universally understood set of rights and liberties. The creative process may moreover require certain compromises to be made within the body of emergent liberties. The possibility of uncompromising vindication of accrued rights and liberties, thus, would fall to a secondary position in the ordering of fundamental national priorities. [Emphasis in original]

34 Richardson (1984:76, 108). The concerns of this author were belied by the fact that the Constituent Assembly, at its first meeting on 21 November 1989, unanimously resolved to adopt the 1982 Constitutional Principles as a “framework to draw up a constitution for South West Africa/Namibia”.

35 Ghai (1990:4).

36 Hinz (2006a:282).

37 See Mangu (2002:157).

38 Ojwang (1990:57, 70).

Furthermore, in terms of African constitutionalism, it is held that traditional chieftainship and popular participation within the tribal system should be recognised.³⁹

In Africa, the adoption of notions of African constitutionalism has not always led to positive experiences. Often, it led to one-party rule, lifelong presidencies, abuse of power, outright military dictatorships, and the denial and suppression of individual human rights by an authority assumed on behalf of the collectiveness or by virtue of higher state interests.⁴⁰

A yearning for a return to a form of African constitutionalism may not only erode the legitimacy of the Namibian Constitution, but also give to a ruling party the pretext for the installation of an autocratic government and the denial of human rights and freedoms. In this respect, the warning by Hage Geingob sounds true:⁴¹

One thing is sure, if attempts are made by influential persons to undermine the constitution, backed by the ruling party having two-thirds majority in the National Assembly, the constitution can be wrecked.

A promised land and frustrated expectations

The Namibian Constitution is highly idealistic and generous. It promises a land of fulfilment and plenitude. Its Preamble⁴² proclaims the equal and inalienable right of all members of the human family; the establishment of a democratic society where the government is responsible to the people; the unity and integrity of the nation; national reconciliation; and a determination to cherish and protect the gains of the long struggle against colonisation, racism and apartheid.⁴³ Chapter 3 contains an impressive catalogue of entrenched fundamental rights and freedoms, and special provision is made for their enforcement. To entrench their protection, Article 131 proscribes any amendment or repeal of the Constitution that diminishes or detracts from these rights and freedoms. In addition, Article 95 enshrines an equally impressive list of tasks which the state promises to undertake for the welfare of the people, such as the advancement of women, senior citizens and workers; the formation of independent trade unions; access to public facilities, health and other services; the promotion of justice on the basis of equal

39 See Koyana (1995:28); Hinz (2006a:24).

40 See Ghai (1990:4), who states that, in Africa, “[t]he ideology of constitutionalism had only the most slender of appeals to the rulers and the ruled. Legitimacy comes from other sources, and some of these sources are antithetical to the rule of law”.

41 Geingob (2003:66).

42 In *Kauesa v Minister of Home Affairs* 1994 NR (HC) 135, the Court held that the Preamble was an integral part of the Constitution.

43 In the *Kauesa* case, Justice O’Linn views the Constitution as a compromise agreement, and at 143(E–G) goes on to state the following: “The letter and spirit of this compromise agreement was reconciliation. It envisaged corrective measures, but not revenge; not discrimination in reverse; not the mere changing of roles of perpetrator and victim. The parties to the settlement relied for its interpretation on the honour and integrity of the participants”.

opportunity; and the maintenance of ecosystems. In addition, Article 98(1) promises an economic order with the objective of securing economic growth, prosperity and a life of dignity for all Namibians.

Admittedly, the principles of state policy contained in the Constitution are not legally enforceable by a court; however, they must serve as guidelines to the government, and the courts are entitled to have regard to those principles in interpreting any laws based on them.⁴⁴

It speaks for itself that a government and ruling party that protects human rights and freedoms, uphold the principles of state policy, and generally adhere to the provisions of the Constitution will enhance the latter's legitimacy.⁴⁵

Conversely, if a government fails to fulfil its constitutional commitments and, furthermore, its governance is tainted by corruption, nepotism, the wasting of public resources and discrimination, the promised land of the Constitution will not be realised and the high expectations raised by the Constitution will be betrayed. Of course, it is primarily the government that must be blamed for such a betrayal. Finally, however, those betrayed expectations will be projected on the Constitution, and its legitimacy will be questioned and contested. If that happens, the very existence of the Constitution is in jeopardy.

It falls outside the scope of this article to investigate the performance records of the Namibian Governments, past and present, and find out in how far the expectations raised by the Constitution are being fulfilled. Such an investigation would require an extensive study and assessment of Namibian politics, economics and state administration.

Suffice it here to point to a 2005 publication of surveys that were carried out to establish political sentiments amongst the population, especially the youth.⁴⁶ The findings of the associated report are discouraging. The growing marginalisation of women and young people was noted, as was widespread political apathy. Some 40% of the youth do not want to engage in political activities and were not interested in the vote.⁴⁷ More worrying was the finding that there was –⁴⁸

... a growing trend for people to be disenchanted with the form of democracy in Namibia, and voter apathy has been observed in a democracy that is only 15 years old.

In this climate of a declining preference for democracy, there is a disturbing conclusion, namely that single-party and even military rule become options.

44 Article 101.

45 In this respect, the third presidential term decided on in 2000 must be noted as a clear transgression of Article 29(3).

46 LeBeau & Dima (2005).

47 (ibid.:70).

48 (ibid.:107, 108).

Surely, if the will on the part of the people to uphold a democracy⁴⁹ is in decline, the legitimacy of the Constitution is increasingly eroded.

The muted voice of the Constitution: Constitutional interpretation

The voice of the Constitution should be heard clearly and loudly, especially when the courts, in their judgments, interpret its provisions. This is why the courts, as the protectors and mouthpieces of the Constitution, should be totally independent, and why judges should perform their function without fear, favour or prejudice.

By stressing the importance of human rights and freedoms as well as socio-economic advancement, the authoritative interpretation of the Constitution by the courts enhances and strengthens its legitimacy. Such interpretation should, apart from clearly establishing the law, also assure the unity and integrity of the body of laws and should serve justice.⁵⁰ In the latter respect, much has been written lately about a ‘transformative constitutionalism’. Marius Pieterse,⁵¹ for example, poses the following question:

What do we mean when we speak about “constitutional constitutionalism”? ... What does this mean, and what does it require of our community of constitutional interpreters?

In this regard, Pieterse defends an –⁵²

... essentially social-democratic understanding of the concept as mandating the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a “culture of justification” for every exercise of public power.

To him, the Constitution contributes to transformation in primarily three ways. Firstly, it does not stand in the way of political projects aimed at social transformation; secondly, it mandates the state to prioritise and actively pursue transformation; and thirdly, it functions as a tool of transformation by requiring that its provisions are interpreted and applied in a manner that furthers their transformative purpose.⁵³ In short, *transformative constitutionalism* means an interpretation and application of the Constitution that will foster freedom, equality and social justice.

In Namibian case law, two approaches to constitutional interpretation are found. Justice O’Linn⁵⁴ holds the view that “[t]he Constitution must be interpreted broadly, liberally

49 See La Torre (2007:30), who refers to Prof. Konrad Hesse’s “*Wille zur Verfassung*”, namely the will to uphold the constitution.

50 Zippelius (1989:745) mentions three elements of constitutional interpretation: the goal of setting rules (“*Regelungswerk*”), the keeping of the unity of the law (“*Rechtseinheit*”), and justice (“*Gerechtigkeit*”).

51 Pieterse (2005:155).

52 (ibid.).

53 (ibid.:164).

54 In *Kauesa v Minister of Home Affairs* 1994 NR 102 (HC) at 118 (D–E).

and purposively”. On the other hand, Chief Justice Dumbutshena⁵⁵ is of the opinion that “[c]onstitutional law in particular should be developed, cautiously, judiciously and pragmatically if it is to withstand the test of time”.⁵⁶

The Constitution is not an ordinary law of Parliament: it is a fundamental law on which all state institutions rest. It is also a policy document of overriding importance, since it clearly prescribes to government how it must protect human rights and freedoms, and how the principles of state policy should be carried out in practice. This asks for a complete departure of the previously casuistic approach that did not allow the courts to express themselves on governmental policies. Thus, a narrow, positivistic interpretation of the Constitution, without considering its goals and purposes, would be a bloodless exercise. By its decisions, the courts, in a spirit of transformative constitutionalism, must construct a comprehensive system of normative values. Showing themselves to be “sensitive and knowledgeable”⁵⁷ to the values and institutions of the Constitution, the judiciary becomes a major contributor to its legitimacy.

For these reasons, the approach advocated by Justice O’Linn has to be preferred.

Conclusion

The most important factors which may threaten the legitimacy of the Namibian Constitution are the misappropriation of an ideology of African constitutionalism, the accumulation of betrayed hopes and aspirations, and a jurisprudence that does not acknowledge the underlying goals and visions of the Constitution.

Legitimacy is a multifaceted concept and there are many other sociological, economic and political factors that may affect it adversely, such as a declining economy and increased poverty, a lack of transparency, and racial tensions. A very important factor is the behaviour of the main actors in the political arena, namely the political parties. If ruling political parties and their leaders do not pledge their constant support to the Constitution and a multiparty democracy and are bent on retaining their power, the people will eventually lose their belief in a constitution that is supposed to be above the power games of politicians. As Charles M Forbad warns, —⁵⁸

[w]ith so many political parties in Southern Africa sitting with comfortable majorities in parliament, all they will certainly try to do is to prepare to win again rather than open space for effective competition.

At the time of its adoption and immediately afterwards, the Namibian Constitution enjoyed a high measure of legitimacy and there was general optimism about its success.

55 In *Kauesa v Minister of Home Affairs*, *Namibian Law Reports* 1995, 175 at 184(A–B).

56 See also the Chief Justice’s remark that “[t]he lesser [sic] the judicial branch of government intrudes into the domain of Parliament[,] the better for the functioning of democracy” (ibid.:197).

57 See Chief Justice Mahomed in the foreword to Naldi (1995).

58 Forbad (2007:45).

Craig Gross observed in 1992 that –⁵⁹

[t]here are few signs indicating that Namibian democracy and constitutionalism will unravel in the near future.

However, 15 years after Independence, Debie LeBeau and Edith Dima came to the worrying conclusion that –⁶⁰

Namibia is still a country with serious political and ethnic divisions, as well as [a] general lack of understanding and acceptance of democracy.

Legitimacy of the Constitution is not a given state of affairs. Legitimacy must constantly be reinforced and assured by being constantly alert to those undermining and destructive elements which could eventually erode it. The Namibian Constitution, after 20 years, has retained much of its legitimacy as a modern and progressive democratic constitution, unanimously adopted by the freely elected representatives of the people. It should be fervently hoped that, in future, its legitimacy will not become eroded and finally destroyed.

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59 Gross (1992:269, 292).

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SECTION II
THE GENESIS OF THE CONSTITUTION
OF THE REPUBLIC OF NAMIBIA

The forerunners of the Namibian Constitution

Nico Horn

Introduction

The Namibian Constitution is a compromise document. Erasmus¹ correctly points out that it is much more than a futuristic document to organise a post-Independence Namibia. The document itself was an instrument to obtain sustainable peace. Consequently, the new Constitution was not fully negotiated by the Constituent Assembly. The Assembly often opted for a compromise rather than enter into bitter debates between former military opponents.

The United Nations (UN), as the successor of the League of Nations, was involved in settlement talks with all parties involved for many years. Indeed, both the General Assembly and the Security Council had maintained constant pressure on South Africa since the 1960s.

A Namibian settlement was extremely important for the international community, not only to bring peace to a war-stricken country, but also to stabilise the southern African region. The Namibian experiment was used by the South African government to pave the way for meaningful negotiations and, eventually, the replacement of the apartheid-based society with a democratic dispensation.²

In this atmosphere, the Constituent Assembly completed the immense assignment of writing a Constitution for a nation ready to be born. The Constitution's replacement of the oppressive apartheid system with a constitutional, democratic society was done in accordance with the principle of inclusion, rather than an "exclusionary shadow".³

1 Erasmus (2002:9f). See also Erasmus (2000).

2 It was not a coincidence that the then South African President FW de Klerk made his dramatic speech – announcing the unbanning of the African National Congress (ANC), the South African Communist Party (SACP), the Pan-Africanist Congress of Azania (PAC), the Azanian People's Organisation (AZAPO) and other movements, as well as the release of Nelson Mandela on 1 February 1990 – shortly after the Namibian Constituent Assembly had unanimously accepted the Constitution. The smooth and peaceful elections and the acceptance of a liberal Constitution with an entrenched Bill of Human Rights broke new grounds for negotiations in South Africa.

3 I borrow the metaphor from the French philosopher, Michel Foucault (e.g. Foucault 1967). His philosophy of power is based on the conflict between the in-group and the vagabonds, the outcasts, who are always shifted to the periphery of society, or the "exclusionary shadow", as Foucault calls it. However, contrary to popular belief, Foucault did not believe in the inevitability of exclusion. See, for example, his positive view of the Iranian people's revolution (Afary & Anderson 2005:203–209). See also Miroslav Volf's interpretation of Foucault (1996:64, footnote 2).

The dream of a community of equal people, sharing resources equally, runs like a golden cord throughout the document – especially Chapter 3, entitled “Fundamental Human Rights and Freedoms”. The Chapter is clearly based on the Universal Declaration of Human Rights.

The high value assigned to human rights and social and democratic values was the result of this negotiated settlement. The demise of communism, the inability of Eastern Europe to fund the war in Angola, and especially the Cuban military presence in the latter country, all contributed to a milieu conducive to negotiations. Under these circumstances, it was undoubtedly necessary for both parties to compromise. But since South Africa was in power, one can assume that most of the compromises came from the liberation movement – the South West Africa People’s Organisation, SWAPO – eager to return to Namibia and contest UN-supervised elections.

But the parties did not come to the negotiations with empty hands. Some important historical documents undoubtedly paved the way for war enemies to understand each other and come to acceptable compromises. This paper looks at some of these documents.

The Constitutional Principles by the Western Contact Group

Two important international decisions smoothed the transition to Namibia’s independence, but also had a decisive influence on the content of the Namibian Constitution. Firstly, in 1978, the UN Security Council accepted Resolution 435 as a basis for Namibia’s independence. While Resolution 435 was elaborated into an extensive plan including UN-supervised elections, the disarmament of the South West African Territorial Force (SWATF) and the confinement to base of the People’s Liberation Army of Namibia (PLAN), it was not implemented for another 11 years.

The second important international initiative was the drafting in 1981 of the Constitutional Principles by the Western Contact Group (WCG), also known as the Eminent Persons Group, consisting of Canada, France, West Germany, the United Kingdom, and the United States (US). The Constitutional Principles represented an attempt by the WCG to ease the fears of both South Africa and the internal parties.⁴

In January 1981, the UN sponsored the so-called pre-implementation conference for Security Council Resolution 435. The conference took place in Geneva, where a South African delegation under the leadership of the Administrator-General for South West Africa, Danie Hough, including 30 Namibian leaders from internal parties, met Sam Nujoma and a SWAPO delegation. The conference was aimed at getting the negotiations for Namibia’s independence back on track. At that stage, South Africa was no longer convinced that an international settlement was possible in Namibia without SWAPO’s participation. The election victory of the Zimbabwe African National Union – Patriotic Front (ZANU-PF) under Robert Mugabe in Zimbabwe in March 1980 was a major shock

⁴ The Democratic Turnhalle Alliance (DTA) and some smaller parties who cooperated with South Africa in the Transitional Government for National Unity (TGNU).

to the South African government. The fact that the moderate compromise leader, Abel Muzorewa, was politically destroyed by ZANU-PF did not strengthen the hopes for a recognised DTA government in Windhoek.

The conference, however, came to naught because the delegation comprising the South Africans and the internal parties used the opportunity to attack the UN for its partiality. The WCG planned to introduce a three-phase negotiation proposal on the Namibia question, but the process broke down when one of the internal parties, the Democratic Turnhalle Alliance (DTA), presented the UN with a list of demands to stop its pro-SWAPO approach.

After the Geneva conference, the WCG started working on constitutional principles that would ease the fears of whites and be acceptable to all the parties involved. The first draft of these principles was released in October 1981.⁵

The WCG established minimum guarantees for the constitutional process and the eventual Constitution, including a Bill of Rights as part of the latter, an independent judiciary, and a multiparty democracy. Eight supplementary points were added to Resolution 435.

Although SWAPO initially rejected the Constitutional Principles, they eventually agreed that the document could become the foundation for the independence process and the Namibian Constitution. Since SWAPO had confirmed similar principles back in 1976, their rejection was possibly based on the fact that they did not trust the Western powers and did not appreciate US and European states and former colonial powers playing such an important role in Namibia's future.

Eventually, the Principles became the foundation on which the Constitution was built. At the first meeting of the Constituent Assembly on 21 November 1989, Theo-Ben Gurirab of SWAPO proposed that the Assembly adopt the Principles as a "framework to draw up a Constitution for South West Africa/Namibia". The proposal was unanimously adopted.

Since the Constitutional Principles had become an official annexure to Resolution 435 in 1982, in the UN Secretary-General's note to the Security Council on 16 March 1990, he stated the following:⁶

The Constitution is to enter into force on Independence Day. As the fundamental law of the sovereign and independent Republic of Namibia, the Constitution reflects the "Principles for a Constituent Assembly and for a Constitution of an independent Namibia" adopted by all parties concerned in 1982 and set out in the annex to document S/15287 of 12 July 1982.

5 The Principles, officially known as *Principles for a Constituent Assembly and for a Constitution of an independent Namibia*, were received as a UN document on 12 July 1982 (S/15287) and accepted by the Security Council as part of Resolution 435.

6 UN document S/20967/Add.2. Available at http://www.un.org/en/sc/repertoire/89-92/CHAPTER%208/AFRICA/item%2005_Namibia_.pdf; last accessed 15 January 2010.

According to Wiechers, the Principles have remained part of Namibian and international law even after Namibia's independence and the implementation of the Constitution.⁷ Indeed, they had already acquired the status of international law when they had been included with Resolution 435. They are also now a legally enforceable Resolution of the Security Council which can be invoked by interested parties and UN member states.

While the Principles were only guidelines in Namibia's pre-Independence era, they became the precondition upon which the Namibian Constitution and the institutions of state were to be founded when the Constituent Assembly adopted them in 1982. Wiechers calls the Principles a "fundamental 'constitutional impediment' on the Namibian legislature, which prohibits their abolition, repeal or amendment".⁸ Consequently, Wiechers argues, the 1982 Principles cannot be changed or amended, and any amendment to the Constitution that goes against the 1982 Principles is de facto unconstitutional.⁹

While Wiechers goes too far in his evaluation of the 1982 Principles, it remains an important document for understanding the foundations of the Namibian Constitution. However, despite the fact that the Principles became a Security Council Resolution, they were never intended to have a life of their own. Once the Namibian Constitution had been drafted in compliance with the 1982 Principles and accepted by the Constituent Assembly, the said Principles had no further role to play.

In the early years after Independence, the status of the 1982 Principles was raised on a regular basis. In *State v Heita*, where Justice O' Linn considered to recuse himself mero motu, he did not go into the correctness of Wiechers' position, but nevertheless stated that it "at least serve as the background against which, and the context within which, the Namibian Constitution should be interpreted and applied".¹⁰

In *Ex Parte Attorney-General: In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*,¹¹ counsel for the Prosecutor-General relied strongly on the Principles in his argument in favour of an independent Prosecutor-General. While Justice Leon did not explicitly refer to the Principles in his judgment, it is interesting that he referred to the separation of powers as a Grundnorm of a Rechtsstaat.¹² In this sense, the judge defined Namibia's prosecutorial authority as part of the functions of the judiciary rather than the executive. To compromise the independence of the judiciary would be a violation of the Constitution.¹³

While the court did not refer to the 1982 Principles, one of the major tenets of the Principles, namely the independence of the judiciary, is not only strongly protected, but also interpreted broadly to include the prosecutorial authority. In *Kauesa v Minister of*

7 Wiechers (1991:1ff).

8 (ibid.).

9 (ibid.).

10 1992 NR 403 (HC), at 407.

11 1998 NR 303 (SC); Heads of Arguments of State, p 48.

12 Or basic norm or foundation of a state based on the rule of law.

13 1998 NR 303 (SC); Heads of Arguments of State, p 48.

Home Affairs & Others, the High Court again relied on the 1982 Principles, but also stated that Wiechers' position was questionable.¹⁴

Since then the debate on the legal position of the 1982 Principles has died. It is doubtful that any Namibian court will in the near future rely on Wiechers' dictum. But it will remain a key to understanding the historical developments leading to the specific form and content of the Constitution.

However, apart from the independence of the judiciary, the protection of land (or property rights) also formed part of the 1982 Principles. The SWAPO government has been extremely sympathetic of the Zimbabwean land reform programme. While they never approved a 'land grab' for Namibia, the villain in Zimbabwe – as in the rest of Africa – was the white colonial farmer. The government has often referred to the fact that the struggle was about land and, therefore, real reconciliation can only take place if it goes hand in hand with an aggressive land reform programme that will assist the government programme of poverty alleviation.

The white farmers, on the other hand, refer to the negotiations of 1989 and the eventual settlement in which South Africa and SWAPO agreed that property will be protected. Thus, although they seldom refer to the 1982 Principles, the protection of property rights in Article 16 of the Constitution is often quoted. They see the protection of property rights in the Constitution as a settlement agreement between themselves and the new SWAPO government at Independence.

One of the aims of the 1982 Principles was to ease the fear of the white minority community. In that sense, it was indeed part of the settlement agreement between the South African authorities and SWAPO. However, while the Constitution has become the basis for property rights, the 1982 Principles will always feature in the background of the land issue, either to motivate the thesis that foreign countries prevented Namibia from dealing with the land issue in a responsible manner, or as part of the idea that the protection of property rights was part of the settlement that led to independence.

In summary, South Africa, the DTA and its allies embraced the Constitutional Principles from the outset. The Principles also formed the basis of a proposed plan for independence by the UN Security Council.¹⁵ SWAPO, on the other hand, did not accept the Principles immediately and, in 1988, had still not seen the need to formally do so.¹⁶ As will be pointed out later herein, SWAPO's reaction was not directed against the content of the Principles as much as the idea that a delegation of Western countries were once again prescribing the form of government in Africa.

14 1994 NR 102 (HC) at 137.

15 *1982: Principles Concerning the Constituent Assembly and the Constitution for an Independent Namibia*, Document S15287/12 July 1982.

16 Erasmus (2002:10).

SWAPO's Discussion Paper on the Constitution of an independent Namibia

The idea of a Bill of Rights as part of a future Namibian Constitution did not originate with the WCG. Neither was it alien to the two major political parties involved in the drafting of the Constitution. Katjavivi¹⁷ observes that the debate started within SWAPO as early as the early 1970s.

In 1975, the South African government started preparations for a national conference of internal political parties to set the course for an internationally acceptable independence process without negotiating with SWAPO. The initiative provided the blueprint for the Turnhalle Conference, which later led to the formation of the Transitional Government of National Unity. At the time, the internal SWAPO movement was part of an internal pro-independence alliance, the Namibia National Convention, with the South West Africa National Union (SWANU) and three smaller parties.¹⁸

In response to the Turnhalle Conference, SWAPO released a Discussion Paper on the Constitution of an independent Namibia.¹⁹ The document was a draft constitution, and closely resembled the draft that SWAPO eventually took to the Constituent Assembly after the UN-supervised elections in 1989.

In strong reaction to the South African policies, the document opts for a unitary state and rejects any notion of “Bantustans masquerading as federalism”. The democratic and human rights stance is the point of departure for the rest of the text.²⁰

Our experience of persecution and racialism over many years deepened our unqualified commitment to democratic rule, the eradication of racialism, the establishment of the rule of law, and the entrenchment of human rights.

All the proposals of the WCG are embedded in the Discussion Paper. It opts for a parliamentary democracy, with regular elections, an Executive President, a one- or two-chamber Parliament, an impartial public service, an independent judiciary, an entrenched Bill of Rights, and detailed anti-discrimination legislation. While no economic policy is spelled out, the document included a paragraph protecting “vested legal rights and titles

17 Interview, Windhoek, July 2003. See also Katjavivi (1988:240); Van Wyk (1991:341ff).

18 Doubell (1998:45).

19 The internal SWAPO and NNC leader, Danny Tjongarero, played a prominent role in the process. See Serfontein (1977), who states that Tjongarero drafted the document. The draft was sent to the leadership in exile, who finalised its contents with the assistance of Western lawyers, including British lawyer Cedric Thornberry. Katjavivi (1988:246) confirms this interpretation when he says the document was the result of consultations between the internal and exiled leadership of SWAPO. Doubell (1998:45) overstates Thornberry's contribution: the latter was probably no more than a legal and technical constitutional adviser.

20 Doubell (1998:45).

in property". It even states that the pensions of public servants will be preserved after independence.²¹

The only radical aspect of the document was a proposal that the South African Roman–Dutch law was to be replaced by a totally new system, incorporating certain elements of customary law.²²

The document was released in August 1975, shortly before the Turnhalle Conference assembled in Windhoek.²³ In hindsight, it seems almost tragic that neither South Africa, its Namibian partners in the Turnhalle deliberations, nor SWAPO understood the significance of the moment. SWAPO indirectly extended a hand of friendship and cooperation to South Africa, Namibian whites, and the Turnhalle groupings. The message was clear: SWAPO was not the Marxist/Leninist demon that South African propaganda had made them out to be. They were at pains to point out that the vested interests of whites would be respected, that expatriate expertise would be welcomed in an independent Namibia – a reference to South Africans in the civil service, the police, the defence force, banks and other private enterprises – and that national reconciliation would be an integral part of a future constitutional dispensation.²⁴

The Discussion Paper was a clear indication that SWAPO would have been a meaningful and responsible negotiating partner, as observed by the South African press.²⁵ Unfortunately, some observers and the South African government were still preoccupied with the harsh separation between the East and the West during the Cold War.

Even the centre left *Rand Daily Mail* newspaper in South Africa was sceptical: but not so much about what the Discussion Paper said, but rather of what it did not say. The newspaper argued that SWAPO often used the rhetoric of African socialism in their speeches and propaganda. The Discussion Paper contained nothing that explicitly revoked the pro-communist SWAPO image. In other words, despite the positive elements of the text, the unwritten ghost behind the letters was a socialist demon.²⁶

21 (ibid.:45f).

22 (ibid.:46). The reaction against Roman–Dutch law is understandable, since it was the instrument used by the South African government to oppress the people. And if the courts confirmed the actions of the executive, it was inevitable that the perception would develop that Roman–Dutch law was oppressive and unjust per se. At the deliberations of the Constituent Assembly, SWAPO was advised by, among others, Arthur Chaskalson, later to become the President of the South African Constitutional Court, and Gerhard Erasmus, a Namibian-born Stellenbosch academic. It became clear that a total change in the legal system would create uncertainty and involve unnecessary state expenses. The Constituent Assembly eventually opted to maintain the South African Roman–Dutch law; see Article 140 of the Constitution.

23 (ibid.:46).

24 (ibid.:45).

25 See the reactions of David Martin of *The Star* and Hennie Serfontein of the *Sunday Times*, quoted in (ibid.:46).

26 Imrie, J, in *Rand Daily Mail*, 31 August 1975; quoted in (ibid.:46).

When South Africa and the pro-South African parties ignored the hand extended for negotiation, SWAPO's attitude hardened. In the years that followed, SWAPO radically opposed the Turnhalle movement²⁷ and its political and social agenda.

In August 1976, an enlarged SWAPO Central Committee adopted a Constitution and Political Programme in Zambia. Doubell observes that the document had a predominantly internal purpose, namely to ease the struggle between the old guard and the stream of young people crossing the border to Angola after the fall of Portuguese rule.²⁸ It also served as an instrument of negotiation and reconciliation with the then ruling party in Angola, the *Movimento Popular para a Libertação de Angola* (MPLA). SWAPO was eager to move its headquarters from Zambia, which was under immense pressure from South Africa, to Angola.²⁹

Whereas the Discussion Paper maintained a neutral or non-aligned stance on foreign relations, the SWAPO Constitution, adopted on 1 August 1976, opted to work with –³⁰

... national liberation movements, world socialist, progressive and peace-loving forces in order to eliminate all forms of imperialism, *colonialism and neo-colonialism*. [Emphasis added]

The document is highly critical of Western governments and their support of the "Turnhalle circus", while it stands for building a classless, non-exploitative socialist state.³¹

While the Political Programme was never intended to be a proposal for a future independent Namibian state, it totally overtook the 1975 Discussion Paper. From 1976 onwards, the Political Programme was seen internationally as a statement of SWAPO's political ideology and perceived as the foundation of an independent Namibia. The Political Programme did not include any reference to a Bill of Rights, however. In the international world, SWAPO was seen as a hard-core Marxist movement that intended transforming Namibia into a non-democratic socialist state.³²

Doubell asserts that the Political Programme did not really harm SWAPO in any material way, since the text was vague enough to be adapted to suit SWAPO's audience.³³ Furthermore, SWAPO's Scandinavian donors did not care much about the ideological streams within SWAPO, and the West could not afford to ignore SWAPO after Zimbabwe

27 I use the phrase *Turnhalle movement* here as a collective name for all the role players who foresaw a possible future by way of a negotiated settlement with internal political parties, but without SWAPO.

28 Doubell (1998:55ff).

29 (ibid.).

30 Central Committee of SWAPO (1976:137).

31 (ibid.:6ff).

32 See Doubell (1998:57) for the reaction of the international press and the West in general.

33 (ibid.:58ff).

and the former Portuguese colonies – Angola and Mozambique – had been alienated from their sphere of influence in southern Africa.³⁴

SWAPO themselves did not care much about the tags of the Cold War. It must be remembered that much of the socialist rhetoric was part of a genuine concern for the oppressed people in Namibia. It was not uncommon for liberation movements in Africa and Latin America to look at the oppression of authoritarian states from a Marxist/Leninist class struggle perspective.

SWAPO, like all liberation movements of its time, received the bulk of assistance – both financially and in terms of training and capacity-building – from the East European communist countries and Cuba. In the 1960s and 1970s, neither the old communist bloc nor the growing number of independent African states were overenthusiastic about human rights.

Klenner,³⁵ an academic from the former German Democratic Republic, expressed the view of many Marxists when he claimed that human rights were neither universal nor identical everywhere in the world. Human interests, he claimed, were determined by position in society “under the conditions of the system of private ownership of the means of production”.³⁶ To Marxists like him, the class struggle was the foundation of all abuse and oppression: taking care of the needs of humankind focused on the revolutionary overthrow of the bourgeois state, and individual rights were not a major issue.

At the same time, there was a strong feeling amongst African leaders that the outgoing colonial powers had a hidden agenda by insisting on the inclusion of an entrenched bill of human rights in the constitutions of newly independent African states. In the latter’s view, the colonial masters wanted to protect the property of settlers and companies owned by the “motherland”.³⁷ Bills of human rights – especially if entrenched in new African constitutions – are seen as a tool for keeping post-colonial Africa enslaved. Ironically, Britain, who insisted on an entrenched constitutional bill of rights for its former colonies, did not even have a written constitution of its own.³⁸

Thus, in Namibia, history seemed to be pointing to a growing awareness of human rights. This made an enshrined bill of rights in the Constitution not only acceptable, but also desirable. The working document that SWAPO provided to the Constituent Assembly in fact already contained a bill of rights.

It is, however, unfortunate that SWAPO’s commitment to democracy, an independent judiciary, national reconciliation and the recognition of property rights was not fully appreciated by the West and, especially, South Africa and its Namibian allies in 1975.

34 (ibid.).

35 1977; quoted in Shivji (1989).

36 (ibid.).

37 See Shivji (1989:19) and Legal Aid Committee (1985:12ff).

38 See Shivji (1989:19; see also Ramose (2003).

³³ See O’Linn (2003:15, 172).

Critics of SWAPO will point to the fact that the liberation movement never included a bill of fundamental rights in the organisation's own constitution during its years in exile, and neither did they emphasise a bill of rights after 1976. However, as Katjavivi³⁹ and Doubell⁴⁰ both pointed out, SWAPO presented a democratic constitutional plan to the world several years before the WCG came up with the Constitutional Principles.

Even though one cannot claim SWAPO had a worked-out plan on human rights in the 1970s, it is clear that discussions in the party had already started on this before 1975. Such a process was necessary in order to pave the way for the recognition of individual rights. It was this process that led to the acceptance of a Bill of Rights by SWAPO in 1982. That there were dissenting voices in SWAPO during the liberation struggle opposing such a Bill of Rights is understandable, and should be seen in its historical context.

The Windhoek Declaration

The internal political parties are often seen as mere puppets of the South African colonial government.

However, the TGNU, often seen as a South African initiative, was in fact a compromise. Indeed, the relationship between South Africa and the internal parties – or Turnhalle movement – was complicated. The latter ranged from one extreme on the spectrum of political thinking to the other, and none were mere extensions of the South African government or its representative in Windhoek, the Administrator-General.

On the one hand, South Africa wanted to present the Turnhalle movement as the real representatives on Namibian aspirations; but on the other, they would present initiatives not supported by the majority of the movement. For example, in 1983, the South African government wanted to create a State Council in Namibia similar to the President's Council in South Africa. The idea was not supported by the Turnhalle movement, who wanted South Africa to hand over political power to Namibians. To trump the South African initiative, Moses Katjuongua of SWANU initiated a Multiparty Conference (MPC) on 12 November 1983.⁴¹ On 18 April 1984, the MPC accepted and released the Windhoek Declaration. The Declaration contained a Bill of Fundamental Rights and Objectives. The Windhoek Declaration was a typical Western liberal document, and protected political and civil rights vigorously.⁴² However, as Wiechers points out, this was not the first political grouping in Namibia to accept a Bill of Rights: SWAPO and

39 Katjavivi (1988).

40 Doubell (1998).

41 Mudge invited the DTA, SWANU, the National Party, the Labour Party, the Rehoboth Liberated Democratic Party, SWAPO-Democrats, the Damara Council, the Namibia's People Liberation Front (NPLF) and SWAPO. When SWAPO declined the invitation, the Damara Council and the NPLF also withdrew. See Van Wyk (1999:153, 159).

42 Potgieter (1991).

the Frontline States had already accepted the African Charter on Human and Peoples' Rights in 1982.⁴³

In 1985, the State President of South Africa, acting in terms of section 38 of the South West Africa Constitution Act,⁴⁴ issued Proclamation R101 to establish what it called a *Transitional Government of National Unity*.

Proclamation R101 included the Bill of Fundamental Rights and Objectives in an annexure, as well as an Article providing for the review of laws that contradicted that Bill of Rights.⁴⁵ The TGNU operated in the country between June 1985 and March 1989. The real political power and sovereignty, however, remained in South African hands. In Windhoek, the Administrator-General was the principal representative of the South African government. The Supreme Court of South West Africa approached the Bill of Rights in a liberal, purposive manner. Thus, despite the political pressure of the armed struggle and a transitional government that was constantly under pressure from its colonial master, the court protected the rights of citizens in the spirit of a constitutional democracy in the making.

The Supreme Court of SWA did not waver. The constitutionality of the Terrorism Act⁴⁶ came around in 1989, when a full bench confirmed a judgment by the Supreme Court of SWA ordering the release of six prominent internal SWAPO members who had been detained without trial in terms of section 6(1) of that Act. The appellant was the Cabinet of the TGNU.⁴⁷

Although the applicants did not rely on the Bill of Rights to substantiate their application for a habeas corpus or an interdictum de homine libero et exhibendo, as the remedy was known in Roman–Dutch law,⁴⁸ the judgment of the full bench follows the constitutional lines of previous decisions. Emphasising the importance of strictly complying with the provisions of the law where the liberty of an individual was concerned, Justice Levy commented that –⁴⁹

... [s]ince time immemorial the safety of the State, social unrest and warlike conditions have been invoked by enthusiastic executives as reasons for the Courts to overlook the executives' non-compliance with the provisions of the law.

43 (ibid.:150).

44 No. 39 of 1968.

45 Proclamation R101 of 1985.

46 No. 83 of 1967.

47 *Cabinet for the Interim Government of South West Africa/Namibia v Bessinger & Others* 1989 (1) SA 618 (SWA).

48 For a detailed treatment of the Supreme Court of Appeal of South Africa's application of the Roman–Dutch remedy rather than the habeas corpus merely to undermine the rights of individuals, see Horn (2008:45–68).

49 (ibid.:622).

Even more fascinating is the contribution by Acting Justice Henning, who relied primarily on the Rechtsstaat concept.⁵⁰ He acknowledged that SWA/Namibia at the time could not be classified as a Rechtsstaat (a state governed by law), but still operated as a Wetstaat (a state based on laws) because of its captivity by the Appellate Division in South Africa. He quotes the *Katofa* case⁵¹ to point out that the SWA/Namibian court did not have the power to review Acts that the South African Parliament had made applicable in SWA/Namibia, even if they contradicted the Bill of Rights.⁵² He nevertheless suggested that, on the road to a justice state, power had to be limited by power: *le pouvoir arrête le pouvoir*.⁵³

Furthermore, since it was not possible to strike the Terrorism Act down because of its obvious contradiction of section 3 of the Bill of Rights that prohibited detention without trial, the court nevertheless took the rights of individuals seriously by assuring that the procedures of the security legislation were adhered to before allowing the loss of liberty.⁵⁴ In yet another case⁵⁵ with strong political undertones, the full bench of the Supreme Court of SWA declared parts of an Act – ironically called the *Protection of Fundamental*

50 The judge quotes both German and Dutch legal philosophers to state his case (ibid.:631): “*Der Staat soll Rechtsstaat sein: ... Er soll die Bahnen und Grenzen seiner Wirksamkeit wie die freie Sphäre seiner Bürger in der Weise des Rechts genau bestimmen ...*” [Friedrich Stahl] and “*Hoe meer de rechtsstaatsidee tot werkelijkheid wordt, destemeer zal de Overheid volgens regels van recht handelen*” [Stellinga].

51 *Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A). The ridiculous result of the judgment was that oppressive legislation could remain on the books and be enforced even when it contradicted the protection of Namibians’ rights under the Bill of Rights.

52 *Cabinet for the Interim Government of South West Africa/Namibia v Bessinger & Others* 1989 (1) SA 618 (SWA), p 631.

53 (ibid.).

54 (ibid.:632). It is interesting that the Supreme Court of SWA considered striking down the Terrorism Act despite the *Katofa* case: “In passing I should point out that many of the other provisions of Act 83 of 1967 are also in clear conflict with the provisions of the Bill of Fundamental Rights and Objectives. This has already been authoritatively laid down by the Appellate Division in *S v Marwane* 1982 (3) SA 717 and repeated by this Court in *S v Heita* 1987 (1) SA 311 in October last year. Marwane’s case dealt with a provision in the Constitution of Bophuthatswana which is similar to the corresponding provision in our Bill of Rights. Under the circumstances one is filled with dismay that our Legislative Assembly has still not made use of its powers under Proc[.] R101 of 1985 to repeal or amend the Terrorism Act. It is incomprehensible that citizens of South West Africa should still be subject to the Draconian [sic] provisions of a South African Act of Parliament which was repealed in South Africa 15 years ago and which is moreover in conflict with our Bill of Rights.

“This Court has in the past refrained from adopting the procedure of American Courts of “striking down” legislation which conflicts with fundamental constitutional rights. We have done so because the Court hoped and indeed expected that the National Assembly would itself take the necessary steps to repeal or amend such laws, but the time might come when the Supreme Court of South West Africa has to reconsider its attitude in this regard”.

55 *Namibia National Students’ Organisation & Others v Speaker of the National Assembly for South West Africa* 1990 (1) SA 617 SWA.

*Rights Act*⁵⁶ – unconstitutional since it contradicted entrenched rights such as freedom of expression and freedom of assembly. As Justice Hendler commented,⁵⁷ –

[i]t is clear that it creates criminal offences for activities which in democratic societies have been perfectly acceptable and legal.

In another brave decision the full bench declared the notorious Proclamation AG8 of 1980 unconstitutional.⁵⁸ The South-African-appointed Administrator-General (AG) had legislative powers to make proclamations. AG8, as this particular Proclamation was known, laid the foundation for a segregated future Namibia. It divided the people of Namibia into 11 ethnic groups, and created a so-called second-tier government for each such group. Every Namibian was obliged to belong to one of these groups, even if he or she did not belong to one in an ethnic sense.

The budget allocation to each group was not based on its member total, but on the taxes they paid. Consequently, the whites – with less than 10% of the total population – received a budget substantially higher than that for any other group.

The court took cognisance of the fact that –⁵⁹

... articles or provisions laying down fundamental rights were, by their very nature, drafted in a broad and ample style which laid down principles of width and generality, and ought to be treated as *sui generis*.

Therefore, the interpretation of the said articles or provisions should not be subjected to rigid literalism. Consequently, when the court had to interpret the word *advantage* in the Bill of Rights, they concluded that it should also include *material advantage*, even if the rights enshrined in the Bill of Rights were civil and political, and not social or economic.⁶⁰ The court found that AG8, in its entirety, was in conflict with the Bill of Rights.

The judgment is important not only because it challenged the principle of racially separated development in South-African-occupied Namibia, but also because it laid the foundation of the constitutional pillars framed by the South African Parliament for a future, independent Namibia. While the tenability of a segregated state based on race or ethnicity had been rejected by both the SWAPO and SWANU liberation movements, the Supreme Court declared that it was also impossible to reconcile a state where ethnicity is the ideological foundation of all its laws and interaction with its citizens with a Bill of

56 No. 16 of 1988.

57 *Namibia National Students' Organisation & Others v Speaker of the National Assembly for South West Africa* 1990 (1) SA 617 SWA, at 627.

58 *Ex Parte Cabinet for the Interim Government of South West Africa: In re: Advisory Opinion in terms of s 19(2) of Proclamation R101 of 1985* (RSA) 1988 (2) SA 832 (SWA).

59 (*ibid.*).

60 (*ibid.*:835).

Fundamental Rights; or, to use Justice Henning's terminology in the *Bessinger* case, "a Rechtsstaat cannot be built on the pillars of a Wetstaat".

The Supreme Court of SWA had a constant battle with both the transitional government and the South African Appellate Division. By this, the judiciary charted the course way for a new dispensation in Namibia, where the courts would play a much more significant role in enforcing constitutional rights against oppressive legislation. The TGNU, however, opted to take refuge at the South African Appellate Division rather than strengthen its Supreme Court in the making.

The judgments of the Appellate Division are typical of the fundamentalist approach of courts in South Africa before 1994. This is a typical example of what Dyzenhaus calls "the unwillingness of judges to allow any moral sensibilities to have an impact on interpretation".⁶¹

However, political influence on the judgments cannot be ignored. For example, Justice Rabie's examples in the *Eins* case are anything but neutral.⁶² Eins, a South African living in Namibia, approached the court to declare section 9 of the Residence of Certain Persons in South West Africa Act⁶³ unconstitutional because it was in conflict with several articles of the Bill of Rights protecting residential rights in South West Africa/Namibia. The Supreme Court of SWA agreed with Eins, and declared the said section unconstitutional.

However, the South African Supreme Court of Appeal did not agree. Justice Rabie took it for granted that Proclamation R101 of 1985 (including the Bill of Rights) was subject to the laws of the South African Parliament.⁶⁴ He also refused to weigh the restriction that new laws laid on people residing in South West Africa/Namibia against the protected human rights of Proclamation 101. Justice Rabie restricted the application of the Bill of Rights by pointing out that Eins, a South African citizen living in SWA/Namibia, had always been restricted in his residence rights. Section 9 of the Residence of Certain Persons in South West Africa Act was just a repetition of earlier proclamations, he pronounced, and Eins could have faced deportation in terms of the security legislation. He further ruled that, since restrictions to the enjoyment of certain residential rights had always been part of Namibian law, the categorisation of section 9 could not be seen as unreasonable and, therefore, a derogation from the Bill of Rights was permissible.

One seeks in vain for any indication in the judgments that the Appellate Division had any vision whatsoever of the birth of a nation. The Supreme Court of SWA, on the other hand, took the Bill of Rights and the protection of the people of Namibia extremely seriously.

61 Dyzenhaus (1998:16ff).

62 See *Eins v The National Assembly for the Territory of South West Africa*.

63 No. 33 of 1985.

64 Cf. his words: "*Artikel 2 van die Handves handel met die persoonlike vryhede* ("liberty of person") *van die individu wat nie deur die bepalings van art[.] 9 van die Wet in gedrang gebring word nie*" ("Article 2 of the Bill of Rights deals with personal liberties ... of the individual not dealt with in the stipulations of section 9 of the Act"; translation Nico Horn).

The legal fraternity gave little – if any – attention to the paradigm shift that took place in the Supreme Court in Windhoek between 1986 and 1990. Scholars often refer to the post-Independence 1991 judgment of *State v Acheson* as the turning point in Namibian jurisprudence, ignoring the radical stance of the Supreme Court of SWA in the 1980s.

In South Africa, Kruger and Curren⁶⁵ only took notice of the positive constitutional interpretations after Namibia's independence. And Nico Steytler took it for granted that the white judges of the Namibian High Court would be the protectors of the old order.⁶⁶

While the judges may not have expressed support for SWAPO during the struggle, their relationship with the transitional government was anything but friendly. On the contrary, the Supreme Court of SWA bench proved to be a thorn in the transitional government's flesh. Looking at the Supreme Court's track record in protecting the rights of Namibians during the struggle, they can hardly be seen as part of the governing elite.

O'Linn criticises the judges in the interim period for their overenthusiastic evaluation of Proclamation R101 of 1985.⁶⁷ The criticism is justified. It should have been clear at the time that there would be no settlement in Namibia without SWAPO's presence. However, the bench was not a political party and it did not have a power base in politics. Even if Proclamation R101 was not a Constitution and Namibia was not a sovereign state, the Proclamation gave the court a tool that enabled them to take Namibian jurisprudence out of the rigid, oppressive thinking of the South African Supreme Court of Appeal.

The fact that Proclamation R101 was so closely linked to the transitional government and the latter's lukewarm commitment to the rule of law clearly undermined the status of the Bill of Rights. The exclusion of SWAPO from the so-called constitutional process also alienated the majority of the people. However, despite these shortcomings, the SWA Supreme Court played an important role in laying the foundations of a culture of constitutional supremacy in Namibia.

One also needs to remember that, before Independence, the courts operated under a system of parliamentary supremacy, which limited them in respect of applying human rights principles. Moreover, the Administrator-General had legislative powers. Successive Administrator-Generals did not hesitate to use these powers to enact draconian proclamations during the struggle for liberation. O'Linn justifiably softens his criticism of the Supreme Court of SWA by concluding that they maintained a high legal standard, especially after the implementation of Proclamation R101.⁶⁸

It is unfortunate that the South African Appellate Division, which remained the final legal authority in Namibia, did not deviate from their stance on parliamentary sovereignty. It ignored the challenge of the Supreme Court of SWA to evaluate the values and aims

65 Kruger & Curren (1991).

66 Steytler (1991:488).

67 O'Linn (2003:264).

68 (ibid.:280).

of the Bill of Rights, and instead followed the traditionally rigid approach by looking primarily to the intention of the legislator and the legal interpretation surrounding the issues.

Neither the TGNU nor the highest court in South Africa gave any indication to the international world or SWAPO that they were serious about implementing a Bill of Rights. The international community had to wait several more years for the TGNU and the internal parties to catch up with the insights of the High Court.

While the South African Supreme Court of Appeal decisions pleased the TGNU and the white minority in Namibia, the decisions did not assist in giving the transitional process and the transitional Bill of Rights credibility.

One can criticise the TGNU for its short-sightedness, its lack of credibility, and the fact that it did not represent the majority of the Namibian people. One can also point to the lack of political will of the South African government to make the Bill of Rights work, and criticise the Appeal Court for its lack of understanding of the fundamental values in a constitutional dispensation. In addition, the Bill of Fundamental Rights and Objectives was undoubtedly premature, since it lacked SWAPO support, and was consequently rejected by the majority of the population. In that sense, it was a failed exercise that did not contribute to an internationally acceptable settlement in Namibia.⁶⁹

However, the innovative and brave interpretations of the Supreme Court of SWA gave credibility to this premature, weak action and helped to create a human rights culture amongst the followers of the DTA and other internal parties. The Bill of Fundamental Rights and Objectives played a positive role in furthering human rights in conservative communities both in Namibia and South Africa.⁷⁰

The Hiemstra Constitution⁷¹

The MPC only accepted the TGNU on the condition that the South African government created a political forum for Namibians to start writing their own Constitution for a future independent Namibia.⁷² On 30 August 1985, the Constitutional Council was created. PW Botha appointed Victor Hiemstra, the former Chief Justice of Bophuthatswana, a South African Bantustan, as the Council's Chairperson. He was known for his constitutional and human rights judgments in the so-called Republic of Bophuthatswana.

69 See O'Linn (2003:15, 173).

70 Wiechers (1991:110) points out that, since transgressions of the Bill were declared justifiable, both the South West African courts and the South African Appellate Division made a number of human rights judgments which proved a valuable learning process.

71 Dirk Mudge points out that the name is a misnomer because the document was basically a political document, drawn up by politicians and based on specific political convictions. Judge Hiemstra played the important role of putting the Constitution into a legal framework. Telephone interviews, Dirk Mudge, Windhoek–Otjiwarongo, 30 January 2010.

72 Dirk Mudge and the DTA did not want another transitional government, which they thought would be used to slow down the process; see Van Wyk (1998:152ff).

The draft Hiemstra Constitution, as had the Supreme Court of SWA before it, rejected the idea of ethnic, second-tier governments or territorially ethnic local governments. It also did not include sections protecting minorities. Consequently, the South African government ignored its own creation. It refused to give any legal or political status to the draft constitution, despite the money that had been put into it and after Judge Hiemstra had spent two years of his life chairing the Council.

Nonetheless, the Hiemstra Constitution played an important role in the development of Namibian constitutionalism. After the Supreme Court's judgment declaring second-tier ethnic governments a violation of the TGNU's Bill of Rights, and since the Hiemstra Constitution also rejected ethnic governments as a constitutional principle, the sectarian ethnic thinking of the National Party was destroyed. It played no role in the Namibian Constituent Assembly.

The Hiemstra Constitution also became the official draft put forward by the DTA at the Constituent Assembly. This Constitution and SWAPO's draft were so similar that Mudge proposed the SWAPO draft be used as the working document of the Standing Committee of the Constituent Assembly.⁷³ Constitutional scholars are of the opinion that as much as 80% of the content of the Hiemstra Constitution correlated with the Namibian Constitution.⁷⁴

Conclusion

Modern critics of the Constitution are possibly correct in asserting that SWAPO only accepted the Constitutional Principles to reach their principal objective: the withdrawal of South Africa from the territory and an independent Namibia. They are also correct in pointing out that the Constituent Assembly went into the constitutional chambers with their hands tied. However, as we have seen, the basic tenets of the Constitutional Principles were all part of SWAPO's Discussion Paper of 1975.

Since SWAPO was extremely critical of the role and objectives of the Western powers in southern Africa, it is hardly surprising that they were slow to accept the Constitutional Principles of the WCG.

The Constitutional Principles went much further than describing the transitional process, the UN-supervised elections, and the working rules of the Constituent Assembly. It also prescribed elements that had to be included in the Namibian Constitution. Among these were the principle of constitutional democracy and an entrenched supreme constitution, as well as the independence of the judiciary, including the function of constitutional review and the separation of powers.

73 Constituent Assembly of the Republic of Namibia. 1989/1990. Constituent Committee Documents, pp. 1–2; quoted in Van Wyk (1998:181,194).

74 These include Marinus Wiechers and Dr Paul Szasz, legal advisor of Martti Ahtisaari; see (ibid.:183, 194).

The principle of constitutional supremacy vis-à-vis a parliamentary democracy has been a bone of contention in many circles. Ramose sees it as a vote of no confidence in the new government, which in a sense it was.⁷⁵ Erasmus correctly points out that the strong Constitution was necessary to ease the fears of the DTA and smaller internal parties – and possibly also those of South Africa.⁷⁶

However, it is also possible to see constitutional democracy as a victory over the oppressive parliamentary ‘democracy’ of South African rule, where the South African Parliament ruled supreme. Okpaluba⁷⁷ remarks that even attempts by the Appellate Division of the Supreme Court to review one of the racially based Acts was dealt with contempt by Parliament. They simply repealed the specific legislation and followed it up with a subsequent, strongly worded new clause.⁷⁸

One cannot deny the role of the WCG or that of the UN and the international community in drafting the conditions for Namibia’s independence and the content of its Constitution. However, as has been pointed out, the Namibian people represented by both internal parties and the SWAPO leadership that came from exile eventually agreed to the inclusion of the Constitutional Principles in the independent country’s Constitution. Indeed, the participants of the constitution-drafting exercise engaged in a real democratic process of compromises and exchanges that prevented any of the parties from manipulating the event.

The mere involvement of the WCG and the international community does not make the Constitution a foreign document, therefore.

Werner Ustoff’s approach to the missionary churches in Africa is helpful in understanding the dynamics of cultural adaptation.⁷⁹ Long after indigenous leaders had assumed control of the the churches founded by European missionaries, since they kept the liturgical and dress code inheritance of the various missions, it is wrong to assume that the originally European religious concepts and codes continue to be alien to African culture and tradition today. Although the missionaries’ traditions may have originated in Europe, when the Anglicans in northern Namibia or the Lutherans in the south sing the hymns of the Reformation today, they are expressing the cultural values of the Namibian people. In the same way, the Constitutional Principles embodied in the Namibian Constitution become Namibian if the Namibian people embrace them as their own and live by them.

75 (ibid.).

76 Erasmus (2002:10).

77 Okpaluba (2003:110ff).

78 See e.g. *Harris v Minister of Interior* 1952 (2) SA 428 (A), which overruled *Ndlwana v Hofmeyr NO* 1937 AD 229.

79 Ustoff was Professor of Missions at the University of Birmingham when the author spent a sabbatical as a William Paton Fellow at that University and at Selly Oak Colleges in 1992. This extract of Ustoff’s thoughts is based on his lectures at the time, and is derived from personal notes.

In conclusion, Erasmus's view that the Namibian Constitution should be seen as a process rather than a mere document is helpful. If the Constitution is seen as part of an important process, its value does not only lie in its post-Independence application. Indeed, without the Constitutional Principles, the pre-Independence negotiations could not have gone progressed.

The dynamics of the negotiations, the history of the process, and international participation are part of the unwritten texts of Namibia's independence. Several constitutional documents submitted by the various parties played a role in the constitution-making process. The 1981 Constitutional Principles, SWAPO's 1976 Discussion Paper, the 1984 Windhoek Declaration, and the Hiemstra Constitution of the mid-1980s all pushed back the frontier for the consensus Constitution that gave birth to the Namibian nation in 1990.

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Drafting of Namibia's Constitution*

Hage G Geingob

Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law. In modern times the growth of political responsibility has been added to this through the winning of initiative in the discretionary matters of national policy by people's representatives; but the most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.

Charles Grove Haines¹

Introduction

The evolution of constitutionalism has been the process of limiting the power of the state. In that sense, Paine's dictum that "a constitution is not the act of a government but of a people constituting a government"² is fully valid. Commenting on this dictum, McIlwain³ observes that the consequence of the validity of Paine's dictum is that the forms and limits followed in this 'constituting' become the embodiment of a 'constitution', superior in character to the acts of any 'government' it creates. He further argues that if this constituent act of the people entrusts certain definite powers to their government, 'enumerated powers,' as we term them, it is a necessary inference that this government cannot exercise any powers not so 'enumerated.' Thus, all constitutional government is by definition limited government or limiting of government. As noted above, Haines, too, emphasizes that "constitutionalism has one essential quality: it is a legal limitation on government."⁴ Legal limitations on the government are, however, not arbitrary. They are or should be based on certain fundamental values, unalterable by ordinary legal process. These fundamental values are an inheritance of the long history of human thought and specific national history and context. Preambles to most of the constitutions acknowledge and recognize these values. Fundamental values based on

* This chapter is cited verbatim, with permission, from Geingob, HG. [n.d.]. *State formation in Namibia: Promoting democracy and good governance*. Windhoek: Trustco Group International (Pty) Ltd.

1 Charles Grove Haines, *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law* (Cambridge, Massachusetts, Harvard Univ. Press, 1930).

2 Thomas Paine, *Rights of Man*, <http://www.ushistory.org/paine>, accessed 1 December 2002.

3 Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, N.Y., Cornell Univ. Press, 1947), <http://www.constituion.org/cmt/mcilw/mcilw.txt>, accessed 25 January 2001.

4 Haines, *The Revival of Natural Law Concepts*.

the inheritance of the long history of human thought include democracy, freely elected representatives of the people, rights of man, sovereignty, and liberty.⁵ Similarly, certain values are driven by a national context. Namibia's Constitution talks about "the rights that have for so long been denied to the people;"⁶ the Preamble to the United States Constitution refers to the need for domestic tranquillity and common defence;⁷ the Preamble to the Japanese Constitution stipulates "that never again shall we be visited with the horrors of war through the action of government;"⁸ and the French Preamble states: "The French people hereby solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty By virtue of these principles and that of the free determination of peoples, the Republic offers to the Overseas Territories expressly desiring this to adhere to them new institutions based on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic evolution."⁹

Specifically, the Namibian Constitution's Preamble states as follows:

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;

Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid;

Whereas we the people of Namibia:
have finally emerged victorious in our struggle against colonialism, racism and apartheid;
are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle;

desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world;

will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state; committed to these principles, have resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity.

Compromising of Vision by Different Interest Groups

The process of constitution making is influenced by the vision and self-interest of various interest groups, parties, classes, sectoral interests, and individuals participating in the process. Self-interest is invariably cloaked in phrases, such as 'public good,' 'essential for stability,' and so forth. Consequently, the final draft of a constitution is always a

5 See for instance, preambles to the constitutions of France, Namibia, South Africa, the United States, and Zambia.

6 Namibia, *Constitution of the Republic of Namibia*, Preamble.

7 United States, *Constitution*, Preamble.

8 Japan, *Constitution*, Preamble.

9 France, *Constitution*, Preamble.

compromise. As an illustration, during the discussion on the text of the Preamble to the Namibian Constitution, one of the members of the Constituent Assembly, Mr de Wet of ACN, was particularly concerned about the Preamble. Reflecting on what he thought were biases, he had said:

Although we accept as resolved by the Standing Committee, that the Preamble should reflect the historical context of the birth of the new state of Namibia and the aspirations of its nation, we do not accept, as it is partly done in the draft, that the Preamble is the place where political views or bitterness of only one of some of the political parties or disputable historical facts are reflected, such as the rights which the inhabitants, or some of them, have allegedly been denied, those who have struggled against whom and who were victorious in such struggle.¹⁰

The victims of apartheid saw this statement as an attempt at clouding the realities of apartheid, and denying its impact on the lives of the majority in Namibia. His comment focused entirely on the self-interest of the whites. However, such statements were rare and should not be taken as a general view of the whites or their representatives at the Constituent Assembly.

As the United Nations had played a significant role in the process of Namibia's nationhood, considerable influence was also wielded by some of the members of the international community on the outcome of the final document. Various parties involved in addressing the Namibian question, i.e., South Africa, the Western Contact Group, ethnic parties and the liberation movement, tried to influence the ultimate outcome of the nature of the Namibian state to suit their own vision or interests. The important provisions of the constitution, the Constitutional Principles, were 'imposed' on the Constituent Assembly because the West wanted to ensure that the liberation movement did not opt for socialism that might compromise the interests of the settlers.

This interplay of conflicting interests has a sociological aspect – of how we view human nature. The processes of constitution making at the Federal Convention in Philadelphia in 1776, and at the Assemblée Constituante in Paris in 1789, also provide examples of the interplay of conflicting interests in the shaping of the final document. For instance, at the Federal Convention, the participants held a “generally dismal view of human nature.” Alexander Hamilton had argued, “Men are ambitious, vindictive, and rapacious.” Echoes of Machiavelli were clearly discernible in his statement. That is why James Madison preferred a ‘republic’ in which whims of masses are filtered through their representatives and agents, to direct ‘democracy.’¹¹ However, it would be a fallacy to believe that the representatives and agents can be expected to be any less ambitious, vindictive and rapacious. That is why the rule of law instead of the rule of will is so important.

In Windhoek, the situation was similar to the one that prevailed in Philadelphia. ‘Dismal view of human nature,’ or of the nature of politicians or power-holders also could be

10 Windhoek Constituent Assembly, Standing Committee on Standing Rules and Orders and Internal Arrangements, *Minutes of the Meeting of 30 January 1990*.

11 Robert D. Kaplan, *Warrior Politics: Why Leadership Demands A Pagan Ethos* (New York, Random House, 2002)1, p. 63

sensed in the interplay of the self-interest of communities represented by the participants in the Constituent Assembly and their desire for 'safeguards'. The Windhoek Assembly in fact reflected the racial and ethnic nature of the Namibian society divided by long years of apartheid.

The impact of this racial and ethnic nature will be highlighted in this, and the next two chapters.

Politics being largely about images, especially in the public sphere, various representatives at the Windhoek Assembly were concerned about how their constituencies would perceive their interests being addressed by their elected representatives. White representatives were concerned about protecting property rights of the whites and special privileges enjoyed by them. These included exclusive schools; the position enjoyed by their languages, namely, German and Afrikaans; representation in the parliament; and civil service job and pension guarantees. In this effort, their demands had already received a boost from the Western Contact Group and the Constitutional Principles espoused by them. Other parties that relied on their ethnic constituencies also sought to ensure representation in the parliament by arguing in favour of a bicameral parliament. Still others argued for the inclusion of tribal authority structures within the framework of the constitution, as has been the case in Botswana and Zimbabwe.¹²

Thus, events leading to the framing of Namibia's constitution had many variables, often conflicting, with different interests and parties trying to influence the clauses in the constitution that rule the machinery of government, the assignment of rights, and the procedures for amending the constitution.

In this chapter, some aspects of the emergence of the Namibian constitution have been compared with those of the French and U.S. constitutions, because they were two important countries known to have held conventions or conferences to draft their constitutions. Namibia, followed later by South Africa, was the only country in Africa at that time that drafted its own independence constitution through a Constituent Assembly. Many other African constitutions were drafted in Europe.

Drafting of Namibia's Constitution

The primary purpose of United Nations Resolution 435 was to hold free and fair elections for electing the Constituent Assembly that would draft the constitution of independent Namibia. It was not intended to hold elections for an independent Namibia. This was in compliance with the agreed Constitutional Principles.

12 For instance, in Botswana, the Tribal chiefs are represented at the highest level in the House of Chiefs, and District Councils Chiefs are non-elected members of the Councils, http://www.locgovinfo.co.zw/Mozambique__Study_Tour_to_Botswana.htm, accessed 3 November 2003.

Ten political parties had qualified to participate in the United Nations supervised Constituent Assembly elections of 1989.¹³ These included Aksie Christelik Nasionaal (ACN), Christian Democratic Action for Social Justice (CDA), Democratic Turnhalle Alliance of Namibia (DTA), Federal Convention of Namibia (FCN), Namibia National Democratic Party (NNDP), Namibia National Front (NNF), Namibia Patriotic Front (NPF), SWAPO-Democrats (SWAPO-D), SWAPO of Namibia (SWAPO), and United Democratic Front of Namibia (UDF). However, only seven parties won seats: SWAPO 41, DTA 21, UDF 4, ACN 3, and NPF, and FCN and NNF 1 each.

The first meeting of the Constituent Assembly took place on 21 November 1989, at Tintinpalast, which is now the seat of parliament in Windhoek. The leader of the majority party, Mr Sam Nujoma, chaired this meeting. "A number of procedural issues had already been agreed to through consultation and published as the Constituent Assembly Proclamation of 6 November 1989."¹⁴ First order of business was the election of the chairman of the Constituent Assembly. There were two nominations, Mr Hage Geingob of SWAPO and Mr Andrew Matjila of DTA. After voting, I (Hage Geingob) was elected chairman.

I knew well, as did the rest of the SWAPO leadership, that the Namibian society was divided because of years of apartheid and racial stratification in the provision of services and opportunities. During campaigns for elections it was clear that the Namibian society had remained divided. Therefore, the first job for me was to promote a spirit of consultation, mutual respect and reconciliation. In my opening remarks, I emphasized:¹⁵

The people of Namibia ... have given us a mandate to hammer out and adopt in a spirit of compromise, a spirit of give and take, a constitution that will launch our country and people into nationhood. This is a trust we dare not betray Obviously there will be differences of opinion on very vital matters, but through debate and consultation we should be able to find solutions and move forward. As chairman I will try my level best to be as impartial as is humanly possible. Towards all the political parties I will endeavour to be courteous and expect that the same spirit will prevail in this house.

Immediately thereafter, Mr Sam Nujoma said, "Namibia is a huge country with a small population. Therefore all Namibians, regardless of colour, creed or place of origin, have a place in our beautiful country. It is for us only to reach out to one another and mould a new nation out of diversity."¹⁶

These two speeches set the tone for the things to come. Leaders of some other parties also made statements of reconciliation.

13 *Democracy Factfile*, http://www.sardc.net/sd/sd_factfile_namibia.htm, accessed 3 November 2003.

14 Sam Nujoma, *Where Others Wavered: The Autobiography of Sam Nujoma* (London, Panaf, 2001), p. 424.

15 Windhoek Constituent Assembly, *Minutes of the Meeting of 21 November 1989*.

16 *Ibid.*

Acceptance of Constitutional Principles

Prior to the convening of the Constituent Assembly, suspicions had run high. Non-SWAPO parties knew little about SWAPO and were suspicious that it would want socialism in Namibia. Furthermore, some of the non-SWAPO parties having close links with the South African apartheid regime were suspicious of any government dominated by blacks. I sensed their suspicions and sought to build confidence by alleviating the fears of various ethnic groups. Towards that end, I decided to have one-on-one informal meetings with many of the Constituent Assembly members even prior to the first meeting of the assembly. Such interactions that emphasized a shared vision for a new Namibia helped create a favourable climate for the work of the Constituent Assembly.

During the confidence-building period before the drafting of the constitution started, I discovered that some whites would seek to reserve some of the privileges they had enjoyed during the apartheid era. This came out during a courtesy call I paid on Mr Jannie de Wet of ACN with a view to getting to know what his fears were. Mr de Wet was very happy to meet with me. He told me that the whites would be happy if the education system and standards were maintained. He identified fifteen schools that he would like to be reserved for the whites. If that could be given to whites there would be no problem, he said. I listened and said that I would report to the committee for the drafting of the constitution to see how they could deal with this issue.

White parents, with whom Mr de Wet had talked, took this issue further to Administrator General Mr Pienaar's attention. Mr Pienaar then brought it to the attention of the Drafting Committee of 21. What the parents, led by Ms Dominee de Klerk, demanded were three conditions: Christian character of education (that had characterised education in this country for years), maintenance of the standard of education, and instruction in mother tongue, especially in Afrikaans and German medium schools.¹⁷ Perhaps it should be mentioned that the administrator general did not seek to influence the proceedings of the Constituent Assembly, nor would he have been allowed to do so by me as the chairman because the work of the Constituent Assembly had nothing to do with him.

In any case, demands of whites brought to the attention of the Drafting Committee by Mr Pienaar were rejected as they were aimed at perpetuating white privileges. At this time, Mr Dirk Mudge made a very profound statement, "The impression must not be created that it is now only black people who are opposed to privatisation [of schools]. There are hundreds of white people who are opposed to that; for, privatisation would be a sort of 'rykmansapartheid' (meaning rich man's apartheid)."¹⁸

There was also a perception in some speeches at the first Constituent Assembly meeting that SWAPO lacked commitment to democracy, as almost all the leaders of the opposition referred to the importance of the 1982 Constitutional Principles. Mr Sam Nujoma observed: "Before and during the elections, certain perceptions had been

17 Windhoek Constituent Assembly, Standing Committee on Standing Rules and Orders and Internal Arrangements, *Minutes of the Meeting of 11 Dec. 1989*.

18 *Ibid.*

created that SWAPO was a socialist organization and was not committed to such ideals as democracy, right to property, etc.”¹⁹

This perception was propagated by ‘instant’ democrats, i.e., white oppressors who denied Namibians their human rights including democracy, who were second-guessing SWAPO’s democratic credentials. They believed that SWAPO would reject the Constitutional Principles proposed by the Western Contact Group and by so doing incur the wrath of the West. Instead, SWAPO pulled the rug from under their feet by adopting the Constitutional Principles. There were no disagreements within SWAPO about the acceptance of these principles. SWAPO agreed in its caucus that we propose to accept the Constitutional Principles at the very first sitting of the Constituent Assembly. These Constitutional Principles²⁰ included the provision that:

Namibia would be a sovereign, unitary, and democratic state with a constitution that provided for a system of government with three branches, an elected executive branch elected by universal and equal suffrage which will be responsible to the legislative branch; a legislative branch to be responsible for the passage of all laws; and an independent judicial branch which will be responsible for the interpretation of the constitution and for ensuring its supremacy and the authority of law. In addition, the constitution was to include a declaration of fundamental rights including right to life, personal liberty and freedom of movement; to freedom of conscience; to freedom of expression, including freedom of speech and free press; to freedom of assembly and association, including political parties and trade unions; to due process and equality before the law; to protection from arbitrary deprivation of private property or deprivation of private property without just compensation; and to freedom from racial, ethnic, religious or sexual discrimination. The declaration of rights was to be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals would have the right to have the courts adjudicate and enforce these rights.

Adherence to the Constitutional Principles was in keeping with the essential requirement that the final constitution had to be approved by the United Nations Security Council. Unanimous adoption of this suggestion by all participants in the Constituent Assembly removed doubts harboured by many and warmed the different parties towards each other, thus making the work of the Constituent Assembly go much more smoothly.

Acceptance of SWAPO’s Draft Constitution as the Working Draft

The same afternoon, a Committee on Rules and Standing Orders was established.²¹ The committee did most of the work and quickly. A week later, on 28 November, it presented

19 Nujoma, *Where Others Wavered*, p. 425.

20 United Nations. *Yearbook of the United Nations* (New York, U.N. Dep. Of Public Inf.), p. 1292.

21 Members of the committee were Mr Hage Geingob (Chairman), Mr E. Tjiriange, Mr H. Ruppel, Mr Hidipo hamutenya, Mr Theo-Ben Gurirab, Mrs P. Ithana, Mr N. Iyambo, Dr M. Tjitendero, Mr N. Angula, Dr P. Katjavivi, Mr N. Bessinger and Mr B. Amathila (all from SWAPO), Mr J. Gaseb, Mr P.M. Junius, Mr H.E. Staby, and Mr A. Matjila (all from DTA), Mr V. Rukoro (from NNF), Mr J.G.A. Diergaardt (from FCN), Mr M.K. Katjuongua (from NPF), Mr J.W.F. Pretorius (from ACN), and Mr R.R. Diergaardt (from UDF).

its report containing draft standing rules and orders to the Constituent Assembly. After a few minor corrections, the report was accepted and the assembly proceeded to appoint a Standing Committee on Standing Rules and Orders and Internal Arrangements to address any new issues arising in the process of deliberations of the assembly. Membership of the new committee was the same as that of the Committee on Rules and Standing Orders that it replaced.

Various political parties had their own draft constitutions for independent Namibia with diverse positions on many of the constitutional elements. The Constituent Assembly reflected on various procedures for considering and reconciling the different drafts. I was not averse to resolving differences clause by clause, but there was unanimous concern that such a process could be time-consuming, time that the Namibians did not have, for, it was imperative that they wrested reigns of power from South Africa as soon as possible.

The process was, however, speeded up when, at its 30 November meeting, the assembly adopted a motion by Mr Nahas Angula of SWAPO, as amended by the proposal of Mr Rukoro of NNF. The motion adopted stipulated that various parties represented at the assembly would submit their constitutional proposals or ideas to the acting secretary of the assembly no later than 4 December 1989. It was also agreed that each party would have the right of introducing their proposals by way of statements to the assembly on 4 December. The motion further mandated and instructed the Standing Committee to receive and consider other proposals regarding the future of Namibia, identify and formulate working categories for a future constitution or areas of material dispute in various proposals, and to make proposals for establishing committees to deliberate and negotiate on the above. The Standing Committee was asked to report back to the assembly on or before 12 December.

On 4 December, each party introduced its own version of a constitution for independent Namibia, and its constitutional ideas. Debates on various ideas continued in the Constituent Assembly for the next two days. DTA President, Mr Muyongo, stated, "Namibia is a state that abides by the principles of territorial integrity and rejection of secession."²²

A spirit of give and take, of confidence building, also spilled over in the work of the Standing Committee. Occasionally, there were lighter moments to break the monotony. During the 8 December 1989 meeting, during our discussion on fair trial, I suggested that the two proposals be married. Mr Ruppel broke into laughter, "Marry the DTA! Who would have thought we would marry the DTA!" Mr Barnes, too, joined in, "Who would have thought we would take up such a marriage!"²³

22 Windhoek Constituent Assembly, *Minutes of the Meeting of 4 December 1989*. Ironically, nine years later he led an armed rebellion against the state for the secession of the Caprivi Region.

23 Windhoek Constituent Assembly, Committee on the Rules and Standing Orders, *Minutes of the Meeting of 8 December 1989*.

SWAPO's suggestion that the Assembly adopt the 1982 Constitutional Principles as the starting point had already created a favourable climate for working together. The committee's work was made easier still as a result of a suggestion from Mr Dirk Mudge of DTA. He recognized that SWAPO was in the majority, and suggested that SWAPO's draft constitution be adopted as a working draft, and discussions could take place around it on issues where different drafts were at variance with it. Mr Mudge stated, "We did spend many hours together and we have, and I am not apologizing for that, taken your proposal as the basis for our discussion, not because it is the best proposal but because it represents the views of the majority and we have to take that into account."²⁴ All members of the committee unanimously accepted this suggestion, and it set the stage for addressing specific issues.

The Constituent Assembly provided an opportunity of free and unfettered expression of opinions by members on each and every paragraph of the draft constitution until consensus was reached. In fact, the Drafting Committee of 21 persons never had to vote on any issue during its meetings. My approach was not to curtail filibustering but to allow debate to go on until late hours. The end result was that various members would eventually agree on the issue at hand, often without making any change to the original proposal. On the other hand, if I sensed that the views of the members were so strong and the debate was becoming acrimonious, I would call for a tea break to cool off the atmosphere. During the tea-break, I would consult with key players, such as Mr Dirk Mudge, Mr Rukoro, and others from non-SWAPO parties, and Mr Theo-Ben Gurirab, Mr Hidipo Hamutenya, Dr Mose Tjitendero, Mrs Pendukeni Ithana, Mr Nahas Angula, Mr Hartmut Ruppel and others from SWAPO's side to bring the discussions on track.

The Standing Committee submitted its first report to the assembly at its 12 December meeting. As I was the chairman of the committee as well as the chairman of the assembly, Mr Ruppel of SWAPO introduced the report. He reported that:²⁵

1. There was a unanimous agreement to employ the constitutional proposals submitted by the majority party elected to the Constituent Assembly as a working document.
2. There was a broad agreement between parties on a number of issues and therefore only minor amendments and discussions were required. These issues included the preamble, general provisions of the constitution, citizenship, fundamental rights, the electoral system, procedure to amend the constitution, the environment, the language issue, definition of the territory, education, and local government and/or regional councils.
3. There were a number of issues that needed further discussions but in respect of them there was no material dispute. These included: State organs including, *inter alia*, the police, the defence force, prisons and the ombudsman, the economic system and its institutions, land reform, state succession, and transitional provisions.
4. There were two important areas requiring further deliberations, namely the executive and specifically the role of the president within the executive, and the composition of the legislature.

24 *Ibid.*

25 Windhoek Constituent Assembly, *Minutes of the Meeting of 12 December 1989*.

The report also recommended that the Standing Committee be allowed to continue with its deliberations and negotiations with a view to reaching agreement or to identifying constitutional issues in respect of which material disputes existed.

This report was adopted unanimously.²⁶

Executive vs. Ceremonial Presidency

There was general agreement between the framers of the Constitution at Windhoek that executive power should not be unchecked. There were, however, differing views on how these powers could be subjected to oversight. DTA members concentrated on arguing that Namibia should have a constitutional or ceremonial presidency as against executive presidency. At the 8 December 1989 meeting of the Standing Committee, Mr Mudge had stated:

We know that you also agree with a democratic society. So it is just a matter of finding a solution to a problem which has been worrying us for a long time, the fear of dictatorship, the fear of concentrating power in one person, our fear that we might end up with an undemocratic society, the fact that things can get out of hand and it is now for us to discuss this problem. You must explain to us now how you see that there could be some restrictions, some restraints placed on the state president so that he cannot do things on his own.

Mr Ruppel elaborated on SWAPO's position and in response, Mr Mudge stated:²⁷

We feel very strongly about the concentration of power, because as we see it, power corrupts and absolute power corrupts absolutely. The proposals in the working document, as I see it, have the inherent danger of establishing the system whereby the head of state exercises absolute power. We have listened to Honourable Ruppel only now, we will consider the proposals. In the meantime, we are of the opinion that the head of state in this proposal will exercise absolute power.

DTA had argued that providing for a constitutional head of state would be in line with the Westminster type of democracy. It was interesting that they opposed executive presidency despite the fact that in South Africa, with whom DTA had longstanding relations, there was an executive state president. Concern was also expressed that executive presidencies in Africa were not on the whole successful.

SWAPO, on the other hand, viewed the African experience in a different light. Problems of many African countries were not a result of executive presidencies, but of inadequate constitutional checks and balances. In the absence of checks and balances, trouble could come from wherever the executive power rested. SWAPO did not share the concern of non-SWAPO parties about executive presidency. It therefore argued strongly in favour of executive presidency, subject to appropriate constitutional checks and balances.

26 *Ibid.*

27 Windhoek Constituent Assembly, Committee on the Rules and Standing Orders, *Minutes of the Meeting of 18 December 1989*.

SWAPO members were also unanimous in their belief that executive presidency was essential for building a unified state – Namibia needed a leadership structure that would promote cohesiveness by bringing together various ethnic and racial groups that had been divided under apartheid rule. Anything short of that structure had the potential of undermining the fragile unity of the society. Therefore, SWAPO argued for a strong central government and against Namibia's becoming a federal state.

One finds evidence of similar concerns during the constitutional debates at the Federal Convention in Philadelphia. "The decision to establish the office of the president caused 'considerable pause', according to James Madison. Virginia's George Mason feared that the office would create a "foetus of a monarchy." But with Congress and the Court holding sufficient countervailing power, the framers were able to establish an office that was powerful yet under control."²⁸

At the Windhoek Constituent Assembly, the framers of the Constitution agreed to make the president the head of state and of government, provided that he or she shall share executive power with the cabinet comprising the prime minister and ministers. In fact, the final document emphasized: "The President shall in the exercise of his or her functions be obliged to act in consultation with the Cabinet."²⁹

Some of the non-SWAPO members of the assembly also argued that the terms of office of the president should be limited to two, five-year terms. The United States example was quoted very often, despite the fact that when the framers of the constitution in Philadelphia had established the presidency

they did not limit the terms of office. They felt that a democracy did not need artificial limits, that there might indeed be situations where the country needed continuity and leadership of an established president. One of the reasons the Framers were able to write a strong executive into the constitution was that they knew who was going to be the first president and trusted him with such authority. And George Washington did not let them down.³⁰

Despite the fact that no term limits were set at the Philadelphia Convention, George Washington had set a precedent by stepping down after his second term, a standard that became firmly established when Thomas Jefferson stepped down after his second term in 1808.

Similarly, in Namibia, by the time the Constituent Assembly met for the first time, it was already known that Mr Sam Nujoma had led SWAPO to victory and would be the first head of state. Therefore, the debate regarding the presidency was not just at an ideological level, it was very much about the personality they knew.

28 Victor Camber, *Giving up on Democracy: Why Term Limits are Bad for America* (Washington, DC, Regnery Publishers, 1995), p. 119.

29 Namibia, *Constitution of the Republic of Namibia*, Article 27.

30 Camber, *Giving up on Democracy*, p. 120.

However, in the spirit of give and take, SWAPO agreed to the provision of a two-term presidency but remained unconvinced by the reasoning given to justify it. SWAPO members felt that limiting the terms was unnecessary and undesirable. First, dictating that a person cannot contest elections for the third term, and dictating that the citizens cannot vote for that person was tantamount to abridging the person's and voters' natural rights. Many of them also felt that elections themselves provided term limits. If citizens did not wish a person to continue in office, they could vote him/her out. Further, limiting terms denied the country access to an experienced office holder.

Diffusion of the executive power of the president as a result of his/her sharing executive power with the cabinet, and limit on the number of terms the president can serve, helped alleviate the concerns of the opposition parties. Time will tell if such an arrangement is successful in protecting Namibia from the possibility of any dictatorial tendencies.

The issue dealing with the nature of presidency was resolved within a week and, on 20 December, the Standing Committee was able to present its second report informing the Constituent Assembly that the committee had succeeded in resolving all the substantive issues in principle, subject only to technical and minor further amendments and discussions on details regarding the system of proportional representation and a second house of parliament.

At this stage, the committee also agreed that the draft constitution and the principles agreed on should be referred to a panel of three eminent lawyers³¹ who were to be instructed to finalize the draft incorporating the said principles for submissions to the Standing Committee for further deliberations. The committee also resolved that the three lawyers should have had no previous involvement in the drafting of the proposals for any of the parties elected to the Constituent Assembly and that they should receive instructions from the Constituent Assembly.

This report was also adopted with considerable satisfaction. In their comments, various members of the Constituent Assembly applauded the spirit of cooperation that existed between various parties. Mr Dirk Mudge said, "Our party wants to put it on record that if deliberations in a future government would take place in the same spirit of goodwill, understanding, in the same spirit of give and take, the people of this country need not fear the future, but they can look forward to the future with confidence."³² Mr Moses Garoeb of SWAPO commented: "The responsibility is ours as leaders to ensure that this infant democracy that we are in the process of establishing, will not only be born, but will be institutionalised and stabilized."³³ Mr Katjuongua of NPF said, "Let's hope that this is

31 Lawyers recommended by the committee were Adv. Arthur Chaskalson, Prof. Marinus Wiechers and Prof. Gerhard Erasmus. The appointed lawyers were invited to sit in the Constituent Assembly and Standing Committee meetings to get a feel of the political context of the discussions. They did not participate in any discussions unless specific questions were directed to them.

32 Windhoek Constituent Assembly, *Minutes of the Meeting of 20 December 1989*.

33 *Ibid.*

the first important sign of many good things to come our way.”³⁴ Similarly, Mr Justus Garoeb of UDF said, “The elected representatives of the Namibian people have come to the unanimous consensus to bury the past, to get rid of all factors threatening confidence and cooperation to work out a formula for lasting peace and prosperity for our people.”³⁵

Organization of the Legislature

Organization of the legislature differs a great deal from state to state. Elster³⁶ identifies three stages in the process of evolution of the legislature:

In the first stage, there is a strong monarchy which is perceived as arbitrary and tyrannical. In the second stage, this monarchy is replaced by a parliamentary regime. In the third stage, when it is discovered that parliament can be just as tyrannical and arbitrary as the king, some form of checks and balances is introduced.

As the Constituent Assembly turned its attention to working out details about the nature of the legislature, some of the concerns of the members of the assembly were to bring about accountability and establish a system of checks and balances. However, at the same time, one could see that the reasoning behind non-SWAPO parties arguing for a bicameral parliament was informed not just by their desire to enhance accountability. They believed that under proportional representation, with the whole of Namibia as one constituency, SWAPO would continue to secure a majority in the National Assembly for years to come. However, if a second house were created with equal representation from various regions, with elections based on a constituency system, SWAPO would fail to gain a majority in the second house.

Non-SW APO parties' thinking was based on the belief that the composition of regions would remain the same as that prevailing in the pre-independence era irrespective of their population sizes. As SWAPO's power base was perceived to be restricted to one northern region where most of the Oshiwambo speaking people lived, non-SWAPO parties felt that they stood a good chance of controlling the second house as they could gain majorities in many other regions.

Arguing in favour of a bicameral parliament, Mr Katjuongua appealed:³⁷

Chairman said the first day when he became chairman that it was a process of give and take. Now, I think I have been giving (laughter) and I don't want the people to break the part of their deal. I have been giving and so far I have not scored any point. So really brothers and sisters I must report back home. So, I take it here you will not die here if you do compromise ... to provide mechanisms by which all of us in bigger or smaller numbers feel that we are part of

34 *Ibid.*

35 *Ibid.*

36 Jan Elster, *Arguing and Bargaining in Two Constituent Assemblies*, <http://www.law.upenn.edu/conlaw/issues/vol2/num2/elster.htm>, accessed 19 July 2001.

37 Windhoek Constituent Assembly, Committee on the Rules and Standing Orders, *Minutes of the Meeting of 18 December 1989*.

the same process That is one reason why I feel strongly that we must have a bicameral legislature.

What the non-SWAPO parties did not realize was that the situation was bound to change once the constitutionally established Delimitation Commission completed its task of redrawing regional boundaries. When the Delimitation Commission created new regions with approximately equal populations, the old Ovamboland was divided into four regions, Otjikoto, Ohangwena, Oshana, and Omusati. This development was sure to change the composition of the second house. In a sense, population concentration in the afore-mentioned regions could ensure SWAPO majority in the house by virtue of the fact that there were to be four times the number of representatives from former Ovamboland. Under the old arrangement, only two candidates could be sent to the National Council from former Ovamboland, but under the new delimitation arrangement, eight could be sent from the same area that had been divided into four regions. However, it needs to be mentioned that it was not clear at the time what the outcome of the work of the yet to be established Delimitation Commission would be. Nevertheless, SWAPO was sure of its popularity in the different regions, but the non-SWAPO parties underestimated its popularity.³⁸ SWAPO, therefore, had no difficulty accepting the non-SWAPO parties' proposal of a bicameral parliament.

The concept of bicameralism, as sought and secured by non-SWAPO parties, was ill conceived for various reasons. First, Namibia was conceived to be a unitary state and not a federal state, and regions were administrative rather than political units. Second, as in the United States, this was an attempt to balance rights attached to individuals with rights attached to regions. In Philadelphia, James Wilson had argued against rights attached to states, "Can we forget for whom we are forming a Government? Is it for men or for the imaginary beings called States?"³⁹ Advocates of individual rights had argued, "States ought to be represented in the federal assembly proportionally to their population, whereas those who believed in the rights of states argued for equal representation In the United States the compromise was equal representation in the upper house and proportional in the lower."⁴⁰

In Paris, on the other hand, the principle of bicameralism was rejected after debate. However, with the later addition of a senate to the legislature, France today has a bicameral parliament.

Bicameralism was adopted in Namibia, a unitary state, in the spirit of compromise by SWAPO. However, the attempt of the non-SWAPO parties was to curtail the power of the head of state, and that of the ruling party represented in the National Assembly. In the end, little purpose was served by this provision as short-term expectations of the non-SWAPO parties to control the second house failed to materialize. In future, however,

38 After the first Regional Council elections held in 1992, SWAPO's control of the National Council was assured with an enlarged majority.

39 Elster, *Arguing and Bargaining in Two Constituent Assemblies*.

40 *Records of the Federal Convention of 1786*, p. 483.

it is entirely possible that two different political parties could control the two houses. SWAPO also accepted the concept of bicameral parliament, because it considered that the regional aspect of the second house would be very useful in bringing democracy closer to the people. This thinking was in tandem with SWAPO's belief in the de-concentration of power from the centre to the periphery to make decisions more relevant to the developmental needs of the regions.

Bicameralism was accepted by the Constituent Assembly with 72 members of the National Assembly elected on proportional representation basis, and 26 members of the National Council elected, two from each of the thirteen regions, by the regional councillors who themselves had been elected from their constituencies.⁴¹

However, in stipulating the administrative working of the two houses, legal draftsmen created a serious mistake in drafting the relevant provisions by largely sticking to the SWAPO draft that provided only for a unicameral parliament. They drafted the article envisaging two houses, but overlooked making the necessary provision for staffing. Article 51(1) of the Constitution provides that the speaker shall appoint a person as the Secretary of the National Assembly. However, no such provision exists for the National Council. This error has come to haunt the executive and the legislature, making it necessary to amend the Constitution in the near future or to seek an interpretation by the Constitutional Court.

Bill of Rights

A Bill of Rights is enshrined in Namibia's constitution. Though inclusion of the Bill of Rights in constitutions, as an element for curtailing the power of the state over citizens, has a relatively long history, it is a new idea in Africa. Subsequent to Namibia's including the Bill of Rights in the Constitution, most other countries in Africa that made transition to democracy during the last decade, including South Africa, incorporated some form of Bill of Rights in their new constitutions.

In the case of Namibia, impetus for the inclusion of the Bill of Rights in the Constitution came from the Constitutional Principles. Furthermore, recognizing that the United Nations had played a very important role in the Namibians' struggle for liberation, it would have been ironic for the new state not to value the provision of human rights. These were also the very principles Namibians had fought for. In fact, the basic rights and freedoms in the Namibian constitution are largely, but not exclusively, derived from the Universal Declaration of Human Rights (1948).⁴²

Even if these outside influences were not there, and the constitution did not enshrine human rights provisions, Namibia would certainly have become signatory to the two

41 Namibia, *Constitution of the Republic of Namibia*, Chapter 8.

42 A useful source on the human rights provisions in the constitution is: Gino J. Naldi, *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (Cape Town, Juta, 1995).

conventions of the Universal Declaration of Human Rights as it did soon after securing independence. In 1992, Namibia also ratified the OAU's African (Banjul) Charter on Human and People's Rights. However, the framers of the Constitution felt so strongly about human rights that they decided to include them in the Constitution⁴³ and protect them against any dilution by providing that:

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.⁴⁴

This provision, however, does not stop the legislature from enhancing fundamental rights provisions.

Framers of American and French Constitutions had, however, thought very differently about human rights, despite the fact that they considered these rights to be important in some ways:

Some of the American delegates thought a Bill of Rights would be dangerous, as it might suggest that every right not included in the enumeration could be freely violated by the government. Because the Constitution restricted the powers of the government by enumerating them, it was felt that enumerating the rights might similarly be viewed as restrictive.⁴⁵

Further, C.C. Pinckney of the South Carolina House of Representatives took a different approach but towards the same end. He argued that a Bill of Rights generally begins "with declaring that all men are by nature born free. Now, we should make that declaration with a very bad grace, when a large part of our property consists in men who are actually born slaves."⁴⁶ A Bill of Rights was consequently left out of the American Constitution.

However, the issue of human rights was not to go away so easily. Just five days before the Philadelphia Convention adjourned, George Mason and Elbridge Gerry raised the question of adding the bill of rights to the constitution. Again, just three days before the convention adjourned, Pinckney and Gerry sought an addition of a clause regarding the liberty of the press. This provision, too, was rejected because "the power of Congress does not extend to the Press."⁴⁷ It has been suggested that "perhaps the lateness of the Convention, perhaps the desire not to present more opportunity for controversy when the document was forwarded to the States, perhaps the belief, asserted by the defenders of the Constitution when the absence of a bill of rights became critical, that no bill was needed because Congress was delegated none of the powers which such a declaration

43 Namibia, *Constitution of the Republic of Namibia*, Chapter 3.

44 *Ibid.*, Article 131.

45 Elster, *Arguing and Bargaining in Two Constituent Assemblies*.

46 See the *Records of the Federal Convention of 1786*.

47 United States, *Amendments to the Constitution: First Through Tenth Amendments*, <http://www.frbgate4.access.gpo.gov>, accessed 15 December 2002.

would deny, perhaps all these contributed to the rejection.”⁴⁸ Soon thereafter, however, many of the founding fathers urged an amendment to the constitution to include a declaration of rights and consequently, ten amendments were ratified.⁴⁹ As regards rights not enumerated in the constitution, the Ninth Amendment stipulates: “The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” This amendment is thus a positive affirmation of the rights that are not enumerated but are protected by other provisions.

In Paris, at the Assemblée Constituante, arguments against the inclusion of the Bill of Rights in the constitution reflected the fear of granting too many rights rather than too few. “Two of the most prominent moderates, Lally-Tolendal and Malouet, argued that a Bill of Rights might give the people exaggerated, confused, and dangerous ideas about their liberties, and argued for a postponement.”⁵⁰

In Windhoek, despite the international character of Namibia’s struggle for independence, and despite the framers’ commitment to human rights, various political parties had very different purposes for seeing the enshrining of the Bill of Rights in the constitution. SWAPO was concerned with ensuring that apartheid did not re-emerge, and that adequate provision existed to reverse the wrongs of apartheid. It therefore argued in favour of Article 23 dealing with apartheid and affirmative action. DTA, on the other hand, strove to ensure that property acquired by the whites was protected against appropriation. However, partly because of the provisions stipulated in the Constitutional Principles and partly because the provisions sought by various parties were within the framework of the Universal Declaration of Human Rights, general consensus ensued fairly quickly for the inclusion of a Bill of Rights in the constitution.

The Electoral System

The nature of democracy depends on, *inter alia*, the type of representation achieved. As John Stuart Mill pointed out,⁵¹

Two very different ideas are usually confounded under the name democracy. The pure idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practised is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens; the latter, strangely confounded with it,

48 *Ibid.*

49 These amendments deal with freedom of religion, speech, press, assembly, freedom to bear arms; protection against unreasonable searches and seizures, protection against being held answerable for any crime unless on presentment or indictment by a grand jury, speedy and public trial by an impartial jury, and protection against excessive bail, excessive fines, and cruel and unusual punishment.

50 *Archives Parlementaires de 1787 a 1860 Premiere Serie (1789 a 1799)(1875-1888)*, pp. 222-23, 320 and 322-23. Quoted in Elster, *Arguing and Bargaining in Two Constituent Assemblies*.

51 John Stuart Mill, *Considerations on Representative Government* (Buffalo, Prometheus Books, 1991).

is a government of privilege, in favour of the numerical majority, who alone possess practically any voice in the State ... to the complete disenfranchisement of minorities.

In pre-independence Namibia, “government of privilege, in favour of numerical majority” was denied in favour of government of privilege, in favour of the white minority. As majority rule was sure to follow at the time of independence, members of the Windhoek Constituent Assembly, knowing that the choice of electoral system can influence representation greatly, focused on their own parties’ chances in the parliament.

An understanding of the pros and cons of different electoral systems was therefore important. The United Nations Institute for Namibia had done extensive work on comparative electoral systems,⁵² and its work was available to the members of the Constituent Assembly.

This work outlined all the different electoral systems and provided pros and cons for each. Rather than making specific recommendations, the study sought to outline the implications of various electoral systems *vis a vis* the philosophy and theory of representation, the franchise, the administrative machinery for elections, determination of results, nature of constituencies, voter registration, election campaigns, voting and voter security, ballot security and counting of votes, and the treatment of results.⁵³

Members of the Constituent Assembly also had first-hand knowledge of elections, because elections for the Constituent Assembly had just ended. As the campaign and elections for the Constituent Assembly proceeded, various implications outlined in the United Nations Institute for Namibia study also became clear. Illustrations of some of these implications are outlined in Chapter 3. Because of these experiences and the information available to the members of the Constituent Assembly, there was considerable debate in the Constituent Assembly on the choice of electoral systems.

In considering the choice of an electoral system for Namibia, a consensus had emerged that National Assembly elections should be held on proportional representation basis. Different parties in the Windhoek Assembly had, however, favoured proportional representation for different reasons. SWAPO members had agreed to this system because they felt that they, having spent decades out of the country, might not do so well if elections were held on a constituency basis which tends to favour local personalities. SWAPO was also pleased with the proportional representation system used for the election of the Constituent Assembly as it had allowed it to gain a majority in the assembly. Non-SWAPO parties, on the other hand, supported the proportional representation system as it favoured smaller parties’ representation in the National Assembly. Thus, the proportional representation system offered something to every party. As the proportional representation system allowed better opportunities for smaller parties to gain seats in

52 Ncube and Parker, *Comparative Electoral Systems and Political Consequences*; and Dieter, *Elections and Electoral Systems*. Both of these documents provide a comprehensive overview of types of electoral systems, as well as of their respective advantages and disadvantages.

53 Ncube and Parker, *Comparative Electoral Systems and Political Consequences*, p. 201.

the parliament, it was considered a more democratic system than the first-past-the-post system.

Although the framers of the constitution were unanimous in their choice of the electoral system for the National Assembly, there was considerable disagreement in the choice of electoral system for electing members of the National Council. The thinking of various non-SWAPO parties favouring a constituency-based system for electing regional councillors was very similar to their thinking on having a bicameral parliament. They had thought that SWAPO's power base would be eroded with the creation of a second house, and once again they thought that they, being strong in many regions, would do better in elections based on a constituency system. As already explained in this chapter, SWAPO was happy to oblige, knowing well that the delimitation of constituencies would contradict some of the assumptions of the non-SWAPO parties.

Regrettably, in this debate, the most important aspect of proportional representation was completely lost, that "rational underpinning all proportional representation systems is to reduce the disparity between a party's share of the national votes and its share of the parliamentary seats."⁵⁴ Reynolds⁵⁵ notes, "For ethnically divided states, the prevailing academic wind clearly blows in favour of proportional representation and against plurality." Lijphart⁵⁶ also supports the view that divided societies need a proportional representation system to protect the interest of the minorities. According to him, the proportional representation system in such societies has consistently posted the best records.

As regards presidential elections, there was unanimity that the president should be elected by direct, universal and equal suffrage, with Namibia as one constituency. Further, the elected candidate must receive over 50% of the votes cast. If necessary, a number of ballots should be conducted until such a result is achieved. This provision was included in the constitution.⁵⁷ So far, however, outcome of the first round has resulted in meeting this requirement.

Thus, because of the interplay of the interests of various political parties represented in the Constituent Assembly, Namibia ended up with three electoral systems.

The president is elected based on first-past-the-post system with the condition that the candidate must secure at least 50% of the votes cast. He/she does not have to be the leader of the political party with a majority in the parliament. The president is directly accountable to the people every five years but is not accountable to the parliament. He/she does not sit in the parliament. His/her powers are thus defined and limited only by the constitution that provides for the sharing of executive power with the cabinet.

54 Andrew Reynolds, *Electoral Systems and Democratization in Southern Africa* (Oxford, Oxford Univ. Press, 1999), p. 90.

55 *Ibid.*, p. 93.

56 A. Lijphart, "Democracy in Divided Societies" in *Journal of Democracy*, Vol. 4, No. 4 (1993) pp. 18-38.

57 Namibia, *Constitution of the Republic of Namibia*, Article 28.

Members of the National Assembly are elected on a proportional representation basis, based on party list. The party determines the order in which names of candidates appear on the list. Finally, members of regional councils are elected from constituencies on a first-past-the-post system. Regional councillors from each region, in turn, elect two representatives from within themselves to the National Council.

Thus, Namibia's electoral system allows for the possibility that the president is an independent candidate or candidate of one party, and the majority in the National Assembly, and therefore members of cabinet are from another party. This would be similar to the situation in France and Russia. If such a situation prevailed in the distant future, it could curtail the president's powers considerably as he/she would be required to exercise his/her powers in consultation with the cabinet with a majority from a different party.

Procedure for Amending the Constitution

Constitutions should strike the right balance between rigidity and flexibility. It should neither be easy nor impossible to change them.⁵⁸

On the one hand, 'Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy.' On the other hand, we should keep in mind the dictum of constitutional lawyers, ascribed to Justice Robert Jackson: the Constitution is not a suicide pact. It must be possible to unbind oneself in an emergency. Society must not be confined too tightly.⁵⁹

Mechanisms for amending constitutions should strike the right balance between rigidity and flexibility. The Windhoek Assembly opted to entrench fundamental rights and freedoms.⁶⁰ Further, the article stipulating specific majorities required in parliament or in a referendum for amending the constitution may not be repealed.⁶¹ Any other provisions of the constitution can be repealed or amended by a majority of two-thirds of all the members of the National Assembly and two-thirds of all the members of the National Council. In case an amendment or repeal of any of the provisions of the constitution secures a majority of two-thirds of the members of the National Assembly, but fails to secure such majority in the National Council, the president has the option of subjecting the amendment or repeal of the relevant provision of the constitution to referendum.⁶²

Mechanisms for amending the constitution chosen by the Windhoek Assembly seem to be very adequate. This standard clause was in fact lifted from the existing constitutions – indeed, similar provisions exist in almost all the constitutions. If anything, Namibia's constitution is slightly harder to change than most. This provision was also in SWAPO's

58 *Archives Parlementaires de 1787 a 1869 Premiere Serie (1789 a 1799)(1875-1888)*, p. 517.

59 Elster quoting John E. Finn, *Constitutions in Crisis* 5 (1991); *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949).

60 Namibia, Constitution of the Republic of Namibia, Article 31.

61 *Ibid.*, Article 132.

62 *Ibid.*

original draft that was adopted as a basis for drafting the Namibian Constitution. This provision guards against instability so that the constitution remains unaffected even when majorities fluctuate between forty-nine and fifty-one percent.⁶³ Furthermore, the requirement of a two-thirds majority of all members in both houses ensures serious consideration of the issue.

Adoption of the Constitution

On 25 January 1990, I, as the Standing Committee chairman, tabled the draft constitution of the Republic of Namibia at the Constituent Assembly meeting. Debate of the draft started on 29 January. For the next one and a half days statements were made by different parties, and on 30 January the assembly started considering the draft clause by clause. This debate continued the next day, but before adjourning, Mr Theo-Ben Gurirab moved that independence day should be determined to be 21 March 1990. This motion was carried unanimously. The country was to become independent on the midnight of 21 March 1990.⁶⁴

Work on the finalization of the constitution continued until 6 February when the draft was finalized. The stage was now set for the adoption of the constitution. One of my concerns was whether the constitution would be adopted by consensus or by majority vote. So far the Constituent Assembly had done everything by consensus; thus, I felt that we should adopt the constitution by consensus as well. Adoption of the constitution by consensus would also send a message of unity and oneness at this historic moment. Therefore I lobbied all members to endorse the constitution by consensus first, and then to enter reservations if any. I feared that if reservations were entered before the adoption of the document, it could have diluted the unanimity that was being sought. All, even by Mr Pretorius, former National Party stalwart, accepted this proposal. In pursuit of this ideal, I also made a last minute dash to see the Baster Kaptein, Mr Hans Diegaard, to persuade him, and he agreed by stating that he had no quarrel with the constitution or the incoming SWAPO government, but had a quarrel with Mr Pik Botha, the then Minister of Foreign Affairs of South Africa, who had told him that he would not have to abdicate his position if he were to join the Security Council Resolution 435 process.

On the morning of 9 February 1990 in front of the current parliament building, I declared, "We therefore adopt this constitution by consensus. Any objection? No objection," and brought down the gavel quickly. The constitution was adopted unanimously.⁶⁵ It must have seemed to those who were not insiders, and who were not aware of behind-the-scene consensus building efforts, that I brought the gavel down quickly so as not to give anybody a chance to change their mind. May be so - but not really.

The miracle of 80 days was accomplished. As the day of independence was set to be 21 March 1990, work on the process of nation building had to start. At the time of adoption

63 Elster, *Arguing and Bargaining in the Two Constituent Assemblies*.

64 Windhoek Constituent Assembly, *Minutes of the Meeting of 31 December 1989*.

65 Windhoek Constituent Assembly, *Minutes of the Meeting of 9 February 1990*.

of the constitution, I had compared nation building with the building of a house – the Namibian House. I had said that the foundation for that house was the constitution. The building blocks, the different ethnic groups: Damaras, Ndongas, Afrikaners, Hereros, Germans, Ovambos, etc. Mortar to hold these different bricks was composed of the laws passed by the parliament. When one finalises the laying of the bricks, one plasters the wall, paints it with colours. I further said, “We painted out house with the blue, white, yellow sun, green and red, our national colours. Once the house is painted, no one would see the bricks or different ethnicities. All that everyone would see is a strong house in which the children of Namibia will be able to live in peace, security and harmony.”

All the members of the Constituent Assembly signed the constitution on 16 March 1990.⁶⁶ In his 16 March 1990 report, the United Nations Secretary General transmitted to the Security Council the full and definitive text of the Constitution of Namibia, together with a comparison between the new constitution and the 1982 Constitutional Principles.⁶⁷ The Constitution duly met the Security Council’s approval.

For Namibia, constitutional democracy is a new concept, and its success will largely depend on Namibian society’s ability and willingness to internalise the constitution. First steps in this process of internalisation were taken in 1989 when the elected Constituent Assembly comprising citizens of Namibia met within the country in Windhoek⁶⁸ to draft the constitution, decide on the day of independence and also to elect the first president as a transitional measure, and deem him to have been elected under Article 28 of the constitution.

Furthermore, the way in which the constitution was to be implemented was prescribed in Article 135 which stated that: “This Constitution shall be implemented in accordance with provisions of Schedule 7 hereof.” Important provisions of Schedule 7 include the president’s appointing the prime minister and administering to him or her the oath or affirmation set out in Schedule 2 of the Constitution; the Constituent Assembly’s deciding the day on which the National Assembly would meet, at a time and at a place specified by the prime minister; the members of the National Assembly, with the prime minister as the chairperson, would take the oath/affirmation prescribed by Article 55 before the judge-president or a judge designated by the judge-president for this purpose, and elect the speaker of the National Assembly.⁶⁹

Constitutional Provisions and Personality Issues

The constitution stipulates in Article 32 (3)(i)(aa) that the president appoints a prime minister. In terms of Article 36, the prime minister is the key advisor and assistant to the president in his execution of the functions of the government.

66 Windhoek Constituent Assembly, *Minutes of the Meeting of 16 March 1990*.

67 United Nations, *Yearbook of the United Nations 1990*, Vol. 44 (New York, U.N. Dep. Of Public Info., 1999) p. 950.

68 Most of the African countries’ constitutions were drafted outside the countries and by people comprising the citizens and representatives of the colonizing states. In Namibia, on the other hand, constitution was drafted by Namibians in Namibia.

69 Namibia, *Constitution of the Republic of Namibia*, Schedule 2.

Although the Constitution is not explicit on the number of cabinet members, it mentions functions of a finance minister, a defence minister and a foreign minister. Therefore the size of the cabinet depends on the president, and, in the carrying out of this function, he consults with the prime minister as the primary constitutional assistant and advisor to him/her.

Consultations between the president and the prime minister were routine and very useful during the first term and during half of the second term, and executive relations were close. However, after the second elections (1994) when, for the first time, the president was elected directly by the people (as per the constitutional requirement) and received 72% of the votes, relations between the president and the prime minister changed. Perhaps, the president, now having been elected directly by the people, thought that he was mandated to rule and was accountable only to the people.

However, a brave cabinet and also the last SWAPO Party Congress held in August 2002 proved that the president could still be called to order in Namibia.⁷⁰ There can nevertheless be attempts by presidential coteries to encourage the president to be 'presidential'. These sycophants, who surround the president, are interested in their own survival and seek to please the president by 'informing' him that he was very popular with the people. This sycophancy may be reflected in their behaviour of promoting omnipotence of the presidency. It can take many forms; such as the way the president is addressed (head of state and head of government, commander in chief, tatekulu, revolutionary, founding father, etc.), as had been the case in Zaire under President Mobutu, and in Malawi under President Banda. As Bratton and Van de Walle⁷¹ put it: "Presidentialism implies systematic concentration of political power in the hands of one individual, who resists delegating all but the most trivial decision-making tasks."

Such a trend seems to be emerging in Namibia. For instance, in 2003, President Nujoma issued a circular stating that all members of government including leaders of the legislative organ should obtain permission from the 'appointing authority', i.e. from him, to travel out of the country. This authority was in the past delegated to the prime minister as the head of government administration. There has been an attempt or desire to take all decisions at the head of state level. In the same year, the president also assumed the responsibility of the portfolio of information and broadcasting as he wanted to "put that house in order" which presumably no minister could do. Such attempts at micromanagement are the beginning of presidentialism. As Kamuzu Banda of Malawi put it in 1972, "Nothing is not my business in this country: Everything is my business, everything. The state of education, the state of our economy, the state of our agriculture, the state of our transport, everything is my business."⁷²

However, in Namibia we have not yet reached that level of assumption of power over everything by one person. At the last SWAPO Congress, many of the 'impositions' by

70 Members of the Cabinet often disagreed with the president's views.

71 Michael Bratton and Nicolas van de Walle, *Democratic Experiments in Africa: Regime Transition in Comparative Practice* (Cambridge University Press, 1998), p. 65.

72 *Ibid.*, p. 65.

the president were resisted and the president, although not happy, had to live with the objections.⁷³ We are thus at the crossroads of presidentialism. Time will tell which way Namibia will go.

The next two chapters deal with some of the specific aspects of state formation that provide a glimpse of the direction Namibia might take.

Conclusion

Events leading to the adoption of the constitution of Namibia show interplay between the self-interests of various players. As mentioned in Chapter Three, there were many players attempting to manage transition to Independence in Namibia in a way that furthered their own interests. Influencing change by influencing the provisions of the constitution was an important aspect of this process. Positions were taken by the Western Five to ensure that Namibia became a liberal democracy with all the attendant rights provisions in its constitution; and almost all the parties drew on the 1982 Constitutional Principles to ensure that their interests were protected. However, it was the spirit of compromise that eventually resulted in achieving an outcome satisfactory to all: (1) Namibians were happy with the independence of their country; SWAPO was happy that its many years of struggle had at last borne fruit; and even non-SWAPO parties were happy with the process of reconciliation and inclusivity; (2) at a time when the United Nations was coming under increasing pressure for its alleged ineffectiveness, it was glad to see the culmination of a successful mission; (3) the Organisation of African Unity, the Frontline States and members of the Non-Aligned Movement were happy to see the last colony in Africa become independent; (4) the United Kingdom, France, and Germany managed to protect their economic and settler interests in the region; (5) the United States of America secured its economic and geopolitical interests in the region, and (6) South Africans were glad to see the end of pariah status in the community of nations; and (7) Angola and Cuba were happy to see the end of South African incursions and clandestine support for UNITA.

Keeping in mind that the constitution has been in existence for the last thirteen years, it has proved its value on all fronts. It has ensured fundamental human rights of the citizens, and its provisions for constitutional amendment have worked effectively. Its provisions are enforceable – though time will tell whether Namibia succeeds in meeting this condition. One thing is sure, if attempts are made by influential persons to undermine the constitution, backed by the ruling party having two-thirds majority in the

73 At the Third SWAPO Congress, the president insisted that certain number of women be declared elected without following the laid-down procedure. He insisted on this action as he wanted the women to believe that he cared for them though no woman had been appointed to the top four positions. To make up for that discrepancy, the president sought to increase women's representation through unconstitutional means. At the Central Committee meeting held in August 2002 the president also tried to endorse four candidates for unopposed acceptance but there was resistance and other nominations were made. The president accepted the decision but other nominees lacked the courage to accept the nominations.

National Assembly, the constitution can be wrecked. So, at present, the integrity of the constitution depends on SWAPO's commitment to it. Survival of the constitution and its effectiveness would depend not just on individuals internalising the constitution but also on the evolution of society and social groups, and, in turn, civil society, that is ready to defend the constitution.

Such developments are already taking place as discussed in Chapters Five and Six. However, the western nations continue to demand from the African states what does not even prevail in their own countries. For example, no elections are perfect – problems arose in the U.S. presidential elections of 2000 as mentioned in Chapter Six. Had that happened somewhere in Africa, elections would have been subjected to considerable criticism.



The genesis of the Namibian Constitution: The international and regional setting

Theo-Ben Gurirab

Introduction

German South West Africa, as Namibia was then known, became and remained a German colony from 1884 until 1915, when the country was invaded by South African forces after Great Britain declared war on Germany in August 1914. Under the terms of the Peace Treaty of Versailles that terminated the First World War, South Africa was designated as the mandatory power over Namibia in 1920. Part 1 under Article 22 of the same Treaty established South West Africa as a “C” Mandate, and this was subsequently confirmed by the Council of the League of Nations by resolution in December 1920. Supervisory power over South Africa was transferred to the Permanent Mandates Commission of the League of Nations, to which South Africa was legally obliged to report annually on its administration of the country. Both German and South African colonial rule was marked by gross human rights violations of the dignity, rights and freedoms of the country’s inhabitants. In the case of South African rule in particular, the racial and ethnic policies of apartheid not only discriminated against the majority of citizens, but were in clear violation of the provisions of the Mandate, more especially of Article 22 of the League of Nations Covenant under which mandatory powers had to apply “the principle that the wellbeing and development of such peoples form a sacred trust of civilization ...”. Apartheid was a system of governance where the majority had no say in the manner in which their country was being administered.

Resistance

It is not surprising, therefore, that the people of Namibia made a decision to fight for their right to independence and, ultimately, self-determination. The South West Africa People’s Organisation (SWAPO)¹ came into existence on 19 April 1960, as a successor to the earlier Ovambo Peoples’ Organisation (OPO). That same year, Ethiopia and Liberia brought a petition before the International Court of Justice (ICJ), in which they charged South Africa of materially violating the provisions of Mandate over Namibia, particularly those provided for in Article 22 of the League of Nations Covenant. Moreover, Ethiopia and Liberia argued before the ICJ that the mandate over Namibia had lapsed in 1945 following the founding of the United Nations (UN) and the setting up of the UN Trusteeship Council. The petition failed as the ICJ held that the petitioners (Liberia and Ethiopia) did not have the necessary legal standing to bring the case before the tribunal. This acted as a powerful catalyst for SWAPO to initiate an armed struggle against South Africa’s continued illegal occupation of the country. SWAPO declared, “We will cross

¹ Today the ruling SWAPO Party of Namibia.

rivers of blood to liberate Namibia!” On 27 October 1966, the UN General Assembly passed Resolution 2145 (XXI), which revoked South Africa’s mandate over Namibia. The UN subsequently established the UN Council for South West Africa to administer the territory until independence. This was compounded by an advisory opinion of the ICJ in 1971, which held that South Africa’s occupation of Namibia was illegal and in breach of international law. Previously, the UN Security Council (UNSC) had deemed Resolution 2145 a recommendation only, that is, without legal force. The South African government refused to recognise the UN’s authority over Namibia, however, and proceeded to divide the country into ten ethnic homelands (or *Bantustans*) and held elections to this effect.

In 1977, the Western Contact Group (WCG), comprising Canada, France, the Federal Republic of Germany, the United Kingdom and the United States, launched a diplomatic initiative, as a group of UNSC members, to address the stalemate over Namibia. As a result of the WCG’s efforts, the UNSC passed Resolution 435 on 29 September 1978, which sought to address the unresolved problem of ensuring independence and self-determination for Namibia under the aegis of the UN. The proposal was a result of consultations with the then front-line states – Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe –, SWAPO, the UN, and the WCG, but only after SWAPO and the Frontline States had extracted a compromise on Resolution 432 (1978) on Walvis Bay. The most pertinent provisions of the latter Resolution were as follows:²

The Security Council,

...

2. *Reiterates* that its objective is the withdrawal of South Africa’s illegal administration from Namibia and the transfer of power to the people of Namibia with the assistance of the United Nations in accordance with the Security Council resolution 385 (1976);
3. *Decides* to establish under its authority a United Nations Transition Assistance Group in accordance with the above-mentioned report of the Secretary-General for a period of up to 12 months in order to assist his Special Representative to carry out the mandate conferred upon him by the Security Council in paragraph 1 of its resolution 431 (1978), namely, to ensure the early independence of Namibia through free elections under the supervision and control of the United Nations;
4. *Welcomes* the preparedness of the South West Africa People’s Organization to co-operate in the implementation of the Secretary-General’s report, including its expressed readiness to sign and observe the cease-fire provisions as manifested in the letter from its President of 8 September 1978;
5. *Calls upon* South Africa forthwith to co-operate with the Secretary-General in the implementation of the present resolution; ...

Notwithstanding Resolution 435, South Africa continued to administer the country in violation of international law, and went as far as holding internal elections in Namibia in December 1978. These were boycotted by SWAPO and some other political organisations such as the South West Africa National Union (SWANU) and the Namibia National Front (NNF, a grouping of nine political parties). This state of affairs called for renewed and concerted efforts and discussions between SWAPO, the UN, the Frontline States and

2 Emphases in original.

the WCG. One result of these discussions were the 1982 Constitutional Principles, which became the framework for Namibia's Independence Constitution.

SWAPO's perception of the 435 process

SWAPO did not really trust anybody in the 435 framework – whether it be the WCG, the UN, the Frontline States, Nigeria, South Africa, or the internal Namibian parties. From the start, SWAPO was suspicious of the WCG's motives and intentions, and did not believe they were sincerely concerned about the fate of Namibia. For SWAPO, the WCG was only pursuing their economic and political interests in the southern African region. These interests gave the WCG leverage over South Africa. Then there was the question of the status of Walvis Bay and the islands, which, under UNSC Resolution 432 (1978), were recognised as being an integral part of Namibia. SWAPO – like South Africa – did not want this issue to be dealt with by the WCG on the simple grounds of “Why should we negotiate that which is ours?” This put the WCG in a very difficult position because, even by ignoring the issue, they were always open to SWAPO's assertions and accusations that they were endorsing South Africa's historical and legal claim to Namibian territory. Throughout, the Contact Group always had to face the possibility of a breakdown in the negotiations over this question.

Even SWAPO's friends, the Frontline States and Nigeria, who had formed an extended SWAPO delegation in the negotiations, were suspected at times. In fact, SWAPO even resisted their first attempts to persuade it to seek a negotiated settlement on the basis of UN SC Resolution 385 (1976) after the WCG had approached them for just that purpose. The problem was that Nigeria and the former Frontline States were sovereign actors and, therefore, protected their own interests and behaved in their own ways. Often, SWAPO was unaware of the content of the correspondence between Nigeria, the Frontline States and the WCG. There were imponderables and suspicions.

Some commentators have opined that the Frontline States were responsible for ‘delivering’ SWAPO. This is something that we in SWAPO felt they were sometimes trying to do, although we did not always approve. Nevertheless, the whole negotiating framework was a useful arrangement under the circumstances: it confirmed SWAPO's unique status, and enhanced its legitimacy in the eyes of the world.

Linkage

Chester Crocker, the former United States Secretary for African Affairs, described *linkage* as quite a sophisticated strategic formula that took into account the interests of all parties. As one of those parties, however, we did not see it in the same way: for SWAPO, linkage was a negation of the principle of self-determination. The presence of Cuban troops in Angola was a separate deal between two sovereign states. Linkage kept Namibia's independence hostage for about seven years. SWAPO managed to convince our friends in the Frontline States to look at linkage in this way. They forced through a number of General Assembly resolutions that characterised *linkage* as a blockage. What Crocker called “constructive engagement” was for us destructive engagement.

Another reason why SWAPO did not believe in linkage was because, as Crocker himself pointed out, its rationale was regional security, and this was not one of our chief concerns. SWAPO was primarily concerned with an armed liberation struggle, which, in terms of regional security, made the liberation movement a pawn in a larger power game. At the time, it was not politically premature for SWAPO to think in regional terms ahead of independence.

In the end, SWAPO could do nothing. The states themselves agreed on the framework for the withdrawal of the Cuban troops from Angola.

Pre-implementation meeting

As indicated above, the negotiations were not without their shortcomings. For example, why did the Geneva ‘pre-implementation meeting’ in January 1981 fail? Why did the South Africans and the Namibian internal parties behave the way they did at that meeting? If one understands what occurred in the autumn of 1980 when the UN visited South Africa, one can see clearly why nothing materialised in Geneva: the Reagan administration was replacing the Carter administration within a couple of weeks, so South Africa would soon have a friend in Washington.

In SWAPO’s opinion, by the time the UN team arrived in Pretoria in the autumn of 1980, the South Africans were being fed on the hope of a Republican victory in the forthcoming US presidential elections. They believed a Reagan administration would act in their favour. They also probably managed to convince the internal parties in Namibia, notably the Democratic Turnhalle Alliance (DTA), to see things the same way. So, despite all the UN efforts to encourage confidence-building by holding receptions and cocktail parties, simply nothing happened in Geneva. That is, nothing happened except for the internal parties’ elaboration of their position concerning – to use their words – the UN’s arbitrary recognition of SWAPO as “the sole and authentic representative of the people of Namibia”, and, therefore, “partiality in favour of SWAPO”. This stalled the process, and the result was that some of SWAPO’s friends in the UN began to think that perhaps such recognition by the UN General Assembly had not been such a good idea in the first place. In fact, the internal parties – and the DTA in particular – were South Africa’s pawns and received unlimited slush funds.

UN recognition of SWAPO

Firstly, the criticism directed at the UN for according SWAPO sole and authentic status is either a deliberate distortion of history or ignorance about the origin of such status. Firstly, its origin was not within the UN but within the former Organisation of African Unity (OAU). For reasons of decolonisation, the OAU Liberation Committee identified colonies where there were ongoing armed struggles in order to determine which had legitimate liberation movements or political organisations that they could support. In some cases, such as Angola and Zimbabwe, the OAU Liberation Committee even recognised more than one liberation movement because, in their judgment, those were bona fide

liberation movements fighting equally on behalf of the oppressed.³ The OAU then did what was its standard practice: it recommended to the UN and other international bodies to recognise these accredited movements. Such recognition was awarded to SWAPO in 1973 by the UN General Assembly by way of Resolution 1435. In 1978, recognition was upgraded to the status of permanent observer.

Secondly, the status of being the “sole and authentic” representatives of the Namibian people had no relation to other organisations or political parties in Namibia. It was merely in relation to South Africa, the colonial power that occupied the country against the wishes of the majority of the people. In that context, the OAU judged SWAPO to be the movement deserving support and recognition. That the UN General Assembly accepted the OAU recommendation was not, therefore, an arbitrary decision.

Thirdly, neither the OAU nor the UN denied the existence of other political organisations in Namibia. However, in terms of the independence struggle – something in which the OAU and the UN were interested – the contribution of other political organisations was felt to be wanting. The other worthy Namibian political organisations abdicated on their own.

The Constitutional Principles and the Impartiality Package

The introduction of the 1982 Constitutional Principles by the WCG into the negotiations was an idea SWAPO resisted. SWAPO saw it for what it really was, namely a dilatory tactic. It was not the substance of the principles that was problematic, but the political subterfuge of introducing them. The Principles themselves, which were lifted from the 1948 Universal Declaration of Human Rights, were not new to SWAPO: they were the very basis of our struggle for human dignity, equality and freedom, democracy and social justice. It was for this very reason that most countries, governments and peoples recognised and supported SWAPO.

SWAPO felt that, by introducing this extraneous issue, the rules of the game were being changed midstream to suit South Africa and the internal parties of Namibia. In particular, SWAPO opposed the requirement of a two-thirds majority for the adoption of an Independence Constitution. We saw it as a deliberate attempt to deny SWAPO a clear victory by raising the bar. Even the envisaged electoral rules would have been countered to influence the outcome in favour of the puppets.

It can be seen that, even after the election of the Constituent Assembly in November 1989, the Constitutional Principles were always before us. In fact, when the members of the Constituent Assembly wrote the Constitution, they transcended them. Quite simply, the Principles were not a stretch of the imagination for SWAPO: the Constitution we adopted in early 1990 would have been written without them. As a matter of fact, SWAPO’s own draft constitution was the basis on which the work was carried out.

3 There have been instances when the OAU has even withdrawn its recognition of certain liberation movements.

As regards the so-called Impartiality Package, from SWAPO's perspective this had to do with the relationship between SWAPO and the UN on the one hand, and South Africa and the internal parties on the other. The Package meant that any political and financial benefits that SWAPO derived from the UN and its specialised agencies would be forfeited. Yet, if this was an attempt to restore balance, it failed. During the run-up to the November 1989 elections, the UN imposed the terms of the Package on SWAPO – cutting the flow of money and political resources – but left South Africa free to continue its support to the internal parties. In other words, at the end of the day, the Impartiality Package was not that impartial after all, and worked to the benefit of one party in particular. We were not fooled, however, despite even some of our friends missing the point that nothing is over until it is over. SWAPO stayed the course and won the final victory.

SWAPO: Defender of the UN

Upon and after Independence, the UN enjoyed the limelight. I like to think that SWAPO was among the defenders of the organisation – to keep it going – particularly during the 1980s when 'UN-bashing' was fashionable. Thus, after Namibia became independent, SWAPO was happy that the UN had achieved global recognition and encouragement for its peacemaking and peacekeeping efforts. Even with all the disappointments, suspicions, mistakes, and misjudgments, the UN in the end played its role successfully. Indeed, the UN's success story in Namibia became its best practice for other operations, including that launched in Cambodia.

Beyond the struggle: National reconciliation

The objective of SWAPO's struggle was an independent Namibia. Therefore, since the beginning, the movement not only had to keep abreast of political developments and the various political formations that were taking place inside the country, it also attempted to foster greater unity, solidarity, and cooperation amongst all Namibians. At the onset, our natural ally was obviously the South West Africa National Union (SWANU) because we were very close: we were old school friends, saying one and the same thing. From the early 1960s, there were attempts to unite our parties or, failing that, at least forge a common front against a common enemy, as the saying went. This kind of relationship between SWAPO and SWANU has persisted into the present, all things aside.

Both SWAPO and SWANU also attempted to link up with smaller political parties and groups led by progressive traditional and religious leaders, again on the same platform of showing a united front against a common enemy. SWAPO AND SWANU both concentrated on the black constituency because it was necessary and natural to capture and rely on a grass-roots and broad-based support. We are talking about the world of apartheid, divided communities, and a society of oppressor and oppressed. But as time moved on, we also started the process of zeroing in on sections of the white population. That proved successful and, in retrospect, all this has served our nation well.

Initial contacts with the white community started around 1980. They began with a meeting in Germany just after an international conference on Namibia that had been

held in Paris. A few of us quietly went to meet some German-speaking Namibian businesspersons in an effort to start a dialogue. Although the meeting was constructive because we were at least talking to each other, it abounded with suspicions, distrust, and uncertainties. Our compatriots were sceptical – if not entirely cynical – about our overtures. Stockholm, New York, London, Amsterdam and, later, Lusaka and Harare served for further meetings.

Then, in January 1981, during the so-called pre-implementation meeting in Geneva, the West German Foreign Minister, Hans-Dietrich Genscher, facilitated a dinner for SWAPO leaders and a larger number of representatives of the German-speaking community from Namibia. Our compatriots put many questions to us at that meeting. This allowed us to begin assessing their views and, in particular, how they perceived change in Namibia. The still unresolved land issue was at the core and the colonial past was ever present.

Following this meeting, between 1982 and 1987, SWAPO started to meet with different groups. Although mostly German, we had contact with Afrikaans-speakers, English-speakers, and even coloureds and blacks whom we had not approached before. The open policy we kept going everywhere later served the transition well.

In 1988, just prior to the beginning of the implementation of the UN Plan for Namibia, our dialogue with the whites started to take shape in two important meetings: one in June in Stockholm, and the other in Kabwe, Zambia, in October. At these meetings we progressed from the usual question-and-answer session to more serious and topical discussions. The meetings produced more substantive dialogue. We discussed issues such as the land question, nationalisation, SWAPO's Marxism, the future of whites in Namibia, violence and, later on in 1988, of course, the Cubans in Angola. We welcomed very much the openness that we were detecting among our compatriots, who had hitherto not really been part of the national perspective in Namibia.

SWAPO also engaged in additional efforts. Notably, sometime in 1983 and 1984, we contacted a friend, a prominent businessperson, who was a US ambassador to the UN, to help us meet Harry Oppenheimer. Through those contacts we were able to meet with Oppenheimer for the first time in October 1984 in New York. Although the then SWAPO President Sam Nujoma was to have met Oppenheimer, because the two men could not synchronise their schedules, in the end it was Andimba Toivo ya Toivo and I who went. The meeting was not formal: we were not negotiating or even engaging in serious discussion over the role of De Beers' Anglo-American Consolidated Diamond Mining in Namibia. All we were doing was trying to open further channels for dialogue and building mutual understanding with the future in mind.

A few years later, in 1988, we met Oppenheimer's son, Nicholas Oppenheimer, in London in a spirit of continuing contacts. On that occasion he and his colleagues asked SWAPO President Nujoma to indicate to all present to say the kind of things that Comrade Robert Mugabe had started saying about national reconciliation in Zimbabwe. But we told them that Mugabe was speaking from Harare and we were in London; if we had been back home in Windhoek, the situation would have been different.

There were also other ways in which SWAPO tried to read the minds of the white community in Namibia. We used some of our white members who were able to go back and forth; we also used other people as couriers to go in with specific instructions, contact people, ask questions, and get certain information. We even had someone high up in Martti Ahtisaari's, the UN Special Representative on Namibia's cabinet. But that was before his UN job.

SWAPO also tried to start a dialogue with the DTA, and with Dirk Mudge in particular, for we had received intimations that he wanted to contact us. He wanted us to renounce the armed struggle, while we wanted him to give up the nonsense of the so-called Interim Government. The South African regime, and in respect of a good African, Frederik van Zyl Slabbert, wanted Mudge to be in. But for SWAPO, this was not how it was to be.

These developments outline how SWAPO paved the way for the constitutional process. SWAPO went through things consciously because, as a party, we were preparing to score a victory and form the first Independence government. SWAPO did not think that the liberation struggle was an end in itself, and that that alone would lead to change; rather, we wanted to be ready to bring about Namibia's genuine liberation, independence, and a new beginning.

During the struggle, SWAPO had been saying that we were ready for the bullet, but also for the ballot box. Thus, when election time came, we were the first party to draw up a draft national constitution and election manifesto, which we unveiled in Windhoek on 2 July 1989. This was a turning point. It was the closing of one chapter and the opening of another. It was a point at which our language, our image, our thinking, and our modes of communication with the Namibian people were recast in a new context and mindset. Dirk Mudge also contributed to this change in SWAPO. During one of the first drafting sessions for the Constitution, in which we were dealing with one of these issues of substance, Mudge cautioned us not to change our new stance. I understood how he meant it. Since then, we in SWAPO have managed to allay many fears in the white community.

Mudge was not trying to convince SWAPO to be less militant. Rather, as a Namibian, he was concerned about a breakdown of the process and what the repercussions would be. Hage G Geingob, then Chairman of the Drafting Committee, understood that, and built bridges to encourage dialogue towards progress. We were able to reflect on those days during the recently celebrated 20th anniversary of our Constitution.

Mudge was also correct when he said that we, the elected representatives of the Namibian people, wrote the Constitution. Although we had the 1982 Constitutional Principles before us as a drafting framework, our Constitution is the product of serious internal political negotiations and progress. We debated every aspect of it until we reached consensus. Only then, did we instruct, in specific terms, the drafters to put that consensus into the appropriate legal language to our collective satisfaction. All this was done under a very able, forceful chairperson, Hage G Geingob, who was also a great builder of consensus. We never had to vote on a single issue even though we were a collection of political parties from across a wide spectrum of political and ideological convictions.

The point is that, when we first sat together in that Drafting Committee, an All-Party Standing Committee, we realised we had a common mandate from the Namibian people to produce a truly Namibian Constitution. I like to think that it was this sense of shared obligation that made us instantly think as Namibians and not in the first instance as leaders or members of political parties. This is what made it so easy for us to write a constitution in 80 days. The Namibian Constitution is, therefore, the collective brainchild of all those who served on that Committee. It is a constitution that, to my mind, represents a new vision, self-determination, and reconciliation. Our Constitution is at once our victory, our shield, and our guide for the future for all our compatriots.

But it is only a piece of paper: Namibians did not inherit a democratic political culture. Such a culture did not exist in Namibia. Indeed, it did not exist in South Africa until we succeeded here and showed them the way forward. So, in the process of creating that political culture, the values of tolerance and cooperation became very important. This is our task as elected leaders in our National Assembly and we dare not deviate from it.

Conclusion

I conclude by submitting that, yes, we have a fine Constitution; so far, so good. There is political stability, visible peace, and social relations in the country are harmonious. But for our democracy to flourish, for our Constitution to be written into the hearts and minds of the people, we – as the government, as the Parliament, as the Judiciary, as a nation – must be able to deal with poverty, land reform, homelessness, joblessness, and all the other social challenges. If not, this model, this success story so far, will be short-lived. Without economic and financial underpinnings, Namibia's democracy will remain fragile. Namibia's people must have confidence in the future.



The art of compromise: Constitution-making in Namibia

Dirk Mudge

How can we hope to understand the world of affairs around us if we do not know how it came to be what it is?

AL Rowse

For more than a century, the country that was to become Namibia was ruled in terms of constitutions and laws in whose drafting the inhabitants were never involved and seldom properly consulted.

During 1883, Adolph Lüderitz, a German merchant, established a trading station at what is today the coastal town of Lüderitz. To protect his interests, he persuaded the German Government to declare a protectorate in 1883 over large tracts of land in the south-western parts of the future Namibia.¹

From 1883, the country was first ruled by the military under *Landeshauptmann*² Curt von François, and then, in 1909, by a Landesrat.³

After the German forces were defeated by South Africa in 1915 and the subsequent end of the First World War in 1918 and the Peace Treaty of Versailles on 28 June 1919, South Africa took over control of the territory. A military government under an Administrator was installed, and continued to govern after South West Africa (SWA) was entrusted to South Africa to be administered as an integral part of the latter in terms of a mandate signed on 20 December 1920.

In 1925, South Africa, in terms of the SWA Constitution Act,⁴ introduced a Legislative Assembly for SWA with 18 members. Of these, 12 were elected by white voters and the other six (white) members were appointed by the Administrator. A four-member Executive Committee was also provided for.

In 1949, shortly after the National Party in South Africa defeated the United Party in a general election, the South African Parliament amended the SWA Affairs Act⁵ to give the

1 For the sake of clarity, I shall hereafter refer to the country as *South West Africa* when I discuss the period before Independence, and as Namibia from Independence onwards, even though the country went by the name *South West Africa/Namibia* for a while in the 1980s.

2 Captain.

3 Legislative assembly.

4 No. 42 of 1925.

5 No. 23 of 1949.

white voters in SWA direct representation in both houses of the South African Parliament by way of four Senators and six Members of Parliament. Thereafter, all 18 members of the Legislative Assembly were to be elected by the white voters in the territory. The South African Citizen Act⁶ extended South African citizenship to anyone born in SWA, but only whites had the vote. For all practical purposes, these laws made SWA a fifth province of South Africa.

In 1964, the South African Government, under Prime Minister Dr Hendrik Verwoerd, implemented the infamous Odendaal Plan. In terms of this Plan, 400 white-owned farms were expropriated to extend the so-called homelands set aside for the country's indigenous peoples.

In 1969, several Departments previously administered by the Executive Committee were placed under control of Ministers of the South African Government. The SWA Administration was, in this process, degraded to the level of a provincial administration, similar to that of other South African Provinces. This amounted to a de facto incorporation of the territory and had far-reaching international consequences.

Ethiopia and Liberia, the only African members of the United Nations (UN) who had been members of the League of Nations, instituted legal proceedings in the World Court against South Africa in 1960 on the grounds that the latter was administering SWA in a manner contrary to the League's mandate, the UN Charter, the Universal Declaration of Human Rights, and the opinions of the International Court of Justice (ICJ).

Six years later, in 1966, the World Court dismissed the applicants' claims because Ethiopia and Liberia had no rights or interests in the case. The court's ruling was widely interpreted as a victory for South Africa, even though there was no factual evidence to back this up.

The World Court also made it clear that it was not entitled to pronounce judgment on the merits of South Africa's administration of SWA.

In 1968, the UN General Assembly adopted a resolution which –

... took into account General Assembly Resolution 2145, by which the General Assembly of the United Nations terminated the mandate of South Africa over South West Africa and assumed direct responsibility for the Territory until its independence.

On 29 July 1970, the UN Security Council requested advice from the ICJ. The question put to the ICJ was this: What are the legal consequences for States of the continued presence of South Africa in South West Africa (Namibia) notwithstanding Security Council Resolution 276/1970.

In 1971, the ICJ made the following pronouncement:

6 No. 44 of 1949.

As the continued presence of South Africa in South West Africa is illegal, South Africa is under obligation to withdraw its administration immediately and thus put an end to its occupation of the territory.

Following the ICJ's directive in 1970 and far-reaching decisions by the UN, it became evident that South Africa was under tremendous pressure to withdraw its administration from SWA.

In 1972, local leaders had their first taste of international politics when Dr Kurt Waldheim, the UN Secretary General, visited South Africa in an effort to resolve the lingering SWA problem. Dr Waldheim paid a brief visit to the region to spell out the seriousness of the situation to local leaders. It was evident that he wanted to avoid confrontation and further actions by the UN General Assembly. During his visit to South Africa, Dr Waldheim indicated that he would appoint a special representative to visit that country and SWA for consultation with local leaders, apparently to find common ground.

Swiss diplomat Dr Alfred Escher, accompanied by a certain Mr Chaco from India and a Mr Pedanou from Togo, arrived in Windhoek in the beginning of 1973. Shortly before their arrival, Dr Hilgard Muller, the South African Minister of Foreign Affairs, unexpectedly requested me to accompany Dr Escher on a tour to various parts of the Territory. This was my first opportunity to have extensive deliberations with a representative of the international community, while hearing the views of the black inhabitants – a domain previously reserved for the South African Government and its representative in SWA, the Commissioner General for the Indigenous Peoples of SWA, Mr Jan de Wet. Mr De Wet accompanied Dr Escher on his visit to the northern homelands, Ovambo and Kavango.

When I took over from Mr De Wet at Otjiwarongo, I encountered my first problem, namely accommodation for Dr Escher's group and a place where I could entertain them and create an opportunity to meet local residents. The local hotel was initially not prepared to accommodate them because of the 'non-whites' in the group. The Mayor of Otjiwarongo explained to me that it would also be an embarrassment to make his property available for a barbeque. I eventually succeeded in convincing the hotel owner that the men were from the UN. This was my first experience in international politics, but certainly not my last. More were still to come on our trip to the South. Dr Escher addressed gatherings of Nama people, but instead of listening to them, he became prescriptive – proposing a federal system of government. I warned him on several occasions that South Africa's declared policy, as set out in the SWA Survey of 1967, was that the people themselves would decide on their system of government, and that, to my mind, he was overstepping the boundaries of his assignment.

Relations between Dr Escher and me deteriorated to such an extent that I phoned Dr Muller and Mr Pik Botha – then serving at the African Desk in the Department of Foreign Affairs – to meet the delegation at Oranjemund in order to clarify the purpose of Dr Escher's visit. I did not feel experienced enough to solve the problem, however. After Dr Muller and Mr Botha's visit to Oranjemund, our meetings on our way back to Windhoek were more fruitful. But again, we had problems with accommodation. In

Keetmanshoop and Mariental, the hotels were not prepared to accommodate our group for the same reasons mentioned before. We therefore had to overnight at the half-completed Hardap rest camp. These experiences made me more sensitive to racial discrimination than I had been before.

The Prime Minister's Advisory Council

During a meeting in Pretoria between Dr Escher and the Prime Minister of South Africa, Mr John Vorster, they reached an agreement that the Prime Minister would take full control of the administration of the Territory and that he would establish an office in Windhoek. Thus, instead of trying to find a way to end South Africa's illegal control over SWA, it was reinforced.

At the same meeting it was also decided that an Advisory Council, representative of the inhabitants of the Territory, would be assembled. The Commissioner General, Mr De Wet, was asked to nominate representatives for the indigenous groups, while Adv. Eben van Zijl and I were nominated as representatives of the white inhabitants.

I did not agree with the composition of the Advisory Council because most of the representatives were indoctrinated homeland leaders who were favourably disposed towards the South African Government. In March 1973, I made contact with Mr Clemens Kapuuo, Paramount Chief of the Herero people, who, since the UN had come into being, had petitioned the world body to bring an end to South Africa's occupation of the Territory.

Kapuuo was seen as an enemy by the South African Government, in spite of the fact that he was an outspoken opponent of violence or an armed struggle. Kapuuo refused to join the Advisory Council, but agreed to have further discussions with me regarding the future of SWA. Even at this early stage, it was evident that there were serious differences between me and my white colleagues on the one hand, and between us and the South African Government on the other.

House of Assembly

The October 1973 Session of the UN General Assembly

During the trip with Dr Escher, I realised that I was not adequately informed about the international situation. I was thrown in at the deep end without any background on the problems facing our country at international level. Dr Muller responded favourably to a request from me to attend the forthcoming Session of the UN General Assembly as an observer.

My visit to New York for this purpose in 1973 can be seen as a turning point in my political career. For the first time, I realised that South Africa was fighting a losing

battle regarding its control and administration of SWA. When Dr Muller ascended the rostrum to deliver his address, the vast majority of the members walked out, with only the representatives of a few Western countries and Malawi remaining. I conveyed my assessment of the situation to Mr Pik Botha, who attended the Session, and Mr Carl von Hirschberg, South Africa's Permanent Representative to the UN. I suggested that the only solution to the problem was to let the people of SWA determine the future of the country, as was promised to them in 1967.

Another incident that had a major impact on my way of thinking was a meeting with Mr Kapuuo, who was in New York to address the Fourth Committee of the UN. The two of us agreed that neither the UN nor South Africa could permanently solve the SWA problem because the UN was biased in favour of the South West Africa People's Organisation (SWAPO), who wanted to take over control of the country by force, and was biased against South Africa, who wanted to impose their policy of separate development on SWA. We also agreed that the armed struggle needed to be terminated and that a democratic solution should be found instead.

During this meeting with Mr Kapuuo, I understood for the first time the feelings of an oppressed black inhabitant of this country, betrayed by an organisation on which he and his people had for many years relied to find a peaceful and democratic solution to the Territory's problems. Mr Kapuuo felt beleaguered by the South African Government, who labelled him an enemy, and the UN, who had betrayed him. This meeting between two former political enemies led to a sincere friendship which lasted until his assassination in March 1978.

Prior to my departure from New York, I arranged a meeting with Prime Minister Vorster in Pretoria. I informed him that Messrs Botha and Von Hirschberg and I had come to the conclusion that South Africa's position at the UN was under threat, and that the only remaining solution was self-determination.

Mr Vorster undertook to arrange a meeting in January 1974 to discuss my proposals. On 24 January that year, a committee – later referred to as the *Quo Vadis Committee* – had its first meeting to discuss ways and means to enable the people of SWA to exercise their right to self-determination.

Mr AH du Plessis and I represented the National Party of SWA. The Prime Minister was accompanied by Ministers of his Cabinet, senior officials from certain Departments in the South African Government, and Mr De Wet, the Commissioner General for the Indigenous Peoples of SWA.

This was the first in a series of meetings of a committee under the chairmanship of Prime Minister Vorster, which ultimately led to the establishment of the constitutional conference later known as the Turnhalle Conference. I repeated my view that the real leaders of the people, including Kapuuo, needed to be invited to participate in the proposed conference.

Minister MC Botha and Mr Jan de Wet did not agree, however, and insisted that the homeland leaders be invited instead. SWAPO consistently refused to talk to internal leaders and made it clear that they were only prepared to talk to South Africa.

The first step towards self-determination

The Turnhalle Conference, an initiative of the people of South West Africa, representing 11 political parties and representing 11 population groups, convened in September 1975. This group included Mr Kapuuo, the leader of the National Unity Democratic Organisation (NUDO). I was elected as Chairman of the Conference, and had the opportunity to play a decisive role in uniting the delegates with a Declaration of Intent, which envisaged independence for the region by peaceful means as the ultimate goal.

It soon became obvious that my National Party colleagues and I had different agendas. Messrs Du Plessis and Van Zijl obviously wanted to safeguard white interests at the expense of the other groups, while I stood firmly on the principle of non-discrimination and respect for human dignity. Indeed, I advocated better human relations throughout my political career.

When a draft Constitution for an independent Namibia was discussed at the Conference, it became evident that there were serious disagreements between me and my National Party colleagues regarding the functions and powers of the different levels of government. My colleagues proposed extensive powers for second-tier (ethnic) authorities and a ‘toothless’ central government, while I proposed a strong central government with limited powers to ethnically based (cultural) authorities.

A more serious point of dispute was the National Party’s claim that the Representative Authority for Whites had to have jurisdiction over the so-called white area, in spite of the fact that more black than white people lived in that area. Relations between my party colleagues and me became more strained, and I was accused of disloyalty. My views on human relations and respect for human dignity were seriously challenged. I could not remain silent any longer.

Addressing a meeting in the small village of Kamanjab in November 1976, attended by farmers from that area, I declared that I did not need apartheid laws and the Prohibition of Mixed Marriages Act⁷ to maintain my identity. I also suggested that the National Party of SWA should sever its ties with the party in South Africa. I expressed myself strongly in favour of political cooperation across racial divides. National Party leader, Mr Du Plessis, reprimanded me sharply for criticising the party in a public speech.

Congress of the National Party, September 1977

After several attempts to resolve policy differences, I announced that I would challenge the National Party leadership at the Congress. In the weeks prior to the Congress I had

7 No. 55 of 1949.

discussions with a small group of party members who openly sided with me. We focused on policy matters, and agreed that my making myself available as party leader was, in the first instance, not a personal matter, but an opportunity for the Congress to either accept or reject my constitutional proposals. We also decided that I would not be personally involved in an election campaign.

After my announcement that I would challenge his leadership, Mr Du Plessis made it abundantly clear that, should he be re-elected, I would either have to accept his leadership and his policy, or leave the party. He said he would do the same, should he lose.

I lost by six votes (141–135). I had no option but to leave the Congress. The last words I spoke before leaving the hall was to thank those delegates who had voted for me for their support, and state in conclusion that “I’m leaving, but you must stay and correct what is wrong in the Party.”

In spite of my appeal, 78 delegates followed me when I walked out of the hall. There was chaos outside. Reporters were running around to get more information and delegates had no idea what was going to happen next. Somebody suggested that we meet that same evening to discuss the road ahead. At this meeting it was decided that action committees had to be formed in all constituencies, and that a conference would be held to decide on future action.

On 5 October 1977, the Republican Party was formed and I was elected as its leader. One month later, on 5 November, the Democratic Turnhalle Alliance (DTA) was established. Mr Kapuuu was elected as President, and I as Chairman. These developments, as could have been expected, divided the white population and led to emotional outbursts. Republican Party leaders and supporters were called traitors and our meetings were often disrupted. The DTA was the first-ever non-racial political organisation registered in South West Africa in the history of the country.

The Western Initiative

Simultaneously with the above-mentioned events, five major Western powers – Canada, France, Germany, the United Kingdom and the United States of America – took the initiative and proposed that a Constituent Assembly be elected under UN supervision. It was obvious that proposals such as these by Western countries were prompted by the initiative taken by the Turnhalle Conference.

We never considered a unilateral declaration of independence as an option.

I succeeded in convincing the DTA leaders to accept the Western proposals, subject to certain conditions, mainly with regard to the impartiality of the UN.

1978 elections

Because of the slow progress made with the negotiations between South Africa and the UN, and South Africa’s reservations regarding the UN’s impartiality, on 20 September

1978 Prime Minister Vorster declared that he was obliged to honour his government's commitments to the Turnhalle Conference, and that SWA would become independent on 31 December 1978. He announced that elections for a Constituent Assembly would be held in December that same year.

I had serious doubts about the wisdom of having an election without participation by SWAPO. SWAPO, however, having been recognised by the General Assembly as "the sole and authentic representative of the people", did not show any interest in a democratic process and insisted that the country be handed over to them. Be that as it may, the election provoked a serious and open debate concerning the independence issue.

White South West Africans – who had never believed that South Africa would give up SWA – realised that, sooner or later, the country would become independent. An unknown number of them sold their properties and left for South Africa.

Even without SWAPO's participation, it was the first multiracial election in the history of SWA, and can be described as an exercise in democracy. In spite of the reasons given by the South African Prime Minister as regards the holding of the 1978 elections, I suspected that, because of the infighting in SWA politics, he wanted the real leaders of the country to be elected. This was later confirmed by his successor, Mr PW Botha.

During the election campaign I experienced strong opposition from right-wing parties and some of my meetings were disrupted. At some of these meetings I was bombarded with eggs and tomatoes and, at Grootfontein, even assaulted. Emotions ran high and I was called a sell-out and traitor because I supported independence and condemned apartheid.

Reconciliation, respect for human dignity and an end to apartheid and racial discrimination formed the core of my colleagues' and my speeches. Even if this election did not achieve international recognition, it brought about a change of heart and attitude that was recognised and applauded by SWAPO leaders when they returned to Namibia in 1989.

Mr Hage Geingob and Mr Theo-Ben Gurirab assured me that the Namibia they came back to was not the same one they had left.

I often said that, although we did not write a final Constitution on paper during and after this election, we wrote a Constitution in the hearts of people, paving the way for a peaceful independence process.

The election was won by the DTA with an overwhelming majority. However, at the elected Assembly's first meeting after that, the newly elected Prime Minister of South Africa, Mr PW Botha, requested the elected members of the Constituent Assembly not to continue with the drafting of a final Constitution. This new approach by the South African Government originated at a meeting they had had with the five above-mentioned Western powers. The South African Government undertook to do its best to persuade the

elected leaders not to continue with the drafting of a Constitution, but to consider ways of achieving international recognition through cooperation in terms of Resolution 435. He described the election as a process to elect leaders.

Proclamation AG 21 of 14 May 1979

The South African Government agreed to transform the Constituent Assembly into a Legislative Assembly. The Administrator-General consequently issued proclamation AG 21 to institutionalise this new arrangement. For the first time in history, black citizens could participate in the making of laws at national level.

One of the first laws to be passed by this Assembly was a bill I introduced on 8 June 1979 to abolish racial discrimination in public facilities and residential areas. This led to another emotional outburst from conservative whites. On 11 June that year, probably for the first time in SWA's history, hundreds of white demonstrators bearing placards gathered outside the Turnhalle building. They placards bore derogatory remarks about me and my white colleagues.

The introduction of this anti-apartheid law also worsened the already strained relations between me and Prime Minister Botha. Mr Botha could not forgive me for dividing the whites in SWA, and this law, and especially the penalty clause it contained, angered him. I was summoned to Pretoria and warned that unless the penalty clause was scrapped, he would immediately dissolve what was then termed the *Interim Government*. He also insisted that the majority party should include members of the minority ethnic parties in its executive. I undertook to make some concessions by amending the penalty clause to provide for the loss of licence in the case of contravention of the law, and deleted the imprisonment provision. As was proven later, Mr Botha was empowered and prepared to dissolve the National Assembly – the last thing I wanted to have happen. We were, however, satisfied when the Administrator-General approved the bill.

On 2 August 1979, Dr Gerrit Viljoen succeeded the first Administrator-General, Judge Theunie Steyn. It immediately became obvious that Dr Viljoen had been instructed by the South African Government to establish second-tier authorities for the different population (ethnic) groups on the basis of the draft Turnhalle Constitution. I tried to convince Dr Viljoen to limit the powers of such Representative authorities to those functions directly affecting ethnic groups. He made certain concessions, but it was evident that he had definite instructions.

Proclamation AG 8 of 1980

Dr Viljoen published Proclamation AG 8, thus establishing Representative Authorities for the different ethnic groups. On 12 June 1980, he also established a 12-member Executive Council. I was elected as its first Chairman. Apart from the fact that functions that should have been administered by the central government were allocated to Representative Authorities, the Representative Authority for Whites was allocated sources of state

revenue that the others did not get. This meant that the Representative Authority for Whites had surplus funds, while the others could do little to improve standards of education, health care, and the other responsibilities entrusted to them. This, more than anything else, was the beginning of the end of the second-tier system of government.

On 2 August 1980, Mr Danie Hough became the third Administrator-General of SWA. It was generally accepted that the Interim Government would be allowed to administer the Territory without interference from South Africa until Resolution 435 – elections under UN supervision – came into force.

The implementation of Resolution 435 was delayed several times because of differences between South Africa and the UN. After Mr Ronald Reagan became President of the United States in November 1980, he found common ground with the South African Government regarding the withdrawal of Cuban and Soviet troops from Angola.

During Reagan's term of office, the US Administration – particularly Mr Chester Crocker, the new US representative in the Western Contact Group – embarked on a new policy of Constructive Engagement. Mr Crocker's approach was that once the Angolan problem had been resolved, the problems regarding the Implementation of Resolution 435 could be resolved without much trouble.

It was without doubt the best option, but it took years to achieve this goal.

Another positive development during this period was the endorsement by the UN Security Council of the 1982 Principles proposed by the Western Contact Group, accepted by the internal parties and endorsed by the Security Council. These Principles stipulated, amongst other things, that the Constitution needed to be adopted by a two-thirds majority in the yet-to-be-elected Constituent Assembly.

Realising that this exercise might take some time, Mr PW Botha – now elevated to President of South Africa – again interfered in the affairs of the Interim Government: this time in an attempt to appease his right-wing supporters in South Africa and SWA.

On 12 November 1982, I was again summoned to Pretoria. Upon my arrival I found five leaders of ethnic parties in the company of President Botha, namely Koos Pretorius, Hans Diergaardt, Justus Garoëb, Barney Barnes, and Peter Kalangula. Several senior members of the South African Defence Force were also present. President Botha gave us until the next morning to make proposals on how to restructure the Interim Government to make provision for ethnic representation – that is, in his words, “to make the Government more representative”. I refused to cooperate. I could not understand the President's logic. How could he consider a government elected in a ‘one person, one vote’ election as not being representative? It became obvious that the President was obsessed with the idea that a government could only be representative if all ethnic groups were included. President Botha's obsession consequently spelled confrontation between the two of us.

On 19 November 1982, President Botha arrived in Windhoek, accompanied by Mr Pik Botha, and I was summoned to the Administrator-General's office. President Botha accused me of many things, one of which was repudiating him in public. When he again raised the issue of ethnic representation, I realised that he was looking for a reason to dissolve the elected government and to replace it with an ethnically composed Legislative Assembly. After a heated argument I left the room, slamming the door. The following morning, President Botha announced that the Interim Government would be dissolved on 28 February 1983.

On 10 January 1983, two months before the Interim Government's intended dissolution, the Administrator-General informed me that he was not prepared to approve a Bill on Public Holidays introduced by me and already passed by the National Assembly. The Bill abolished certain public holidays, amongst which was the Day of the Covenant, which had sentimental value for the white population only. The Bill caused an emotional reaction from conservative Afrikaners, and President Botha had probably instructed the Administrator-General not to approve it. On 18 January that year, I resigned as Chairman of the Council of Ministers in protest. Before the Speaker could call a special session of the National Assembly, the Administrator-General dissolved the National Assembly with immediate effect. After this humiliating experience, I was determined never to serve in any Interim Government again.

On 15 February 1983, Dr Willie van Niekerk succeeded Mr Danie Hough as Administrator-General. Much to my surprise, he announced that he intended to convene a State Council, similar to the one he had chaired in South Africa. The purpose of the Council would be to draft a Constitution for an independent Namibia. I was vehemently opposed to any South African initiative and conveyed my views to him accordingly.

Two members of my party, the DTA, had secret meetings with the Administrator-General. Similarly, two newcomers to the internal politics of SWA – Mr Andreas Shipanga and Mr Moses Katjuongua – had meetings with the Administrator-General. They proposed that a Multiparty Conference (MPC) instead of a State Council be convened to discuss the constitutional future of Namibia. As in the past, they did not have any problems in convincing members of the DTA and other parties to participate, seeing that there would be financial benefits involved. I found myself standing alone in the DTA and, much against my will, I agreed to participate – provided that the MPC confine itself to a discussion on constitutional proposals, and that an interim government would not be considered. I should have known better. It did not take long before the possibility of another interim government was raised and strongly supported by virtually every member of the MPC.

During May 1985, the Administrator-General arranged a meeting in Cape Town between President Botha and the leaders of the MPC. The objective of the meeting was to hand over a petition to President Botha requesting a transitional government. The idea of a

transitional government had earlier been accepted by the MPC at the initiative of Messrs Shipanga and Katjuongua. There was a strong feeling among MPC leaders that I should keep a low profile during the meeting, because they were afraid that I might bedevil everything.

They were aware of my reservations regarding the establishment of an interim government and the strained relationship between me and President Botha. Right at the start of the meeting, President Botha referred to the incident in 1982, insisting that I apologise for repudiating him. Looking at the faces of my colleagues with whom I had come a long way, I had to consider whether I should remain stubborn or rather make a compromise which I had, for the sake of unity, done several times before.

I did not apologise, but I stated that, had I done anything that might have obstructed progress regarding the future of my country, I was sorry. Much to the relief of my colleagues, President Botha accepted my 'apology' and my colleagues got their interim government. In terms of Proclamation R101, the Transitional Government of National Unity (TGNU) was established on 17 June 1985, and recomposed to represent the following parties:

- DTA – 22 members
- Aksie Christelik Nasionaal (ACN, a white party) – 8 members
- Federal Convention of Namibia (FCN, a Baster party) – 8 members
- Labour Party (a so-called Coloured party) – 8 members
- SWAPO-Democrats (SWAPO-D) – 8 members, and
- National Patriotic Front (NPF) – 8 members.

President Botha got what he wanted: an ethnically composed interim government. With it, he got the support he demanded of colleagues who were supposed to have accepted Resolution 435, which provided for a democratic election under UN supervision. Representative Authorities, with the Representative Authority for Whites being financially far better off than the others, survived again. SWAPO-D and the NPF did not control a Representative Authority, since they had never contested an election. Because of that, they were opposed to the existence of Representative Authorities.

The DTA, having strong and proven support, found itself in a much weaker position than before. It could easily be outvoted by the other five (mainly ethnic) parties.

Again I found myself at a political crossroads. Should I quit, i.e. be politically marginalised or totally neutralised? By staying on, I could possibly influence future developments and ensure that SWAPO did not get the two-thirds majority as required by the 1982 Principles. I could only hope that, should the TGNU succeed in bringing about the necessary social and economic changes and agree on a draft Constitution, it could improve the internal party's chances of getting more than 33.3% of the votes in the proposed election. I decided to stay on, knowing that the road ahead would not be an easy one. I was fighting a lone battle, but I refused to give up. On more than one occasion the South African Government tried to get rid of me.

On 1 July 1985, Adv. Louis Pienaar became the last Administrator-General of SWA. He served in this capacity until Independence. I expected him to level the playing field for the internal parties and to assist them in winning the confidence of the population, but he was the worst of them all. During the last four years before Independence, he opposed and obstructed me in every possible way. Adv. Pienaar was a close friend and loyal servant of President Botha's, and although it might sound stranger than fiction, the two of them continued to put the TGNU under pressure to protect and promote ethnicity. When I proposed that the ethnically based Representative Authorities be abolished, Adv. Pienaar, in a report that became available after Independence, referred to my "demagogical utterances" and accused me of "trying to be popular by emphasising independence", "confusing Mudgian logic", "a domineering style and autocratic behaviour", and spoke about a "post-Mudge era". In one of his reports to President Botha, he stated that he had reliable information that I was not popular in the ranks of the DTA and the TGNU. This conclusion was not entirely unfounded, because some of my colleagues did not look forward to Independence: to them it meant losing their salaries, fringe benefits, and the opportunity of promoting their personal images. During a DTA executive meeting on 29 June 1987, I made the following remark: "After 13 years, I am no longer prepared to tolerate political opportunists who can be bought with a car, a house and a salary." My statement was taped by an informer and made available to the Administrator-General.

In a desperate effort to force the TGNU to protect minority (ethnic) interests in a draft Constitution, President Botha announced South Africa's financial contribution to SWA's budget would be reduced by R200 million. At this very late stage, Adv. Pienaar wanted an election for whites to take place, but this required approval from the TGNU – and we rejected it. In spite of all this and the financial threat, I insisted that minority rights could only be protected by the majority and that we would make ourselves the laughing stock of the world if we continued insisting on the protection of minorities: only minorities had been protected in the past, while the frustration, fears and suffering of the majority had not been appreciated.

Cuban withdrawal from Angola

In terms of a New York agreement between South Africa, Angola and Cuba, the withdrawal of Cuban troops from Angola was finally agreed upon on 22 December 1988, paving the way for the implementation of Resolution 435. On 16 January 1989, the Security Council set 1 April that year as the target date for the implementation of Resolution 435 and, on 1 March, in terms of the Resolution, the TGNU was dissolved. On the same day, an election for a Representative Authority for Whites took place. On principle, the Republican Party did not participate: a white election, only months before the election scheduled for 7–11 November 1989 in terms of Resolution 435, was considered a futile exercise.

Ten political parties registered for participation in one of the world's most fiercely contested elections. SWAPO won the election, but since it could not draw two thirds of the vote, it was not mandated to write a Constitution independently.

Drafting a Constitution for an independent Namibia

The Constituent Assembly, elected in terms of Resolution 435, met on 29 November 1989. After a few introductory speeches and policy statements, it became obvious that drafting a Constitution in a meeting consisting of 72 members would be a mission impossible.

It would have been even more difficult because the meetings would be open to the press and the public. This would without doubt have had an inhibiting affect on the members and would make them hesitant to make compromises that would make them unpopular with their parties. The Assembly therefore tasked the already elected Committee on Rules and Standing Orders with the responsibility of drafting a Constitution. This Committee, henceforth referred to as the *Constituent Committee*, consisted of 21 members. Our meetings were not open to the public or the press.

The parties who won seats in the Constituent Assembly were represented as follows:

- SWAPO – 11
- DTA – 5
- ACN, FCN, NNF, NPF and UDF – 1 each.

Constitutional proposals submitted by parties

On 8 December 1989, political parties were given the opportunity to table their constitutional proposals. To my surprise, only two complete and comprehensive documents were handed in: the SWAPO draft Constitution and the DTA draft Constitution.

According to our information, SWAPO's proposal was drafted by a South African judge of Indian descent. Although I had no further information on the drafting of their Constitution, I concluded that the contents of our two proposals were not that far apart and, in a spirit of give and take, we could reach consensus.

The DTA draft was the result of more than ten years of discussions within our party and negotiations with the South African Government. During this period, we stood firm on the principle of a central government elected by all South West Africans on the basis of universal franchise (one person, one vote). The DTA never ignored the existence of different ethnic or cultural groups, but had problems in clearly defining *ethnic group*, what their areas of jurisdiction (geographic or demographic) were, and how to register voters in terms of ethnic groups. This would have been very problematic in the case of the white 'ethnic group', for example, with its diversity of languages and cultures. But these were problems we had to face, and even our party had members who were not completely 'detrribalised'.

The TGNU eventually passed the Constitutional Council Act⁸ with the following task: "To work out a basis on which the territory can exist as an independent and Sovereign

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state”. The Chairman was to be a judge or a retired judge. Judge VG Hiemstra, a retired judge from South Africa, was approached to lead the Council.

The Council consisted of 16 members appointed by six parties. The DTA was represented by six members and the other five parties by two each. On 10 June 1987, the Constitutional Council approved the final draft with the required two-thirds majority. The National Party and the Basters voted against the final draft, which provided for the following:

- A Bill of Rights
- A ceremonial President
- A National Assembly of 60 members elected by proportional representation
- A Senate of 28 members
- Regional Councils
- Municipal Councils, and
- An independent judiciary.

SWAPO draft becomes the Working Paper

After having studied the Constitution drafts handed in by some of the political parties and in particular the SWAPO proposals, I suggested that we use the SWAPO draft as a discussion document, later referred to as the *Working Paper*. Committee members were noticeably surprised and they afterwards admitted that they had wondered what had motivated me to make such a proposal. Mr Mosé Tjitendero understood, and reacted as follows:

In any conference you start with a working document. You look for its shortcomings and its omissions and then you try to rectify those. I thought the reason why Mr Mudge suggested the adoption of a working document was that he took into account how conventionally it covers the areas that are dealt with by Constitutions.

Suspensions and distrust soon disappeared and a team spirit developed.

I could not imagine that former enemies could join hands in a spirit of goodwill and patriotism, determined to write a Constitution for a democratic and peaceful Namibia. We almost immediately became friends and I will always remember the way in which my DTA colleagues and I were accepted unconditionally as co-writers of the Constitution.

We were privileged to have had a very capable Chairman, Mr Hage Geingob. He was a real consensus-builder, and often succeeded in ‘marrying’ SWAPO and DTA proposals.

The Constituent Assembly unanimously decided that the draft Constitution needed to adhere to the 1982 Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia, drafted by the five Western powers and circulated as a document of the Security Council.

These proposals, often referred to as “the holy cow”, contained principles accepted by all parties before the 1989 election. It was obvious from the outset that all members were deeply aware of the responsibility resting upon our shoulders. The future of our country was at stake. We had to shape Namibia’s future – and this would not be an opportunity to go for each other’s throats. We all realised that it was not only a privilege to be involved, but that it was the final round of a process which had been dragging on for years. There was no turning back. Party-political considerations had to make way for positive and rational thinking. We were fully aware of the obstacles ahead of us, but we also considered the alternative if we did not succeed in reaching consensus on a Constitution.

Of course we also had our lighter moments. Once, we were discussing the composition of the government and I referred to the system in another country. Mr Nahas Angula remarked that we must not be ‘copycats’ by taking our cues from other Constitutions. I reminded him that SWAPO’s proposal contained a Chapter “Directive Principles of State Policy”, literally borrowed from the Indian Constitution. He was caught by surprise. Because I strongly opposed the inclusion of matters of policy in the Constitution, I was curious to determine where they had come from. Because I was informed that the SWAPO draft had been compiled by a Judge of Indian descent, it was easy to find the source.

This did not often happen to Mr Angula. I admired him for his sharp intellect, rational thinking, and willingness to listen and to consider another person’s point of view. Once, when I had fought hard to convince the Committee of something, he remarked: “I agree with Mr Mudge, as I usually do.” Of course, this was not always the case, but it is true that we often agreed.

Having now mentioned his name, it would only be fair to mention a few other members of the Committee who impressed me and who played an important role in drafting our Constitution.

During the entire period of three months that we met in the Constituent Assembly, the members of all parties with the exception of Mr Kosie Pretorius of ACN impressed me with their positive approach and their willingness to consider different views and proposals. It often happened the members of the same party disagreed and supported proposals coming from another party.

Koos Pretorius was the exception. In spite of having accepted the SWAPO draft as a working paper, he differed fundamentally from the basic principles contained in both the SWAPO and DTA proposals and there was no way his outdated Turnhalle principles could be accommodated.

As a matter of fact, he did not even try to incorporate them.

He seldom participated in the deliberations and reserved his position on almost every article, preferring to ask permission to state his position “outside”. The Chairman often

referred to Mr Pretorius's "standard position". But the Constitution was not drafted 'outside'; it was not even drafted in the Constituent Assembly, but in the Constituent Committee. When I asked him why he did not participate more in the debates, he replied that it was because he had difficulty expressing himself in English. I told him that this should not be a problem and that English was not my home language either. Even his party colleague Mr Jan de Wet found it difficult to support him all the way.

Points of material dispute

Immediately after the SWAPO draft was accepted as the Working Paper, members were given the opportunity to identify points of material dispute, i.e. articles which they wanted to have deleted or amended. The following points were identified:

The President

SWAPO proposed a President with extensive powers assisted by Ministers without original powers, and who would be mere advisers to the President. SWAPO's proposals provided as follows:

- The President shall be the head of State and of the Government and Commander in Chief of the armed forces.
- The executive power of the Republic of Namibia shall vest in the President.
- Except as may otherwise be provided by law, the President shall in the exercise of his functions be obliged to act in consultation with the Council of Ministers, but he shall not be obliged to follow the advice tendered by the Council of Ministers or any other person.

The DTA was in favour of a ceremonial head of state as well as a Cabinet of Ministers and a Prime Minister. After a heated debate which lasted several weeks, it was agreed that SWAPO's proposal be amended as follows:

- The President shall be the head of State and the Government and the Commander in Chief of the armed forces.
- The executive power of the Republic of Namibia shall vest in the President and the Cabinet.
- Except as may be otherwise provided in this Constitution or by law, the President shall in the exercise of his duties be obliged to act in consultation with his Cabinet.

Election of the President

SWAPO stood firm on their proposal that the President "shall directly be elected on a secret ballot by a simple majority". SWAPO delegates were adamant that the President would be accountable to the voters and not to Parliament, and that s/he would not be obliged to attend sessions of Parliament. The DTA and other parties wanted the President to be elected by Parliament, that he would attend sessions of Parliament, and that s/he would be accountable to Parliament. Again, this point of material dispute provoked a long and heated debate. It was ultimately agreed as follows:

- The President shall be elected by direct vote.
- The President and the Cabinet shall each year during the discussion of the official budget attend Parliament, during which session the President shall address Parliament on the state of the nation and the future policies of the Government, shall report on the policies of the previous year, and shall be available to respond to questions.

I supported the proposal and stated that the President could hardly be expected to attend all sessions of Parliament, taking into account his multitude of other official and ceremonial duties.

The compromise limited the powers of the President extensively. While the President is more than a ceremonial figure, he cannot execute the executive functions of government without the Cabinet and he is accountable to Parliament.

The National Council (House of Review)

The provision for a bicameral Parliament was strongly opposed by SWAPO, mainly because they feared that nomination of its members by Regional Councils would promote ethnicity. Some of the parties representing mainly ethnic communities insisted on the provision of a second chamber. In the end, SWAPO reluctantly conceded to this.

Proportional representation

SWAPO's proposal provided for single-member constituencies in terms of which the country would be divided into constituencies. A Delimitation Commission appointed by the President would be responsible for demarcating the different constituencies, taking into account the size of the area and number of voters in each constituency. This entailed that constituencies would not all have the same number of voters.

A strong argument in favour of single-member constituencies was that every constituency would be represented in Parliament by a person they had elected independently. The strongest argument against this procedure was that, because of the difference in the number of voters in the various constituencies, a party winning the majority of seats need not necessarily have a majority in terms of total votes cast.

The DTA proposed a party-list system in terms of which seats were allocated to parties in proportion to the number of votes they received. The disadvantage of this proportional representation system was that members nominated by parties would not be responsible for particular constituencies. The DTA proposal was approved.

Affirmative Action

Affirmative Action was not really a point of material dispute since the DTA proposal also made provision for it. But I had serious problems with its formulation and the Article in which it was provided for.

Chapter 1 in Part Two of the Working Paper provided for “Fundamental Rights, Responsibilities and Guarantees”. Article 6 of this Chapter, which dealt with “Equality of Citizens and Freedom from Discrimination”, read as follows:

- (1) All people shall be equal before the law.
- (2) No person may be discriminated against on the grounds of colour, ethnic origin, gender, religion, creed or social or economic status.
- (3) The practice of racial discrimination and the practice and ideology of apartheid, from which the majority of the people of Namibia have suffered so long, shall be prohibited and Parliament shall be entitled to render such practices and the propagation of such practices criminally punishable by the ordinary courts, by means of such punishment as Parliament which deems necessary for expressing the revulsion of the Namibian people to such practices.
- (4) Nothing contained in this Article, or any other part of the Constitution, shall prevent Parliament from making special provision for the advancement of any class of persons within the territory of the Republic of Namibia, who have, in the bona fide perception of Parliament, historically been handicapped socially, economically, politically, or educationally by unfair or discriminatory laws and practices perpetrated by any administration or government prior to the independence of Namibia. [Emphases added]
- (5) The Executive and the Administration shall likewise not be precluded by this article or any other part of the Constitution from advancing such handicapped classes of persons contemplated by the preceding Article by policies and practices conferred on the members of such handicapped classes of persons’ preferences in public employment and in the allocation of educational, housing and welfare resources. [Emphases added]
- (6) The provisions of Article 6b(5) and 6(6) hereof shall cease to be of any application upon the expiry of twenty-five (25) years from the date of the independence of Namibia.
- (7) In the application of any practices and policies such as contemplated in Article 6(5), Parliament shall be entitled to pay regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged to play a full, equal and effective role in the social, political and cultural life of the nation.

I had serious reservations about the provision in Article 6(4) that nothing contained in that Article – or in any other part of the Constitution – could prevent the government from making any special provision for the advancement of “any class of persons”. I identified these stipulations as points of material dispute during the early stages of the Committee’s deliberations, but it was a very sensitive issue and I had to give it a lot of thought – and I did.

Mr Pretorius was often under fire because of his repeated reference to “groups” and “group rights” – and yet, here, SWAPO wanted to provide for groups in our Constitution. Even worse, the SWAPO draft described the previously disadvantaged as a “class of persons”. I strongly objected to the division of the population into classes.

There could be no doubt that Article 6 protects the fundamental freedom from discrimination and primarily that of the individual. Indeed, Sub-article (2) states clearly that “*No person* may be discriminated against” [emphasis added].

My submission was that not all black persons had been disadvantaged equally, that not all white persons had been advantaged equally, and that other considerations should be taken into account as well. A mere division of the population into two classes would be an oversimplification of this complicated issue. My proposal was accepted and the phrase “class of persons” was replaced by “persons”. Thus, once the policy of Affirmative Action was implemented, the individual’s fundamental right would be effected. For instance, if a person’s farm was expropriated, it did not affect the rights of a group (class of persons) but of the individual; and when a person’s application for employment was turned down, only the person could go to court, not the group (class of persons) to which s/he belonged, as the group would only be affected indirectly. This means that not all previously advantaged persons would be affected equally and, likewise, not all previously disadvantaged persons would benefit equally.

Again, my objection was not to the principle, but to the reference to “classes of persons”.

I could, however, not deny that the colour of a person’s skin had dominated the unacceptable policies of the past, and that a common desire to redress the inequalities of the past was understandable.

To accommodate this historical inequality, the Article was replaced by a new one providing for “a balanced structuring of the civil service, defence force, police force and the prison service”. Here, *balanced* meant that these formerly white-dominated bodies needed to be restructured to make it racially balanced as should be the case with land ownership.

The essential point I had wanted to make was that colour could not be the only gauge.

Expropriation and land reform

Land reform was never discussed by the Constituent Committee. In fact, the Constitution does not contain an Article providing for land reform. It is true that the Herero-speaking members of the Committee on several occasions insisted that this issue be discussed, but it never happened. Land reform only came to the fore two years after Independence, when a Land Conference was called. It was obvious at the time that there were concerns in some circles about the Herero nation’s claim for the restitution of ancestral land. The Conference decided against the restitution of ancestral land in favour of a policy on land reform. Strictly speaking, land reform is not a constitutional matter: it is a matter of policy. I will, therefore, not elaborate on this issue.

Expropriation of property did not constitute a new principle. Laws providing for the expropriation of immovable and movable property had existed before Independence – but under the proviso that it could only be done in the public interest. During the discussion of this principle, I emphasised that we were not discussing land reform, but the expropriation of land to build a road, school, or pipeline in the interest of a community or town, i.e. in the public interest.

A secular state

Mr Pretorius of the ACN identified the provision for Namibia to be a secular state as a point of material dispute, but he did not at any stage motivate his objection to it. I, too, had a problem with regard to a secular state as proposed in the Working Paper. I tried my best to convince my colleagues that provision needed to be made for the supremacy of God in the affairs of our country, and wanted to know exactly what the correct interpretation of *secular state* was.

Our legal advisors were very helpful, and provided us with a legal and constitutional interpretation of the word *secular*. It simply means a separation of state and Church, and that there would not be a state religion or a Church recognised by the state, as was the case in the past when the National Party Government and Afrikaans Churches were political allies.

For me, one of the members of SWAPO made it absolutely clear when he said, “We do not want another Iran here.” It must be stated that the Namibian Constitution is not against religion. Freedom of religion is guaranteed in Article 10.

I accepted the explanation and Mr Pretorius did not have anything more to say on this issue in the meeting, but he continued to make public statements outside the meeting. The proposal in the Working Paper was approved.

Adoption of the Constitution

When the Constitution drafted by the Constituent Committee was adopted in front of the Tintenpalast on 9 February 1989, I was excited and proud of our achievement. It was without doubt the climax of my political career. The Chairman, Mr Geingob, came to me and we embraced each other. He was my Chairman and my friend, and the colour of our skins was irrelevant. The final Constitution belonged to all Namibians, irrespective of our political differences in the past.

I was determined to retire from politics and spend the rest of my life with my wife Stienie on our farm, Ovikere. After almost half a century in politics, during which I had had very little time to attend to my farming operations, I had to recover financially. I was on the receiving end of strong opposition and character assassination by my own (white) people, who for a long time had resisted change and independence. I had always had to rely on my own resources: I had never received a salary from a political party, and had used my car and aircraft without compensation. I was tired and wanted to spend more time with my family.

I was confident that, thanks to the spirit in which our new Constitution had been written, Namibia faced a bright future. I also had no doubt that the DTA was more than capable of filling the role of opposition. Both the DTA leaders and my SWAPO Committee colleagues persuaded me to serve in the new National Assembly for one term.

I agreed reluctantly, and even now, 20 years later, I regret having done so, because in a short period of time after Independence many of my dreams vanished. Soon after the establishment of the first government, I discovered that in politics – as in life – you have no permanent friends, but only permanent interests. I was prepared to fulfil my role as a member of the opposition, and I was equally prepared to be criticised. What I did not expect was that my white skin would again become a trump card in the hands of the ruling party and an embarrassment to my own party. My DTA colleagues were accused of being stooges of a white man. This was the last thing I expected from the very same people with whom I had had such good relations in the Constituent Committee. But I was also disappointed by the reaction of my DTA colleagues. They were noticeably embarrassed. For many years I had served under a black President and a black Vice President in the DTA. I had never apologised for that, and at no stage was it ever embarrassing to me. This was, to my mind, not the intention of the writers of the Constitution. Our Constitution condemns racism in the strongest possible terms, and sets reconciliation and racial harmony as a supreme goal. After three years in Parliament I decided to retire in the interests of my country and to remove myself as a stumbling block in the way of reconciliation. But it did not end there: racism also poked its ugly nose into our party affairs, but that is a story for another day.

I found consolation in the fact that I did not experience the same attitude outside Parliament. My humble contribution before Independence was recognised, and I experienced only goodwill and respect from my countrymen and -women. That was the end of my political career and I have since kept a low profile. Alas, the attitude of SWAPO leaders towards me did not change. It became obvious that the role I had played in the past and the contribution I had made in drafting the Constitution became an embarrassment to them. They prefer to see Mr Pretorius as a prototype of white Namibians, and Mr De Wet as a fresh convert.

The Constitution after 20 years

Our Constitution has, without any problems, survived 20 years of Independence. In spite of demands from radical groups and the Monitor Action Group (MAG) to amend the Constitution, the Namibian Government has, as far as I know, not considered these demands favourably.

Most of these suggested amendments were directed at the Articles in Chapter 3 of the Constitution, which provide for the protection of fundamental rights and freedoms. Their amendment is not possible, because fundamental rights and freedoms are entrenched in our Constitution. Indeed, Article 131 provides as follows:

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

Except for Chapter 3, our Constitution can be amended and it might be necessary in future to do so. The procedure to be followed is clearly stipulated in the Constitution. So far, the government has not tampered with the Constitution – and I praise them for that. As I will point out later, the government unfortunately has not always interpreted all the provisions of the Constitution correctly.

The Constitution and Independence are interrelated

The uncertainty that prevailed for many years came to an end when Namibia gained its independence. Namibia was recognised internationally and investor confidence grew, resulting in economic growth. Job opportunities increased as a consequence of a restructured government service and growth in the private sector. Foreign aid became freely available, and the last remnants of racial discrimination were removed. All this and much more changed the lives of Namibian citizens.

The result was a Constitution firmly establishing a multiparty democracy, protecting the fundamental rights and freedoms of every person in Namibia, and setting out to promote the welfare of the people of Namibia, with special reference to the less privileged and the historically disadvantaged. The Constitution also provided for an executive power vesting in the President as well as the Cabinet, and legislative powers vesting in the National Assembly and an independent judiciary. This separation of powers constitutes a very important element in the constitution of a democratic dispensation.

Our Constitution is, therefore, not the product of any political party or person, but the common product of joint effort by patriotic Namibians. Thus, we can expect that all the members of the Constituent Assembly will remain guardians of their own creation. All this makes our Constitution strong. But it was no easy achievement.

Ignorance concerning the provisions of the Constitution

The majority of Namibians have never researched or been informed of the provisions of the Constitution and their fundamental rights enshrined in it. Most people are better informed about the traffic laws and the hunting laws than about the Supreme Law of the state. Much more should be done to encourage citizens to study the Constitution. Making the minutes of the Constituent Assembly and the Constituent Committee available to them will undoubtedly be of great help in such an endeavour. Although courts of law are not obliged to consider the intentions of lawmakers in their judgments, knowing and understanding the Constitution will also greatly benefit ordinary citizens.

I have already mentioned that the meetings of the Constituent Committee were not open to the public and the press. For reasons I have already mentioned, I can see no reason why now, after 20 years, the minutes cannot be released.

National reconciliation

I am sad to say that national reconciliation has not been fully achieved. Clearly, the Constitution alone cannot solve the problem: it only sets the ideal. What is needed is a change of heart, a change of attitude, and observance of the Great Command: love your neighbour as you love yourself.

Wrong interpretations of the provisions of the Constitution: The advancement of persons and the redistribution of wealth (Article 23(2))

In spite of the fact that the Constitution provides for the advancement of “persons”, the government, for the purpose of Affirmative Action, continued to differentiate between ‘classes of persons’, namely a black class and a white class. This, to my mind, was not the intention of the Committee, where both Mr Geingob and Mr Angula agreed with me that not all disadvantaged persons had suffered equally and that not all advantaged persons had benefited equally. They had also agreed with me that the term “class of persons” in the Working Paper had needed to be replaced by “persons”. By way of an example, let me illustrate what the result of this wrong interpretation was. A particular previously disadvantaged person was elected as a Minister or appointed as a senior civil servant. He receives a high salary with all the fringe benefits. He purchases a farm with a soft loan from Agribank, or even a second one in the name of a relative. Perhaps he is allocated a fishing quota or a mineral concession, and is appointed as the chief executive of a leading company. There appears to be no end in sight. He becomes a multimillionaire.

A former colleague of mine who received a fishing concession left N\$8 million to his beneficiaries when he passed away. Ironically, he was very much privileged under the previous government. But he qualified for the fishing quota because he belonged to a disadvantaged ‘class of persons’. But what has happened to tens of thousands of other members of the same ‘class’? Is this not a serious violation of the fundamental principle of non-discrimination?

This unacceptable situation started with a misinterpretation of and confusion regarding the concepts *wealth* and *welfare*. The promotion of the welfare of the people was what the writers of the Constitution had in mind. The redistribution of wealth is mentioned nowhere in the Constitution, while the promotion of the welfare of the people is repeatedly emphasised. Government and political leaders have consistently argued that you can only share in the wealth of the country if you can own or share in the ownership of its natural resources.

In principle, there is nothing wrong with this argument because, in the past, black Namibians were denied opportunities. The indisputable fact that natural resources are the sources of wealth is unfortunately forgotten. Ownership by a few privileged persons does not necessarily mean that the welfare of the people has been or will be promoted. Should natural resources not be utilised responsibly and productively, not only the owners will be negatively affected: workers will have to be retrenched, the turnover of the business

sector will decline, and this will be followed by further retrenchments. The ripple effect of the mismanagement of natural resources goes far beyond the effect it might have on the owners.

Land – particularly agricultural land – is a valuable and limited natural resource: there will never be more land. Unfortunately, during elections, politicians created the impression that every Namibian was entitled to land – a promise that can never be kept. The problem is further complicated by the fact that the landless are not prepared to be settled on vacant land. Thus, land reform policies are focused entirely on the redistribution of around 4,000 commercial farms, a substantial number of which have already been acquired by individual farmers through Agribank loans and for resettlement purposes by the Ministry of Lands and Resettlement.

Even if all the existing commercial farms were to be acquired for the resettlement of landless Namibians, not more than 300,000 people can be accommodated, while the same number will have to be settled somewhere else or will have to roam the country in search of a livelihood.

The question can rightfully be asked: Does the Land Reform Policy, as it is being implemented, make economic sense? Will it promote the welfare of the people, or is the policy politically motivated and an effort to keep election promises?

Land reform has become the most controversial and emotive part of the policy of Affirmative Action. Why land? What makes land different from other natural resources? It is a proven fact that farming is not as profitable as many people seem to believe. Should a prospective farmer have to buy a farm for millions of dollars, even if is by means of soft loans, his/her prospects of making a success are bleak. It is also a proven fact that small-scale farming can, for several reasons, not succeed. Resettlement farms are not different from communal land: they are only smaller, scattered all over the country, and difficult to control. It remains a fact that most poor Namibians prefer to opt for wage employment.

Did the government leaders ever take cognisance of the disastrous consequences of the Odendaal Plan, implemented in Namibia by South Africa, when 400 commercial farms owned by successful and productive farmers were expropriated to ‘resettle’ black farmers? What could have been the most impressive land reform plan ever failed dismally because the plan was politically motivated. Existing homelands had to be enlarged so that black people could be encouraged to leave the white areas and settle in the homelands. Political considerations overshadowed economic realities, and the tragic results are now there to be seen, especially in what was supposed to have been the Damara homeland. Fences have been broken down and carried away; and farmhouses have collapsed in ruins, spoiling the wonderful scenery of what has now become a tourists’ paradise, mainly because of its emptiness and desolation. It could be argued that the present situation is after all preferable to a homeland without a future for its inhabitants. Fortunately, the mountains, the rivers and the grasslands are still there to be admired and enjoyed by

tourists and to provide a livelihood for an unknown number of inhabitants finding wage employment at lodges and other tourist facilities.

A balanced structuring of the public service, the police force, the defence force and the prison (now correction) service

The implementation of a policy to restructure the abovementioned services can be described as successful and welcomed by those who suffered from discrimination in the past. Although the restructuring was seen as discrimination by white citizens, nobody could deny that the civil service was unbalanced because of past discriminatory policies and practices, and these issues had to be redressed.

A relevant question now, however, would be this: At what stage will the public service be considered to be sufficiently balanced? The SWAPO Constitution (Working Paper) had proposed the following:

Preferences in public employment and in the allocation of educational, housing and welfare resources shall cease to be of any application upon the expiry of twenty-five (25) years from the date of the Independence of Namibia.

The Committee unanimously agreed that 25 years was too long, and that the programme needed to be phased out sooner. Affirmative Action cannot continue indefinitely. Today, 20 years have lapsed since Independence. To my mind, now is the appropriate time to take stock and make the necessary decisions concerning future policies on Affirmative Action.

Amendment of the Constitution

The constitutions of all democratic countries can be amended, should changing circumstances necessitate this. Articles 131 and 132 of our Constitution also provide for amendments, as follows:

Article 131 Entrenchment of Fundamental Rights and Freedoms

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or retracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

Article 132 Repeal and Amendment of the Constitution

- (1) Any bill seeking to repeal or amend any provision of this Constitution shall indicate the repeals and/or amendments with reference to the specific Articles sought to be repealed and/or amended and shall not deal with any matter other than the proposed repeals or amendments.
- (2) The majorities required in Parliament for the repeal and/or amendment of any of the provisions of this Constitution shall be:
 - (a) two-thirds of all the members of the National Assembly; and
 - (b) two-thirds of all the members of the National Council.

Article 132(3) provides for a referendum, should the above-mentioned majorities not be secured.

It is evident, therefore, that amending our Constitution can be quite complicated. I accepted the final draft without reservations and I stand by it. At this point, I can see no reason why we should tamper with it.

For over 20 years we have been praised by the international community for our democratic Constitution. The Security Council endorsed the 1982 Principles prescribing a multiparty democracy. We cannot ignore that fact, and if we do, we can expect an international reaction and even interference. But even more importantly, over the past 20 years, a democratic culture has grown in Namibia and I am sure it will continue.

It is crucial that our Constitution should become a living document. I have often in the past emphasised that a Constitution must not only be written on paper but in the hearts of the people. The Constitution is now on paper. How can it become a living document if the majority of the population remains ignorant of its contents? But they need more than just knowledge of the contents of the Constitution. They should be made aware of the ideals and the intentions of those who wrote it. Namibians need to accept the Constitution with pride and passion.

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SECTION III
CHALLENGES WITHIN
THE NAMIBIAN CONSTITUTION

Justice: Beyond the limits of law and the Namibian Constitution¹

Manfred O Hinz

The quest for justice – An introduction

Providing answers to the quest for justice is the objective of jurisprudence. Modern constitutionalism is the translation of years of debate between legal positivists and those believing in ideals of justice in existence outside the realm of law. Legal anthropologists and sociologists of law have added conclusions from research in different socio-cultural circumstances, and have shown that law is not a monolithic code of rules, but has many faces, even in a given, hence, legally pluralistic society. Work on legal – or, in a wider sense, normative – pluralism has changed the thus far dominant approach to jurisprudence, for which the law of the state was *the* law. The dominant approach of jurisprudence interpreted law as state-centred. Legal pluralism, on the other hand, views law as a complex societal phenomenon to which the state contributes – but so do the people of a society who generate law as an expression of their concepts of *justice*. Whether or not the law by the state and the laws by the people will meet in peaceful coexistence will depend on the circumstances prevailing in a given society. Whether or not the various normative codes in a given society – legal codes in the strict sense of the word or normative codes beyond the world of law – will be able to play their roles as societal orientations complementing each other will depend on how the stakeholders in that given society will interpret *law*, the plurality of laws, and their relationships to the aforementioned other normative codes.

The Constitution of the Republic of Namibia is one of the first constitutions in Africa to take a clear stand on the position of customary law. In Article 66, Sub-article 1, the Constitution confirms the validity of customary law and places it on the same level of recognition as the colonially inherited common law of the country, the Roman–Dutch law. For Namibia, 20 years of independence are also a clear demonstration of the peaceful coexistence of the law of the state and the customary laws under the administration of the various traditional authorities operating in terms of the Traditional Authorities Act.²

1 An earlier version of this paper was presented as the First Antony Allott Memorial Lecture, held at the School of Oriental and African Studies (SOAS), University of London, on 17 January 2006. I wish to express my gratitude to SOAS and, in particular, to my colleague and friend Prof. WF Menski of SOAS for honouring me with the invitation to pay this scholarly tribute to Allott, the promoter of African Law as a distinct member of the families of laws. An amended version of the paper was read on the occasion of my official farewell from the Faculty of Law of the University of Namibia, held on 16 October 2009. It is my special pleasure to extend also my thanks to all my colleagues in the Faculty in the establishment of which I assisted and in which I served since its inception in 1993.

2 No. 25 of 2000.

However, a closer look at the dominant comprehension of the law shows that a deeper appreciation of the concept of *legal and normative pluralism*³ would have led to a discourse on law that would have been more conducive to achieving what law sets out to achieve: justice, more justice.⁴ I will illustrate this in analysing two cases decided by Namibian courts and another that has occupied public debate for some time, without having reached a solution. The analysis of the three cases will focus on one very particular element of the concept of *legal pluralism*: the *limits of law*, as they were introduced into jurisprudence by Antony Allott.

Allott's *The limits of law*

Allott's *The limits of law*⁵ has intrigued me ever since I read it for the first time years ago. Indeed, it offered the concept of *limits* to me as a tool of interpretation in circumstance in which I would never thought of applying it before. I wish to illustrate this experience with a thought-provoking example.

Some time ago, the South African *Business Day* newspaper published a comment by – as the author described himself– a “black gay South African”⁶ about the South African Constitutional Court's decision in the Fourie case⁷ on the legal status of same-sex relationships. The decision, which was handed down some days before the comment was published, was eagerly awaited: it followed an extensive public discussion of what the status of same-sex relationships would be under the Constitution of the Republic of South Africa, which guarantees the right to sexual orientation in its Bill of Rights.⁸ Although the Constitutional Court was clear about the constitutional recognition of same-sex relationships, to the disappointment of many it avoided – in its majority opinion – the immediate translation of this constitutional verdict into an amendment of the South African law that governs marriages. The court's opinion instead held that it was to the legislator to provide for the necessary interventions to remedy the unconstitutional situation with respect to same-sex relationships. For the author of the newspaper comment, however, this was not “far enough”: what he expected from the Constitutional Court was “to simply read the appropriate gender-neutral language” into the existing legal instrument.⁹ In other words, the author held that there was no legal limit that prevented the court from not taking the right to sexual orientation seriously.

Is this reference to the limit of law – or, rather, the alleged non-existence of legal limits – part of a mere general, i.e. socio-political, discourse, or does it also have legal and jurisprudential meanings?

3 Why *normative* has been added to *legal* will be explained below.

4 What will constitute the “more” in justice will be understood after going through the next parts of this article.

5 Allott (1980).

6 *Business Day*, 13 December 2005, p 11.

7 *Minister of Home Affairs & Another v Fourie & Others; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (3) BCLR 355 (CC); hereafter *Fourie* case.

8 Section 9(3) of the Constitution of the Republic of South Africa of 1996.

9 *Business Day*, 13 December 2005, p 11.

Scholars of jurisprudence, constitutional law and human rights may feel irritated by this question and ask what makes it worthy of debate. After all, has it not been the sacred obligation of legal philosophy to determine limits to law for the sake of justice? Has it not been the task of human rights to inform us where human rights limit the law? The answer to both questions is “Yes”; but the sociology and anthropology of law will raise their hand to ask, “Have philosophy and human rights delivered what they were expected to?” Responding to this would lead us into controversial fields that we would not be able to plough in this article. We will instead travel into Allott’s *The limits of law* – and beyond.

Allott built the foundation of *The limits of law* over years of work in African law: as a lawyer interested in the application of law, as a researcher of African law, as a legal practitioner involved in law reform, as a legal analyst who eventually had to take note of the confrontations between European law exported to Africa, its (in many cases violent) inroads into the pre-existing African laws, and the manifold reactions of African law to the intervention of imported laws. Allott’s approach to the limits of law has sociological and anthropological facets that have opened up avenues for debate that have not been available in the conventional discourse of legal philosophy and jurisprudence before.

However, acknowledging these avenues is one thing; exploring the landscape beyond the limits defined by Allott is quite another. What is beyond the limited law? Are there other normative orders – not necessarily legal in the strict sense – that have a bearing on law proper?

In my attempt to answer these questions, I will, after giving an account of Allott’s *The limits of law*, briefly enquire what happened to it in the subsequent jurisprudential discourse and from there argue normative expectations beyond the limits of law Allott discussed. I will use the three indicated Namibian cases to enquire about the normative fields that are beyond the law and the field of ethics, and about the extent to which the field of law and fields beyond the usually envisaged sphere of law complement each other.

Allott published *The limits of law* some 25 years ago. James Read commented on Allott’s book in an article written for the 1987 special volume of the *Journal of African Law*, which marked the periodical’s 30th anniversary and, at the same time, celebrated the professional career of its founding editor – Allott. For Read, *The limits of law* presented –¹⁰

... a lively and engaging original survey of the fundamental concepts and nature of law, accessible even to first-year law students, yet authoritative and persuasive in the weight of experience and reflection which informs it.

What was Allott’s aim of investigating the limits of law? His aim was, as he put it in a reply to a critical review of his book, –¹¹

10 Read (1987:13).

11 Allott (1983:147).

... to examine the limiting factors, whether from society, from the form of law-making, the nature of law, or extraneous non-human causes, which restrict the capacity of laws to achieve what they are intended to achieve

In other words, what Allott was primarily interested in were not limits ordered by the natural drive for justice, but the functioning of law as a socially embedded system. In this, he followed Hart; indeed, he refers quite often to Hart's *The concept of law*,¹² from which, as Allott admitted, he "obviously benefited greatly".¹³ Where he deviates from Hart, he does so with a view to amending him, particularly as regards de-Westernising his concepts.¹⁴ Otherwise, following the tradition of positivism, Allott held that the existence of law was not a question of value but of fact. As he put it, –¹⁵

A sentence can be grammatical but be a lie; a law can be valid but unjust.

Therefore, the focus of Allott's *The limits of law* is not on *law* as the general idea or concept of legal institutions, but on *law* as a coherent legal system, and as a rule of a given legal system with factual consequences subject to empirical research.¹⁶ Thus, the effectiveness or ineffectiveness of law is Allott's yardstick in assessing the limits of law. Allott's challenging conclusion is that ineffective law may be ineffective with respect to the designed intention of that particular law, but it will be effective, seen from a broader perspective, ineffective law is to weaken law.¹⁷

Law, being a system of communication has inherent limits because communication has limits.¹⁸ Similarly, the effectiveness of law, being an interactive process between its makers and its recipients, is subject to all possible disturbances that may affect communication. The effectiveness of law is also dependent on the type of society to which a given law is to apply. After discussing the functioning of customary law in what we call *traditional* African societies, Allott comes to conclude that compliance with customary law in traditional societies is higher than compliance with common law in Western societies. Modern societies with legislators that are tempted to impose ambitious legal innovations very often fail to respond positively to these innovations.¹⁹

Social and cultural environments are a further ground for setting limits to the effectiveness of law.²⁰ The colonial and post-colonial projects of translocating Western law to all

12 Hart (1997).

13 Allott (1980:291).

14 I refer here in particular to Allott's chapter entitled "Limits on law from the nature of the society" (Allott 1980:49ff), where he argues three defects identified by Hart as allegedly lacking in what the latter calls "primitive communities" because of the absence of secondary rules in the Hartian sense: the defect of uncertainty, the defect of the static character of rules, and the defect of inefficiency. For the references to Hart, see Hart (1997:78ff, particularly 91ff).

15 Allott (1980:XI).

16 These "three different forms of typography for law" are explained in detail in Allott (1980:1ff).

17 (ibid.:159).

18 (ibid.:5ff, 73ff).

19 (ibid.:66f).

20 (ibid.:99ff).

corners of the world have to be assessed with respect to the distinct environmental conditions that developed their specific responses (from various forms of acceptance to resistance) to the translocation of law.

Introducing a further potential limitation of law as a legal system and, in this capacity, excluding it from other normative systems such as religion, morality, societal habits and conventions, Allott notes that —²¹

[/]law is only one normative system among many which compete for the attention and the allegiance of those to whom they are addressed There is not, and never will be, a god-given definition of either ‘law’ or ‘morality’, since each term refers to what is a human construct, the content of which is ever-changing. [Emphasis in original]

Allott, therefore, offers what he calls a “schematic analysis” of normative statements – legal, religious, moral and habitual – which allow at least a structural differentiation of the various systems of norms prevailing in societies²² and, with this, an assessment of the social (socio-religious) limitations that law may have in a given society. If, says Allott,²³ –

... religion, morality or mores succeed in gaining the allegiance of the community in preference to Law, Law is weakened and its norms become frustrate[d]. They do not thereby lose their validity; they merely lose their efficacy. The legal norms cease to describe possible ways of behaving in society. [Emphasis in original]

The many references to findings based on (sociological and anthropological) empirical research cannot deviate from Allott’s practical motivation to translate those findings into statements that are informed by his concept of *democracy* as the constitutional form of general participation in the running of society. The openness to empirical knowledge about the practical working or not working of law is the foundation on which a cosmopolitan view²⁴ of law (*Law* and *law* in Allott’s sense) is built. At the same time, the limits link the interest in the social working of law, in the sense of soft positivism,²⁵ to practical political philosophy. In other words, the never-abandoned, always prevalent question of – and, in jurisprudence, about – what is *good* (or *just*) law returns for Allott in the question about the *effectiveness* of law. Although there is no automatism between *effective* and *good* (or *just*) law, there is some probability that law that respects its limits is indeed good.²⁶

21 (ibid.:121, 122).

22 (ibid.:128ff).

23 (ibid.:140).

24 I use *cosmopolitan* to reflect factually evidenced trends in globalisation which oppose globalisation as a uniformly streamlined process directed by the dominant economic forces in the world economy. Cf. Hinz (2009).

25 Cf. Hart’s use of “soft positivism” in the postscript to Hart (1997:250ff).

26 In pursuing this further, the chapter entitled “The no-law state: Power, dictate and discretion” in *The limits of law* (Allott 1980:237ff, 244) could be analysed. What Allott does in this chapter is [Continued overleaf]

Allott's *The limits of law* has received only limited scholarly recognition.²⁷ An exception is Werner Menski's treatment of the work. In his *Comparative law in a global context*,²⁸ Menski uses Allott's conceptualisation of *law* as one of his gateways into a comparative to law in a globalising context.²⁹ Menski places Allott in the small family of post-modern theorists of legal pluralism alongside Moore, John Griffith and Chiba – the latter being the only non-Western thinker in the ancestry of legal pluralism.³⁰

Why did *The limits of law* not attract more attention? Was the cause the alleged mechanistic conception of legal systems as it that conception was seen to be a major theoretical handicap for Allott to avoid an oversimplified understanding of purpose in law, as suggested by one of the few reviewers of *The limits of law*?³¹ I fail to see the reason for the lack of interest in *The limits of law* lying in its alleged methodological flaws. Epistemological deadlocks have never stopped human beings from engaging in practical philosophy – and rightly so! My understanding, instead, is that the lack of recognition of *The limits of law* has more to do with its topic and the socio-political messages the book offers. Already in *The limits of law*, Allott anticipated that the mainstream jurisprudence would not be in favour of his views on law:³²

When I tried out some of the ideas in this book on colleagues, I was amused to be met with a completely typical and predictable reaction from some of them – this was arrant populism, and only one step from fascism. ... We need not be frightened by this predictable reaction, usually coming from the intellectual elites who would be displaced or cut down to size if account were taken of popular opinion. Why should 'populism' be a rude word in the mouths of the elite, like 'fascist' before it? If 'populism' means *proposing* policies which the people will accept, what is wrong with that? If it means *consulting* people before making decisions or acts which will affect them, what is wrong with that? As I said above, these practices are justifiable, not only on grounds of true democracy, but on the utilitarian or pragmatic ground that they are more likely to be successful.

to look at law and its functioning in the former Soviet Union by, on the one hand, maintaining his positivist approach of law, but, on the other, giving space for questions on the relation between law and power; on the dictate being a source or negation of law; the validity of law (is law what the law says or what people do?); etc.

27 Very obvious proof is that one will hardly find entries on "Allott" or "limits of law" in widely used textbooks on jurisprudence. My special search for reviews of Allott's book (albeit limited, given the constraints in access to sources in a country such as Namibia) did not produce more than what I referred to in this article. Moreover, i.e. on top of no one referring to Allott, they also use 'his' concepts without acknowledging him. Where limits of law – in Allott's sociological/anthropological sense – are discussed, they are without reference to Allott's approach. This statement is not be read as if the concept limits of law was copyrighted to Allott, but to show that publications after Allott's *The limits of law* could have profited from the state of the degree of insight reached by Allott.

28 Menski (2006).

29 (ibid.:108ff).

30 (ibid.:119ff).

31 Woodman (1983:129ff).

32 Allott (1980:289); cf. here also Sanders (1987).

Despite promising developments in Western legal sociology and anthropology since the time of enlightenment, the art of application of law through interpretation has remained at the centre of interest for legal education and research. What the great French philosopher and founder of legal anthropology, Montesquieu, initiated when travelling through Europe, collecting information on the functioning and backgrounds of law and political institutions,³³ was left to anthropology as a subject basically distinct from what law schools have been doing! While the judge is the legal leitmotiv in continental legal systems, in common law systems (including the Roman–Dutch law systems in southern Africa) it is the legal practitioner. Both professions are basically not concerned with the societal side of the law, the perception of law by the people, and the practical consequences of the application or non-application of law.

Looking at law from the societal point of effectiveness is tantamount to legal blasphemy of the dominant approach to law in two ways: it challenges the monopolistic authority over law claimed by lawyers, and it links the search for justice to the aspirations and expectations of the people to whom law applies.

Three Namibian cases

I will now turn to three cases in Namibia as examples of learning about the limits of law in its application.

The first case will highlight problems around the limits of law in the interface between state law and African traditional law. The second case will look at special problems relevant to the limits of law in view of the growing tendency of the Namibian and South African judiciary to extend their scope to what are called *value judgments*. The third case takes the issue of societal values, expectations and aspirations further down the road into the need to promote ethical considerations in a consistent manner, complementing the limited world of law.³⁴

The State v Glaco, or: “To give birth is to dig a mountain”³⁵

This is the case of a young San woman who was approximately 17 or 18 years of age when an incident happened that led to a charge of murder against her. The case *S v Glaco* was decided by the High Court of Namibia in 1993.³⁶

When Glaco learned that her son, who had been sent for medical treatment without her knowledge, was in Windhoek, she decided to go to Windhoek to fetch him. The journey to Windhoek was the first-ever journey Glaco had taken out of an area she had lived in

33 Cf. Stubbe-da Luz (1998:53ff).

34 This case takes special note of Allott’s attempt to determine the place of law with respect to other normative systems.

35 The second part of the heading is a proverb of the *Basotho* of southern Africa.

36 1993 NR 141.

since birth. The area, formerly Eastern Bushmanland and now the Tsumkwe East District in the Otjozondjupa Region, is a remote one.

On her way back, Glaco, who was pregnant, felt that she was about to give birth. The car in which she was travelling stopped and Glaco gave birth to a baby who did not appear to be alive. While some of the people in the car with Glaco suggested burying the baby on the spot, Glaco insisted on taking it along.

Back on the road, the baby suddenly showed signs of life – to the joy of everyone in the car. They decided to take the mother and her child to the nearest hospital. The two were admitted, while the car and its other occupants continued on their way to Tsumkwe. The obviously premature baby was placed in an incubator.

What happened after that could not be fully established. Witnesses testified that they found Glaco in the room where the incubator was, with the baby dead. Glaco, who could not speak a language understood in the hospital, maintained later that she went to the incubator room to clean the baby and that the baby fell while she was carrying it. However, one of the witnesses testified that she saw Glaco twice letting the baby fall to the floor.

A post-mortem of the baby revealed marks on its neck that evidenced the baby must have been throttled. The pathologist's investigation substantiated that the baby's death had been caused by damage to the head as a result of being dropped, and by strangulation.

The court was eventually convinced that Glaco had terminated her baby's life, but recognised the condition—mentally and physically—that Glaco was in after giving birth on the road and then left alone in the hospital without being able to communicate with anyone. The court concluded the case as follows:³⁷

For the rest of her life she must carry in her heart the knowledge that she terminated the life of her little boy. Can there be a greater punishment? ... Her suffering is her deterrent. She needs no sentence to remind her of the horror which she has experienced.

Glaco was sentenced to be detained until the rising of the court (and, of course, the court immediately rose!).

It is open to speculation whether the accused understood the sophisticated logic of the learned judge in delivering a sentence of imprisonment for a second until the court rose. It is less open to speculation whether the accused was aware of the wrath of God that the judge hung over her and her way back home! Whatever the accused might have thought later about what happened at the hospital and in the incubation room, I assume it was certainly not even close to the thoughts of the judge that led to the reasoning of his sentence! As the judge put it, –

[M]y verdict is therefore guilty of murder ...

37 (ibid.:149).

This he conceded after stating that he was relying solely on the cumulative effect of all the evidence submitted to the court for his verdict.³⁸ But although the woman was found guilty of murder, the following were regarded as extenuating circumstances:³⁹

At the hospital ... where she [Glaco, who was otherwise described as “an unsophisticated young Bushman girl”]⁴⁰ was taken to, she was put in a ward, [and] her baby was put into an incubator in another room. She understood that the incubator was intended to help the baby, but this was an alien development in her life. In the hospital no one could talk to her, and she could not talk to no one [sic]. Her language was not understood, and she did not understand any other language. After she was admitted to the hospital, her husband, and those who had brought her to the hospital, left for Bushmanland. Whatever support this young and simple girl had in those most traumatic circumstances, whatever support she had then, was whipped away from her.

The judge also referred to expert evidence according to which women were often “depressed and could do strange things after giving birth, including killing themselves or their babies”,⁴¹ but could not find evidence that Glaco was indeed in such a state of depression.

In other words, the judge of the *Glaco* case had an understanding that he would not do justice to the case by applying his Roman–Dutch criminal law strictly and sentencing the accused accordingly. He understood that the case before him confronted him with the limits of the law applied by him. Not being able to access information on the relevant legal or extra-legal conflict resolution mechanisms of the San, he took recourse to the Christian ethics of guilt underlying Roman–Dutch criminal law. Although this recourse was, at the end, most probably irrelevant to the accused, he could have done more justice by accepting that it was impossible, in the circumstances in which Glaco found herself, for his law to assess the difficulties of “digging a mountain” (in the words of the above-quoted *Basotho* proverb), and more so what constituted the mountain facing her. Trying more justice would have meant accepting the limits of his law by acknowledging them and subsequently closing his book. Not doing this was, indeed, a contribution to making law ineffective law which is to weaken Law, as Allott says.⁴²

38 (ibid.:148).

39 (ibid.:149).

40 (ibid.:148).

41 (ibid.:149).

42 Closing his book would have been a special sign of wisdom, as it was a sign of wisdom by Tatting J to withdraw from the case of the *Speluncean Explorers*, where survivors of an expedition ended up eating one of their fellow explorers in the exceptional circumstances of being confined to a cave without food for a life-endangering period of time. Tatting concluded his judgment as follows: “Since I have been wholly unable to resolve the doubts that beset me about the law in this case, I am with regret announcing a step that is, I believe[,] unprecedented in the history of this tribunal[:] I declare my withdrawal from the decision of this case”. The *Speluncean Explorers* case was invented by Fuller to provoke debate about what *justice* means, and what the challenges are in so-called hard cases (Fuller 1949:616ff). On the Dworkin/Hart controversy as regards the judicial treatment of ‘hard’ cases, see the postscript in Hart (1997:688ff).

Closing the book of Roman–Dutch justice would, nevertheless, not automatically have led to closing the book of justice in total. Should Glaco, in one way or the other, have been responsible for the death of her baby, members of her community would certainly have initiated procedures in accordance with the social and cultural practices of the !Kung San in order to establish what had happened at the hospital, and to determine the appropriate remedy for it. This would most probably have entailed employing their well-known healing methods to get rid of the wounds of the experienced horror.⁴³

Immigration Selection Board v Frank, or: “Even the dead want an increase in their number, how much more the living?”⁴⁴

The *Frank* case, as it is commonly referred to, was decided by the Namibian Supreme Court in 2001.⁴⁵ Frank, a female German national, had applied for a permanent residence permit. Frank’s main reason for the application was that she was living with a Namibian woman in a same-sex relationship, and that the couple had joint responsibility for the Namibian woman’s son. The Supreme Court, hearing the matter on appeal from the High Court, confirmed the refusal of Frank’s application.

In deciding the case, the Supreme Court embarked upon a far-reaching exercise of interpreting the Constitution of the Republic of Namibia in order to determine what the constitutional place of same-sex relationships would be. This was particularly necessary as the Namibian Constitution differs from its South African counterpart in that it does not recognise the right to sexual orientation,⁴⁶ although it recognises the right to freedom from discrimination on the basis of race, gender, etc.⁴⁷

The court recalled a very central statement made in one of the first decisions of the Supreme Court of Namibia where it interpreted *dignity* as guaranteed by the Constitution.⁴⁸ According to this, constitutional interpretation has to start with noting –⁴⁹

... the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people as

43 There is literature on the social control and legal norms in !Kung San communities (cf. Marshall 1976:43ff; Thoma & Piek 1997) and on the use and function of healing practices as control mechanisms (cf. e.g. Katz 1982). The Namibian Constitution confirms customary law to be at the same level as common law (Article 66(1)). The Glaco judgment shows no attempt to establish the relevant law of the !Kung San before employing law impregnated with the European-Christian concept of guilt, even though a well-known anthropologist was called to give expert witness in the case. The recognition of San socio-legal concepts could have been taken into account in considering the court’s jurisdiction or the application of the law in terms of the principles the law of conflicts of laws.

44 The second part of the heading is a proverb of the Akan of Ghana.

45 *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107.

46 As mentioned in the introduction to this paper.

47 Article 10, Namibian Constitution.

48 *Ex parte Attorney General: In re: Corporal Punishment by Organs of State* 1991 NR 178

49 *Frank* case, pp 136f.

expressed in their national institutions ..., as well as the consensus of values or “emerging consensus of values” in the civilised international community”.

The “national institutions” that are to inform the court about the state of affairs of accepted values include Parliament; the courts; tribal authorities; common law, statute law and tribal law; political parties; news media; trade unions; established Namibian churches; and other relevant community-based organisations.⁵⁰ In order to obtain the necessary information from these institutions, the court is allowed to use all sorts of methods, including “special dossiers compiled by a referee”.⁵¹

However, the court in the *Frank* case did not go that far. Instead, it simply accepted that the President of the Republic of Namibia as well as the Minister of Home Affairs had expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships. When this matter of same-sex relationships was raised in Parliament, so the court said, nobody from the ruling party made any comment that opposed what had been quoted from the Head of State and the Minister concerned.⁵²

The *Frank* case represents a trend in Namibian and South African case law. The reasons for the trend to value judgment are apparent.⁵³ The call for value judgments is in response to judgments that, in applying oppressive and discriminatory legislation under apartheid, claimed to follow the rule of law in the very formal sense, i.e. law as it was enacted by the legislator at the time. In correcting this, the courts in Namibia – and later in South Africa – decided to opt for value judgments as an alternative to apartheid positivism.

For the courts to opt for values does not mean there is an automatism between public opinion and court decision. It remains part of the court’s task to decide whether there is, in the words of the Supreme Court, a –⁵⁴

... mere ‘amorphous ebb and flow’ of public opinion or whether it points to a permanent trend, a change in the structure and culture of society.

50 (ibid.:137).

51 (ibid.:138).

52 (ibid.:150f).

53 Referring to values in constitutional jurisprudence in Namibia (and, after the change to democracy, in South Africa) goes back to one of the already mentioned ground-breaking Supreme Court decisions, namely *Ex parte Attorney General: In re: Corporal Punishment by Organs of State* 1991 NR 178. Mahomed AJA, as he then was, refers in this case to the need of a value judgment in interpreting the constitutional concept of dignity in order to establish whether or not corporal punishment violated dignity (ibid.:188). Berker CJ, as he then was, wrote in his separate opinion to the quoted case that “... the one major consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs of the people of Namibia” (ibid.:197). In addition to this, the court of the *Frank* case refers to a number of subsequent Namibian and South African cases that pursue the concept of value judgment further.

54 *Frank* case, at 138, quoting an earlier High Court decision, namely *S v Vries* 1998 NR 244 at 265.

It is the court's task to evaluate —⁵⁵

... whether the purported public opinion is an informed opinion based on reason and true facts; [or] whether it is artificially induced or instigated by agitators seeking a political power base.

This is a jurisprudential programme of a size that will unavoidably lead us to raise all sorts of concerns prompted by the concept of limits of law!

Indeed, on the one hand, post-apartheid, post-colonial, postmodern jurisprudence has to acknowledge that values and the dealing with values are inevitably part of the business of the lawyer, the lawmaker, and those that apply the law. On the other, jurisprudence has to acknowledge the strong message of *The limits of law* that urges us to test the societal environment in terms of the extent to which the far-reaching employment of controversial values by the judiciary would be conducive to an intended decision, as these intended decisions would otherwise run the risk of becoming ineffective. The fact that Frank was eventually, i.e. after the matter had gone through the courts for some time, granted the desired permit simply by applying for it in accordance with the formal requirements of the law indicates the Supreme Court's de-facto ineffective value judgment.

What would then be the adequate social and political framework for a needed value assessment that would, at the same time, respect the limits of the law?

Judge A Sachs, who wrote the majority of the South African Constitutional Court judgment in the above-mentioned South African same-sex marriage case, was not prepared to close the matter with the stroke of his judicial pen, although the right to sexual orientation – according to his interpretation of constitutional law would have given him safe grounds to do so.⁵⁶ Instead, the court held that it —⁵⁷

... should not undertake what was said to be a far-reaching and radical change without the general public first having an opportunity to have its say.

The court found that there was extensive public consultation over a number of years. Nevertheless, the court did not order the invalidity of the relevant parts of the South African family law, but suspended its invalidity. According to Sachs J, —⁵⁸

[t]his is a matter that touches on deep public and private sensibilities. I believe that Parliament is well-suited to finding the best ways of ensuring that same-sex couples are brought in from the cold. The law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered

55 *Frank* case, at 138.

56 In fact, the court reserved this possibility by ordering that, if the South African Parliament failed to correct the Marriage Act, 1961 (No. 25 of 1961) as currently in force, in a given time a judicial amendment of the Act would come into operation that was intended to remedy the unconstitutional situation; see the *Fourie* case at 415).

57 (*ibid.*:402).

58 (*ibid.*:406).

that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the Preamble and section 1⁵⁹ permeate every area of the law.

In other words, although the South African Constitution would, from the point of view of a conventional interpretation, have authorised the court to amend the law in favour of giving same-sex marriages legal status, the court did not do it. Indeed, the court's modest and, thus, self-restricting approach respected the limits of law. The court forced the elected opinion-leaders of the people to work and argue through the possible legislative responses to the need to recognise same-sex marriages. This will also confront those who believe same-sex relations are 'un-African' and, therefore, a 'decadent and immoral Western practice'⁶⁰ with the need to reason their arguments with their opponents. Although it is understood that the quoted Akan proverb "Even the dead want an increase in their number, how much more the living?" emphasises all-African values such as the family, the reproduction of the family, and the continued representation of one's ancestors through the living,⁶¹ the question nevertheless remains how far this family obligation can determine our orientation to life. Judge Sachs responded to this for the court, putting it as follows:⁶²

The Court held ... that however persuasive proactive potential might be in the context of a particular world-view, from a legal point and constitutional point of view, it is not a defining characteristic of conjugal relationships. To hold otherwise would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such a relationship or become so at any time thereafter.

The Ovaherero claim for compensation for genocide, or: This is the first time for us to work through what happened to us in 1904⁶³

The case I wish to refer to here is that of members of the *Ovaherero* communities against Germany for reparation for the genocide committed by the German colonial power in the then colony of South West Africa in 1904 and thereafter.⁶⁴

59 The Preamble of the South African Constitution confirms the constitutional foundations for a democratic and open society, while Section 1 defines the principal democratic values such as human dignity, non-discrimination, and the rule of law.

60 This type of argument is found in many political debates in Namibia and South Africa, as well as in other African countries.

61 These values concretise *ubuntu* and its first Grundnorm, *umuntu ngumuntu nga bantu* ("A person is a person because of other persons"). It may be added that the same judge who wrote the majority judgment in the *Fourie* case, A Sachs, employed (together with other judges sitting over the same case) *ubuntu* in his opinion about the unconstitutionality of the death penalty in South Africa; see *S v Makwanyane & Another* 1995 (6) BCLR 665 (CC) at 781ff.

62 *Fourie* case at 388.

63 The second part of the heading represents the words of an *Omuherero* informant interviewed by the author in July 2004.

64 It was only in 2001 that the Herero People's Reparation Corporation, registered in the District of Columbia in the United States, initiated a lawsuit in a US court against German companies [Continued overleaf]

What happened in 1904 in the colony has been assessed by historians and lawyers as genocide against the *OvaHerero* who resisted German colonialism, and the colonial attempt to deprive them of their land. When the *OvaHerero* lost the battle of Ohamakari⁶⁵ (Waterberg), many of them were forced to flee into the Kalahari Desert – where they died. Many of those who survived the battle were put into camps. Of these, the ones that survived the harsh and inhuman conditions in the camps were later released, but they were not allowed to assemble in their political and social structures, possess land, or raise cattle.

Analysed in terms of the Genocide Convention,⁶⁶ what happened in 1904 and the years thereafter would aptly have been defined as the crime of genocide – had genocide been a crime under law at the time. Attempts by representatives of the *OvaHerero* to get a United States court to rule against Germany and make it pay reparations for what happened 100 years ago has not been successful so far.⁶⁷

When the centenary of the battle of Ohamakari and the genocide were commemorated in Namibia in 2004, the German Minister for Economic Cooperation and Development visited Namibia. She addressed the Namibian public on the day of the commemoration and made it clear that, for her, what happened in 1904 would, if it had happened today, qualify as genocide. She asked for forgiveness, expressing this request in the words of the Lord's Prayer. People from the audience did not quite understand the Minister's declaration and shouted "Where is the apology?" The Minister took the floor again and clarified as follows:⁶⁸

All what I have said was an apology for the crime committed in the name of German colonialism.

There are many legal obstacles that have prevented the *OvaHerero* case against Germany from succeeding legally.⁶⁹ However, the apology of the German Minister proves that legal obstacles are not necessarily the end of such cases. Beyond the limits of law is what, for some time now, is being rediscovered in the form of what we may call *morality* or *ethics*.⁷⁰ Reading through the very extended discourse on the *OvaHerero* case,⁷¹ listening

and, later, against the German state for reparations. The text of the submission to the court is published in *Befunde* (2002:3ff). More details on the case made, its social background and its legal basis can be found in Hinz (2004a:375ff; 2004b:148ff); and Patemann & Hinz (2006:471ff).

65 And members of other Namibian communities who fought with them against the Germans.

66 United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (in force since 1951).

67 For details, see my articles quoted above.

68 I have offered a socio-legal evaluation of the speech of the Minister in Hinz (2005:119ff).

69 Refer to my articles above, which also cite opinions that argue in favour of the *OvaHerero* case.

70 Braun's (2001) textbook on legal philosophy bears the subtitle *Die Rückkehr der Gerechtigkeit* ("The return of justice"), indicating a significant turn away from positivism in social and legal philosophy.

71 Particularly as documented in many Namibian newspapers.

in particular to what members of the *OvaHerero* placed on the table, it is obvious that dealing with the German colonial past has an ethical standing: one that cannot be ignored politically. The normative system beyond the limits of law and based on ethical grounds requires recognition and respect. The “Reconciliation Commission” proposed for the settlement of the genocide case in 2004 and tasked with finding a negotiated solution acceptable to all parties concerned⁷² has its foundation here. The fact that, to some extent, politics reacted positively to the proposal⁷³ proves the validity of the approach; the fact that implementation has been delayed proves the difficulty in dealing with demands based on strong ethical grounds.

Conclusion, or: “When a white man wants to give you a hat, look at the one he is wearing before you accept it”⁷⁴

The world is full of unsolved old and new ‘*OvaHerero* cases’, understood in the wider sense. When people plead to close the book on *OvaHerero* cases because of “time that would only be available before God”,⁷⁵ they miss the point that images of God differ as radically as concepts of time do. We know of many court cases that have gone on for years and eventually ended with a limited contribution, if any, to societal restoration. Allott’s argument applies here as well, i.e. that failure to implement law will weaken it. It is, therefore, a challenging task for lawyers to be more aware of the limits of law, and accept proactively the working of non-legal principles and rules beyond the realm of law.

The ground for this has been prepared in many ways. Out-of-court settlements and settlement through arbitration and mediation enjoy increasing support by those who make and those who apply the law in family and labour disputes, but also in other areas of the law. International organisations such as the World Trade Organisation (WTO) have developed their own ways of settling disputes, which – at least in the case of the WTO – is somehow between strict court-like procedures and arbitration. Countries with established criminal law and criminal courts have shown an interest in learning from the administration of justice under customary law, which places restoration of peace

between the shareholders and stakeholders in a case before the interest of following the requirements of rather abstract justice. It follows the similar interest expressed in the United Nations Development Programme’s *Human Resource Report 2004*, which pleads for the recognition of indigenous justice as part of the right to cultural diversity.⁷⁶ The need to strengthen the political and legal recognition of the limits of law behind these trends appears to be of utmost importance, at least if we do not want to give up efforts to contribute to building the human face in globalisation.

72 Cf. Hinz (2010).

73 According to the same German Minister.

74 The second part of the heading is a proverb of the Ewe of Ghana.

75 Meaning that time – like the almost 100 years that had to pass before the claim for the 1904 genocide materialised into a court case – is only exceptionally available on earth, if at all.

76 UNDP (2004).

These concluding remarks must be preliminary as they can only set the framework for further jurisprudential discourses around the limits of law initiated in Allott's pioneering contribution to jurisprudence. Limits of law are becoming increasingly apparent as consequences of the changing role of the (modern or postmodern) state in Africa and elsewhere. In Africa, countries have followed trends of what is called the "new African constitutionalism",⁷⁷ and therefore opted for a constitutional order based on internationally developed human rights, while at the same time, traditional governance and African customary law were kept as part of their legal order in which a very particular potential for resistance is inherent, as expressed in the Ewe proverb quoted at the beginning of this section of the article:

When a white man wants to give you a hat, look at the one he is wearing before you accept it.

The 'hat' to resist could be the rule of law, democracy, human rights, good governance ... !

In more general terms, and taking further my comments on the third case mentioned here, legal (or normative) pluralism has reached a new dimension with the growing trend towards globalisation and the concomitant expectation of cosmopolitanism. The fact that various normative orders of society overlap and meet in a grey area where fora can easily be swapped and, thus, do not produce sharp borders between each other that would allow clear-cut limits of competence is an anthropological discovery of special jurisprudential importance.

Observations of the changing function of the state and of the increasing recognition of the internal dynamics of societies inform us that hitherto ignored limits of the regulatory competence of states are now being acknowledged. In other words, what Allott described in *The limits of law* with respect to African customary law vis-à-vis the law of Western states, by pointing at the higher degree of effectiveness of the African system, is now gaining ground beyond the borders of customary law.

In an article some years ago, Boaventura de Sousa Santos redefined the limits of law (albeit without reference to Allott) in distinguishing three fields in which such limits in the modern/postmodern state will become apparent:⁷⁸

- The change in the quality given to non-state law will set new limits to the law of the state
- The greater participation of formerly excluded social actors will strengthen their position and, thus, contribute to the emergence of more particularistic and complex laws, and
- There are certain complex social phenomena that have shown themselves to be beyond the reach of the law: the Chernobyl nuclear catastrophe and the HIV/AIDS pandemic are two examples.

77 Cf. Hinz (2006:17ff).

78 De Sousa Santos (2001:1308ff).

In view of this, it is striking to see that, apart from the issues related to the third field, i.e. that of complex social phenomena, issues of interpersonal relationships have become prominent in asking for the limits of law. Where, in the concluding part of *The limits of law*, Allott singles out the “house-mate or common law wife” as his focal point,⁷⁹ the similarly embedded difficulty of accommodating same-sex marriages opened this presentation, and was taken up in one of the three exemplifying cases. Was this pure coincidence?

Most probably not: in terms of the changing orientation of the state, the readiness to accept state intervention in organising interpersonal relationships decreases. It decreases because the state’s competence to execute interventions in the interpersonal arena is seen to be outside the scope of the secular state. In some parts of the world at least, states are said to be secular, while in others the closeness between the law of religion and the law in society is maintained and results in peculiar internal problems where people of different orientations meet!

Questions about the limits of law, the limits of the various laws, and the limits between legal and non-legal normative systems need to be placed high on the agenda for legal and legal anthropological scholars. Questions of this kind will go beyond the models Allott had in mind in *The limits of law*, according to which there was a traditional society in which the spheres of law (“Law” in Allott’s writing) and of morality consisted of two concentric circles, with the circle of law fitting completely inside the one for morality. In Allott’s modern society, the circles of law and morality only partly overlap – leaving the larger part of law outside the reach of morality, and the larger part of morality beyond the scope of the law.⁸⁰

Developments around the world have led us to question this simple dichotomy of *traditional* and *modern*. That part of the world that believed it had achieved the last and universal word on modernity is now made to understand that there are modernities or alternative modernities or postmodern human varieties of equal standing:⁸¹ conceptualisations for which we have not found all the necessary models to make us comprehend the complex functioning of normative systems of societies informed by different foundations, i.e. societies that have a modern past and societies the past of which is traditional!

Allott’s *The limits of law* has opened many gateways into this complex blurring of borders. It is left to us, as scholars of African law, jurisprudence and beyond, to continue carrying the torch so that we – and, more so, those who apply the law, i.e. the politicians who refer to law in developing their policies – are better equipped to use law to the limits which it imposes.⁸²

79 At 259ff.

80 Allott (1980:25).

81 As investigated e.g. in Comaroff & Comaroff (1993).

82 Allott (1980:290).

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In dubio pro libertate: The general freedom right and the Namibian Constitution¹

Stefan Schulz

To be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human.

Isaiah Berlin, *Four Essays on Liberty*, p LX

Introduction

Today, at the beginning of the third millennium, most United Nations (UN) member states² subscribe to principles and axioms which, textually, appear akin to those precepts which can be found in international covenants, in particular the Universal Declaration of Human Rights of 10 December 1948. However, even constitutions which remain textually close to the UN Declaration gain different meaning, not only from jurisdiction to jurisdiction, but also over time. Such differences may be the result of a variance in factors contributing to social order in each of the different jurisdictions. An example is the death penalty:³ although not abolished by the constitution of the United States of

1 The original version of this text, which can be accessed at http://www.polytechnic.edu.na/academics/schools/comm_legal_secure/legal/research.php, has been shortened in order to meet editorial requirements. The text is a continuous presentation of a scholarly position, without the constant intrusion of such observations as “Dworkin says this”, “Ackermann J says in ... that”, etc. That the position put forth in this paper has not sprung up ex nihilo should be obvious throughout the text, but the text should be judged on its own merits against the intention to engender a discourse on the topic. However, it should be mentioned upfront that I have been greatly inspired by Robert Alexy, who explicated the normative dimension of negative freedom (liberty) exhaustively in his book *Theorie der Grundrechte* (1996:309–356). This explication has been accepted here, and to the extent that the discussion bears on this residual rights position, the paper owes its structure and content to Alexy.

2 Compare *The Economist Intelligence Unit's Index of Democracy 2008*; available at <http://graphics.eiu.com/PDF/Democracy%20Index%202008.pdf>; last accessed 15 January 2010.

3 Capital punishment was suspended in the United States from 1972 through 1976, primarily as a result of the Supreme Court's decision in *Furman v Georgia* 408 US 238 (1972). Another case in point hinges on the different policy approaches with regard to sexual orientation. In South Africa, “sexual orientation” forms part of the grounds listed in Section 9(3) of the South African Constitution which result in the presumption that differentiation on the basis of one or more of the grounds amounts to unfair discrimination. Article 10 of the Namibian Constitution does not give sexual orientation such protection.

America (USA), the judiciary there has at different times found the death penalty either to be in line with the constitution or not.⁴

The above gives rise to the question about the relationship between specific constitutional concepts – in particular their limits – and overarching concepts like *justice* and *human dignity*, which, although deriving from political philosophy, have been introduced in many constitutions as positive constitutional law.⁵ This relationship may be characterised by strong tensions which inform the intricate relation between constitutional/political philosophy and theory on the one hand, and constitutional interpretation on the other. These tensions surface, inter alia, when citizens intend to enact behaviour which, in the absence of a specific right or freedom, remains unprotected against public censure and prohibition. The problem will be discussed in the following sections in view of the concept of a *general freedom right*.

Freedom and liberty

Freedom is a fundamental though ambiguous practical concept. A classical formulation stems from Thomas Hobbes, who stated that “Liberty, or Freedom, signifieth, properly, the absence of opposition”.⁶ The term has a constant positive emotive component that can easily be coupled with varying descriptive categories. Thus, it is not really surprising that Isaiah Berlin refers to “more than two hundred senses of this protean word recorded by historians of ideas”.⁷ Hobbes also notes that “it is an easy thing for men to be deceived, by the specious name of liberty”.⁸ I shall take Hobbes’ formulation as a point of departure, and for the purposes of this paper, *freedom*, in a juristic sense, shall mean an alternative action. The object of juristic freedom is not just one specific action – which would denote a positive freedom – but the entitlement to select a course of action from a feasible set of alternatives. In this sense, a person is ‘free’ to the extent that his/her alternatives for action remain unencumbered. Here we shall term this freedom *negative freedom*.⁹

4 Abolished in Namibia by virtue of Article 6 of the Namibian Constitution, there is no such clause to be found in the South African Constitution. The South African Constitutional Court, in *S v Makwanyane* 1995 (3) SA (391), nevertheless found that the death penalty was unconstitutional. However, this does not mean that the Court could not reverse this decision (albeit with difficulties) at another time.

5 As it has in Namibia, for example, where Article 1(1) of the Namibian Constitution reads as follows: “The Republic of Namibia is ... founded upon the principles of democracy, the rule of law, and justice for all”.

6 Hobbes (1960:136).

7 Berlin (1969:121).

8 Hobbes (1960:140).

9 *Freedom* can be explicated in various ways in terms of the ‘man on the street’, philosophy, the economy and law. Whoever intends to answer the question regarding the nature of freedom will get entangled in a demanding philosophical project. A venture of simpler dimensions lies in looking at the structure of freedom. But a comprehensive presentation thereof would likewise go beyond the boundaries of this paper, and we will therefore content ourselves with a rudimentary approximation, which is the juristic notion of freedom understood as the entitlement to select a course of action from a number of alternatives. In this sense, *freedom* refers to the absence of obstacles, hindrances or opposition; compare Alexy (1996:194ff).

Fundamental rights and freedoms under the Namibian Constitution

In Chapter 3, the so-called Bill of Rights, the Namibian Constitution enumerates fundamental human rights and freedoms. These are protected and entrenched under relevant special and general provisions. The difference between *rights* and *freedoms* is not explicitly defined therein, but it may be argued that the difference lies in the extent to which the Constitution allows derogation from either.

In respect of freedoms, Article 21(2), which provides for the freedom of speech and expression, thought, religion, association, etc., states that they –

... shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Thus, as far as the freedoms enumerated in the Namibian Constitution are concerned, the Supreme Law allows infringements by virtue of sub-constitutional law within defined limits. This leaves the legislator with a wide margin of discretion. However, the Constitution does not provide such a general limitation clause in respect of fundamental rights, which are enumerated in Articles 6 to 20. Restrictions on rights may, therefore, only be imposed to the extent that they are expressly permitted.¹⁰

General freedom right

The proposition that the lists of both rights and freedoms are ‘enumerations’, and therefore thematically closed, might provoke a feeling of unease. The question whether we are indeed dealing with an enumeration of rights and freedoms is important, because it entails that social behaviour which cannot be subsumed thematically under one or more rights or freedoms lacks constitutional protection. It may be argued that this is a rather unlikely situation and, if it were to occur, it would probably concern issues that are by no means fundamental. Yet, a number of individual decisions and their behavioural expressions – like the self-infliction of somatic or psychic harm (i.e. consumption of licit and illicit drugs and alcohol, smoking tobacco, eating specific food like butter for its assumed negative impact on cholesterol levels), but also suicide and, as the case may, be one’s sexual orientation – could be affected. Whereas the examples are emotionally

10 Article 19 places the right to one’s culture, for instance, under the limitation of “...the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest”.

and morally loaded,¹¹ there is a plethora of more mundane issues. However, it is only at the surface that the latter – e.g. keeping goldfish in an aquarium in one’s home (or keeping any pet); feeding pigeons, squirrels, etc. within municipal boundaries (or any animal anywhere, for purposes other than commercial ones); wearing body ornaments (piercing); wearing particular colours, e.g. red on Sundays (or wearing anything at all); sleeping with one’s windows open at night (or not opening windows at all) – appear negligible or even ridiculous,¹² and the list could go on endlessly. It is these individual decisions and their behavioural expressions that fall within the ambit of the general freedom right (GFR).

Conceptually, the GFR is undetermined and thematically unspecific. It affords citizens the constitutionally protected prerogative to choose, think and act for themselves, unhindered, but within the remits of the constitutional order. On the other hand, it provides, *prima facie*, a (subjective) right vis-à-vis the state not to hinder, obstruct or otherwise interfere with this prerogative. And finally, the GFR encompasses the protection of (legal) states of affairs and entitlements. In this respect, it also provides the individual with an important *locus standi*,¹³ undergirding legitimate expectations to the constitutionality of the entire legal order.¹⁴ The GFR is a residual right in relation to the rights and freedoms that have been thematically enumerated in the Bill of Rights. Technically, the GFR only becomes operational where the domain of no other specific right or freedom is invoked; thus, it provides a subsidiary rights position.¹⁵ The relation between the GFR and other specific rights and freedoms is a relation of logical inclusion. The protective reach of the GFR encompasses anything which is covered by the norm texts of specific rights and

11 For homosexuality, see e.g. <http://www.hrw.org/en/news/2009/10/15/uganda-anti-homosexuality-bill-threatens-liberties-and-human-rights-defenders>; last accessed 8 January 2010. This paper, however, is not primarily concerned with any actually affected category of behaviour, such as homosexuality, or a potentially affected one, such as suicide, the consumption of alcohol, or feedings pigeons in municipal areas.

12 The subjective importance of an act of behaviour may be irrelevant when compared with other individual or collective constitutional positions. Yet, for some people, those or similar acts may be more important than any entrenched positive freedom like association or practising a profession. One might therefore concur with Dworkin (1977), who posits that democracy points to a government treating all members of the community as individuals, “with equal concern and respect”. A similar formulation – though with regard to the concept of human dignity – was used by O’Reagan J in *S v Makwanyane* 1995 (3) SA 391 (CC), paragraph 328: “Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right is therefore the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]”.

13 See *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

14 This is explicitly the position of the German Constitutional Court (*Bundesverfassungsgericht*, abbreviated *BVerfG*) in *BVerfGE* 29, 402 (408).

15 Interestingly, Article 18 (“Administrative Justice”) of the Namibian Constitution covers virtually the whole spectrum of the executive beyond the ambit of any specific fundamental right or freedom. Yet the Article is not a ‘mini’ GFR, because to the extent that the executive acts on the basis of legislation, the infringement on liberty outside the scope of specific fundamental [Continued overleaf]

freedoms – with the exception of the right to equality. From the *prima facie* position to be free to do or not to do anything which does not harm others, it follows logically that it is permissible to assemble and demonstrate peacefully, to petition, to join a trade union, or to freely express one’s opinion, belief, religion, etc. Hence, it is clear that the concept of the *GFR* lies at the root of specific fundamental rights and freedoms. Put differently, specific rights and freedoms constitute thematic sections of the general undetermined permission, which is referred to as the *GFR*.

GFR and the Namibian Constitution

The quest for the *GFR* in any constitution requires a more concrete notion of what to look for in terms of semantic structure and content. Against the backdrop of the above, one should expect a norm text which reflects the ‘negative’ openness of the protected entitlement, such as “Everyone is free to do anything that does not harm others”. This is missing from the Namibian Constitution; therefore, it seems fair to say that the Constitution does not contain a stipulation which expressly grants an undetermined, thematically unspecified, subjective right.

However, the fact that the Constitution makes no express textual reference to the *GFR* does not preclude a construction that presupposes its existence. The material or substantive foundation of the Constitution, particularly the Bill of Rights, is largely characterised by the openness of its concepts. Constitutional interpretation often has to deal with the lacunae which emanate from this openness of the authoritative material. In this context, we note that the Namibian Constitution makes use of the term *liberty* in Article 7, which reads as follows:

No persons shall be deprived of personal liberty except according to procedures established by law.

Liberty is a term which also serves as a synonym for *freedom*, and the tandem *liberty/freedom* then denotes the absence of obstacles, restrictions and hindrances.¹⁶ From this perspective, Article 7 might very well be constructed as the textual anchor for the *GFR*. But it is important to point out here that many will hold that, under the title “Protection of Liberty”, Article 7 refers only to the right or privilege of access to a particular place, undoubtedly encompassing also the physical integrity of the individual.¹⁷

A number of corollaries discounted, constitutional law is always what the judiciary – by virtue of interpretation and construction of the constitutional text – reveals as binding

rights and freedoms remains without protection. Accordingly, only for the time being, i.e. in the absence of a law prohibiting male persons wearing earrings, individuals enjoy constitutional protection against incidents as reported in 2001 (see <http://www.hrw.org/en/node/12326/section/4>; last accessed 8 January 2010) where Special Field Force (SFF) members reportedly began rounding up men in Windhoek (Namibia) wearing earrings, claiming that it was an order from the President to take earrings off any male person.

16 See Footnote 9.

17 *Chaskalson P in Ferreira v Levin NO 1996 (1) SA 984 (CC)*, at paragraph 170.

to the state, its organs, and the citizenry. Thus, constitutional interpretation refers to the judiciary's authoritative construction of the Supreme Law during judicial review of the constitutionality of legislation and government action. It is prudent, therefore, to take a look at the practice of constitutional interpretation by the Namibian judiciary.

In a country where extreme legal positivism had previously buttressed parliamentary sovereignty, the advent of a Constitution entailed a fundamental paradigm shift. Since the coming into force of the Constitution on 21 March 1990, a number of landmark decisions by the Supreme Court have readjusted the normative landscape of Namibia.¹⁸ The Namibian courts greeted the new order positively, although their implementation of it varied.¹⁹ In respect of the Bill of Rights, Namibia's courts in general showed a moderately courageous approach, which Amoo termed "a natural law cum realist or a purposive approach".²⁰ In pursuing this approach, it may be argued, the courts understood the selection of special rights and freedoms posited by the Constituent Assembly from Namibia's socio-historical and political context, reflecting the historical experience of the Namibian people from the early colonial period. The Preamble of the Constitution epitomises this perspective by referring to Chapter 3 as follows:

Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid ...

The Supreme Court keeps to the principle that constitutional interpretation, whether historical, contextual or comparative, can never reflect a purpose that is not supported by the constitutional text as a legal instrument. At face value, the majority judgment in *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another*²¹ may be a case in point. In the *Frank* case, O'Linn J emphasised that constitutional interpretation did not imply the freedom to –²²

... stretch and pervert the language of the enactment in the interest of any legal or constitutional theory.

However, the classical adage of legal interpretation that respect must be paid to the language employed, the consideration of the historical factors that led to the adoption of the Constitution in general, and the fundamental rights and freedoms in particular, together indicate that our courts perceive the Bill of Rights as thematically exhaustive, or closed. In the *Frank* case, at least, the court did not consider the existence of a GFR, possibly because such a rights position was not invoked by the applicants. O'Linn J,

18 For example, *S v Acheson* 1991 (2) SA 805 (Nm) 813A-C; *Namundjepo & Others v Commanding Officer, Windhoek Prison & Another* 2000 (6) BCLR 671 (NmS); *Ex Parte Attorney General, Namibia: In Re Corporal Punishment by Organs of the State* 1991 NR 178 (SC), to name but a few.

19 Schulz (2002:210ff).

20 Amoo (2008a:41).

21 Supreme Court Case No. SA 8/99.

22 Compare Kentridge AJ in *S v Zuma* 1995 (2) SA 642 (CC), paragraph 17; see also *S v Makwanyane* 1995 (3) SA 391 (CC), at paragraph 9.

with regard to the burden of proof in regard to fundamental rights and freedoms, stated the following:²³

... the applicant will have the burden to allege and prove that a specific fundamental right or freedom has been infringed. This will necessitate that the applicant *must also satisfy the Court in regard to meaning, content and ambit of the particular right or freedom.* [Emphasis added]

According to this logic, and since the applicants did not presuppose the GFR, the court deemed it had no reason to enter a presumably irrelevant discourse.²⁴ However, from the argumentative architecture and phrasing of the judgment, it may be inferred that the GFR had not yet appeared on the court's conceptual horizon. The court concretised the meaning of *rights* and *freedoms* in somewhat awkward isolation, without presupposing a conceptual interrelation of all precepts contained in the provisions of the Bill of Rights.²⁵ It is against this background that one may confidently say that the Supreme Court has not yet made space for the GFR in the Namibian Constitution.

Beyond actual constitutional dogmatism, however, there are arguments which suggest that the GFR has a legitimate place in the Namibian Constitution. In the following, we will first address the GFR in historical perspective, and thereafter compare the approach taken so far by the South African and the German Constitutional Courts.

The GFR in historical perspective

In terms of a concrete traditional lineage, human rights and freedoms are understood exclusively as punctual normative assurances – a position which cannot easily be

23 Constitutional law is by and large embedded in the domain of ever-evolving constitutional dogmas, practice and political philosophy. This is different from the usual domain of the learned jurist, where the issue is rather the skilful application of received principles and concepts of the positive law. Where the onus of doing constitutional fieldwork is placed on the applicant, this would expect him or her to shoulder a burden that not only results in prohibitive costs, but that should also rest on society, i.e. the state – or, more precisely, the judiciary and the academe. It is held, therefore, that the court's duty is to ascertain whether any part of an applicant's freedom or rights position has been infringed, provided only that the applicant provides the facts in which to find a hindrance, namely a restriction of liberty; see also Ackermann J in *Ferreira v Levin NO* 1996 (1) SA 984, at paragraph 44; De Waal et al. (2001:140); but see, contra, the approach of Chaskalson P in *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC), at paragraph 16.

24 In fact, the discourse about the GFR would only have been relevant with regard to the second respondent (Khaxas) to the extent that her sexual orientation and choice to live with the first respondent (Frank) in a lesbian relationship would have been negatively affected if the motivation of the Immigration Board had been not to give permanent residence status to the applicant because of her sexual orientation (lesbian). In exercising its discretion, the GFR would have required the Immigration Board to consider the impact of its decision on the second respondent.

25 Amoo (2008a:212, footnote 80).

reconciled with the concept of a GFR.²⁶ However, history provides another, more abstract lineage regarding the concept of *freedom*. Article 4 of the *Declaration des droits de l'homme et du citoyen* (1789) pointedly posits the primacy of the GFR:²⁷

La liberte consiste a pouvoir faire tout ce, qui ne nuit pas a autrui: ainsi l' existence des droits naturels de chaque homme n'a de bornes que celles, qui assurent aux autres members de la societe la jouissance de ces mes droits.

And it is in this line of thought that Kant posited the following:²⁸

Freiheit (Unabhaengigkeit von eines Anderen noethigender Willkuer), sofern sie mit jedes Anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, urspruengliche, jedem Menschen kraft seiner Menschheit zustehende Recht.

GFR in comparative perspective: Germany and South Africa

The GFR has been acknowledged by the German Constitutional Court since its first opportunity to express itself on the issue,²⁹ and it has held this position strongly ever since.³⁰ The German Constitution, the *Grundgesetz*,³¹ stipulates two positions on freedom in Article 2 (Rights of Liberty).³² Article 2(1) grants the right to free development of the personality:

Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmässige Ordnung oder das Sittengesetz verstösst ...

26 The extreme empirical historical perspective recognises fundamental rights and freedoms only to the extent to which the constitutional text determines specifically protected categories of action. This leads inherently to crude constitutional positivism, and may be criticised from a variety of angles.

27 “Freedom consists of the power to do anything which does not harm another: thus, the existence of the natural rights of every man has no other limits than those which ensure other members of the society the enjoyment of the same rights” (translation S Schulz).

28 Kant (1797:237). “Freedom (independence from the constraint of another’s will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity”; (translation available at <http://praxeology.net/kant7.htm>; last accessed 15 January 2010).

29 In its decision of 16 January 1957 (BVerfGE 6, 32), the German Constitutional Court had to decide whether or not to deny granting a passport to the applicant, a certain Mr Wilhelm Elfes. The Constitutional Court decided that no specific right had been violated, but resorted to the GFR as a residual subjective right.

30 See e.g. the more recent decision of the German Constitutional Court in BVerfGE 59, 275 (278).

31 “Basic Law”.

32 “Article 2 (Rights of Liberty)

(1) Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.

(2) The freedom of the individual is inviolable. ...” (translation S Schulz).

whereas Article 2(2) declares the following, inter alia:

... Die Freiheit der Person ist unverletzlich ...

Whereas the construction of the GFR under the *Grundgesetz* is textually, contextually and systematically supported, the situation is different in South Africa.³³ Neither the 1994 Interim Constitution nor the 1996 Constitution contains any reference to a right to the free development of the personality. Nevertheless, the South African Constitutional Court was urged to consider the matter when Ackermann J sought the opportunity in *Ferreira v Levin NO*³⁴ to propose a “broad and generous” reading of Section 11(1) of the Interim Constitution.³⁵ Ackermann J held that this subsection should be read disjunctively, separating a right to freedom from a right to security of the person. Citing Isaiah Berlin³⁶ he argued that the right to freedom was a constitutional protection of a sphere of individual liberty, a bulwark against the imposition of restrictions on the individual by the state without sufficient reason.³⁷ However, the majority of the bench rejected Ackermann’s views and embraced the dictum proposed by Chaskalson P,³⁸ namely that the primary purpose of Section 11(1) of the Interim Constitution was to ensure that the physical integrity of every person was protected. Chaskalson P then referred to the meaning of *freedom and security of the person* in public international law:

[170] ... The American Declaration of the Rights and Duties of Man, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human

33 De Waal et al. (2001:247); Currie & De Waal (2005:292).

34 *Ferreira v Levin NO* 1996 (1) SA 984 (CC), paragraph 45ff. The essential facts on the case are as follows: The South African Constitutional Court received the issue as a referral from the Witwatersrand Local Division of the Supreme Court by Van Schalkwyk J. The matter at hand was the constitutionality of section 417(2)(b) of the South African Companies Act, 1973 (No. 61 of 1973), which compels a person summoned to an inquiry to testify, even though such person seeks to invoke the privilege against self-incrimination. In his minority judgment, Ackermann J held that the applicants had no standing on the grounds of Section 25(3) of the Interim Constitution, which embodies the fair trial principles. The reasons for his approach do not matter here, but given his analysis of the issue of standing, Ackermann J was driven to scan the Interim Constitution for other subjective rights the applicant may have been entitled to which could have been infringed. Whereas there was no such right to be found among the enumerated rights and freedoms of Chapter 3, Ackermann J resorted to the concept of the *GFR*, which he textually anchored in Section 11(1) of the Interim Constitution. Chaskalson P, for the majority judgment, rejected Ackermann J’s analysis of the issue of standing with regard to Section 25(3) of the Interim Constitution, and granted relief on the ground of a violation of the fair trial principle. In passing the majority decision, he gave a brief exposition of its position with regard to a residual freedom right for the time being.

35 The text of Section 11 of the Interim Constitution (1994) has been virtually taken over into Section 12 of the current South African Constitution (1996), although the text of Section 12(1) (a) to (e) is now more specific in its formulation.

36 Berlin (1969:121).

37 *Ferreira v Levin NO* 1996 (1) SA 984 (CC), at paragraph 54.

38 (*ibid.*:paragraph 158ff).

Rights and Fundamental Freedoms, and the African Charter on Human and [Peoples'] Rights, all use the phrase "liberty and security of the person" in a context which shows that it relates to detention or other physical constraints. [Sieghart] notes that although "... all the instruments protect these two rights jointly in virtually identical terms, they have been interpreted as being separate and independent rights", and that the European Commission of Human Rights and the European Court of Human Rights have found that what is protected is "physical liberty" and "physical security". There is nothing to suggest that the primary purpose of section 11(1) of our Constitution is different.

This finding is buttressed by systematic arguments regarding the various thresholds for limitations of fundamental freedoms as set out in Section 33 of the Interim Constitution.³⁹ Without the necessity to expound the very substance and delineation of Section 11(1) of the Interim Constitution,⁴⁰ Chaskalson P rendered a clean sweep of the substance of Ackermann J's judgment, albeit not entirely excluding the future emergence of sufficient reasons to acknowledge the residual right:

... I can see no objection to accepting provisionally that section 11(1) is not confined to the protection of physical integrity and that in a proper case it may be relied upon to support a fundamental freedom that is not otherwise protected adequately under Chapter 3.

GFR – an axiological presupposition

The excursion into the history of ideas and into the comparative approach of two selected jurisdictions to the GFR has shown that the concept holds heuristic, intellectual and practical appeal. Without a specific textual reference to the GFR in the Namibian Constitution, however, it remains a question of logical reasoning to establish whether or not the GFR forms part of its normativity.

With the Constitution as its Supreme Law, Namibia abandoned crude legal positivism, which was then and there epitomised by the orthodox, text-based (literal) approach to juristic interpretation.⁴¹ The literal approach has been widely substituted by the so-called purposive approach, which departs from the assumption that the purpose or object of the

39 (ibid.:paragraph 173ff).

40 Technically, and with regard to Section 11(1) of the Interim Constitution, the majority judgment in *Ferreira v Levin NO* is an obiter. The question as to whether a residual constitutional right to negative freedom should be read into Section 11(1) was not the basis for the majority decision. In fact, against the backdrop of the nature of the GFR as a residual rights position (supra), and the fact that the majority decision referred to in Article 25(3) of the Interim Constitution, i.e. the specific principle of fair trial as the principal anchor of its decision to invalidate section 417(2)(b) of the South African Companies Act, there was no urgency or need to delineate the boundaries of Article 11(1) of the Interim Constitution. It is submitted, therefore, that the view expressed by the concurring majority in this regard is not binding. See also *Ferreira v Levin NO* 1996 (1) SA 984 (CC), paragraph 185, where Chaskalson P posits that "the rule against self[-]incrimination is adequately protected" and so "it is not necessary to consider ... whether the 'residual right' claimed is of a character appropriate for protection under section 11(1)".

41 Botha (2005:47ff).

legislation is the prevailing factor in its interpretation.⁴² But whereas the Constitution is now the frame of reference within which everything is obliged to function, the prism through which everything and everybody has to be viewed, the question arises as to where to find the prism through which to view the Constitution itself.

This question which relates to the normative theoretical question of the foundation of validity cannot be ignored, especially not with regard to topics such as the GFR that are not addressed explicitly by the constitutional norm text. While endeavouring to answer the question, the interpreter, however, encounters the problem that, in the context of positive constitutional law, there are no other sources which share the same normative quality as the Constitution.⁴³ Thus, the Constitution (Kelsen's "Grundnorm", Hart's "rule of recognition") shares the solitude which characterises the normativity of a norm text that is not derived from any other, superior norm. Confronted with this situation, Mahomed J made the following dogmatic statement:⁴⁴

All Constitutions seek to articulate, with different degrees of intensity and detail, the shared aspirations of a nation, the values which bind its people ... and the moral and ethical direction which that nation has identified for its future.

From here it flows naturally that the interpretation of the Constitution always requires ascertaining the foundational values inherent in the Constitution, underpinning the listed fundamental rights and freedoms, and proceeding from there to an interpretation that best supports and protects those values. Technically, what is required is the logic-rational interconnection of material aspects of political philosophy,⁴⁵ to the extent that they can be recognised as being moulded into the Constitution by virtue of a linguistic anchor. This approach is supported by the fact that (the) law is always the expression of a reasonable logical and rational enterprise, i.e. the establishment of the rule of law.⁴⁶ The idea of the

42 (ibid.:51); see already Schreiner JA in *Jaga v Dönges* 1950 (4) SA, at paragraph 653 (A).

43 De Waal et al. (2001:138).

44 *S v Makwanyane* 1995 (3) SA 391 (CC), at paragraph 262.

45 This does not mean resorting to natural law, which in essence holds that the dictates of law are universal, unchanging and discoverable by human reason. Natural law shares epistemological problems with other theories of (objective) values, i.e. intuitionism. The fundamental problem with such theories is that the proclaimed a priori 'values' have to be established individually by means of intuitive, evidentiary processes. In the absence of criteria for true or authentic evidence, intuitive processes amount to nothing more than subjective positions. The same problematic affects the substance of natural law. It is prudent, therefore, to determine the relation between the Constitution and natural law with caution: natural law concepts are reflected in the Constitution and form part of the constitutional law to the extent that they have been textually anchored in the form of politico-philosophical concepts such as human dignity, liberty, equality, and democracy.

46 This inevitably requires a (value) judgment, which is not a value judgment to be made on the basis of the judges' personal values. Mahomed J set out the requirements for constitutional interpretation in *Ex parte Attorney General, Namibia: In Re Corporal Punishment by Organs of the State* 1991 (3) SA 76 NmSC 91 D–F. However, the judgment added a degree of confusion [Continued overleaf]

rule of law connotes a limitation on government; it is the antithesis of arbitrary rule.⁴⁷ Whilst the norm text of the Constitution constitutes the outer limit, which is pledged not to be transgressed by the state and its organs, it remains the repository from which the purpose has to be taken.

Interestingly, the Namibian Constitution may be understood to embrace the ‘principles of integrity’ in the above sense in the opening words of its Preamble:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace; ...

The Preamble suggests a functional integration of dignity/rights, on the one hand, and freedom, justice and peace on the other. For the purposes of this paper, therefore, we may assume that the normative-analytical approach is compatible with the Constitution. For lack of space, the discussion hereafter will focus on the residual right as necessary to give substance to the right to human dignity; and the conceptual correspondence between the GFR and the “*volonté générale*” (Rousseau), which describes the ideal type (Weber) of democracy, informing virtually all contemporary conceptions of *democracy*.

for scholars, among others. In the judgment of the *Frank* case referred to earlier, the court referred to the concept of institutions as understood in the judgment *In Re Corporal Punishment*, and gave guidelines as to how the norms and values were to be identified with reference to the dictionary meaning of *institution*. Amoo (2008b:51) thus concluded as follows: “The Namibian Parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian Churches and other relevant community-based organisations can be regarded as institutions ...”.

O’Linn J and Amoo squarely sideline the tenets of constitutionalism, a direction of constitutional interpretation which Mahomed J presumably did not have in mind either, or rather, which cannot be inferred from his dictum given above. The evolutionary step from parliamentary sovereignty to constitutional supremacy needs to be seen in the abdication of the dictatorship of the majority, while, at the same time, through the establishment of a representative democracy, the legislator became liberated from the volatile day-to-day opinion of the electorate (as to the difficulties, see Cassidy 2002:186). Constitutionalism and representative democracy facilitate the development of a consistent logic-rational legal order (rule of law), which evolves notwithstanding daily shifts in public opinion and the momentary whims and caprices of the electorate, against the backdrop of such principles and precepts as have been agreed upon by the members of a constituent assembly in a presumably sober state, rationally distanced from the vagaries of emotions and irrational states of mind. In fact, the text by Mahomed J is closer to Dworkin’s (1986:225) legal theory, which posits law as integrity, requiring a judge to identify the purpose, content, and command of the law on the assumption that the legal rules at hand were all created by a single author – the community personified – expressing a coherent conception of justice and fairness, an undertaking which instructs the interpreter “to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole” (ibid.:245).

47 Amoo (2008a:313), quoting Nwabueze: “it is the antithesis of arbitrary rule; ...”. One of the first norm texts in this tradition was the Magna Carta (1215), which King John the Baptist (1167–1216) had to concede to the Barons.

State of nature, society, individual, autonomy

The recognition of the GFR obviously carries some of the momentum or an element of liberty – which is always presupposed in the natural state – into the state of freedom, which, as cited above, the Preamble of the Namibian Constitution envisages.⁴⁸ The term *natural state* pertains to the political philosophy of the modern era, to be found particularly in the writings of Thomas Hobbes and Jean-Jacques Rousseau. The natural state (of personal freedom) is the axiological presupposition which leads to Rousseau's "*volonté general*".⁴⁹ Admittedly, all contract models from Hobbes to Rawls face the problem that they presume something which is, however, only emergent in the social process: they posit the contrafactual existence of a presocial individual. But this is not the problem of the GFR. The postulation of the GFR is perfectly compatible with Berger and Luckmann's (1966) contention that "to be in society is to participate in its dialectic process", which represents the background for the ontogenesis of the person as a member of society.

In order to understand this concept of *freedom*, it is necessary to take a closer look at its construction. A state of freedom does not denote the idea of a presocial individual at all. To conjure the image of the isolated individual is not at all justified since, like any subjective entitlement, whether a specific right or freedom, the GFR is – through the balancing law, which requires weighing in accordance with the proportionality principle – deeply embedded in the social. Although the GFR remains contentually undefined, which could be equated with being 'borderless', it is factually as limited as any other (specific) fundamental right or freedom. Logically, this rests on the assumption that the GFR would have to be placed under a general limitation clause comparable to Article 21(2) of the Namibian Constitution. What is decisive, eventually, is only that which is definitely placed under protection – which is not at all without boundaries, and certainly not arbitrary. The practical ambit of the negative freedom will always remain the result

48 The utility of theoretical considerations derived from the politico-philosophical discourse on democracy (and other constitutional precepts) in the context of constitutional interpretation cannot be ignored. Whereas theoretical aspects may be of purely academic importance at the level of sub-constitutional law (Terblanche 2007:172), the theoretical discourse gains crucial relevance for construction where the normativity (purpose and scope) of concepts represented in the norm text has to be ascertained. It is difficult – if not impossible – to conceive of any other or preferable method of interpretation where the norm text by and large makes use of concepts, because concepts are cognitive units of meaning (abstract ideas), usually built from other units which act as a concept's characteristics, and are typically associated with a corresponding linguistic representation such as a word. Therefore, it is held that the purpose of the constitution – or simply any selected constitutional concept – has to be sought under observance of the theoretical discourse which engendered that very concept in the first place. It is this discourse which provides the 'concept characteristics' that are otherwise absent from the text of the constitution.

49 Arguably, to the extent that Namibian society is required to be built on the principles of democracy, as stated in Article 1(1) of the Namibian Constitution, the axiological position has been made part of our constitutional ambit.

of the balancing act⁵⁰ performed between the actual or intended use of liberty and other contrary (legal) positions, individual or collective.⁵¹ Within the thematic ambit of the special fundamental rights and freedoms, the Constituent Assembly has to some degree, and for a number of probable cases, anticipated the balancing/weighting results. Whereas the interpreter has so far been relieved from establishing the most basic preference relations in the domain of fundamental rights and freedoms, this is still outstanding whenever the GFR applies.

However, in all cases, irrespective of the rights position in question, the balancing of different freedoms (of different subjects) becomes necessary. The result of this balancing constitutes what is definitively protected: it contributes to the comprehensive state of freedom referred to in the Preamble of the Namibian Constitution. It follows naturally from the above that bringing about and sustaining a (comprehensive) state of freedom always comes with opportunity costs, which need to be measured in the currency of freedom or liberty. From a historical perspective, *freedom*, in a legal and constitutional sense, means the provisional end-point of a tandem of social and legal developments from the Middle Ages to modernity. This development is epitomised by the emancipation of the law from morality.⁵² By the end of this development, the legal status of a person had become independent from his/her social status in a specific hierarchical social system, and we observe the emergence of a status of formal equality of all citizens. This development, which afforded individuals the potential to shape their life spheres according to their own preferences and inclinations, can very well be described as a social-evolutionary phenomenon, since it brought about a type of society which later proved to be highly flexible and adaptable, far better suited to withstand the challenges and vagaries of change in the system environment,⁵³ and the idea of the GFR may be

50 Fundamental rights and freedoms are not absolute. Even if rights – such as the right to dignity in Article 8(1) of the Namibian Constitution – do not carry an express limitation provision, they have immanent boundaries which are elucidated in relation to the rights of others and the collective interests of society.

51 The *GFR* as a normative concept is certainly commensurate with preference relations, with an emphasis on collective goods/interests at the cost of personal freedom. In this case, the margin of definitive negative freedom becomes very small.

52 Compare Maine (1861).

53 To posit as much may invite critique for it is a deconstruction based on ethnocentric perceptions having emerged in the context of the European Enlightenment. Yet, in the wake of the Enlightenment, science, technology and human development thrived, because the emancipation of the law as its concurrent expression unlocked thinking unencumbered by moral conventions, and created unprecedented alternatives for action. Advances in science were followed by an agricultural revolution, which stabilised food security enormously. Whether the Enlightenment era was such a blessing overall may be doubtful, in particular if one considers the current world economic and social order. The specific anthropocentric world view of the modern era, with its instrumental logic – which is especially associated with liberalism – is largely incapable of conceiving of ‘others’ who define themselves by means of a non-instrumental, ecological relation with nature, as persons, i.e. autonomous subjects (see Benhabib 1992). But the question about viable alternatives lingers. There is certainly more to it than can be discussed [Continued overleaf]

seen as this development's culmination point. The recognition of the GFR preserves the ever-evolving status quo of individual freedom, since it buttresses the autonomy⁵⁴ of the person (vis-à-vis morality). It is, thus, only under the conditions of the GFR, the residual negative freedom, that the person is "free to choose, and not to be chosen for".

Human dignity is a term used to signify that a being has an innate right to respect and ethical treatment. But it is also closely related to concepts like *autonomy*, *human rights*, and *enlightened reason*, and used to critique the treatment of oppressed and vulnerable groups and peoples. But while *dignity* is a term with a long philosophical history, it is rarely defined outright in political, legal and scientific discussions. The inseparable link between *negative freedom* and *dignity* is, thus, less than obvious.⁵⁵ Nonetheless, this link emerges immediately if one considers the conceptual core of human dignity as having developed over time.

in a footnote. However, we also recall that all human cognition begins with a value position. Values are an integral part of social life: no group's values are wrong – they are only different. This epistemological position applies equally to any one specific conception of democracy. Against this background, proponents of the position taken in this paper maintain two things. Firstly, to accept the position as binding on the political system presupposes a separation of law as much as the emergent self/identity from morality. Secondly, whether and when any society can be found so situated is historically contingent, and escapes precise prediction and/or assessment.

54 The Ancient Greek *autonomia* from *autonomos*, from *auto-* "self" and *nomos*, "law"; "one who gives him-/herself their own law".

55 Ackermann J posits in *Ferreira v Levin NO* at paragraph 49 that, without freedom, human dignity is little more than an abstraction: "Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. ... An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others".

Chaskalson P's contrary position is as follows: "In the context of the multiplicity of rights with which it is associated in Chapter 3, human dignity can and will flourish without such an extensive interpretation being given to section 11(1)" (*Ferreira v Levin NO*, paragraph 173). This position can only be reconciled with a more positivist-material understanding of human dignity which reduces the right to dignity to just another subjective entitlement. This formal approach places human dignity at the same level as any other subjective right or freedom, without consideration of the functional interrelation between and interdependence of these constitutional precepts. The latter consideration, however, does not go well with Chaskalson P's standpoint in *S v Makwanyane* (paragraph 144): "The right to life and dignity are the most important of all human rights and the source of all other personal rights in the Bill of Rights ...".

Although not the first to elaborate on the structure, nature and meaning of the concept,⁵⁶ Kant's discourse on human dignity arguably had the most profound influence. He held that there were things that should not be discussed in terms of value, and that these things could be said to have dignity. *Value* is necessarily relative, because the value of something depends on a particular observer's judgment of that thing. Things that are not relative (that are "ends in themselves", in Kant's terminology), are by extension beyond all value, and a thing is an 'end in itself' only if it has a moral dimension. In Kant's words, this 'thing' could only be humans. Kant continued his elaboration of human dignity and put forth the three formulae of will. From formula to formula, and increasingly so, human dignity focuses on self-determination – and autonomy. The emergence of human dignity takes place at the pace of the self-determination/autonomy of the person. It is this autonomy which brings about the person as specifically human. The person has the dignity to choose his/her own ways, to develop the Self, the dignity of autonomy or, in Berlin's words, "to choose and not to be chosen for". Kant, like Pico de Mirandola, posits a structural relation between *dignity* and *liberty*: the (human) person has the dignity to be free. Humanity has the dignity to be free in the wider sense of *autonomy*. Against this background, it is clear that freedom/autonomy are the necessary prerequisites for human dignity to unfold; in this sense, the subjective right becomes the most intensive form of autonomy. This perspective has, virtually without exception, become the focal point for oppressed and vulnerable groups and peoples around the world.⁵⁷

The GFR and democracy

Eventually, it is the foundational concept of *democracy* itself which suggests the recognition of the GFR. In respect of democracy as a form of government, the GFR is (at the level of the individual) the complement of the formal aspects of democracy.

It is the structural-logical extension of the substantial-material limitations imposed on the majority rule by virtue of the specific rights and freedoms which already textually form part of the positive constitutional law. Most often, democracy is seen as a specific principle applied in decision-making, be it at a political level or elsewhere, i.e. the majority rule. Yet, a functional analysis of the constitutional nexus between the majority rule and freedom – against the backdrop of the discourse on democracy in political philosophy – reveals that the establishment of the democratic government is not aimed merely at installing the majority rule as an end in itself. Rather, *democracy* has primarily

56 In 1486, at the beginning of the modern era and about 200 years before Kant, Pico della Mirandola (1469–1493) presented his *Oration on the dignity of man* (*Oratio de hominis dignitate*), in which he revealed the central problem of dignity and freedom. This oration is commonly seen as one of the central texts of the Renaissance, intimately tied with the growth of humanist philosophies; see Baruzzi (1983:111).

57 This view is echoed in *State v Acheson* 1991 (2) SA 805 (Nm), where Mahomed J considered that "Mr Lubowski ... was during his lifetime perceived to be a vigorous proponent of the right of the Namibian people to self-determination and to emancipation from colonialism and racism – ideals which are so eloquently formalised inter alia in the preamble of the Namibian Constitution and arts 10 and 13".

been accepted to mean that legitimate government rests on the citizens' consent, in that the consent of the governed is the defining characteristic of the relationship between the state and its subjects. In other words, government has to be based on the will of the people – in Rousseau's words, the "*volonté générale*". For the lingering question *What constitutes the will of the people?* in the context of our discourse, a short excursus to the history of ideas may be instructive.

In political philosophy since antiquity, the emphasis lies on liberty as democracy's underpinning principle; and Aristotle argues, in essence, that liberty is what every democracy should make its aim. More than 2,000 years later, the foundational principle of liberty was elaborated upon by Rousseau in his perhaps most important work, *The social contract*.⁵⁸ Rousseau, like Aristotle before him, makes liberty or personal freedom the pivotal point of his theoretical construct. Rousseau's concept of *democracy* takes its bearings from personal freedom/liberty as an axiological *a priori*. But, if we were to take this *a priori* seriously, democratic decision-making would always require unanimity. However, Rousseau concedes, realistically, that this is not only impracticable, but impossible:

Were there a people of gods, their government would be democratic. So perfect a government is not for men.

If we take the term in the strict sense, there never has been a real democracy, and there never will be. It is against the natural order for the many to govern and the few to be governed. It is unimaginable that the people should remain continually assembled to devote their time to public affairs, and it is clear that they cannot set up commissions⁵⁹ for that purpose without the form of administration being changed.

From there emanates the recognition that democracy is not a suitable form of government for human societies, as well as the practical necessity to deviate from unanimity as the democratic ideal type of *volonté générale*. Whereas, as a matter of consequence, any form of human government – even democracy – poses a continuous threat to liberty, Rousseau does not suggest the abandonment of the democratic aim, namely liberty. Instead, he suggests the relaxation of the unanimity requirement in favour of qualified majorities in relation to the comparative importance of an issue at hand, and the urgency of decision-making:

There are two general rules that may serve to regulate this relation. First, the more grave and important the questions discussed, the nearer should the opinion that is to prevail approach unanimity. Secondly, the more the matter in hand calls for speed, the smaller the prescribed difference in the numbers of votes may be allowed to become: where an instant decision has to

58 Published in 1762, it became one of the most influential works of political philosophy in the Western tradition. It developed some of the ideas mentioned in an earlier work, the article "Economie Politique" ("Discourse on Political Economy"), featured in Diderot's *Encyclopédie*. The version of *The Social Contract* referred to here is available at http://www.constitution.org/jjr/socon_03.htm#004; last accessed 13 January 2010.

59 Rousseau obviously did not support the idea of a representative democracy.

be reached, a majority of one vote should be enough. The first of these two rules seems more in harmony with the laws, and the second with practical affairs. In any case, it is the combination of them that gives the best proportions for determining the majority necessary.

The principles which have been pinned down by Rousseau in the ‘two general rules’ can be found today in just about all democratic societies. Namibia is no exception in this regard. The Namibian Constitution, the fundamental law, consists of all regulatory material that has been considered functionally, structurally, procedurally, formally and materially as ‘more grave’. The specific majority requirements which have to be met for the repeal and amendment of the constitutional text are laid down in Article 131. Accordingly, repeals and amendments of general constitutional norm text require a two-thirds majority of votes. But a difference is made even within the Constitution, and rights and freedoms under Chapter 3 (Bill of Rights) have been placed under special and absolute protection by virtue of Article 132.⁶⁰ With regard to any other issue, i.e. those matters which do not require repeal or amendment of the constitutional text, a simple majority of votes cast is sufficient for resolutions.⁶¹

Against this background, the postulation of a normative tandem of human dignity, namely autonomy, and negative freedom appears as a consequence, flowing naturally from the very text of the Namibian Constitution. It can be seen as buttressed by the constitutional concept of *democracy*, which – bootstrapping from an initial understanding of Rousseau’s *volonté générale* – de-emphasises the decision-making principle which democracy also denotes, and reminds us that even the objective of the principle as the ideal type of democracy is not so much the formal aspect of decision-making (the majority rules), but the underpinning primordial liberty of the individual.

Intention of the Constituent Assembly

If the conceptual consequences of the political philosophical discourse on democracy are carried over from the theoretical level to the normative constitutional level, one question remains: Would it matter if it could be established that the Constituent Assembly excluded the GFR deliberately, wilfully and consciously from the constitutional text? The question points towards the normative theoretical issue of the significance of the Constituent Assembly’s intention – which is indecisive. The quest for the historical legislator’s intention would open the same Pandora’s box of problems encountered before the advent of the Supreme Law. This quest was always assumptive, and usually amounted to no more than divination.⁶² Of course, this does not mean that the ‘intention’ has no significance at all; but to the extent that an intention has been reconstructed, it at best becomes one set of arguments among others during the logical rational process of

60 See also Article 22 of the Namibian Constitution (“Limitations upon Fundamental Rights and Freedoms”).

61 Compare Articles 54, 67 and 77 of the Namibian Constitution. The usual democratic requirements for decision-making have been also relaxed under the impression of urgency in Chapter 4 (“Public Emergency, State of National Defence and Martial Law”) of the Constitution.

62 See Cassidy (2002).

purposive construction and determination of the purpose sought to be advanced by the Constitution.

Article 7 of the Namibian Constitution and the GFR

Notwithstanding the abandonment of the literal approach of legal interpretation, if one accepts the legitimacy of law as a convention, it is imperative for the constitutional norm text to serve as the outer normative boundary. It is, thus, necessary to identify a textual anchor for the GFR. Article 7 of the Namibian Constitution is suitable in this regard.

Although Article 7 has been discussed in relation to the arrest of a person,⁶³ its structure and context do not suggest that the meaning of *liberty* is limited to deprivation of physical freedom. In terms of its constitutional context, liberty in Article 7 is placed in the middle of a sequence consisting otherwise of life (Article 6) and human dignity (Article 8), two fundamental and – in respect of human dignity – generic concepts. Against the background of the discourse about the relation between human dignity and negative freedom, this positioning suggests the GFR over the much narrower concept of *physical freedom*.

One might want to draw support for a counterargument from the ordinary understanding of ‘freedom (liberty) and security of the person’ and lean on the argument by Chaskalson P in *Ferreira v Levin NO*, who in turn relies on the sense in which the phrase *freedom and security of the person* is used in public international law.⁶⁴

But following this route would ignore that the structure of Section 12 of the South African Constitution is different from Article 7 of the Namibian Constitution. In its Section 12(1), the South African Constitution combines the right to freedom with the right to security, whereas Article 7 of the Namibian Constitution deals exclusively with liberty. Whereas the “right to freedom and the security of the person” in Section 12(1) of the South African Constitution has been placed alongside prohibitions of, inter alia, “detention without trial”, “torture”, and “cruel, inhuman or degrading treatment or punishment” – matters that are all concerned primarily with physical integrity – such topics are not dealt with in Article 7 of the Namibian Constitution. The latter deals with arrest and detention in Article 11, and fair trial guarantees in Article 12. If one agrees with Chaskalson P that the mechanical application of the *expressio unius* principle is not appropriate to an interpretation of Chapter 3, and that, hence, the structure of Chapter 3 – the detailed formulation of the different rights – and the language of Article 7 of the Namibian Constitution cannot be ignored, there is no compelling reason to construct the purpose of Article 7 as concerned primarily with physical integrity.⁶⁵

63 Namibian Police (2000:61ff); *S v Boois, S v Thomas* 1991 NR 455 HC, at paragraphs 455I–456B.

64 *Ferreira v Levin NO* 1996 (1) SA 984 (CC), paragraph 170.

65 Although largely in form of an obiter, in *Ferreira v Levin NO* the South African Constitutional Court speaks with the authority of a custodian of the law. Yet, as has been pointed out above, the court did not categorically exclude the potential for the residual freedom right to be [Continued overleaf]

Conclusion

It is a towering question how to deal with an infringement of liberty, where the actual, intended or only desired behaviour does not fall within the ambit of any special fundamental right or freedom. The non-recognition of a residual (negative) freedom, here called a *general freedom right* (GFR), results in the possibility that the legislator and, more importantly, the executive may unlawfully and even under wilful ignorance of the rule of law, infringe, restrict or violate the life sphere of the individual. The discourse about the GFR takes place at a time when constitutional interpretation has become guided by the notion of *purpose* as opposed to *intention*. The purpose of the Constitution, at large and specific constitutional precepts in particular, takes into account the relevant context, which includes social factors and political policy directions. Since the constitutional text stands at the apex of the hierarchy of laws, it remains largely its own context, and the question that continues to linger on is how to proceed from there. However, given the fallacies of the literal approach, the interpreter cannot fall back on the notion of the intention of the *pouvoir constituant*. Accepting the conventional nature of law, the interpreter has to find answers that can be fettered to the norm text of the constitution in question, which is a linguistic expression of an overarching agreement. Inside the Namibian Constitution, the primordial foundational values are human dignity, liberty, and equality. These values were put forward during the historical process towards the self-determination of the Namibian people. A (preliminary) logical-rational analysis of the functional interrelation of the foundational values suggests that specific fundamental rights and freedoms presuppose an a-priori residual freedom, which encompasses the thematic guarantees offered by them. Based on the consideration that Article 7 of the Namibian Constitution is phrased in a way that already semantically points to a negative freedom, and the fact that *freedom*, in the sense of a state of affairs, has been posited as an objective, it is held here that the Namibian Constitution comprises the GFR. A state of freedom presupposes that infringements on the liberty of a person may only take place if reasonable arguments can justify such infringement. This is the normative effect, which flows from the acknowledgement of the GFR. The GFR is, therefore, a necessary component of a democratic society and, by extension, a necessary component of the Namibian democracy. Where the normative reach of the GFR is dogmatically ignored, the loss of freedom may be minor, and therefore negligible. But even if this were the case, certainty can only be gained once the balancing of values and principles has taken place. Without the actual invocation of negative freedom, the quantum and quality of liberty sacrificed will remain unknown; and any justification of the sacrifice becomes futile.

The discourse that began with this contribution is primarily one which centres on the Namibian Constitution. The benefits and challenges (and solutions) of the concept of a *GFR* in general have been recognised elsewhere. But the challenge remains to engender a meaningful discourse within the Namibian context. It seems more than probable that the positions taken herein will not remain unchallenged. A number of counterarguments will certainly be fuelled by the routines and habituations, the received techniques of

interpretation, which often come with their own bias.⁶⁶ One of the contentious positions has already been pointed out by Ackermann J and Chaskalson P⁶⁷ in *Ferreira v Levin NO*. The consequential challenge may be how deal with the fact that, with the GFR, any tenuous restriction placed on an individual would constitute an infringement of liberty, thus compelling the judiciary to scrutinise every infringement of freedom in this broad sense as meeting the requirements of proportionality. However, answers and constructive suggestions will certainly be provided along the road of the discourse.

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constructed in the South African Constitution. The court's approach, thus, keeps a door open for the construction of the notion of freedom in Section 12(1) in light of the needs of a changing society. The fact that the court took a cautious approach to the question can also be explained with reference to the function of the judiciary, which is to give dogmatic answers to legal questions placed before it. In *Ferreira v Levin NO*, according to the majority judgment, there was no justification to fully engage with the question of whether and how to develop the GFR as a conception under the South African Constitution. The academic discourse does not find itself under such limitations, however, and may venture into logical-rational reasoning with the objective of delineating the normative boundaries of the Constitution and propose definitions of the intricate relationships among the foundational precepts captured by the Constitution's norm text, and so shelve knowledge for judicial reference whenever the need arises.

- 66 Compare Kentridge AJ in the very first judgment of the South African Constitutional Court, *S v Zuma* 1995 (2) SA 642 (CC), at paragraph 17: "..., it is nevertheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a singular 'objective meaning'. *Nor is it easy to avoid the influence of one's personal and intellectual and moral preconceptions*" [Emphasis added].
- 67 *Ferreira v Levin NO* 1996 (1) SA 984 (CC), paragraph 179.

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The constitutionality of Namibia's territorial integrity

Lazarus Hangula

Introduction

As Namibia enters the third decennium of its existence as a nation state, it stands to be congratulated for its tremendous achievements in the area of socioeconomic and infrastructural development as well as for peace and security. By the principle of *Concordia domi, foris pax* – “Harmony at home and peace with neighbours” – alone, Namibia deserves kudos in respect of its relations with neighbouring states.

Indeed, although sporadically interspaced with, and experiencing, vestiges of apartheid as well as the combative rhetoric of yesteryear, Namibia has found its social identity and learned to be at peace with itself, its neighbours and the international community at large, by pursuing an active foreign policy anchored in the basic values of democracy and the Bill of Rights while encompassing the rule of law, tolerance, peace and stability, and border security.¹

Boundaries are established to create certainty and ensure clarity with regard to the exercise of political, civil and economic rights, as well as the exercise of operational and administrative rights of a sovereign state or country.² It is also for these reasons that many countries have their territorial space anchored in their constitutions – and Namibia is no exception.³

Having the status of non-clarity when it comes to a political – or, for that matter, administrative – boundary is often a source of dispute and/or conflict between neighbouring states, administrative entities or even personal entities. Not so long ago, Africa was still experiencing such intestine and interstate conflicts (e.g. those that occurred between Eritrea and Ethiopia, Libya and Chad, Nigeria and Cameroon, and Burkina Faso and Mali).

The *quid iuris* and *quid facti* of Namibia's international boundary

The 195-year history of the chronologically recorded international boundary of Namibia has largely contributed satisfactorily, both conventionally and geodetically, to the creation of its clarity and certainty. In this regard, through dispute resolutions, triangulations and demarcation or beaconing issues related to –

1 Constitution of the Republic of Namibia, Chapters 1, 3, 11.

2 Seidl-Hohenveldern (1992:121–122).

3 Namibian Constitution, Article 1.

- the Kalahari and Ngamiland border
 - the then Neutral Zone in the north of Namibia
 - the Triune Point on the Kwando River
 - the Lozi Privileges, the Islands and the Quadripoint between Botswana, Namibia, Zambia and Zimbabwe in the Zambezi River
 - Kasikili Island, and
 - the issues concerning access to the water and other resources around it, and
 - the alignment of the entire borderline along the Linyanti-Chobe River
- were all satisfactorily resolved and/or clarified by the colonial powers or by the independent sovereign states that succeeded them to treaty and obligation.⁴

However, notwithstanding the above positive developments and despite the definition of Namibia's territorial waters, the creation of an exclusive economic zone (EEZ), and the clarification of the issues concerning the sea-oriented river boundaries in northern Namibia, boundary matters regarding the southern parts of the country have remained dormant for quite some time. Nonetheless, this may not be an issue for much longer because of the ever-growing economic interests in this geographic zone – whether inland, at the coast, or in the sea.

The Kunene River boundary and its projection into the sea

The issue of clarity and certainty of the Angola–Namibia boundary resurfaced a few years ago when a foreign vessel went down in the Atlantic waters off the Angolan–Namibian coast, raising the question “In whose territorial waters did the vessel go down?” Bearing in mind that the international boundary on the Kunene was established by the German–Portuguese Lisbon Convention of 30 December 1886, on 1 July 1993 Angola and Namibia signed a Memorandum of Understanding with the aim of demarcating their common maritime boundary.

However, due to lack of a binding international legal instrument in the form of a Convention or Treaty, the project could not be carried forward. Therefore, on 4 June 2002, the governments of Angola and Namibia signed an agreement to –

... establish, determine and fix the course of the maritime boundary line between their territories and the limits of their territorial waters as well as their specific economic coastal zones ...

in accordance with the United Nations Convention on the Law of the Sea of 1982.

In its Article III, the Angolan–Namibian Treaty of 2002 stipulates the following:

The starting point for the determination and demarcation of Territorial Sea, Exclusive Economic Zone and Continental Shelf between the Republic of Angola and the Republic of Namibia shall be the intersection of the baseline and the parallel of latitude 17°15' south. From this point on the baseline the maritime border will run along the 17°15' latitude S. westwards for a distance of 200 (Two Hundred) nautical miles.

4 Faundez (1989).

Thus, Article III, together with section 22 of Annexure B of the Angolan–Namibian Treaty, also constituted the terms of reference of an envisaged ten-member Joint Commission on the Maritime Boundary. The Joint Commission’s duty would be to determine and demarcate the maritime boundary between the two countries. The Joint Commission was established and conducted its geodetic work from May 2003 to July 2004. The bulk of the work consisted in –

- the triangulation of the Kunene River mouth
- the determination of the baseline and the parallel of latitude 17°15’ S
- the westward extension of the baseline for a distance of 200 nautical miles
- establishing marker beacons on the land, and
- defining the corresponding points of, and laying, the buoys on the sea water.

Through their agreement, Angola and Namibia decided to execute the above steps in order to “exercise full sovereignty over their natural resources”.⁵

With the exception of the cadastral maps that took some time to be finalised due to the nature of the work in and the geography of the sea, the demarcation of the territorial waters between Angola and Namibia was successfully completed, thus duly establishing the clarity and certainty of the maritime boundary between the two countries.

The !Garib/Orange River boundary and the apparent perpetuity of its imbroglio

The English–German Boundary Treaty (the so-called Helgoland Treaty) of 1 July 1890 defined the boundary between Namibia and South Africa as –⁶

... a line commencing at the mouth of the Orange River and ascending the north bank of that river to the point of its intersection by 20th degree of east longitude.

The delimitation of the British–German spheres of influence in Nama(qua)land had, ab initio, the detrimental effect of denying – both de iure and de facto – the inhabitants of the territory then occupied by Germany (then Deutsch-Südwestafrika, today’s Namibia) access to the waters of the !Garib/Orange River. No wonder then that, as early as May 1899, “the Rahman’s Drift Ferry question arose”⁷ and continued for the entire period of German rule in Deutsch-Südwestafrika until Germany’s demise as a colonial power in south-western Africa in the aftermath of World War I. The Rahman’s Drift Ferry question arose when an entrepreneur residing in Great Nama(qua)land (i.e. in Namibia), who wanted to run a ferry service in the !Garib/Orange, could not even establish a pontoon on the Namibian side of the river because, by treaty, it was part of the British-held Cape Colony.⁸ It is certainly an ugly legal situation that de iure excludes the inhabitants of one

5 (ibid.:2).

6 Hertslet (1899:899).

7 Hangula (1991:229).

8 Hangula (1993:105–116).

country or makes them dependent on the *grace* of its neighbouring country on the other side of the river to have access to water in that river.⁹

Although, during the South African occupation of Namibia, “the problem of access to the water of the river for the inhabitants of Great Nama(qua)land became less acute”,¹⁰ the de facto transformation of the *international* boundary on !Garib/Orange River into an *administrative* one during the South African occupation and administration of Namibia did not solve the problem. Instead, it masked and even compounded the problem to a certain extent, as it rendered the border quasi-non-existent for almost a century.

Following the demise of the apartheid regime in 1994 and the creation of an inclusive and democratic government in South Africa, led by the legendary Nelson Mandela, the new South African government showed itself to be amenable to a medium *filum aquae* boundary profile. Such profile would allow the communities on both sides of the river to have access to the water resources in tandem with the current stand in international law, which requires that communities of riparian states have access to common water courses.¹¹ This legal position also conforms to the provisions of Article 14 of the Namibian Constitution and, hence, the gentlemen’s agreement reached at the time between the then heads of state of Namibia (President S Nujoma) and the new democratic South Africa (President N Mandela) to have the boundary between the two countries running in the middle of the river.

Unfortunately, the promising gentlemen’s agreement that was reached informally by the two heads of state and of sisterly countries and parties on the occasion of President Mandela’s last visit to Namibia at the end of 1998 as the President of South Africa appears to have suffered serious setbacks. This was after some South African civil servants objected to the deal due, apparently, to South African citizens’ interests accrued in the !Garib/Orange, and following the collapse or failure of the Namibian–South African talks in Cape Town in 2004/5[?]. Ever since the changing of the guards at the helm of the two governments at the time, no more talks on the boundary issue appear to have taken place. This is due to, amongst other things, an apparent change in the order of priorities, which had by then shifted to the issue of the reintegration of Walvis Bay into the Namibian mainland.

Indeed, it appears that, in the wake of the Namibian–South African negotiations regarding the reintegration of Walvis Bay, the !Garib/Orange River boundary issues lost momentum and got relegated *sine die*. Moreover, not only did the technical people who were charged with this responsibility not agree on a number of issues, but the then foreign ministers of the two countries – Nkozana Dlamini-Zuma and Hidipo Hamutenya – did not seem ever to have met on the matter.

9 Hangula (1991:221–223).

10 Hangula (1993:117).

11 World Bank; Global Environment Facility.

An incongruous status of political suspense

Namibia's grape producers at Aussenkehr and all others who are involved in similar economic ventures on the shores of the !Garib/Orange are doing so through irrigation and water from that perennial river. Bearing in mind the Anglo–German treaty of 1 July 1890, and in terms of that prevailing international legal instrument, one could, however, apodictically say that such activities are happening purely due to the gracious tolerance being exercised by South Africa, emanating from that country's historic-political and via its link to Namibia through its previous administration of the latter. This assertion is based on the fact that international lawyers call Namibia a *non-riparian state* as far as the !Garib/Orange is concerned, because the aforementioned treaty set the boundary on the “north bank”, thus intentionally excluding Namibia from the river and its water – as became evident through the Rahman's Drift Ferry question. Let that ‘legal intention’ be as it may; but can the inhabitants of such an arid area as what was then Namaland and the Namib Desert truly *now* live without access to the waters of their ancestral river, just because two foreign colonial powers so decided at a time and in the name of a discredited pre-human-rights ideological doctrines of imperialism and colonialism?

The answer to the above pertinent question is obvious. I also tend to believe that it was in the consideration of the above that the two statesmen – Nelson Mandela and Sam Nujoma – let themselves be guided by African wisdom, according to which water is life, when they decided that the Namibia–South African boundary should follow the middle of the !Garib/Orange so that the communities on both sides of the river obtained access to the water and its resources. The ethically and wisdom-inspired decision of these statesmen, as well as those who crafted the Namibian Constitution, should be upheld by our generation and by posterity. It is true that Namibians currently have access to the waters of the !Garib/Orange, but this is an inertial state of affairs that has no legal backing.

It may also be true that a number of South African citizens might have rights accrued on the Namibian side of the *middle* of the river. At a time that the integration of the Southern African Development Community (SADC) is moving at high speed, such rights or privileges are not difficult to guarantee. From Merilla and Ceuta (Morocco) to Cabinda, and the famous Lozi Privileges on the Zambezi River, as well as to the more recent International Court of Justice judgment on Kasikili/Sedudu Island on access to the waters and resources around that island, there have been plenty of examples of honouring rights accrued.

Conclusion

With the exception of the ugly chapter of the Mishake Muyongo secession attempt that is reminiscent of the Africa of the early 1960s, Namibia has been at peace within, with its neighbours, and with the international community. Legally and geodetically, it has a state of certainty almost throughout its international boundary, including its territorial waters.

However, the state of *suspense* regarding the boundary at the !Garib/Orange River begs for clarity.

The lack of clarity and certainty with regard to the profile of the !Garib/Orange River boundary may pose serious international, legal, diplomatic, administrative and economic problems associated with exercising rights of sovereignty; rights associated with the United Nations Convention on the Law of the Sea; and rights and obligations concerning the exploitation, use and protection of related resources by authorities of communities of the two states.¹² This is more critical when it comes to the much-needed projection of the boundary into the sea for the determination of the territorial waters of the two countries and their application of the *erga omnes* and principles concerning the sea bordering the two countries.

Through the Rahman's Drift question in the German colonial period and the similar challenge of the then incoming South African Administration, it became clear that it was not possible for Namibia and the inhabitants of Namaland to be deprived of !Garib/Orange River waters on the basis of an ill-conceived 'legal intention' of distant colonial negotiators who crafted the Helgoland Treaty that set the international boundary on the "north bank" of the river. Furthermore, this state of affairs is waiting *ad Calendas Graecas* for a geodetic determination of the baseline of the conventional boundary so as to enable its profile to be projected into the sea for the sake of the demarcation of the territorial waters of the two neighbouring countries. In fact, it is delaying boundary clarity in particular and, consequently, certainty for the two countries to exercise both their rights of sovereignty and their international obligations.

Since the coastal waters and their seabeds off the Namibian and South African coasts appear to be rich in resources such as fish, diamonds, gas and other strategic minerals – including perhaps even petroleum,¹³ it is important that the two countries create lasting clarity and certainty with regard to the profile of their common boundary on the !Garib/Orange. The current suspense status of the boundary is incongruent with the aim and objective of a boundary as well as with the good relations existing between the two governments and peoples.

The warm relationship that obtains between the leadership of the two countries and the existence of highly experienced politicians in law and diplomacy, both in the Namibian Cabinet and at the Presidency itself, could be used to sort out the prevailing issues and stalemate, if any, and create the dearly needed certainty at the !Garib/Orange River: the only portion of the international boundary of Namibia where an unhealthy lack of certainty continues to exist.

12 Höpker (1983:85–86).

13 (*ibid.*:85).

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Constitutional jurisprudence in Namibia since Independence

George Coleman and Esi Schimming-Chase

Introduction

Administrative bodies and administrative officials who are capable of making decisions affecting the citizens should always bear in mind that, by the adoption of the Constitution of Namibia, we have been propelled from a culture of authority to a culture of justification.¹

The above is a profound departure from the following:²

Whether or not any legislative measure is calculated to promote or to harm these interests of the inhabitants, would be a matter of policy in the discretion of Parliament, into which our Courts would decline to enquire.

These two statements by judges 37 years apart not only reflect the evolution of the legal culture in Namibia since Independence, they also manifest the jurisprudential polarity between a natural law approach and legal positivism.³ According to some South African academics, positivism, as a legal theory, is to blame for the terrible track record of the judiciary in respect of the protection of civil liberties in apartheid South Africa⁴ (and, by extension, Namibia prior to Independence). This is chillingly demonstrated in *R v Sachs*, where the following was stated:⁵

Courts of law do scrutinise such statutes with the greatest care but where the statute under consideration in clear terms confers on the Executive autocratic powers over individuals, courts of law have no option but to give effect to the will of the Legislature as expressed in the statute. Where, however, the statute is reasonably capable of more than one meaning a court of law will give it the meaning which least interferes with the liberty of the individual.

This reasoning profoundly affected how courts approached the protection of civil liberties in pre-constitutional South Africa and Namibia. The issue was primarily the limit of the statutory authority – not the manner of its exercise or its consequences.⁶

1 Per Mainga J, in *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC) at 385 I–J.

2 Per Steyn CJ, in *S v Tuhadeleni & Others* 1969 (1) SA 153 (A) at 173 A–B.

3 For a lucid exposition on these theories, see Roederer & Moellendorf (2007).

4 See e.g. Dugard (1971).

5 1953 (1) SA 392, at 399 G–H per Centlivres CJ.

6 *Middelburg Municipality v Gertzen* [1914] AD 544 at 577.

The aim in this article is to explore how the adoption of the Namibian Constitution on Independence Day, 21 March 1990, has affected the jurisprudence in Namibia since apartheid. The period of 1985 to Independence will be alluded to as an historical prelude because it arguably sets the stage for the constitutional development that followed Independence.

1985 to Independence

On 17 June 1985, the first Bill of Fundamental Rights was introduced in Namibia. Ironically, it was done through a Proclamation issued by the State President of the Republic of South Africa.⁷

The Preamble to this Bill of Rights expressed the desire of the people of “SWA/Namibia” to be independent and free from outside domination. Ten fundamental rights⁸ were catalogued, starting with the right to life and ending with the right to own property.

In *S v Heita and Others*,⁹ Levy J (as he then was) held that the provisions of section 2 of the Terrorism Act¹⁰ were in conflict with Article 4 of Annexure 1 to Proclamation R101 and subject to it. However, this case was effectively overruled two months later by the South African Appellate Division, which was the Court of Appeal for Namibia at the time.¹¹

In fact, Chief Justice Rabie explicitly said that Levy J was wrong in the *Heita* matter. Rabie CJ made it clear that, as far as he was concerned, the Bill of Fundamental Rights did not affect legislation that preceded Proclamation R101 even though the legislation might be in conflict with a provision relating to a fundamental right.

In March 1988, in *Ex parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985*,¹² the Full Bench of the Namibian High Court adhered to the *Katofa* precedent and ruled that Proclamation R101 conferred a limited power on the court to test only legislation passed by the Legislative Assembly of Namibia, created by Proclamation R101, and other legislative authorities in Namibia that preceded or coexisted with it, such as the Administrator-General (AG). The court then proceeded to declare the Representative Authorities Proclamation AG 8 of 1980, a Proclamation by the AG that set up ethnically differentiated authorities in

7 The Bill of Fundamental Rights was introduced as Annexure 1 to the South West Africa Legislative and Executive Authority Establishment Proclamation R101 of 1985. This Proclamation was issued under powers granted in terms of section 38 of the South West Africa Constitution Act, 1968 (No. 39 of 1968) – legislation passed by the South African Parliament.

8 Articles 1 to 10, Annexure 1, Proclamation R101 of 1985.

9 1987 (1) SA 311 (SWA).

10 No. 83 of 1967.

11 *Kabinet van die Tussentydse Regering vir Suidwes-Afrika & 'n Ander v Katofa* 1987 (1) SA 695 (A) at 728–729, per Rabie CJ.

12 (RSA) 1988 (2) SA 832 (SWA).

Namibia, in conflict with the Bill of Rights. This matter never went on appeal to the Appellate Division of the Supreme Court of South Africa. If it had, it may well have been overturned.

In the matter of *Eins v Cabinet of the Transitional Government for the Territory of South West Africa*,¹³ the Namibian court declared section 9 of the Residence of Certain Persons in South West Africa Regulation Act¹⁴ (legislation promulgated by the SWA National Assembly) unconstitutional and invalid. However, on appeal, the South African Appellate Division overruled the Namibian court on the basis of Mr Eins's supposed lack of locus standi.¹⁵

The South African Appellate Division again attempted to emasculate the Bill of Rights in Namibia by ruling in *Cabinet for the Territory of South West Africa v Chikane & Another*¹⁶ that the courts could not measure administrative action against the Bill of Rights. Despite this, the Namibian full bench persisted in applying the Bill of Fundamental Rights.¹⁷

A few more cases were reported during the period following the promulgation of Proclamation R101 until Independence.¹⁸ It is clear from these cases that the Namibian judiciary at the time was far more prepared to protect the individual in pre-Independence Namibia than the Appellate Division in South Africa was.

Independence: The Namibian Constitution

Upon Independence and the adoption of the Namibian Constitution, the legal order changed fundamentally. The Constitution makes it clear it is the Supreme Law of Namibia.¹⁹ It goes further and unequivocally provides that the fundamental rights and freedoms enshrined in it are to be respected and upheld by the Executive, Legislature and Judiciary, and are enforceable by the courts in Namibia.²⁰ The Supreme Court and the High Court are created by Article 78 of the Constitution. Both courts are imbued with the interpretation, implementation and upholding of the Constitution, as well as the fundamental rights and freedoms guaranteed by it.²¹

In *Federal Convention of Namibia v Speaker, National Assembly of Namibia, & Others*,²² heard on 6 December 1990, the High Court of Namibia demonstrated from the outset that

13 An unreported matter, also 1988.

14 No. 33 of 1985.

15 *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) per Rabie ACJ.

16 1989 (1) SA 349 (A).

17 See *Namibian National Students' Organisation & Others v Speaker of the National Assembly for South West Africa & Others* 1990 (1) SA 617 (SWA).

18 An example is *S v Mbonge* 1988 (2) SA 391 (SWA).

19 Article 1(6).

20 Article 5.

21 Articles 79(2) and 80(2).

22 1994 (1) SA 177 (NM).

it was up to the challenge to implement the provisions of the Constitution by directing the Speaker of the National Assembly to exercise his function in terms of Article 48(1) (b) of the Constitution to remove a person as a Member of the National Assembly.

Articles 5 to 20 of the Constitution contain the guaranteed fundamental rights, while Article 21 sets out the fundamental freedoms that are protected under the Constitution. Article 25 provides that no legislation may abolish or abridge any right or freedom, nor may the Executive or any government agency do so unless authorised by the Constitution.

The Constitution also permits an extremely limited scope for the abridgement of rights or freedoms enshrined in it. For example, the right to life is inviolable.²³ The right to liberty can be interfered with only in accordance with procedures established by law. Arbitrary arrest and detention are no longer permitted.²⁴ Article 10 further provides that all persons are equal before the law, and protects every Namibian against discrimination. Article 23 permits legislation for the advancement of persons that were disadvantaged by apartheid, which is a limited authorisation for the abridgement of the right to equality.

Article 18 of the Constitution is a very important provision. It grants the inhabitants of Namibia the right to expect – and enforce through the courts – fair and reasonable administrative actions. The equivalent of this right existed before Independence through the common law review procedure. However, before Independence, the review procedure did not allow for a challenge of administrative decisions on the basis of unreasonableness. Article 18 added this ground.

Article 66(1) of the Constitution provides that customary and common law in force on the date of Independence remains valid to the extent to which it is not in conflict with the Constitution or any other statutory law. On the other hand, Article 140(1) provides as follows:

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.

This apparent conflict was resolved by the Supreme Court of Namibia in 2000. It ruled that the net effect of Articles 66(1) and 140(1) is that only statutes need to be declared unconstitutional.²⁵ Therefore, any common law or customary law principle which is in conflict with the Constitution is invalid as at the date of Independence, while an unconstitutional provision in a statute remains in force until declared unconstitutional by a competent court.²⁶

The difficulties that existed prior to Independence in respect of what could be tested against the Bill of Rights and how administrative justice was to be enforced have been

23 Article 6.

24 Articles 7 and 11.

25 *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC) at 263 E–I.

26 *Frans v Paschke & Others* 2007 (2) NR 520 (HC) at paragraph [17].

addressed by the Namibian Constitution itself. The courts were left to interpret and apply the Constitution. The question is this, however: have the Namibian courts done justice to the Constitution over the past 20 years?

A comprehensive discussion of each and every constitutional matter that was decided since independence is beyond the scope of this work. Therefore, three general areas will be focused on: criminal justice, administrative justice and unconstitutional laws. The intention is to provide a broad perspective on how Namibia has departed from an era of fundamental injustice and oppressive legislation to one of equality and reasonableness respecting the rule of law and protecting fundamental human rights.

Criminal justice

Criminal justice is limited here to the changes relating to arrest and detention and the right to a fair trial.²⁷ Prior to Independence, people were regularly and arbitrarily arrested and detained for a variety of (sometimes unspecified) reasons. This was largely because of their beliefs and opposition to the apartheid regime. Some were tried and jailed. Others were incarcerated without trial for long periods. Many were tortured. Since Independence, such arbitrary action has specifically been prohibited. The Namibian Constitution makes it clear in Articles 11 and 12 that no arrest or detention may be arbitrary, and that every trial is required to be fair. Ultimately, it is left to the courts to determine whether or not an arrest or detention is arbitrary and a trial fair in the circumstances.

For the most part, Namibian courts have lived up to the challenge to ensure that the deprivation of liberty is undertaken in strict accordance with the provisions of the Constitution. For example, in *Djama v Government of the Republic of Namibia & Others*²⁸ per Muller AJ (as he then was), the High Court ordered the release of a suspected prohibited person because the Tribunal which was supposed to order his deportation in terms of Article 11(4) of the Constitution had not yet been established. The court relied on the prohibition against arbitrary arrest and detention in Article 11(1) of the Constitution. This is a clear example of judicial activism to protect the individual against arbitrary arrest and detention.

Furthermore, in *Amakali v Minister of Prisons and Correctional Services*,²⁹ the High Court ordered the release of Mr Amakali who was being kept in jail by the prison authorities after he had already served his prison sentence.

The High Court also ruled that a person cannot be charged for escaping from custody if s/he is held beyond the 48 hours authorised in Article 11(3) of the Constitution,³⁰ or if s/he was arrested without reasonable suspicion.³¹

27 Protected by Articles 7, 11 and 12 of the Constitution.

28 1992 NR 37 (HC); see also *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC).

29 2000 NR 221 (HC).

30 *S v Mbahapa* 1991 NR 274 (HC); see also *S v Araeb* 2006 (2) NR 569 (HC).

31 *S v Kazondandona* 2007 (2) NR 394 (HC).

However, on occasion, the Supreme Court has differed with the High Court as to whether an arrest and detention were unlawful.³² Also on occasion, it appears that procedural defects were allowed to undermine a legitimate remedy,³³ which is unfortunate.

The Courts have astutely enforced the right to a fair trial. The change brought about by the Constitution in Namibia was cogently articulated in *S v Scholtz*:³⁴

What, however, has happened is that the law has undergone some metamorphosis or transformation and some of the principles of criminal procedure in the Criminal Procedure Act are now rights entrenched in a justiciable bill of rights. That is, in my view, the essence of their inclusion in art 12 of the Constitution. Any person whose rights have been infringed or threatened can now approach a competent court and ask for the enforcement of his right to a fair trial.

The Supreme Court has also confirmed an accused's right to legal representation and legal aid.³⁵

In *S v Luboya & Another*,³⁶ the Supreme Court relied on a combined application of Articles 11 and 18 of the Constitution to quash charges against accused persons who had been refused legal aid.

The High Court also ruled evidence inadmissible in criminal trials for reasons varying from lack of adequate warning³⁷ to duress³⁸ and torture.³⁹ In *S v De Bruyn*,⁴⁰ in a somewhat obiter manner, the court indicated that a deliberate enticement of a person to commit a crime could lead to the exclusion of the evidence on the basis of unfairness. The cautionary rule in sexual offences was also abolished.⁴¹ The presumption of guilt contained in sections 18(2) and (3) of the Sea Fisheries Act⁴² were also struck down as

32 See *Getachew v Government of the Republic of Namibia* 2006 (2) NR 720 (HC) and *Government of the Republic of Namibia v Getachew* 2008 (1) NR 1 (SC). See also *De Jager v Government of the Republic of Namibia & Another* 2006 (1) NR 198 (HC).

33 *McNab & Others v Minister of Home Affairs NO & Others* 2007 (2) NR 531 (HC), where a claim for detention in squalid conditions was dismissed due to poor pleading. See also *Minister of Home Affairs v Bauleth* 2004 NR 68 (HC).

34 1998 NR 207 (SC) at 216 H-I.

35 *Government of the Republic of Namibia & Others v Mwilima & All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC). See also *S v Kasanga* 2006 (1) NR 348 (HC), where the court went further and held that an accused should be informed of his/her right to legal representation; but see *S v De Wee* 1999 NR 122 (HC) and *S v Forbes & Others* 2005 NR 384 (HC), where the court held that a violation of a constitutional right (failure to inform the accused of his/her rights) did not per se constitute an irregularity.

36 2007 (1) NR 96 (SC).

37 *S v Malumo & Others* (2) 2007 (1) NR 198 (HC).

38 *S v Kukame* 2007 (2) NR 815 (HC).

39 *S v Minnies & Another* 1990 NR 177 (HC).

40 1999 NR 1 (HC).

41 *S v D & Another* 1992 (1) SACR 143 (Nm); *S v Katamba* 1999 NR 348 (SC).

42 No. 58 of 1973.

unconstitutional,⁴³ as was the minimum sentence provision⁴⁴ in section 38(2)(a) of the Arms and Ammunition Act.⁴⁵

The High Court has also ruled that, in order for a juvenile to have a fair trial, it is peremptory for him/her to be assisted by a parent or guardian.⁴⁶

The application of Article 12(1)(b) of the Constitution, which requires an accused to be released if the trial does not take place within a reasonable time, initially presented the Courts with some difficulty.⁴⁷ It appears to be settled now that a delay of approximately 14 months can be regarded as unreasonable, and that an accused could be entitled to be released from stringent bail conditions as well as prosecution, depending on the circumstances.⁴⁸

Furthermore, the restriction of a prisoner's right to appeal imposed by section 309(4)(a) read with section 305 of the Criminal Procedure Act⁴⁹ was declared unconstitutional.⁵⁰

In general,⁵¹ criminal justice in Namibia has made great strides. However, it appears that the lower courts still present cause for concern. For example, sentences of imprisonment imposed by lower courts in excess of three months are subject to automatic review by High Court judges.⁵² This system ensures that proceedings in lower courts are regularly reviewed by the High Court in order to ensure that justice is done. A study of some of the review judgments has shown that, in some instances,⁵³ magistrates are not conversant with the laws they are required to apply. Also, review and appeal records are not timeously finalised or forwarded to the High Court. This undermines the system of review and often results in a failure of justice.⁵⁴ Thus, it appears that endemic failure of justice

43 *S v Pineiro* 1991 NR 424 (HC).

44 *S v Likuwa* 1999 NR 151 (HC).

45 No. 7 of 1996.

46 *S v M* 2006 (1) NR 156 (HC).

47 *S v Strowitzki & Another* 1995 (1) BCLR 12 (Nm); *S v Heidenreich* 1995 NR 234 (HC); *Van As & Another v Prosecutor-General* 2000 NR 271 (HC); *Malama-Kean v Magistrate for the District of Oshakati NO & Another* 2001 NR 268 (HC).

48 *Malama-Kean v Magistrate for the District of Oshakati NO & Another* 2001 NR 268, *Malama-Kean v Magistrate for the District of Oshakati & Another* 2002 NR 413 (SC).

49 No. 51 of 1977.

50 *S v Ganeb* 2001 NR 294 (HC).

51 With the exception of the odd lapse; see *S v Titus* 1991 NR 318 (HC).

52 Section 302, Criminal Procedure Act

53 See *S v Moses Garoëb* 2004 (6) NCLP 57, where it was held that the magistrate asked inappropriate questions to establish whether an accused was guilty of "breaking" into a house; *S v Gurirab* 2004 (6) NCLP 60, where the magistrate was found to have convicted an accused for an offence not known in the law of Namibia and later sought to alter the record to make it appear as if the defect was not apparent; *S v Doeses* 2004 (4) NCLP 1, where the magistrate found the accused guilty of assault with intent to do grievous bodily harm after it was established that the accused intended to hit someone else, and the prosecution led no evidence to prove that there was still an intent to do grievous bodily harm on the unintended person.

54 See Office of the Ombudsman (2007:11–12).

still occurs in the lower courts.⁵⁵ This is largely attributable to a lack of funding and a shortage of skills. For criminal justice in Namibia to fully comply with the principles enunciated in the Constitution, considerable attention has to be paid to the inadequacies of the lower courts.

Administrative justice

Each individual, irrespective of where in the world s/he is, has to deal with public officials or administrative agents. In pre-Independence Namibia, administrative agents ranging from the Administrator-General to police officers, soldiers, commissioners and magistrates were part of the machinery designed to implement and maintain the apartheid system. Individuals had very limited legal remedies against these officials as a result.

Administrative justice encapsulates the means by which every individual in Namibia has legal redress in the event of any action, or omission, by an administrative agent that is perceived to be unjust or unreasonable.

Examples of the enforcement of administrative justice abound in post-Independence Namibia. This enforcement has largely been reliant on the application of Article 18 of the Constitution. The following has been held in this regard:⁵⁶

There can be no doubt that art 18 of the Constitution of Namibia pertaining to administrative justice requires not only reasonable and fair decisions, based on reasonable grounds, but inherent in that requirement fair procedures which are transparent.

This includes the right to be given a hearing before any decision is taken that affects a person's rights.⁵⁷ The courts also now enquire into the fairness of any administrative decision,⁵⁸ which was not possible under the common law as it was applied prior to Independence. This resulted in redress being achieved by people negatively affected by administrative decisions in matters ranging from expropriation⁵⁹ and importation of

55 *S v Paulus* 2007 (1) NR 116 (HC); *S v Karenga* 2007 (1) NR 135 (HC); *S v Rooi* 2007 (1) NR 282 (HC); *S v Witbooi & Others* 2007 (2) NR 604 (HC).

56 *Aonin Fishing (Pty) Ltd & Another v Minister of Fisheries and Marine Resources* 1998 NR 147 (HC) at 150 G.

57 *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC); *Viljoen & Another v Inspector-General of the Namibian Police* 2004 NR 225 (HC); *Kessl v Ministry of Lands and Resettlement & Others and Two Similar Cases* 2008 (1) NR 167 (HC).

58 *Mostert v The Minister of Justice* 2003 NR 11 (SC); *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC); *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC).

59 *Kessl v Ministry of Lands Resettlement & Others and Two Similar cases* 2008 (1) NR 167 (HC).

game⁶⁰ to denying a teacher promotion⁶¹ and the government revoking an agreement with a microlender.⁶²

The Supreme Court went as far as ordering the Minister of Health and Social Services to issue an authorisation to a medical doctor to use the facilities at the Windhoek State Hospital after it found the Minister's initial refusal breached Article 18 of the Constitution.⁶³ The court was of the opinion that to refer the matter back to the Minister would perpetuate the prejudice to the doctor. However, in the *Waterberg* matter,⁶⁴ the Supreme Court decided – with a majority of two to one – to refer the matter back to the Minister rather than impose their decision.

The list of instances where administrative justice was enforced by the courts in Namibia is impressive.⁶⁵ Nonetheless, there may have also been lapses. In *Kerry McNamara Architects Inc & Others v Minister of Works, Transport and Communication & Others*,⁶⁶ the court held that a derivative right was not enough to give a person locus standi to challenge the award of a tender in reliance on Article 18 of the Constitution. In reaching its conclusion, the court applied the 'direct and substantial interest' test which was developed in the pre-constitutional era in the context of civil litigation, without investigating the possibility of a more 'lenient' approach to locus standi in view of the provisions of the Constitution.

Also in *Chairperson of the Immigration Selection Board v Frank & Another*,⁶⁷ the Supreme Court interpreted the definition of *family* in Article 14 of the Constitution restrictively

60 *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v The Minister of Environment and Tourism*, unreported decision of the Supreme Court of Namibia, Case No. SA 13/2004 delivered on 23 November 2005.

61 *Eilo & Another v The Permanent Secretary of Education & Others*, unreported decision of the High Court of Namibia, Case No. LC28/2006, delivered on 13 November 2007.

62 *Open Learning Group Namibia Finance CC v Permanent Secretary, Ministry of Finance & Others* 2006 (1) NR 275 (HC). An appeal has been lodged to the Supreme Court, and a decision is still pending.

63 *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC).

64 *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v The Minister of Environment and Tourism*, unreported decision of the Supreme Court of Namibia, Case No. SA 13/2004 delivered on 23 November 2005.

65 For further examples, see *Viljoen & Another v Inspector-General of the Namibian Police* 2004 NR 225 (HC) (police officer transferred to another region upon two days' notice without prior consultation); *Sheehama v Inspector-General, Namibian Police* 2006 (1) NR 106 (HC) (suspension of police officer without a hearing); *Mostert v The Minister of Justice* 2003 NR 11 (SC) (Magistrate entitled to reasons for transfer); *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC) (person unlawfully declared persona non grata in terms of section 49(1) of the Immigration Control Act, 1993 [No. 7 of 1993]); *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC) (refusal of permanent residence permit without a hearing referred back to Immigration Board; this judgment is also open to criticism; see later herein.

66 2000 NR 1 (HC).

67 2001 NR 107 (SC).

in order to exclude a same-sex relationship. It ruled that same-sex relationships were not recognised in Namibia. In doing so, the Supreme Court overruled the High Court, which found that the Constitution recognised the same-sex relationship as a universal partnership.⁶⁸ This judgment is an example of a conservative and positivist approach. In reaching this conclusion, the Supreme Court judges may have given precedence to their own values through their formulation of what the prevailing values of the Namibian people were at the time in relation to same-sex relationships, because there was ultimately no evidence before the court of any societal value in this context.

In *S v Mushwena & Others*,⁶⁹ Hoff J ruled that he lacked jurisdiction to try accused persons for high treason who were brought to Namibia from Botswana and Zambia without following the prescribed extradition procedure. The Supreme Court overturned this decision with a slim majority of three out of five judges.⁷⁰ Strydom ACJ (as he then was) and O'Linn AJA (as he then was) dismissed the appeal in respect of most of the accused, while the majority of the court allowed the appeal. This is another failure of both criminal justice and administrative justice in Namibia. It was clear from the facts that the majority of the accused had been brought back from Botswana and Zambia through the unlawful conduct of officials on both sides of the respective borders. The message sent by the Supreme Court does not bode well.⁷¹

It would also appear that the scope of what constitutes an *administrative action* is gradually being narrowed. Recently, the Supreme Court per Strydom AJA said the following:⁷²

The issue in the present appeal is whether the termination of the agreement by the first appellant was administrative action which would have entitled the respondent to claim application of Article 18 of the Constitution which requires fair and reasonable action by administrative bodies and administrative officials. Once it is found, as I have, that the termination of the agreement did not constitute administrative action, Article 18 does not apply.

In reaching this conclusion, the Supreme Court went to great trouble to distinguish the nature of the agreement in this matter from the agreement in *Open Learning Group Namibia Finance CC v Permanent Secretary, Ministry of Finance & Others*,⁷³ where

68 *Frank & Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

69 2004 NR 35 (HC).

70 *S v Mushwena & Others* 2004 NR 276 (SC).

71 On the subject of the Caprivi treason trial, it is noted that, on 1 August 1999, approximately 130 persons were arrested on charges of treason. Over 270 charges were recorded in this case. To date, ten years later, the trial still continues, and some accused have in the meantime passed away. The fact that so many charges were laid against such a substantial number of accused may play a role in what has become the longest trial in Namibian history. At the same time the fact remains that there is a clear and embarrassing infringement of Article 12(1)(b) of the Constitution in the Caprivi matter.

72 *The Permanent Secretary of the Ministry of Finance & Others v Dr Cornelius Martinus Johannes Ward*, Supreme Court, unreported Case No. SA 16/2008, delivered on 17 March 2009 at paragraph [71].

73 2006 (1) NR 275 (HC).

the High Court accepted that the cancellation of the agreement in question was an administrative action. This may very well be the beginning of a gradual erosion of the right to enforce administrative justice. The effect of this is that whoever contracts with government may or may not expect fair treatment and a right to be heard before such contract is cancelled, depending on the nature of the agreement as perceived by the court.

Apart from the criticism levelled above, the overall condition of administrative justice in Namibia is laudable. The courts have generally been prepared to come to the assistance of the aggrieved individual. This is light years from the positivist approach to administrative actions that Namibia experienced prior to Independence.

Unconstitutional laws

The Namibian Constitution has profoundly affected common law and customary law, as well as legislation that adversely affects the individual's rights and freedoms. In the case of common law and customary law, as pointed out earlier, Article 66 of the Constitution has the effect that any principle that adversely affects any constitutional right or freedom is invalid as at the date of Independence. However, it may sometimes still be necessary for a court to declare a common or customary law unconstitutional in order to resolve uncertainties. For example, the common law rule prohibiting children born out of wedlock from inheriting from their father under intestate succession was declared unconstitutional.⁷⁴

As mentioned earlier, legislation endures until declared unconstitutional by a court. An important judgment in this context is *Ex parte Attorney-General: In re Corporal Punishment by Organs of State*.⁷⁵ This matter was referred to the court by the Attorney-General in terms of Article 87(c) read with Article 79(2) of the Constitution, and concerned institutional corporal punishment. Several legislative provisions were in the firing line, and Article 8 of the Constitution was the barometer against which they were to be measured.⁷⁶

In one of the most lucid judgments emanating from the Supreme Court, Mahomed AJA set the parameters thus:⁷⁷

Article 8 of the Constitution must therefore be read not in isolation but within the context of a fundamental humanistic constitutional philosophy introduced in the preamble ... and woven into the manifold structures of the Constitution.

The court concluded that any corporal punishment, whether inflicted through the criminal penal system or in schools, constituted degrading and inhuman punishment within the

74 *Frans v Paschke & Others* 2007 (2) NR 520 (HC).

75 1991 NR 178 (SC).

76 (ibid.:179 G–188). Article 8 of the Constitution protects human dignity and proscribes cruel, inhuman or degrading treatment.

77 (ibid.:179 G); this consideration is sometimes forgotten.

meaning of Article 8(2)(b) of the Namibian Constitution. As a result, several legislative provisions were struck down in one fell swoop.

This was taken further in what came to be known as the *Cultura 2000* matter. This matter demonstrates the flexibility available to a court in applying the Constitution. Just before Independence, the Representative Authority for Whites (RAW) established under Proclamation AG 8 donated R4 million to *Cultura 2000*, an organisation set up to preserve the ‘white culture’. RAW made a further soft loan of R4 million to *Cultura 2000*, which the Administrator-General converted into a donation one month before Independence.

After Independence, the Namibian government promulgated the State Repudiation (*Cultura 2000*) Act⁷⁸ under Article 140(3) of the Constitution. The purpose of this legislation was to recover the R8 million. *Cultura 2000* challenged this legislation in the High Court. The latter ruled that the legislation was ultra vires and invalid.⁷⁹ In reaching this conclusion, the court took a strictly positivist view and considered it irrelevant that *Cultura 2000* originated as a racist organisation that would be an unlawful body in post-Independence Namibia. The court reasoned that, because the act of making the donation had been completed before Independence, the Government could only expropriate with just compensation. In the court’s opinion, this did not make sense. It also found that Article 140(3) of the Constitution did not authorise the government to recover anything. Therefore, the court concluded that the State Repudiation (*Cultura 2000*) Act was ultra vires and invalid in its entirety.

The Namibian government appealed the ruling,⁸⁰ which was subsequently partly overturned. Mahomed CJ (as he then was) succinctly disposed of the High Court’s reasoning as follows:⁸¹

A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the “austerity of tabulated legalism” and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government. An interpretation of art 140(3) which limits its potential operation only to acts by the previous Administration which were “uncompleted” would not give to the clear words of the article a construction which is “most beneficial to the widest possible amplitude” ...

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

78 No. 32 of 1991.

79 *Cultura 2000 & Another v Government of the Republic of Namibia & Others* 1993 (2) SA 12 (Nm).

80 The appeal judgment is reported as *Government of the Republic of Namibia & Another v Cultura 2000 & Another* 1993 NR 328 (SC).

81 (ibid.:340 B–H).

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

A limited positivist application of the Constitution was turned into a generous purposive approach – the way it should be.

Unfortunately, through the years, the natural law values have not always been triumphant. An example is the case of Mr Mwellie, an ex-employee of the Ministry of Works, Transport and Communication (the defendant), who was dismissed.⁸² He alleged the dismissal was unlawful and approached the High Court for reinstatement.

The defendant raised the point that section 30(1) of the Public Service Act⁸³ limited the time in which a person could bring an action to 12 months and, since more than 12 months had elapsed, Mr Mwellie had no claim. Mr Mwellie retorted that this limitation had to be unconstitutional because the normal prescription period was three years. The court rejected Mr Mwellie's response and agreed with the defendant.

In reaching this conclusion, the court relied on the *Chikane* judgment,⁸⁴ amongst others, as authority. The *Chikane* case was decided before any Constitution was in place. The court embarked on an elaborate analysis of the applicable principles and concluded that "the special plea of prescription taken by the defendant must be upheld".⁸⁵ The court then proceeded to dismiss the plaintiff's claim with costs. The consequence for Mr Mwellie, who was in all likelihood unfairly dismissed, was that he had had no redress, and was responsible for his own legal costs as well as the defendant's.

In retrospect, it is now clear that this judgment was wrong, in so far as there is no provision in the Public Service Act for the possibility of a waiver by the Minister in respect of the 12-month time frame.⁸⁶

However, for the most part, the Namibian courts have done an admirable job since Independence, and the list of legislative provisions that have been struck down is inspiring.⁸⁷

82 *Mwellie v Minister of Works, Transport and Communication & Another* 1995 (9) BCLR 1118 (NmH).

83 No. 2 of 1980.

84 *Cabinet for the Territory of South West Africa v Chikane & Another* 1989 (1) SA 349 (A).

85 At 1142 H–1143 A.

86 See *Minister of Home Affairs v Majiedt & Others* 2007 (2) NR 475 (SC) and the cases discussed there.

87 *Kauesa v Minister of Home Affairs & Others* 1996 (4) SA 965 (NmS) (Regulation 58(32) deemed to have been made under Police Act, 1990 (No. 19 of 1990)); *S v Smith* 1996 (2) SACR 675 (Nm) (section 11(1) of Racial Discrimination Act, 1991 (No. 26 of 1991)); *Mostert v The* [Continued overleaf]

In the recent judgment of *Africa Personnel Service (Pty) Ltd v Government of the Republic of Namibia & Others*,⁸⁸ in a landmark judgment the Supreme Court struck down section 128 of the 2007 Labour Act.⁸⁹ Section 128 was intended to criminalise outright so-called labour hire services in Namibia. The court applied Article 21(1)(j) of the Constitution, which forms part of the protected freedoms, and reads as follows:

All persons shall have the right to practise any profession, or carry on any occupation, trade or business.

This judgment outlines very important principles and guidelines relating to legislation imposing prohibitions in Namibia. It is a poignant reminder that the statement in *R v Sachs* by Centlivres CJ, to which reference was made at the outset, is a relic of the distant past. Maybe the time has arrived to say: Namibia has developed a constitutional legal order.

In the realm of common law and customary law, important strides have also been taken. Thus, Namibians can have no doubt that, for the most part, everyone is equal before the law,⁹⁰ and a wife and husband married in community of property are also equal.⁹¹ Discrimination on the basis of race without the permissible legislation was declared unlawful.⁹²

Minister of Justice 2003 NR 11 (SC) (section 9 (as amended) and section 10 of the Magistrates' Courts Act, 1944 (No. 32 of 1944)); *S v Vries* 1998 NR 244 (HC) (section 14(1)(b) of the Stock Theft Act, 1990 (No. 12 of 1990)); *Freiremar SA v The Prosecutor-General of Namibia & Another* 1996 NR 18 (HC) (proviso to section 17(1) of the Sea Fisheries Act, 1973 (No. 58 of 1973)); *S v Van den Berg* 1995 NR 23 (HC) (the presumption contained in sub-paragraph (b) of section 35A of the Diamond Industry Protection Proclamation of 1967); *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs & Another; Nasilowski & Others v Minister of Justice & Others* 1998 NR 96 (HC) (section 2(1) of the Indecent and Obscene Photographic Matter Act, 1967 (No. 37 of 1967) unconstitutional); *Hendricks & Others v Attorney General, Namibia, & Others* 2002 NR 353 (HC) (presumptions in sections 12(1) and (2) of the Combating of Immoral Practices Act, 1980 (No. 21 of 1980) unconstitutional because they derogate from the right to be presumed innocent); *Detmold & Another v Minister of Health and Social Services & Others* 2004 NR 1 (section 71(2)(f) of the Children's Act, 1960 (No. 33 of 1960) prohibiting non-Namibians from adopting Namibian children unconstitutional).

88 As yet unreported, Case No. SA 51/2008, delivered on 14 December 2009.

89 No. 11 of 2007.

90 With the exception of sexual orientation, in the sense that a same-sex relationship is not considered family: *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).

91 *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC). See also The Married Persons Equality Act, 1996 (No. 1 of 1996), but see *Stipp & Another v Shade Centre & Others* 2007 (2) NR 627 (SC), where the effect of the Act was neutralised on procedural grounds. See also *S v Katamba* 1999 NR 348 (SC) and *S v Bohitile* 2007 (1) NR 137 (HC) in relation to the equality of the genders.

92 *Grobbelaar & Another v Council of the Municipality of Walvis Bay & Others* 2007 (1) NR 259 (HC).

The High Court has gone further and adopted crucial social stances, especially relating to children and violence against women, while attempting to strike a fine balance between individual rights and addressing social ills. For example, in *S v Gaweseb*,⁹³ Damaseb JP adopted the following dictum with approval in relation to children:⁹⁴

Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life[-]sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those dependent on the law. It is a function of the State not only to provide a good legal framework but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by s 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.

In *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs and Another; Nasilowski and Others v Minister of Justice and Others*,⁹⁵ in the process of declaring a section in legislation unconstitutional, the court said the following per Maritz J (as he then was):⁹⁶

The indignity and outrage suffered by women as a class of persons when senseless sexually explicit scenes of rape and other forms of sexual violence are depicted as normal in pornographic material and the social and moral dangers of exploiting children in such material for the sexual gratification of certain adults, are but two of the reasons why it is imperative for any responsible Legislature to promulgate adequate measures to address those evils in the interest of decency and morality.

Conclusion

While a more detailed and extensive analysis would have done the endeavours of the Namibian courts more justice, the purpose here was to create a general overview of the Namibian judicial landscape since Independence.

Namibia has come a long way since the days of supremacy of Parliament in an apartheid system. However, it appears that the road ahead, although no longer replete with administrative injustices that cannot be redressed, is nonetheless fraught with challenges involving the actual administration of justice. This is manifested by some incompetence in the lower courts, difficulties of access to the courts, unavailability of judges, and extreme delays in delivering judgments.⁹⁷ In a recent speech in Namibia, retired South

93 2007 (2) NR 600 (HC).

94 (ibid.:paragraphs [11] and [12]).

95 1998 NR 96 (HC).

96 At page 102 F–G. See also *S v Bohitile* 2007 (1) NR 137 (HC).

97 Some judgments have been outstanding for over four years.

African Judge Johann Kriegler addressed the failure to deliver judgments in time as follows:⁹⁸

A failure by a judge to deliver judgements timeously is not a matter for disciplinary action to be taken over, but for the judge involved it should be a matter of self-respect. ... It is as much an abuse as beating your wife.

As a 20-year-old, Namibia has done well with its constitutional jurisprudence and the realm of abuse and remedies has changed. As with every growing democracy, there are pitfalls which require urgent attention. If problems concerning the administration of justice are not addressed, the advances gained through jurisprudence may amount to nothing.

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98 *The Namibian*, 27 November 2009, p 5.

The paradigm of equality in the Namibian Constitution: Concept, contours and concerns

Dianne Hubbard

Equality before the law remains a concept fraught with difficulty in interpretation as well as application. It is, as in most of the other fundamental rights, not precisely defined in the Constitution and the Court must therefore define its content, and limitations.¹

This paper will look at how the Namibian courts have handled the challenges of interpreting and applying Article 10 of the Namibian Constitution during the first 20 years of independence.

Concept: The equality clause in context

Equality before the law was one of the tenets which the Constituent Assembly was bound to include in the new Constitution of the Republic of Namibia by virtue of the 1982 Constitutional Principles negotiated prior to Independence.² Although the inclusion of the principle of equality in this constitutional blueprint may have stemmed primarily from fears that whites would be excluded from equal rights in a post-apartheid dispensation, the Namibian Constitution made equality a cornerstone of the values it enshrined for a new, free society.

1 *S v Vries* 1998 NR 316 (SC) at 276G–H, per O’Linn J (concurring judgment).

2 “There will be a declaration of fundamental rights, which will include the rights to life, personal liberty and freedom of movement; to freedom of conscience; to freedom of expression, including freedom of speech and a free press; to freedom of assembly and association, including political parties and trade unions; to due process and *equality before the law*; to protection from arbitrary deprivation of private property or deprivation of private property without just compensation; and to freedom from racial, ethnic, religious or sexual discrimination. The declaration of rights will be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights” [Emphasis added]; *Principles for a Constitution for an Independent Namibia*, United Nations (UN) Secretary-General’s Report S/15287 (12 July 1982) at clause 5. See also *Further Report of the Secretary-General Concerning the Implementation of Security Council Resolutions 435 (1978) and 439 (1978) Concerning the Question of Namibia*, UN Document S/20412 (23 January 1989) at paragraph 35; *Further Report of the Secretary-General Concerning the Implementation of Security Council Resolution 435 (1978) Concerning the Question of Namibia*, UN Document S/20967/Add 2 (16 March 1990); Wiechers (1991).

The role of the 1982 Constitutional Principles is also discussed in *S v Heita & Another* 1992 NR 403 (HC) at 405J–406I, per O’Linn J; and *Kauesa v Minister of Home Affairs & Others* 1994 NR 102 (HC) at 136C, 140J–141A and 143C–H, per O’Linn J. See also Erasmus (2000:8–10).

Equality is in fact the starting point: the first clause of the Preamble to the Constitution makes it clear that the entire enterprise is based on “recognition of the inherent dignity and of the *equal* and inalienable rights of all members of the human family”, which is “indispensable for freedom, justice and peace”.³ The second clause of the Preamble elaborates by noting that the “right of the individual to life, liberty and the pursuit of happiness” applies “regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status”, while the third clause of the Preamble states that these rights are most effectively maintained and protected in a democratic society with a government accountable to freely elected representatives of the people, a sovereign constitution and an independent judiciary.⁴ Thus, one of the stated purposes of the entire structure of government for an independent Namibia is to ensure that individual rights are enjoyed on an equal basis.

The linchpin for ensuring equality is Article 10:

- (1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

This prohibition on discrimination, like the other fundamental rights and freedoms, applies not just to discrimination by the state, but “where applicable to them, by all natural and legal persons in Namibia”.⁵

The constitutional context makes it clear that Article 10 is aimed at the achievement of substantive equality rather than formal equality, as a means to right past wrongs.⁶ The remainder of the Preamble focuses on the previous denial of rights as a result of “colonialism, racism and apartheid”, and on victory in the struggle against these wrongs as a means of “securing to all our citizens justice, liberty, equality and fraternity”. This concern with redressing past inequalities is woven throughout the rest of the Constitution.

The commitment to substantive equality is put into historical context by Article 23, which explicitly prohibits “the practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered

3 Emphasis added.

4 For a discussion of the role of the Preamble in constitutional interpretation, see *Kauesa v Minister of Home Affairs & Others* 1994 NR 102 (HC) at 134H–135H, per O’Linn J.

5 Article 5.

6 Formal equality involves eliminating legal distinctions. Substantive equality requires an examination of laws in their social context to see what approaches will best advance meaningful equality in real life. The South African case of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) provides a clear example of this distinction in practice, with the court noting that “although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved”; at 23E–G, per Goldstone J.

for so long". The Constitution gives teeth to this prohibition by mandating Parliament to pass legislation making future racial discrimination criminally punishable.⁷

Article 23 also explicitly approves of affirmative action –⁸

... for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.

The Public Service Commission, the Inspector-General of Police, the Chief of the Defence Force and the Commissioner of Prisons are all charged to pay special attention to this balanced structuring,⁹ which was part of the 1982 Constitutional Principles,¹⁰ and the independent Ombudsman is given power to act on complaints that balanced structuring has not been achieved.¹¹

Substantive racial equality is reinforced by Article 63(2)(i), which charges the National Assembly –

... to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies[.]

7 Article 23(1). This mandate has been realised by the enactment of the Racial Discrimination Prohibition Act, 1991 (No. 26 of 1991).

8 Article 23(2).

9 Articles 113(a)(aa), 116(2), 119(2) and 122(2).

10 "Provisions will be made for the balanced structure of the public service, the police service and defence services and for equal access by all to recruitment of these services. The fair administration of personnel policy in relation to these services will be assured by appropriate independent bodies"; *Principles for a Constitution for an Independent Namibia*, UN Secretary-General's Report S/15287 (1982) at clause 7.

11 Article 91(b). The effect of Articles 23 and the constitutional provisions on the balanced structuring of government services on the application of Article 10 is discussed in *Kauesa v Minister of Home Affairs & Others* 1994 NR 102 (HC) at 137J–141I, per O'Linn J, which posits that neither of these principles is elevated to the status of a fundamental right or freedom. The case also expresses the opinion that Article 23(2) provides an express qualification to Article 10 – in contrast to the provisions on balanced restructuring, which must not be applied in a way that violates Article 10. However, the Supreme Court criticised the High Court in this case for producing a "wide-ranging judgment dealing with matters not only extraneous and unnecessary to the decision[,] but which have not been argued", and declined to approve or endorse the many obiter opinions expressed therein; *Kauesa v Minister of Home Affairs & Others* 1995 NR 175 (SC) at 183G–I, per Dumbutshena AJA.

Furthermore, Article 23 makes it clear that affirmative action must take into account –¹²

... the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

Substantive sexual equality is given further emphasis in Article 95, which calls for legislation to ensure “equality of opportunity for women” in “all spheres of Namibian society”, particularly in the workforce.¹³

The principle of equality is integrated into other fundamental rights and protective provisions. Against a background where voting rights were granted on the basis of race, the Constitution requires that the President is to be elected by “direct, universal and equal suffrage”;¹⁴ ensures that all citizens have an equal right to political activity;¹⁵ and requires election of the National Assembly by the voters by “general, direct and secret ballot”.¹⁶ Mindful of the apartheid history of ethnic homelands, the Constitution requires that regional and local authorities are to be formulated “without any reference to the race, colour or ethnic origin of the inhabitants of such areas”.¹⁷ It is also noteworthy that the Constitution recognises the need “to promote justice on the basis of equal opportunity” by providing for “free legal aid in defined cases”.¹⁸

In a nation where racial inequality once reached into the most personal areas of life, family rights in an independent Namibia are specifically guaranteed “without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status”.¹⁹ Sexual equality is given particular prominence again here, with the promise that “[m]en and women ... shall have the right to marry and to found a family” and have “equal rights as to marriage, during marriage and at its dissolution”.²⁰

Thus, the Constitution’s equality provision is contextualised by promises of equality in a range of specific contexts, with the primary aim being to redress the wrongs of the past.

This break with the past has been highlighted in many judgments, often with particular reference to Articles 10 and 23. For example, the case of *S v Acheson*²¹ refers to –²²

12 Article 23(3).

13 Article 95(a).

14 Article 28(2)(a).

15 Article 17.

16 Article 46(1)

17 Article 102(2).

18 Article 95(h).

19 Article 14(1).

20 (ibid.).

21 1991 NR 1 (HC).

22 At 17A–B, per Mohamed AJ.

... the right of the Namibian people to self-determination and to emancipation from colonialism and racism – ideals which are now eloquently formalised *inter alia* in the preamble to the Namibian Constitution and arts 10 and 23.

In *S v van Wyk*,²³ which held that a racial motive for a crime could be treated as an aggravating factor in sentencing, the three separate judgments all made reference to the principle of equality and the repudiation of apartheid. The primary judgment refers to several constitutional provisions, including Articles 10 and 23, and concludes that the provisions in question –²⁴

... demonstrate how deep and irrevocable the constitutional commitment is to, *inter alia*, equality before the law and non-discrimination and to the proscription and eradication of the practice of racial discrimination and apartheid and its consequences. [Italics in original]

A concurring judgment notes the following:²⁵

Throughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread – an abiding “revulsion” of racism and apartheid. It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people “for so long” and a commitment to build a new nation “to cherish and to protect the gains of our long struggle” against the pathology of apartheid. I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity.

The case of *Government of the Republic of Namibia & Another v Cultura 2000 & Another*²⁶ notes that the Constitution –²⁷

... articulates a jurisprudential philosophy which, in express and ringing tones, repudiates legislative policies based on the criteria of race and ethnicity, often followed by previous administrations prior to the independence of Namibia.

After referring to the Preamble and Articles 10(2), 23(1) and 63(2)(i), the court in the *Cultura 2000* case goes on to conclude as follows:²⁸

It is manifest from these and other provisions that the constitutional jurisprudence of a free and independent Namibia is premised on the values of the broad and universalist human rights

23 1993 NR 426 (SC).

24 At 452I, per Ackerman AJA, quoted with approval by Berger CJ in his concurring judgment at 455G.

25 At 456G–H, per Mohamed AJA. Portions of this passionate statement were quoted with approval in *Government of the Republic of Namibia & Another v Cultura 2000 & Another* 1993 NR 328 (SC) at 332I–333A, and *Ex Parte Attorney-General: In Re The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1998 HR 282 (SC) at 291D.

26 1993 NR 328 (SC).

27 At 332H–I, per Mahomed CJ.

28 At 333H–I.

culture which has begun to emerge in substantial areas of the world in recent times and that it is based on a total repudiation of the policies of apartheid which had for so long dominated lawmaking and practice during the administration of Namibia by the Republic of South Africa.

Another cogent example of judicial acknowledgment of the historical context of apartheid in constitutional interpretation is *S v Smith NO & Others*,²⁹ which found the definition of *racial group* in the Prohibition of Racial Discrimination Act³⁰ unconstitutionally overbroad on the basis that the Constitution —³¹

... does not justify restrictions with regard to groups of persons who never featured in the pre-independence of this country and were never part of or a party to the social pressure amongst the different peoples making up the population of this country that was occasioned by the erstwhile racist policies.

A somewhat broader view of the aims of Article 10 was articulated by the High Court in *Kauesa v Minister of Home Affairs & Others*,³² where it was stated that —³³

... although the Namibian experience was mainly derived from the oppressive and discriminatory system and ideology of apartheid, the representatives of the Namibian people who finally agreed on the exact content of the Namibian Constitution did not only take cognisance of the aforesaid settlement agreement and their own experiences, but of the evil of discrimination all over the world.

The equality provision was drafted with an eye to the future as well as the past. The principle of equality is entrenched against any amendment which would diminish or detract from it,³⁴ and equality before the law is one of the fundamental principles that must be respected even during states of emergency imposed to deal with national disasters, security threats or public emergencies.³⁵

29 1996 NR 367 (HC).

30 No. 26 of 1991.

31 At 371C–D, per Frank J.

32 1994 NR 102 (HC).

33 At 143E, per O’Linn J. See also 153B–G.

34 Article 131 of the Namibian Constitution reads as follows: “No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect”.

35 Article 24(3) of the Namibian Constitution reads as follows: “Nothing contained in this Article [on the derogation of rights during a state of emergency, state of national defence or martial law] shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Articles 5, 6, 8, 9, 10, 12, 14, 15, 18, 19 and 21 (1)(a), (b), (c), and (e) hereof, or the denial of access by any persons to legal practitioners or a Court of law”.

Contours: The equality clause in action

Judicial application of Article 10(1)

The first judicial consideration of Article 10(1) was in the 1995 *Mwellie* case,³⁶ which involved the unlawful dismissal of a state employee and challenged the constitutionality of a provision of the Public Service Act³⁷ which set a shorter prescription period for claims arising under the Act than for other civil claims.³⁸ After surveying judicial application of similar equality clauses by courts in other countries and by international tribunals, this judgment established the procedure for applying Article 10(1), holding that it permits “reasonable classifications” which are “rationally connected to a legitimate object”.³⁹ The court explained why this approach was necessary in Namibia’s historical context:⁴⁰

In countries such as ours where discrimination was the rule rather than the exception an absolute application of equality will in all probability have the opposite effect from what it was intended for. To treat people as equal who are not equal may lead to the abrogation of rights instead of the protection thereof.

Applying this test to the question before it, the court found that it was reasonable for a law to provide a shorter prescription period for claims against the state as an employer than for other civil claims. The judgment made reference to several factors: the state being by far the largest employer in Namibia, with the largest number of separate divisions and the widest geographic spread; the government having an unusually high turnover of staff and a special need to be able to timeously investigate employment disputes; and the state, as an employer, facing special budgetary constraints. The court also noted that, in terms of the Labour Act,⁴¹ employment issues in respect of other employers had to be

36 *Mwellie v Minister of Works, Transport and Communication & Another* 1995 (9) BCLR 1118 (NmH). It is surprising that this significant case has not been included in the Namibian Law Reports.

37 No. 14 of 1995.

38 The Public Service Act, 1995 (No. 13 of 1995) provides for a 12-month prescription period, in contrast to the Prescription Act, 1969 (No. 68 of 1969), which provides for a prescription period of three years in respect of other civil claims and provides for various grounds which delay the running of prescription. However, in respect of labour matters, the period provided for in the Public Service Act was similar to that provided in section 24 of the Labour Act, 1992 (No. 6 of 1992), which was the labour legislation in force at the time the case was considered.

39 At 1132F, per Strydom JP. See also 1134G–1135A.

40 At 1132D–E. Namibia’s history was also cited by the court at 1137H–1138A, when it rejected an assertion that the application of Article 10(1) should be restricted to classifications relating to the grounds enumerated in Article 10(2): “Bearing in mind the values expressed by the Namibian Constitution of recognising the inherent dignity of all, and according to all equal and inalienable rights, such an interpretation would run contrary to the spirit of the Constitution. To this must further be added the degree of development of the various people of Namibia, our past history of discrimination and the fact that we still sit with a legacy of pre-independence legislation originating from that era. An interpretation such as that contended for ... is therefore in my opinion too restricted and will not give effect to the aims of the Constitution”.

41 No. 6 of 1992.

brought before the Labour Court within 12 months. The Labour Act allowed a court to extend this period on “good cause shown” (an option not available under the analogous provision in the Public Service Act), but the court held in the *Mwellie* case that the absence of such a mechanism did not render the limitation clause unconstitutional if the time period provided for the claim was reasonable.⁴²

A weak attempt to invoke Article 10(1) was dismissed out of hand in 1997 in a case involving a municipal levy, where it was suggested that applying values to property in a central business area that were different from those applied to property in a less affluent township constituted an impermissible form of inequality.⁴³

In 1998, Article 10(1) was used to guide the interpretation of Article 12 – the right to a fair trial – in a case which found that the non-disclosure of certain witness statements to the defence in a criminal trial was unconstitutional. Article 10 was invoked to support the principle of “equality between the prosecution and the defence”.⁴⁴ In 2001, these two provisions were once again read together in a case which relied upon both of them to hold that it is unconstitutional to condition a convicted criminal’s right of appeal on a judge’s certificate which says that there are reasonable grounds for review. The court held that the right of fair trial applies until all channels available to an accused or convicted person have been exhausted, and that the right of appeal must be equally available to all.⁴⁵

In 2001, the Namibian Insurance Association made an unsuccessful attempt to invoke Article 10(1) in respect of a temporary tax exemption granted exclusively to the Namibian National Reinsurance Corporation (Namibre) by the Namibian National Reinsurance Corporation Act.⁴⁶ The Supreme Court found that the challenged exemption did not violate Article 10(1) for two reasons:⁴⁷

- As a state-controlled statutory body established to operate in the public interest, Namibre was *sui generis*; and the right to equality “does not require that everyone be treated the same, but simply that people in the same position should be treated the same”.

42 At 1138H–1140D.

43 *Grobbelaar & Another v Council of the Municipality of Walvis Bay* 1997 NR 259 (HC) at 267E–G, per Maritz AJ: “The allegation that the first respondent derogated from the applicants’ right to equality entrenched in art 10 of the Constitution by discriminating against them (because it did not apply the same land value to land in the central business district of Walvis Bay as that in a lesser affluent township) is not deserving of consideration. That suggestion is baseless and, in my opinion, founded on a misconception that the equality clause in our Constitution contemplates mathematical equality instead of normative or real equality”.

44 *S v Scholtz* 1998 NR 207 (SC) at 218B–E, per Dumbutshena AJA. See also *S v Nassar* 1994 NR 233 (HC) at 254–56, per Muller AJ, where several cases from other jurisdictions cited in the High Court’s judgment on the defence’s right to access information in the police docket cited the principle of equality for the same purpose, although the Namibian judgment did not otherwise place any weight on Article 10 in deciding this question.

45 *S v Ganab* 2001 NR 294 (HC), per Mtambanengwe J.

46 No. 22 of 1998.

47 *Namibia Insurance Association v Government of Namibia* 2001 NR 1 (HC) at 18F–19G, per Teek JP.

- The challenged provisions were rationally related to a defensible public interest, which was the development of a sound national insurance and reinsurance industry.

In 2004, the *Detmold* case⁴⁸ applied Article 10(1) in the examination of a provision in the Children's Act⁴⁹ which prohibited the adoption of children born to Namibian citizens by non-Namibian citizens.⁵⁰ The applicants were German nationals and permanent residents of Namibia, who did not wish to apply for Namibian citizenship because they did not wish to renounce their German citizenship (as Namibian law on naturalisation would require) and thereby lose the benefits of that citizenship. The child they applied to adopt had already been in their foster care for several years; they had been found suitable to be adoptive parents, and the child's biological mother had consented to the adoption. Therefore, the only obstacle to the adoption was their citizenship. The court found the prohibition in question to be unconstitutional as a violation of Article 10(1) and Article 14, which protects the family. With respect to Article 14, the court held that it could not be disputed that a "family" was "the best vehicle for bringing up children", and that the next best thing to a biological family was an adoptive family. The court further held that it was therefore the duty of society "to make possible, and not hinder or frustrate, a family for every child given up for adoption". The strict prohibition on adoption by non-Namibian citizens was found to be unconstitutional because it "deprives a child given up for adoption of the possibility of being adopted by persons who are prepared to afford it a secure and stable 'family'", which might not otherwise be available to the child.⁵¹ In terms of Article 10, the court noted that the provision in question differentiated between categories of people in adoption matters in two senses, namely –

48 *Detmold & Another v Minister of Health and Social Services & Others* 2004 NR 174 (HC).

49 No. 33 of 1960.

50 Exceptions were provided only for relatives of the child or for non-Namibian citizens who qualified for Namibian citizenship and had a pending application for naturalisation. Section 71 of the Children's Act stated the following in relevant part:

"(2) ... A children's court to which application for an order of adoption of a child is made shall not grant the application unless the court is satisfied –

...

(f) in the case of a child born of any person who is a Namibian citizen, that the applicant or one of the applicants is a Namibian citizen resident in Namibia: Provided that the provisions of this paragraph shall not apply –

(i) where the applicant or one of the applicants is a Namibian citizen or a relative of the child and is resident outside the Republic; or

(ii) where the applicant is not a Namibian citizen or both applicants are not Namibian citizens but the applicant has or the applicants have the necessary residential qualifications for the grant to him or them under the Namibian Citizenship Act (Act 14 of 1990), of a certificate or certificates of naturalization as a Namibian citizen or Namibian citizens and has or have made application for such a certificate or certificates,

and the Minister has approved of the adoption".

51 At 181C–182C, per Damaseb AJ.

- between children born in Namibia to Namibian parents, and children born in Namibia to foreigners, and
- between Namibian citizens and foreigners who did not qualify or did not wish to become naturalised Namibian citizens.

The court also held that these differentiations had no rational connection to a legitimate government purpose, since they had the effect of excluding children born to Namibian parents from adoption by persons who might provide them with the best possibility of a secure family life.⁵²

In the 2006 *Lisse* case, which dealt with an administrative decision to revoke a private doctor's authorisation to practise at a state hospital, the Supreme Court noted (somewhat in passing) that a Minister applying discretion on this issue had to "take into consideration and apply" Article 10. Since many private doctors are allowed to practise at state hospitals, refusing this authority to a particular private doctor without a sound reason would be a breach of the fundamental right of equality before the law.⁵³

In the 2007 *Majiedt* case, the Supreme Court came to a similar conclusion as the High Court had in *Mwellie* (although curiously without making any reference to *Mwellie*).⁵⁴ Here the Supreme Court overturned a High Court finding that Article 10(1) had been violated by a provision of the Police Act⁵⁵ providing for a shorter prescription period for claims against the police than for other civil claims.⁵⁶ The High Court judgment had emphasised the connection between the challenged provision and past injustices, holding that it –⁵⁷

52 At 182D–183B. The court unfortunately did not explain its application of the test for constitutionality in terms of Article 10(1) in any further detail.

53 *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC) at 757J–758B, per O'Linn AJA.

54 *Minister of Home Affairs v Majiedt & Others* 2007(2) NR 475 (SC), per Chomba AJA.

55 No. 19 of 1990.

56 The Police Act provides that claims against the state are to be instituted within 12 months after the cause of action arose, in contrast to the Prescription Act, 1969 (No. 68 of 1969), which provides for a prescription period of three years in respect of other civil claims and provides for various grounds which delay the running of prescription. Section 39(1) of the Police Act states the following:

“Any civil proceedings against the State or any person in respect of anything done in pursuance of this Act shall be instituted within twelve months after the cause of action arose, and notice in writing of any such proceedings and of the cause thereof shall be given to the defendant not less than one month before it is instituted: Provided that the Minister may at any time waive compliance with the provisions of this subsection”.

57 High Court judgment per Damaseb, JP, as quoted in *Minister of Home Affairs v Majiedt & Others* at 485H–J.

... carries the real risk that poverty and ignorance – which is the lot of the vast majority of this country because of past discriminatory policies – will only serve to perpetuate that condition for long. Instead of making it possible for as many people as possible to exercise the right to access to court which has been “denied to them for so long”, the law will achieve the opposite result.

The High Court found that the differing prescription schemes produced an inequality between claimants, and that no legitimate government objective had been offered which could justify the distinction.⁵⁸ In contrast, the Supreme Court found that the legitimate government objective was the need to promote the speedy resolution of claims against the state in order to allow the state to assess its liabilities promptly and accurately.⁵⁹ It also held that, because the shorter prescription period included the possibility of a waiver by the relevant Minister at any time, this flexibility was sufficient to protect the right of access to court for people of all socio-economic positions,⁶⁰ noting that claimants disadvantaged by poverty could also apply for legal aid.⁶¹ In a conclusion which could be interpreted as raising the bar for the application of Article 10(1), the Supreme Court stated that –⁶²

... in order to violate the constitutional rights and freedoms encapsulated in arts 10(1) and 12(1)(a), namely the right of equality before the law and of access to the courts, respectively, a statutory provision has to purport to ensure that every reasonable avenue to the enjoyment of those rights is closed

The Supreme Court then found that the statutory provision examined in the case at hand did not have this effect.⁶³

The most recently reported case to apply Article 10(1) was *Nationwide Detectives* in 2008, where the Supreme Court held that the term *persons* in Article 10 could include artificial persons such as corporations as well as natural persons, and then relied on Article 10(1) read together with Article 12(1)(a) on the right to a fair and public hearing to mean that it would be unconstitutional to forbid a corporation (particularly a small one) from being represented in court by an ‘alter ego’ who is not a legal practitioner.⁶⁴

This survey shows that Article 10(1) has seldom been applied to invalidate laws, and that attempts to use it to motivate findings of unconstitutionality have generally only been

58 (ibid.:491E–G).

59 *Minister of Home Affairs v Majiedt & Others* at 491G–J.

60 (ibid.:489B–491A).

61 (ibid.:492A–H).

62 (ibid.:492H–I).

63 (ibid, 492I–J)

64 *Nationwide Detectives CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 (SC) at 300D–301F, per Shivute CJ.

successful where it has been applied in conjunction with other constitutional provisions which help define its meaning – as in the *Detmold* and *Nationwide Detectives* cases.⁶⁵

Judicial application of Article 10(2)

There was an early brush with the application of Article 10(2) in the 1991 case of *S v Dameseb & Another*.⁶⁶ The High Court held that the special cautionary rule applied to sexual offences lacked any rational basis and rested on an unsupported assumption that false charges in such cases were particularly likely. The court stated that, given that the vast majority of complainants in such cases are female, this rule thus “has no other purpose than to discriminate against women”, and “probably also is contrary to art 10 of the Namibian Constitution which provides for equality of all persons before the law regardless of sex”.⁶⁷ However, this somewhat ambivalent pronouncement was ruled to have been obiter dicta by a subsequent case which found that there were no convincing

65 Article 10 has been cited in several other cases involving criminal matters, without being directly applied.

A case concerning the retroactive applicability of an amendment to the Criminal Procedure Act, which allows the prosecution as well as the defence to appeal the decision of a lower court in a criminal case, noted that this amendment gave effect to the letter and spirit of Article 10 by providing procedural equality to prosecution and accused; *S v Van den Berg* 1995 NR 23 (HC) at 35I–36C, per O’Linn J.

In the same vein, Article 10 was cited to stress the point that the rights of crime victims should be given emphasis equal to the rights of criminal offenders, in a concurring judgment in a case which found aspects of a statutory minimum sentence unconstitutional as a violation of Article 8 (*S v Vries* 1998 NR 316 (SC) at 268C–H, per O’Linn J (concurring judgment)). The same judgment, at 275D–F, also referred to Article 10 in support of the concept of mandatory minimum sentences as a mechanism for ensuring that “equal criminals must be punished equally for equal crime” [emphasis in original]. See also 277C.

Article 10 was also cited in a 1996 case in support of the proposition that labour laws should safeguard and balance the interests of both employer and employee; see *Du Toit v Office of the Prime Minister* 1996 NR 52 (LC) at 73G–H, per O’Linn J.

Without being specifically discussed, Article 10 was quoted to contextualise a holding that it was a violation of the right to a fair trial to refuse legal assistance to an indigent accused charged with a serious crime such as treason, and that government resources were not a factor to be considered in this regard; see *Mwilima v Government of the Republic of Namibia* 2001 NR 307 (HC) at 315D–E, per Levy AJ.

In 2007, the Supreme Court took note of an argument that criminal defendants charged with fraud had been discriminated against by being denied legal aid because they were foreign nationals, but found that there was no factual basis to this assertion; see *S v Luboya & Another* 2007 (1) NR 96 (SC) at 101E–102D, per Chomba AJA.

66 1991 NR 371 (HC), per Frank J (also cited as *S v D & Another*).

67 At 374F–375F. This case was cited in the South African case of *S v Jackson* 1998 (1) SACR 470 (SCA), for the proposition that it had abolished the cautionary rule.

reasons for the continued application of the rule, without reaching the question of whether it breached the guarantee of sexual equality in Article 10.⁶⁸

In 1997, it was contended in *Council of the Municipality of Windhoek v Petersen*⁶⁹ that a municipal decision to allow traders of handmade crafts to operate in a specified area in the central business district, while excluding vendors of other forms of goods, was a violation of Article 10(2). The evicted hawkers asserted that they had been discriminated against on the basis of their “economic status” by the distinction drawn between different members of the economic sector. The High Court held that this assertion was based on a misinterpretation of *economic status* in Article 10(2), which “relates to pecuniary or financial status or position and is primarily concerned with protecting the impoverished against discrimination”.⁷⁰

A more robust but still unsuccessful attempt to utilise Article 10(2) took place in the case of *Müller v President of the Republic of Namibia & Another*⁷¹, where the Supreme Court for the first time laid down a general procedure for the application of this Article. When Mr Müller married Ms Engelhard, he wanted to adopt her surname, so that the two of them could operate their jewellery business under her more distinctive and well-established business name. Under Namibian law, she could simply have started using his surname upon their marriage if she had wished, but he could assume her surname only by going through a formal name-change procedure which involved extra effort and expense.⁷² Mr Müller contended that the different name-change rules for husbands and wives violated Article 10, while the state asserted that, while they may have violated formal equality, they did not violate the principle of substantive equality, since most wives chose to adopt their husbands’ surnames on the basis of “traditions and conventions

68 *S v Katamba* 1999 NR 348 (SC) at 350C–351A, 360E, 362A–H, per O’Linn AJA. This judgment noted at 361C–J that courts have “a constitutional duty to protect the fundamental rights of victims”, and referred to “the contemporary norms, views and opinions of Namibian Society” but seemed to find the rule unnecessary rather than unconstitutional.

69 1998 NR 8 (HC).

70 At 11J–12D, per Hannah J.

71 1999 NR 190 (SC).

72 This situation resulted from section 9(1)–(2) of the Aliens Act, 1937 (No. 1 of 1937), which provides as follows:

“(1) If any person who at any time bore or was known by a particular surname, assumes or describes himself by or passes under any other surname which he had not assumed or by which he had not described himself or under which he had not passed before the first day of January 1937, he shall be guilty of an offence unless the Administrator General or an officer in the Government Service authorized thereto by him, has authorized him to assume that other surname and such authority has been published in the Official Gazette: Provided that this subsection shall not apply when –

(a) a woman on her marriage, assumes the surname of her husband;

(b) a married or divorced woman or a widow resumes a surname which she bore at any prior time ...

[Continued overleaf]

that have existed since time immemorial”.⁷³ The Namibian Supreme Court drew on precedent in South Africa and Canada in applying a stricter test for differentiation on the grounds enumerated in Article 10(2), in contrast to the “rational connection” test which the *Mwellie* case had held to be the appropriate method for applying Article 10(1). The court noted in *Müller* that the grounds for discrimination articulated in Article 10(2) “are all grounds which, historically, were singled out for discriminatory practices exclusively based on stereotypical application of presumed group or personal characteristics”,⁷⁴ and that the constitutional guarantee of non-discrimination would be negated if rational connection to a legitimate legislative objective were sufficient to justify discrimination on one of the stated grounds.⁷⁵

The court also set out a four-step test for the application of Article 10(2) of the Constitution, as follows:⁷⁶

The steps to be taken in regard to this sub-article are to determine –

- (i) whether there exists a differentiation between people or categories of people;
- (ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article;
- (iii) whether such differentiation amounts to discrimination against such people or categories of people; and
- (iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of art 23 of the Constitution.

The court held further that an element of unjust or unfair treatment was inherent in the meaning of the word *discriminate*, and that, to determine whether unfair discrimination was present, a court should look at the purpose of the discrimination in question; the impact of the discrimination on the victim and any previously disadvantaged groups in society; and whether the discrimination had the effect of impairing the victim’s human dignity.⁷⁷ It justified this incorporation of the concept of *unfairness* with reference to Namibia’s history of discrimination on all of the enumerated grounds listed in Article

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- (2) No such notice as is mentioned in subsection (1) shall be issued unless –
 - (a) the person concerned has published in the manner hereafter prescribed once in each of two consecutive weeks in the Official Gazette and in each of two daily newspapers which circulate in the district in which the said person resides and which have been designated for such publication by the magistrate of that district, a notice of his intention to assume another surname; and
 - (b) the Administrator General or an officer in the Government Service authorized thereto by him, has satisfied himself from a statement submitted by the said person and from reports furnished by the Commissioner of the South West African Police and by the said magistrate, that the said person is of good character and that there is a good sufficient reason for his assumption of another surname ...”.

73 At 194B–C, per Strydom CJ.

74 At 199H–I.

75 At 199F–H.

76 At 200B–D.

77 At 203.

10(2), noting that correcting this history might require attempts to “level the playing field”; otherwise the result might be to perpetuate persisting inequalities rather than to eliminate them. The court further noted that, while Article 23’s affirmative action provisions covered a wide field, they might not be sufficient to cover all forms of past discrimination. Thus, the court was apparently attempting to leave the door open to distinctions on the enumerated grounds which could advance substantive equality and permit positive steps to help redress past inequalities.⁷⁸

Applying the test it had formulated to the issue before it, the Supreme Court held that the different rules for husbands and wives with regard to surnames did not amount to unfair discrimination. Key factors were that –⁷⁹

- the complainant, a white male who emigrated to Namibia after Independence, was not a member of a prior disadvantaged group
- the aim of the name change formalities was not to impair the dignity of males or to disadvantage them
- the legislature has a clear interest in the regulation of surnames, and
- the impact of the differentiation on the interests of the applicant was minimal since he could adopt his wife’s surname by a procedure involving only minor inconvenience.

Somewhat ironically, given the court’s emphasis on the need to break with the past and right past wrongs, it placed significant weight on the fact that the challenged statutory provisions gave effect to “a tradition of long standing in the Namibian community that the wife normally assumes the surname of the husband”.⁸⁰

The first successful application of Article 10(2) came only in 2000, ten years after Independence, in the *Myburgh* case.⁸¹ The issue here was a husband’s marital power over his wife in a civil marriage in community of property, which rendered her incapable of

78 At 198B–F, 201C–H.

79 At 203G–204F. One commentator implies that the case outcome might have been different if it had focused on the corresponding discrimination against Ms Engelhard, who was deprived of the right to easily make her surname that of the married couple: “In effect, the rule allows women to give up their identity more freely than it allows this ‘privilege’ to men. This does not enhance gender equality in society”; Bonthuys (2000:467).

The matter was subsequently referred to the United Nations Committee which oversees the International Covenant on Civil and Political Rights. This Committee ruled in 2002 that the different procedures for dealing with surnames did constitute unfair sex discrimination in terms of the International Covenant. As a result, in June 2002, the Committee gave the Namibian Government 90 days to report on what it had done to rectify the problem; UN Human Rights Committee, Communication No. 919/2000, CCPR/C/74/D/919/2000, 28 June 2002. Mr Müller changed his name to Mr Engelhard under the laws of his home country of Germany – but at the time of writing, more than seven years after the decision of the international forum, the impugned provisions of the Aliens Act remain unchanged.

80 At 204B.

81 *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC).

suing or being sued on her own and left her with limited contractual capacity.⁸² Applying the test from the *Müller* case, the court found that the resulting sex differentiation amounted to unfair discrimination which violated Article 10(2). The persuasive factors were that women were a prior disadvantaged group, and that the differentiation was based on stereotyping which failed to take cognisance of the “equal worth of women” and impaired their dignity individually and as a class.⁸³

This was followed by an unsuccessful attempt to invoke Article 10 in the *Frank* case,⁸⁴ which dealt with the role of a lesbian relationship between a foreigner and a Namibian citizen in the foreign partner’s application for permanent residence. It was argued on behalf of Ms Frank that, if her relationship with a Namibian citizen had been a heterosexual one, she could have married and would have been able to reside in Namibia or apply for citizenship as the spouse of a Namibian citizen. It was asserted that that the failure to afford her comparable rights in her lesbian relationship implicated the constitutional right to equality in Article 10 and the protection of the family in Article 14 (amongst other rights which were not given detailed consideration by the court).⁸⁵ The court found Article 14 inapplicable on the grounds that the “family” protected by it –⁸⁶

... envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race.

82 Marital power in respect of civil marriages was abolished by Parliament in the Married Persons Equality Act, 1996 (No. 1 of 1996), section 2, but the loan agreement which was the starting point of the case was entered into prior to the date when this statute came into force.

83 At 265H–266J, per Strydom CJ.

84 *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).

85 The right to privacy in Article 13(1) and the right to reside and settle in, and leave and return to, Namibia in Article 21(1)(h)–(i) were also raised, but these were rather summarily rejected by the court as being irrelevant and farfetched; see *Frank* at 147A–E, 148G.

86 *Frank* at 146F–G, per O’Linn AJA. The South African case of *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) at paragraph 51, per Ackermann J, discusses the problems with this focus on procreation as a defining feature of marriage:

“From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy”.

[Continued overleaf]

With respect to Article 10, the court noted that Article 10(2) does not expressly prohibit discrimination on the grounds of “sexual orientation”,⁸⁷ indicating (somewhat obliquely) that the term *sex* in this provision does not encompass “sexual orientation”.⁸⁸ Turning to Article 10(1) and purporting to apply the test set forth in *Mwellie*, the court concluded (without further discussion) that there was no “unfair” discrimination because “[e]quality before the law for each person does not mean equality before the law for each person’s sexual relationships”.⁸⁹ This finding is elaborated in the court’s *meru moto* consideration of whether the respondent’s right to dignity had been violated, when it notes that the state’s failure to afford the same treatment in respect of permanent residence to “an undefined, informal and unrecognised lesbian relationship with obligations different from that of marriage” as compared to “a recognised marital relationship” amounts to differentiation, but not discrimination.⁹⁰

It is somewhat hard to follow the court’s reasoning, as the test it applies is actually a mixture of the approaches taken to Article 10(1) and 10(2) in previous cases. In respect of Article 10(1), *Mwellie* requires an examination of whether a differentiation bears a rational connection to a legitimate purpose; in respect of Article 10(2), *Müller* requires

This criticism is even more applicable to the concept of family, where extended family units can and often do comprise other groupings not defined by procreative potential, such as siblings, aunts or uncles and their nieces or nephews, cousins, single parents and children, single grandparents and children, and child-headed households – just to name a few of the myriad household compositions one might find in Namibia. The Canadian Supreme Court had the following to say on this score (*Canada (Attorney-General) v Mossop* (1993) 100 DLR (4th) 658 at 710C–E, per L’Heureux-Dubé J, quoted in *National Coalition* at paragraph 52):

“The argument is that procreation is somehow necessary to the concept of family and that same-sex couples cannot be families as they are incapable of procreation. Though there is undeniable value in procreation, the Tribunal could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families. The flaws in this position must have been self-evident. Though procreation is an element in many families, placing the ability to procreate as the inalterable basis of family could result in an impoverished rather than an enriched version [of the concept]”.

87 At 149I.

88 The court states the following in *Frank* at 149G–H: “Whereas the word ‘sex’ can be defined as ‘being male or female’, or ‘males or females as a group’, ‘sexual orientation’ could encompass in theory ‘any sexual attraction of anyone towards anyone or anything’. The prohibition against discrimination on the grounds of sexual orientation is so wide, that a case may even be made out for decriminalizing the crime of bestiality, particularly, when done in private” [citation omitted].

The Court also notes “in passing” at 145E–F that the International Covenant on Civil and Political Rights specifies sex as one of the grounds on which discrimination is prohibited but not sexual orientation. In fact, in March 1994 (before Namibia’s ratification of the Covenant), the Human Rights Committee charged with monitoring the Covenant stated that the references to *sex* in the provisions on discrimination are “to be taken as including sexual orientation”; see *Toonen v Australia* Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994).

89 At 155E–F.

90 At 155I–156C.

checking to see if a differentiation upon one of the enumerated grounds amounts to discrimination, which is interpreted to mean unfair discrimination, and if so, whether it falls within the affirmative action exceptions provided for in Article 23.⁹¹ The *Frank* analysis purports to be applying Article 10(1), but discusses the question of whether or not the differentiation amounts to unfair discrimination, rather than whether the differentiation bears a rational relation to a legitimate government purpose. Some other problematic aspects of this case are discussed below.

The prohibition on racial discrimination has been applied on its own only once, in the 2003 *Berendt* case, which dealt with the race-based rules in the Native Administration Proclamation 15 of 1928 that govern inheritance.⁹² When Martha Berendt died unmarried and intestate in 1999, the Native Administration Proclamation provided that her property must devolve in accordance with “native law and custom”.⁹³ In the course of a dispute between her three children about the actions of one of them as the executor of the estate, the other two siblings challenged the constitutionality of the relevant provisions of the Native Administrative Proclamation and asserted that the estate should be administered in terms of the Administration of Estates Act,⁹⁴ which applies to most estates not covered by the Proclamation.⁹⁵ The court found that the legislative provisions which

91 See *Müller* at 199J–200D, quoted in *Frank* at 154I–155C.

92 *Berendt & Another v Stuurman & Others* 2003 NR 81 (HC). Section 2 of Regulation GN 70 of 1 April 1954, which was promulgated under section 18(9) of Native Administration Proclamation 15 of 1928, provides as follows:

“If a native dies leaving no valid will, his property shall be distributed in the manner following:–

- (a) If the deceased, at the time of his death, was –
 - (i) a partner in a marriage in community of property or under antenuptial contract; or
 - (ii) a widow, widower or divorcee, as the case may be, of a marriage in community of property or under ante-nuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if he had been a European.
- (b) If the deceased does not fall into a class described in paragraph (a) hereof, the property shall be distributed according to native law and custom”.

93 Section 18(1) of Native Administration Proclamation 15 of 1928 provides as follows:

“All movable property of whatsoever kind belonging to a Native and allotted by him or accruing under native law or custom to any woman with whom he lived in a customary union, or to any house shall upon his death devolve and be administered under native law and custom”.

It should be noted that this section uses overtly sexist terminology, and is silent on what happens when an African woman. This omission probably stems from the fact that women were regarded under customary law as perpetual minors who could not own property. Section 18(2) provides as follows:

“All other movable property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom”.

94 No. 66 of 1965.

95 As another remnant of colonial history, the deceased estates of ‘Basters’ of the Rehoboth community are governed by Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941.

drew distinctions on the basis of race violated Article 10(2), following the reasoning in an analogous South African case:⁹⁶

There can be no doubt that the section and the regulation both impose differentiation on the grounds of race, ethnic origin and colour, and as such constitute discrimination which is presumptively unfair The Minister and the Master suggested that the administration of deceased estates by magistrates was often convenient and inexpensive. However, even if there are practical advantages for many people in the system, it is rooted in racial discrimination, which severely assails the dignity of those concerned and undermines attempts to establish a fair and equitable system of public administration. Any benefits need not be linked to this form of racial discrimination but could be made equally available to all people of limited means or to all those who live far from the urban centres where the offices of the Master are located. Given our history of racial discrimination, I find that the indignity occasioned by treating people differently as “blacks” ... is not rendered fair by the factors identified by the Minister and the Master.

The court concluded that the impugned statutory provisions were unconstitutional violations of the prohibition on racial discrimination, and gave Parliament a time frame of almost two years to correct the defect.⁹⁷ In response, Parliament passed the Estates and Succession Amendment Act,⁹⁸ which actually made no reforms whatsoever to the substantive law of succession. In fact, the wording of the law practically defies belief, as it repeals the sections found to be unconstitutional, but then effectively reinstates them by making them applicable to the same persons they would have applied to “had the said provisions not been repealed”.⁹⁹

The most recently reported case applying Article 10(2) at the time of writing is the 2007 *Frans* case, in which the High Court examined the constitutionality of the common law rule prohibiting ‘illegitimate’ children from inheriting intestate from their fathers. The court found that the differentiation between *legitimate* and *illegitimate* children was based on “social status” and therefore proceeded to apply the *Müller* test. It found that the basis for the rule was the punishment of sinful parents – although the rule made no distinction between children born of adultery, incest or a relationship between loving

96 At 84E–H, per Manyarara AJ, quoting *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC) at paragraph 22.

97 This remedy was based on Article 25(1)(a) of the Constitution. The government subsequently requested and received a six-month extension of the deadline.

98 No. 15 of 2005.

99 Section 1 of this law reads in full as follows:

“(1) Section 18 of the Native Administration Proclamation, 1928 is amended by the repeal of subsections (1), (2), (9) and (10).

(2) Despite the repeal of the provisions referred to in subsection (1), the rules of intestate succession that applied by virtue of those provisions before the date of their repeal continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed”.

This failure to give effect to the court’s decision was not challenged as there were no further instructions from the clients at this stage; information from Legal Assistance Centre, which represented the clients in this case.

partners who live together without being married – and thus gave a “social stigma” to all such children. The court concluded that this amounted to unfair discrimination and that the rule was, therefore, unconstitutional.¹⁰⁰

So in the last 20 years, the equality clause has been invoked in the name of sex, sexual orientation, economic status, social status, and race – and applied three times to invalidate existing laws: once on the basis of sex (*Myburgh*), once on the basis of race (*Berendt*), and once on the basis of social status (*Frans*).

It is strange, given that the concept of *equality* in the Namibian Constitution is premised on a definitive break with the country’s apartheid past, that the equality clause has been so seldom used to challenge racial discrimination. It would be tempting to hope that this is because all vestiges of racial discrimination have been obliterated in Namibian law, but this is sadly not the case. As the Committee on the Elimination of Racial Discrimination has pointed out, some Namibian laws that remain in force retain a “discriminatory character”, including aspects of customary laws with gender-related dimensions of racial discrimination.¹⁰¹

Concerns: Some anomalies in the application of Article 10

Looking at the court’s role in interpreting equality, one finds some worrying incongruities in the approaches taken in various cases.

100 *Frans v Paschke & Others* 2007 (2) NR 520 (HC) at 528–29, per Heathcote AJ. By the time this case came to court, Parliament had in fact already done away with the common law rule in the Children’s Status Act, 2006 (No. 6 of 2006), which had been passed by Parliament but had not yet come into force. Section 16(2) of this Act provides as follows:

“Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by testamentary disposition, be treated in the same manner as a person born inside marriage”.

However, while the Act generally has retrospective effect, there is an exception in respect of the provision on inheritance by children born outside marriage: it applies only “to estates in which the deceased person died after the coming into operation of this Act” (section 26(2)). This exception was made in an effort not to upset transactions which were regarded as settled. The Children’s Status Act came into force a little over a year after the High Court judgment was handed down, on 3 November 2008; Government Notice No. 266 of 2008, Commencement of the Children’s Status Act, 2006 (Act No. 6 of 2006), Government Gazette 4154.

101 See Committee on the Elimination of Racial Discrimination (73rd session), CERD/C/NAM/CO/12, 22 September 2008 at paragraph 11. The Committee recommended as follows (*ibid.*): “The Committee urges the State party to review its laws with a view to removing discriminatory laws in order to provide equal protection and treatment to all persons. Recalling its general recommendation No. 25 (2000) on gender-related dimensions of racial discrimination, the Committee recommends in particular that the State party urgently ensure that its laws, especially on marriage and inheritance, do not discriminate against women and girls of certain ethnic groups. It invites the State party to consider introducing a system which allows individuals a choice between customary law systems and the national law while ensuring that the discriminatory aspects of customary laws are not applied”.

[Continued overleaf]

The timing of the invalidity

One anomaly concerns the timing of the application of Article 10 (along with other constitutional provisions) to statute law, as opposed to common law and customary law. We have examples of past, present and future application. *Detmold* invalidated a statutory provision with immediate effect, while *Berendt* found several statutory provisions unconstitutional, but allowed them to remain in place temporarily in order to give Parliament time to correct the problem. *Myburgh*, with *Frans* following in its footsteps, held that common law provisions found to be in conflict with Article 10 were invalid from 21 March 1990, the date on which the Constitution came into force. According to *Myburgh*, provisions of common law or statutory law which conflicted with the Constitution were in fact “swept away” at Independence by virtue of Article 66(1),¹⁰² with the role of court judgments on this point being only “to determine the rights of parties where there may be uncertainty as to what extent the common law was in existence”.¹⁰³ In contrast, statutory provisions remain in force by virtue of Article 140(1) “until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court”.¹⁰⁴

The law on default marital property regimes also still utilises race-based rules; see *Mofuka v Mofuka* 2001 NR 318 (HC) and 2003 NR 1 (SC). Both judgments discuss the provisions of Native Administration Proclamation 15 of 1928, which apply to marriages between “blacks” in certain parts of Namibia. (The constitutionality of these provisions was not challenged in this case.) The Legal Assistance Centre and the Law Reform and Development Commission have both published recommendations for law reforms which would remove remaining race and sex discrimination in the laws pertaining to marriage, divorce and inheritance; see LAC (1999, 2000, 2005a, 2005b, 2005c); LRDC (2003, 2004a, 2004b).

102 At 261. Article 66(1) reads as follows:

“Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law”.

103 At 261E–G.

104 Article 140(1) states in full:

“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”.

According to the court in *Myburgh*, this Article is buttressed by Article 25(1)(b), which also applies only to statutory enactments. Article 25(1)(b) reads as follows in relevant part:

“Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

...

(b) any law which was in force immediately before Independence shall remain in force until amended, repealed or declared unconstitutional. ...”.

Although *Myburgh* offers a detailed textual analysis to support its interpretation of the various constitutional provisions in question,¹⁰⁵ it seems odd that the type of law which is the source of the discrimination would determine the effective date for the removal of the discrimination, and one wonders if this can indeed have been the intent of the provisions in question. It would seem to fall foul of the principle of legal certainty,¹⁰⁶ as one can envisage a situation where prescription does not begin to run until the parties acquire knowledge of the effect of the Constitution on their rights through a court judgment,¹⁰⁷ so that events which happened years and years in the past could conceivably be challenged.

This aspect of *Myburgh* relies for its holding in part on a case decided under the Interim Constitution of South Africa, but the situation in South Africa was an easier one because the Interim Constitution provided that, unless the Constitutional Court ordered otherwise, a declaration that a law was invalid in terms of the Constitution “shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity”.¹⁰⁸ The final South African Constitution reaches the same result by a different route, giving the Constitutional Court powers to limit the retrospective effect of a declaration of invalidity.¹⁰⁹ It should also be noted that the rules in South Africa regarding the effect of a declaration of constitutional invalidity are essentially the

105 At 260H–265C.

106 See, for example, *Meintjies v Joe Gross t/a Joe’s Beerhouse* 2003 NR 221 (LC) at 223B–D, per Maritz J, which discussed (in relation to the doctrine of stare decisis) “the need for legal certainty, the protection of vested rights, the satisfaction of legitimate expectations and the upholding of the dignity of the court”.

107 See, for example, *Ditedu v Tayib* 2006 (2) SA 176 (W), where the prescription period did not run in a case where a claimant received wrong advice on the relevant law from an attorney; *Deysel v Truter & Another* 2005 (5) SA 598 (C), where a prescription period in respect of surgical operations did not begin to run until the claimant had secured a medical opinion confirming his suspicion that the operations were negligently performed; *Poolman & Others v Transnamib Ltd* 1997 NR 89 (HC), where a prescription period did not run because the plaintiffs said that they simply did not know of the relevant provisions of the 1992 Labour Act until January 1996; and *Jacobs v Adonis* 1996 (4) SA 246 (C), where a prescription period did not begin running until a factual finding in a court case provided key information.

108 Interim Constitution of South Africa, 1993, section 98(6)(a). The court also has the power to postpone the operation of the invalidity in terms of section 98(5). See *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC) at paragraphs 26–28, per Ackermann J.

109 The current South African Constitution (dating from 1996) provides as follows in section 172(1):

“When deciding a constitutional matter within its power, a court –

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect”.

[Continued overleaf]

same, regardless of whether the source of the law in question is a statute, common law, or customary law.¹¹⁰

In the *Bhe* case, which found the customary law rule of primogeniture and some related statutory provisions unconstitutional, the South African Constitutional Court articulated the problem which could face Namibia in the wake of the *Myburgh* case:¹¹¹

The statutory provisions and customary law rules that have been found to be inconsistent with the Constitution are so egregious that an order that renders the declaration fully prospective cannot be justified. On the other hand, it seems to me that unqualified retrospectivity would be unfair because it could result in all transfers of ownership that have taken place over a considerably long time being reconsidered.

The court's solution in this case was to make the invalidity retrospective to the date on which South Africa's first democratically formulated Interim Constitution came into force, namely 27 April 1994, but to exempt the finding from applying to any completed transfer of ownership to an heir who had no notice of a challenge to the legal validity of the laws in question.¹¹²

Canada takes a similar approach. In Canada, a statute which is contrary to the Canadian Charter of Rights and Freedoms is technically invalid from the date of the Charter (or from the date the legislation was passed if that was after the Charter came into force), but this does not require giving retrospective effect to the judgment in every case:¹¹³

The starting point under South Africa's 1996 Constitution differs from that under its Interim Constitution of 1993. Under the latter, an order of invalidity operated only prospectively unless the court specifically made it retrospective; under the 1996 Constitution, constitutional invalidation is presumptively retrospective unless the court order specifically limits its retrospective effect. See *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 1288 (CC) at paragraphs 11–12, per Kriegler J.

110 The South African courts have additional constitutional powers to develop common law and customary law; see South African Constitution, sections 39(2) and 173. See also O'Regan (1999); *Bhe & Others v Magistrate, Khayeltisha & Others* 2005 (1) SA 580 (CC) at paragraphs 109–129, per Langa DCJ.

111 *Bhe & Others v Magistrate, Khayeltisha & Others* at paragraph 126.

112 (*ibid.*: paragraph 129). For further discussion of the handling of this issue in various jurisdictions, see *HKSAR v Hung Chan Wah*; *HKSAR v Asano Atsushi*, Criminal Appeal No.'s 411 of 2003 and 61 of 2004 in the High Court of the Hong Kong Special Administrative Region, Court of Appeal, 26 January 2006; available at http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=51417; last accessed 27 September 2009. This case notes at paragraph 30 that some jurisdictions (in some exceptional cases) apply court rulings of unconstitutionality only prospectively, where this is necessary "to protect those who have entered upon transactions giving rise to rights and obligations and who have, in doing so, genuinely relied upon that which was at the time fairly taken to be settled law, and where to reverse the consequences of that reliance would cause them undue hardship".

113 *Canadian Charter of Rights Decisions Digest*, "Section 32(1): Charter decisions" at section 8; available from the Canadian Legal Information Institute (CanLII) at www.canlii.org/en/ca/charter_digest/s-32-1.html#_Toc68429571; last accessed 29 September 2009.

A declaration of invalidity goes undoubtedly to the past since what it says, in effect, is that the law was *ultra vires* the legislature and, therefore, never acquired legal force and effect. The judgment does not create a new legal situation; it has a date and will be operative in the future, but it simply declares what is and what always has been. It does not mean that all that could have resulted from the application of the invalid law will be affected. The law did not have legal existence, but it nevertheless existed as a fact and the legal system cannot but give effect to that reality if chaos is to be avoided. However, the invalid law may not govern or influence transactions or situations not already closed or spent.

The Canadian courts have identified factors which must be assessed in deciding on the appropriate time frame of a constitutional remedy.¹¹⁴

Namibia is, in contrast, currently in something of a jurisprudential bind, without the ability to harmonise the timing of the invalidity of findings on the unconstitutionality of different forms of law, and with (as yet) no discussion of any principles for preventing the retrospective invalidity of common law or customary law from upending transactions which have long been regarded as settled.¹¹⁵

“Value judgments”

Namibia’s equality jurisprudence has suggested that there are two different approaches to constitutional interpretation, depending on whether the rights in question are absolute or whether they require a value judgment to supply specific meaning.

114 Canadian law on this issue is discussed at length by the Canadian Supreme Court in *Canada (Attorney General) v Hislop* [2007] SCJ No. 10 at paragraphs 78–108, per LeBel and Rothstein JJ. This case notes the following at paragraph 103:

“People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what the Constitution requires. Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments. But where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interests of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other”.

115 The Myburgh case simply concludes at 266I–J that the common law rules that were the subject of the case “are in conflict with the provisions of the Constitution and that they ceased to exist when the provisions of the Constitution took effect on Independence, i.e. 21 March 1990”.

In *Frans*, the court rather poetically responded to the assertion that such a declaration of invalidity would open “possible floodgates of litigation” by saying the following at 529I–530E, per Heathcote AJ:

“Floodgate-litigation arguments cannot cause an unconstitutional rule to survive. Sometimes, as in this case, it is indeed necessary to open the floodgates to give constitutional water to the arid land of prejudice upon which the common-law rule has survived for so many years in practice”.

In *Myburgh*, the court noted that this was “not an instance where meaning and content must still be given to the provisions of the Constitution”, stating that “no value judgement is necessary” to see that the common law rules on marital power are discriminatory and unconstitutional.¹¹⁶ The *Frank* case applied an extensive value judgment, giving the prohibition of the death penalty as a contrasting example of a fundamental right which is absolute and requires no value judgment.¹¹⁷ This example makes sense as it should not involve much in the way of interpretation to see whether a particular law provides for the death penalty or not.¹¹⁸ However, it is hard to see how the tests developed by the courts for the application of either Article 10(1) or (2) could be applied in an absolute manner. Assessing the factors which argue for or against a rational connection to a legitimate government objective is not a mechanical exercise, and deciding when discrimination is “unfair” would seem to involve a value judgment by the very nature of the question. In fact, even the *Myburgh* case which purported not to require a value judgment on the question of sex discrimination supported its finding that the sex discrimination in question was unfair with reference to women’s prior discrimination, and to stereotyping which denied women’s equal worth and impaired the dignity of women.¹¹⁹ But if *Myburgh* had, like *Frank*, turned to Parliament on this issue or even taken an opinion poll, it would have found significant support for the proposition that men should be recognised by law as the heads of households.¹²⁰

This highlights a second problem with the approach taken by Namibia’s equality jurisprudence to the analysis of “Namibian values”. The *Frank* case stands at the centre of this concern.

As a starting point, if *Frank* had followed the line of other equality jurisprudence more closely, it would have started by noting that the alleged discrimination affected a previously disadvantaged group,¹²¹ which (even more seriously) is also currently

116 At 266B–I and 268D–E, referring to the portion of Article 6 which states that “[n]o law may prescribe death as a competent sentence”.

117 At 137E.

118 However, even this is not necessarily the case. In the unreported case of *S v Tjijo*, High Court, 4 September 1991, Levy J stated that life imprisonment was tantamount to a sentence of death; quoted in *S v Tcoelib* 1992 NR 198 (HC) at 200E–F. However, *S v Tcoelib* held at 205G and 205H–213H, per O’Linn J, that Article 6 surely referred to the death sentence as understood in its ordinary meaning, but applied a value judgment to see if life imprisonment was unconstitutional as cruel, inhuman or degrading punishment (concluding that it was constitutional).

119 At 266C–G.

120 See the summary of the Parliamentary debate on the Married Persons Equality Act in Hubbard (2007:101–104) and LeBeau & Spence (2004:33).

121 See *National Coalition* at paragraph 42, per Ackermann J, for a discussion of past discrimination against gays and lesbians in South Africa which is equally applicable to Namibia: “Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do [Continued overleaf]

disadvantaged.¹²² The court would have then assessed the impact of the discrimination, perhaps noting (as in South Africa) that past patterns of disadvantage and stereotyping give rise to vulnerability, and the more vulnerable the group adversely affected by the discrimination, the more likely that the discrimination will be unfair.¹²³

However, without considering these factors, *Frank* proffered a long list of potential sources of information on values: Parliament, courts, tribal authorities, common law, statute law, tribal law, political parties, news media, trade unions, “established Namibian churches”, and other “relevant community-based organisations”.¹²⁴ This list is problematic for several reasons. Firstly, all of these institutions are male-dominated and rooted in a patriarchal past – hardly the best place in Namibia to look for a holistic expression of values on sex discrimination. Secondly, all of these sources of information on values would be likely to give expression to mainstream, majority values only. Does this mean that minority views are not entitled to any respect? In a country as diverse as Namibia, this would be highly problematic. In South Africa, it has been pointed out that

the impact of discrimination on gays and lesbians “is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves”, while in contrast, other traditionally disadvantaged groups such as blacks and women form a majority in society.¹²⁵

not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays”.

122 For example, in 1997 then President Sam Nujoma was quoted as referring to homosexuality as “a hideous deviation of decrepit and inhuman sordid behaviour” which “deserves a severe contempt and disdain from the Namibian people and should be uprooted totally as a practice”; *Mail and Guardian*, 14–20 February 1997. On another occasion he reportedly said that “[h]omosexuals must be condemned and rejected in our society”; *Windhoek Advertiser*, 12 December 1996. A Deputy Minister is quoted as saying that “[h]omosexuality is like cancer or AIDS and everything should be done to stop its spread in Namibia”, urging that gays and lesbians be “operated on to remove unnatural hormones”; *New Era*, 5–11 October 1995. One government Minister referred to homosexuality as an “unnatural behavioural disorder” (“Homosexuality is a mental disorder which can be cured”, *The Namibian*; three-part article by Helmut Angula, appearing on 10, 17 and 24 November 1995), and another said that gays and lesbians should be “eliminated” from the face of Namibia (*The Namibian*, 2 October 2000). See also Human Rights Watch & Gay and Lesbian Human Rights Commission (2003:24ff); Reddy (2001:83–87).

123 *National Coalition* at paragraph 44.

124 *Frank* at 150E–G.

125 *National Coalition* at paragraph 25 and note 32.

Despite quoting a large number of potential sources of information on Namibian values, the *Frank* judgment actually relied on only two Namibian sources on the issue of sexual orientation: separate statements by the Namibian President and the Minister of Home Affairs to the effect that homosexual relationships were against Namibian traditions and values (combined with the failure of any other Member of Parliament from the ruling party to make any comment to the contrary when the matter was raised in the house).¹²⁶ As has been pointed out elsewhere, there are many reasons (other than tacit agreement) why Parliamentarians might have remained silent, such as party loyalty or respect for the speakers – and opposition MPs as well as civil society groups *did* speak out in opposition to the views of the two persons mentioned.¹²⁷ The *Frank* judgment might just as easily have pointed to the fact that the entire Parliament had already recognised the need to protect persons against discrimination on the basis of sexual orientation by making this a prohibited basis for discrimination in the 1992 Labour Act, which was still in force at that time.¹²⁸ It might also have cited, as “relevant community-based organisations”, two Namibian groups already active for several years in working for the advancement of the rights of gay and lesbian Namibians.¹²⁹

The real problem seems to be that the *Frank* case looks to values of the wrong order. There is a long line of cases which posit that the Constitution must be interpreted in accordance with Namibian values.¹³⁰ This is true in any democratic society, and especially in a country like Namibia, where the majority was for so long oppressed and suppressed. But the values which should guide constitutional interpretation are the core values which inform the new constitutional order, rather than the political views of the majority of the moment.

If the values in question were simply those which reflected majority opinion, the court would be little different from the legislature. Indeed, it was posited in the *Frank* case that “Parliament has the last say”, with power to overrule court judgments.¹³¹ The *Frank* judgment goes on to note that Article 1(2) of the Namibian Constitution states that “[a]ll

126 *Frank* at 150E–G.

127 Cassidy (2000:186).

128 There has been a changing tide in Parliament since the time when the *Frank* case was decided. The Combating of Domestic Violence Act, 2003 (No. 4 of 2003) covers romantic relationships, but only between people “of different sexes” – a wording specifically included to exclude gay and lesbian relationships from the protections of this law. Similarly, the reference to sexual orientation was dropped from both the Labour Act, 2004 (No. 15 of 2004) and the Labour Act, 2007 (No. 11 of 2007). However, it should be noted that the judgment in the *Frank* case was cited in support of the exclusion of gays and lesbians from the Combating of Domestic Violence Act; see Hubbard (2007:121).

129 Sister Namibia, founded in 1989, and the rainbow project, founded in 1997.

130 See Amoo (2009); Horn (2009).

131 At 141B–F, which reads as follows:

“In regard to the judicial authority, the Namibian Constitution is ambiguous. The judicial authority is vested in the Namibian Courts by Article 78(1). But 78(2) makes their independence subject to the Constitution and the law. Although Article 78(2) provides that the Cabinet or Legislature or any other person may not interfere with the Courts in the exercise of their judicial [Continued overleaf]

power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State”.¹³² But this argument seems to misunderstand the role of the Constitution and the courts as a check on the power of the majority of the day, and as *part* of the democratic institutions referred to in Article 1.

There is a deeper level of values which is inherent in the very structure of the Constitution. The totality of the constitutional framework clearly shows that democracy entails more than unqualified majority rule;¹³³ guaranteeing the equality of “all persons” implicitly promises protection for minorities and those with unpopular views or lifestyles.

This has been clearly articulated by the South African courts, which are also situated in a historical context where the majority was denied the right to determine their own fate for a long and painful time. For instance, it was stated in *S v Makwanyane* that the key purpose of judicial review is “to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process”:¹³⁴

Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected. This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.

In the same vein, the 2006 *Fourie* case in South Africa stated the following:¹³⁵

functions, Article 81 provides that a decision of the Supreme Court is no longer binding if reversed by its own later decision or if contradicted by an Act of Parliament. This means, so it would appear, that Parliament is not only the directly elected representative of the people of Namibia, but also some sort of High Court of Parliament which[,] in an exceptional case, may contradict the Supreme Court, provided of course that it acts in terms of the letter and spirit of the Namibian Constitution, including all the provisions of Chapter 3 relating to fundamental human rights”.

This stance misses the point that Parliament can “overrule” the courts only by legislation “lawfully enacted”, which must also mean constitutionally valid, since the Constitution is the “Supreme Law” (Article 1(6)). For a discussion of how the Namibian system contrasts with the British system on this point, see Okpaluba (2000:112).

132 At 141F–G. The judgment concludes at 141G–H that the Namibian courts are in a much weaker position than their counterparts in South Africa.

133 See Erasmus (2000:13).

134 *S v Makwanyane & Another* 1995 (3) SA 391 (CC) at paragraphs 88–89, per Chakelson P (citations omitted).

135 *Minister of Home Affairs & Another v Fourie & Another* 2006 (1) SA 524 (CC) at paragraph 95, per Sachs J (citations omitted). This case also stated the following at paragraph 94 (citations omitted):

“Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom”.

The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.

The *Fourie* case concluded that an egalitarian society “embraces everyone and accepts people for who they are”, saying that equality means “equal concern and respect across difference” rather than “the elimination or suppression of difference”:¹³⁶

At the very least, it [equality] affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society ... The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage ... The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation ... At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

There is support for this view from a range of sources all over the world, from different periods of history. For example, James Madison said in respect of the United States Constitution that part of the role of a constitution was to prevent the majority from being able to “carry into effect schemes of oppression”,¹³⁷ while English philosopher John Stuart Mill spoke of the need for “constitutional checks” to protect against the “tyranny of the majority”.¹³⁸ A 1998 judgment of the Canadian Supreme Court made the following statement about equality:¹³⁹

It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.

136 (ibid.:paragraph 60; citations omitted).

137 Madison (1787:81).

138 Mill (1859). He also said the following (ibid.):

“The will of the people, moreover, practically means, the will of the most numerous or the most active part of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, may desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power”.

See also Erasmus (2000:11–12).

139 *Vriend v Alberta* [1998] 1 SCR 493 at paragraph 69.

Closer to home, the African Charter of Human and People's Rights couples non-discrimination with the duty of mutual respect and tolerance for all fellow beings:¹⁴⁰

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

These higher-level values like mutual respect and tolerance for all are also at the heart of the Namibian Constitution. It is this level of values which was articulated in several early cases involving other aspects of the Constitution. For instance, the 1991 *Acheson* case speaks of the Constitution as "the articulation of the values bonding its people and disciplining its Government".¹⁴¹ The 1991 *Corporal Punishment* case stated the following:¹⁴²

The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty

and the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.

The 1993 *Cultura 2000* case stated that various constitutional provisions made it manifest –¹⁴³

140 Article 28.

141 *S v Acheson* 1991 NR 1 (HC) at 10A–B, per Mahomed AJ.

142 *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC) at 179E–G, per Mahomed AJA. The concurring judgment by Berker CJ discusses the evolving nature of values at both national and international level, but concludes at 197G–198I that – "… the making of a value judgment is only possible by taking into consideration the historical background, with regard to social conditions and evolutions, of the political impact on the perceptions of the people and a host of other factors, as well as the ultimate crystallisation of the basic beliefs and aspirations of the people of Namibia in the provisions in the Bill of Fundamental Human Rights and Freedoms".

The South African Constitutional Court (in *Shabalala & Others v Attorney-General of the Transvaal & Another* 1996 (1) SA 72 (CC) at paragraph 26, per Mahomed DP; footnotes omitted) has similarly discussed how the South African Constitution –

"… retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment".

143 *Government of the Republic of Namibia & Another v Cultura 2000 & Another* 1993 NR 328 (SC) at 333H–I, per Mahomed CJ.

... that the constitutional jurisprudence of a free and independent Namibia is premised on the values of the broad and universalist human rights culture which has begun to emerge in substantial areas of the world in recent times and that it is based on a total repudiation of the policies of apartheid which had for so long dominated lawmaking and practice during the administration of Namibia by the Republic of South Africa.

These cases did not refer to the kind of values one would find in opinion polls,¹⁴⁴ but to the deeper formational values which must underlie a democratic government premised on dignity and equality for all.

If we go back to the Preamble to the Constitution, where this chapter began, we are reminded that the most effective way to maintain and protect the rights of dignity and equality so long denied to the people of Namibia is through a system where the democratic government operates “under” a sovereign Constitution and a free and

144 Contrast the *Frank* case at 138C–D, which refers to “properly conducted opinion polls” as one of many possible sources of values to guide constitutional interpretation. The role of current public opinion is confusingly presented here in any event, as the judgment goes on to quote part of a passage from *S v Vries* 1998 NR 244 (HC), which emphasises that the value of public opinion will differ in different cases. The quoted passage reads as follows in full at 265A–G, per O’Linn J:

“There can be no quarrel at all with the principle that public opinion is not a substitute for a duty vested in the Courts to interpret the Constitution and uphold its norms. One can also agree that public opinion cannot be decisive. It seems to me, however, with great deference to the learned and eminent Judges [referring to a quoted passage from the South African case of *S v Makwanyane & Another*], that the statement ‘may have some relevance’ is putting the value of public opinion too low. In my respectful view the value of public opinion would differ from case to case, from fundamental right to fundamental right and from issue to issue. In some cases public opinion should receive very little weight, in others it should receive considerable weight. It is not a question of substituting public opinion for that of the Court. It is the Courts that will always evaluate the public opinion. The Court will decide whether the purported public opinion is an informed opinion based on reason and true facts; whether it is artificially induced or instigated by agitators seeking a political power base; whether it constitutes a mere ‘amorphous ebb and flow of public opinion’ or whether it points to a permanent trend, a change in the structure and culture of society; whether it is a cry for help and protection by the law-abiding majority that live in fear and uncertainty amid a growing culture of lawlessness and violence threatening the whole fabric of society and the Constitution. The Court therefore is not deprived of its role to take the final decision whether or not public opinion, as in the case of other sources, constitutes objective evidence of community values. It is the current community values which must be established by this and other means”.

The South African case referred to articulates what I respectfully assert to be the more reasoned view (*S v Makwanyane & Another* 1995 (3) SA 391 (CC) at paragraph 88, per Chaskalson P): “Public opinion may have some relevance to the enquiry, but in itself it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were decisive, there would be no need for constitutional
Continued overleaf]

independent judiciary.¹⁴⁵ One of the core values of the Constitution is its role as a check on majority rule to ensure that the dignity and equality of all persons remains inviolate.

Equality applies to the minority as well as to the majority, to those with unpopular views, to those who are marginalised. The promise of Namibian independence is that the dignity and equality of *all persons* will henceforth be respected. Those who are vulnerable in society and those who lack political power are the people who most need the fundamental protection against discrimination which only a Constitution can provide. These are the values which should guide the application of the principle of equality, which is the foundation of Namibia's freedom.

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adjudication. The protection of rights can then be left to Parliament which has a mandate from the public, and is answerable to the public for the way in which its mandate is exercised, but this would be a return to parliamentary sovereignty and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected".

145 Preamble, clause three. See *Afshani & Another v Vaatz* 2006 (1) NR 35 (HC) at 48A–C, per Maritz J:

"One only has to refer to . . . the first paragraph of the Preamble to the Constitution to understand why human dignity is a core value, not only entrenched as a fundamental right and freedom in ch 3, but also permeating all other values reflected therein".

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Constitutional supremacy or parliamentary sovereignty through back doors: Understanding Article 81 of the Namibian Constitution

Francois-X Bangamwabo

Introduction

Before Independence, Namibia (then South West Africa/SWA) applied the Westminster system of government, that is, parliamentary sovereignty. This system was imported from South Africa¹ into SWA by the Administration of Justice Proclamation, No. 21 of 1919.² Under parliamentary sovereignty, the legislature is empowered to make or repeal any law whatsoever on any subject, with no corresponding competence on the courts to question the validity of any law so made.

A good example of the application of sovereignty of Parliament is the United Kingdom (UK). In the Constitution of the United Kingdom, the courts are bound to take the validity of every Act of Parliament for granted, and there could be no question of non-compliance with any constitutionally prescribed procedure. Therefore, the UK Parliament is not only sovereign but also supreme, i.e. there is no law to which it is subject as regards either the content of its power or the procedure for exercising it, and it is this supremacy that excludes the supremacy of the Constitution.³

The opposite of parliamentary sovereignty is constitutional supremacy. The supremacy of the Constitution demands that the court should hold void any exercise of power (either by the executive or legislature) which does not comply with the prescribed manner and form or which is otherwise not in accordance with the Constitution from which the power derives.⁴ Whilst the supremacy of the Constitution can coexist with the sovereignty of Parliament, the former necessarily excludes the latter.

Upon attainment of political independence, Namibia discarded the sovereignty of Parliament, and rather opted for the supremacy of the Constitution. Article 1(6) of the

1 It is noteworthy that South Africa has since discarded this system with the new constitutional order which came into existence in the mid-1990s after democratic elections which put an end to the horrendous system of apartheid. See e.g. ruling by Mohamed, then CJ, in *Speaker of the National Assembly v De Lille* 1999 (4) SA 863.

2 Briefly, the effect of this Proclamation was to introduce both Roman–Dutch Law and Anglo–Saxon common law as they were applied in the then Union of South Africa. For more on this, see Tshosa (2010:7). See also the ruling by Claassen JP, as he then was, in *R v Goseb*, 1956 (1) SA (SWA), at 666.

3 Wheare (1954:8).

4 (*ibid.*:10).

Constitution of the Republic of Namibia provides for the supremacy of the Constitution over all other laws. The implication of the supremacy clause is that any law enacted by the legislature or any action taken by the executive must comply with the dictates of the Constitution since, within the hierarchy of laws, the Constitution, the organic basic law, is the apex norm, the Grundnorm.

In addition, Article 25(1) reads as follows:

Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid ...

Clearly, the above constitutional provision supplements the supremacy clause: it is, thus, unconstitutional and invalid for the legislature to enact any law in excess of powers granted to it by the Constitution.

Notwithstanding the foregoing, Article 81 of the Constitution allows Parliament to overturn or contradict rulings of the Supreme Court. The literal interpretation of this Article may raise the following conundrums:

1. Does Article 81 make Parliament a final (judicial) authority with the powers to review and/or contradict decisions rendered by the Supreme Court?
2. Assuming that the answer to the foregoing question is in the affirmative, does this mean that Article 81 reintroduces the Westminster system of parliamentary sovereignty through a back door, in contradiction with Article 1(6) of the Constitution?
3. If the legislature can willy-nilly contradict decisions of the highest court of the land, what would then be the place, relevance of the doctrine of a separation of powers, which is well-rooted in all modern politico-legal systems?
4. Can Article 81 be construed as a constitutional instrument put in place to counter the so-called counter-majoritarian dilemma?

This paper attempts to address the above questions. It is the author's opinion that, whilst the legislature is, by virtue of Article 81, empowered to contradict the Supreme Court's decisions, this process has to be done lawfully and in line with other constitutional provisions. Thus, this paper endorses the following proposition: in order for Parliament to contradict the constitutional decisions of the Supreme Court or any other court, it (Parliament) has to amend the Constitution. Although this proposition is not expressly endorsed by any constitutional provision, it is justified by a purposive reading of the Constitution. This understanding is also supported by additional premises derived from the founding principles of the Constitution, as read with the provisions of its Chapter 19.

Analysing Article 81 of Namibian Constitution

The Namibian Parliament derives its authority and powers to contradict the Supreme Court's decisions from Article 81 of the Namibian Constitution. This Article stipulates the following:

A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or it is *contradicted* by an Act of Parliament *lawfully* enacted. [Emphasis added]

The scope and content of Article 81 is limited to the binding nature of the Supreme Court's rulings – that much can be deduced from the ordinary meaning of the words used in the Article. What is not self-evident is this: how does Parliament lawfully contradict a decision of the Supreme Court? That is, what is the legal framework in which Parliament has to operate when contradicting Supreme Court decisions? The answer to this question cannot be deduced from the language of Article 81. Neither can the answer be inferred from the Article itself, because it only stipulates what Parliament can do: it does not indicate the process and procedure that should be followed by Parliament.

Article 81 is a codification of the *stare decisis* rule, a well-known rule of the common law, which deals with the relevance and legal force of judicial precedents. Although this rule is mostly associated with common law, which is judge-made law, it impacts on legislation as well.⁵ This rule provides that decisions of a higher court are absolutely binding on all lower courts until and unless the higher court contradicts such a decision.⁶ The Supreme Court is Namibia's apex court in all legal disputes, whether they involve the interpretation of legislation or common law. Article 79 sets out the court's jurisdiction *ratione materiae*, stipulating that the court has jurisdiction to hear, *inter alia*, "appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of [the] Constitution". Decisions of the Supreme Court have binding force until the conditions in Article 81 kick in.

At this point, I need to make a few preliminary remarks. The first of these is terminological. For the sake of brevity, disputes involving the interpretation, implementation and upholding of the Constitution will be referred to as *constitutional decisions*. Decisions other than those that involve the interpretation, implementation and upholding of the Constitution will be referred to as *non-constitutional decisions*. The latter category involves disputes resolved through exclusive application of common law rules. This distinction is crucial to this enterprise because it is the major premise on which most of the arguments are posed. The second point relates to the types of legislation. In this paper, I will refer to legislation that requires a simple majority in order to be passed as *ordinary legislation*. This is contrasted with legislation requiring special majority in order to be passed.

5 Du Bois (2007:76).

6 (ibid.:87).

The last remark is a clarification. This paper does not aim to argue that Parliament does not have the power to contradict constitutional rulings of the Supreme Court. Rather, the paper argues that both the rules of the Constitution and the normative order underlying it suggest that Parliament should amend the Constitution to achieve this outcome.

I will now provide examples of the difference between constitutional and non-constitutional disputes. Factual causation, be it in the law of delict or criminal law, is resolved by the application of the *condictio sine qua non* test.⁷ This rule is derived from the common law, and delictual disputes turning on factual causation are resolved by the application of the abovementioned common law rule. Thus, the apportionment of delictual damages is resolved through the application of rules stipulated in the Apportionment of Damages Act.⁸ In contrast with the aforementioned disputes, there are others that involve issues of constitutionality of legislation. If the court has to determine whether a legislative provision banning the practice of labour brokering/hiring is unconstitutional, the court has to look at the provisions of the Constitution impacted upon by the banning of such a practice. The court then has to look at whether the provisions of the legislation unjustifiably limit the rights in the Bill of Rights. If any such provision in the legislation does, the impugned provision is struck down. A dispute of this nature is a constitutional dispute par excellence, for it can only be resolved by the application of rules stipulated in the Constitution. While the distinction between *constitutional* and *non-constitutional* decisions can be loose, the point remains that a dispute that is to be adjudicated by the application of constitutional provisions is a constitutional dispute, no matter whatever else it may be. Attention will now be focused on this class of disputes.

It was mentioned earlier that Parliament is empowered to contradict Supreme Court decisions by lawfully enacting legislation to that effect. In the ensuing paragraphs, the thesis is put forward that, for Parliament to lawfully contradict constitutional decisions of the Supreme Court so that they lose their binding force, it is a necessary condition that they amend the Constitution.

The power vested in Parliament to contradict Supreme Court decisions is qualified by the requirement of lawfulness. What does the lawfulness requirement in Article 81 entail? The adverb *lawfully* is derived from the adjective *lawful*. According to the Oxford English Dictionary, *lawful* means “permitted or recognised by law”. The correct question to ask, therefore, is this: when is a legislative contradiction of a constitutional decision by the Supreme Court recognised by law? The answer to this question cannot be *When it is lawfully passed*, for then the Article would be circular and that is not plausible. The answer to this question should, thus, be sought in the constitutional principles regulating the legislative process.

Chapters 7 and 8 of the Namibian Constitution contain, inter alia, the rules governing the legislative process in general. Chapter 19 contains special rules that are to be observed in the process of constitutional amendments. When Parliament overrules the Supreme

7 *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A), at 914–15.

8 No. 34 of 1956.

Court on a constitutional matter, it amounts to an ostensible constitutional amendment with the effect that the provisions of Chapter 19 will be engaged.⁹ This is because, in terms of the constitution, constitutional interpretation is an exclusive province of the judiciary. Secondly, any contrary reading would make nonsense of one of the founding principles of the Constitution, namely the rule of law. What could possibly justify the qualification to the general rules by the provisions of Chapter 19? The answer lies in the constitutional supremacy clause in Article 1(6) of the Constitution. Because of its supreme status, the Constitution is treated differently from ordinary rules of law that are contained in legislation, the common law or any other sources recognised by the common law. For this reason, there are special rules stipulated for its amendment.

Chapter 19 stipulates the rules that should be observed for constitutional amendment. Article 131 entrenches the provisions of Chapter 3 of the Constitution. Article 132 deals with repeals and amendments to the Constitution. Articles 132(a) and (b) lay down the famous two-thirds majority rule, making this the threshold for any changes to the Constitution. This is in comparison with the simple majority required for the passing of ordinary legislation.¹⁰ Although the significance of the provisions of Article 132 will depend on the political circumstances of the time, what is clear is that constitutional amendment is deliberately meant to be a cumbersome procedure.

It would be a conceptual error to view the provisions of the Constitution – including the ones presently under discussion – as mere rules. These rules should be understood against the values underlying the Constitution, requiring the court to embrace substantive reasoning when interpreting constitutional provisions. That is, the court should engage in rightness or wrongness evaluations when interpreting these provisions. This value-laden approach to constitutional interpretation has been confirmed in numerous Supreme Court judgments.

In *Ex Parte Attorney-General, Namibia: In re: Corporal Punishment*,¹¹ the majority judgment of Mahomed J described the Constitution as an “articulation of the nation’s commitment to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law”.¹² In *Mwandingi v Minister of Defence*,¹³ the court expressly endorsed the purposive approach to constitutional interpretation in order to “avoid the austerity of tabulated legalism”.¹⁴ In the case *Ex Parte Attorney General, Namibia: In re: Constitutional Relationship between the Attorney-General and Prosecutor General*,¹⁵ the court expressly distinguished the Constitution from a mere statute on the grounds that it articulates and embodies the consensual values of the state.¹⁶

9 Article 131.

10 See Articles 67 and 77 of the Constitution.

11 1991 (3) SA 76 (NmSC).

12 At 2–3.

13 1992 (2) SA 355 NmSC.

14 At 362.

15 1995 (8) BCLR 1070 (NmSC).

16 (*ibid.*:13).

In *Government of the Republic of Namibia v Cultura 2000*,¹⁷ the court advocated a broad liberal and purposive approach to the interpretation of the Constitution.¹⁸ While reliance on the corporal punishment case referred to earlier can be hazardous (because it involved interpretation of the Bill of Rights), the *Mwandingi, Relationship between AG and PG* and the *Cultura 2000* cases all involved provisions outside the Bill of Rights. Thus, these decisions are good authority that the whole Constitution should be read purposively.

Avoiding a ‘High Court of Parliament’

Article 78(1) vests the judicial authority in the Judiciary. Article 78(2) provides that the courts are to be independent and that the Cabinet and the legislature should not interfere in judicial functions. It was also pointed out earlier that Article 79 indicates the court’s jurisdiction *ratione materiae*. In the *Cultura 2000* case referred to earlier, the court mooted the potential ambiguities of Articles 78(1) and (2) when viewed in light of Article 81.¹⁹ That is, the power of Parliament to reverse Supreme Court decisions turns Parliament – to borrow from O’Linn J – into “some High Court of Parliament”.²⁰ The term *High Court of Parliament* has uncomfortable undertones for it envisages the judicial and legislative organs rolled into one. This makes nonsense of the separation of powers. The term also has uncomfortable undertones in our historical context.

In pursuit of the apartheid policy, the South African Parliament sought to disenfranchise any voter who was not classified as *white*. The franchise was defined by imperial legislation and two-thirds of both houses of Parliament were required to change the legislation. To disenfranchise black and so-called coloured voters, Parliament passed the Separate Representation of Voter’s Act,²¹ but with a simple majority. The Appellate Division (AD) declared this legislation invalid, however, in the case of *Harris v Minister of Interior*.²² Parliament responded by passing the High Court of Parliament Act (HCPA).²³ This Act allowed Parliament to set aside any past or future decisions in which the AD had declared certain legislation invalid. The next step was not a surprise, as Parliament declared the *Harris* judgment invalid. The AD then declared the HCPA invalid on the grounds that this was Parliament disguising itself as a court in order to do, by simple majority, what it could not do by special majority. Parliament had the last say, however, when they inflated the Senate and packed the AD with National Party sympathisers. The amendment to the legislation was duly passed, and a challenge to invalidate it failed in the case of *Collins v Minister of Interior*.²⁴

The South African Parliament could do this because, at the time, South Africa operated under the system of Westminster constitutionalism with parliamentary sovereignty. As

17 1993 NR 328.

18 340 B–D.

19 At 113.

20 See also the *Frank* case, p 113.

21 No. 46 of 1951.

22 *Harris v Minister of the Interior* 1952 (2) SA 428 (A).

23 No. 35 of 1952.

24 *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

mentioned earlier, one of the consequences of this was that Parliament could make and unmake any laws without any substantive constraints. This system gives Parliament monopoly over power and, as we all know, “absolute power corrupts absolutely”.²⁵ It is within this context that the system of constitutional supremacy should be understood. In systems where the Constitution is supreme, all legal and political acts of government inconsistent with the Constitution are invalid. More importantly, these limitations should be justiciable – meaning that the courts should have the power to invalidate such action.

When the courts review legal or political acts by government, they are vindicating constitutionalism and the rule of law. They are ensuring that power is exercised within the confines of the Constitution. If Parliament could contradict the judiciary by passing an ordinary Act of Parliament, procedural limitations such as the special majority provisions would become meaningless, for then, Parliament could simply disguise itself as a ‘High Court of Parliament’ and do by simple majority what is required by special majority.

The Namibian Constitution recognises the rule of law ideal as well as its systemic aspects, namely the separation of powers and judicial review as procedural and structural limitations on power.²⁶ The courts, through the rule of law ideal, are able to review all governmental actions for both procedural and substantive validity. If Parliament is able to contradict all Supreme Court rulings through simple majority legislation, the court’s judicial review powers would be meaningless – which, in turn, means that the rule of law would be reduced to a mere lofty ideal. This is more consistent with the Westminster constitutional model in which Parliament reigns supreme. However, it is inconsistent with the Namibian constitutional enterprise in which the Constitution reigns supreme.

The countermajoritarianism dilemma: Normative harmony or normative discord

There is tension between judicial review as an aspect of the rule of law and democratic theory. This tension cannot be ignored, because the Namibian Constitution recognises both democracy and the rule of law as founding principles.²⁷ This tension, which is common to all constitutional democracies, is described by constitutional scholars in the United States (US) as the *countermajoritarian dilemma*.²⁸ The main conundrum is that when the courts strike down statutes (through judicial review), they trump the will of the prevailing majority as expressed by Parliament. That is, the concept of judicial review counteracts the fundamental principle of democracy because it bestows upon unelected public officials (judges) the power to nullify the acts of elected public officials (the legislature).

25 Lord Acton, in a letter to Bishop Mandell Creighton, 1887.

26 Article 1(1).

27 Article 1(1).

28 Brest (1975:67).

Some authors have argued that the tension between judicial review and democracy is not inherent and is, therefore, reconcilable.²⁹ Because the Namibian Constitution endorses democracy and the rule of law, these arguments will be instructive to Namibian constitutional lawyers. The synthesis is to be found in the political condition of *constitutionalism*: a proclamation that a constitutional enterprise has certain essential features, so that even a majority government has no business amending or destroying them.³⁰ These features include individual rights and the mechanism by which they are protected. The function of preserving these essential features is entrusted to the judiciary, requiring judges to ensure that the exercise of executive powers is in terms of law. This proposition, in short, is what amounts to the concept of *judicial review*. Because judicial review is a necessary element in respect of enforcing individual rights as well as other limitations on governmental power, it follows that it is a necessary element of a constitutional enterprise. It is a necessary mechanism for preserving the principles that are fundamental to the constitutional enterprise against incursion by government.³¹ For this reason, all governmental decisions ought to be subject to judicial review.

To discharge this duty, judges have to deduce from the language of the Constitution a political morality upon which society is based.³² This requires judges to, among other things, identify an interpretive theory that strikes a balance between the competing principles of democracy and the rule of law. It is against this backdrop that theories on constitutional interpretation should be understood.

There are also competing theories on constitutional interpretation. One is propounded by legal philosopher Ronald Dworkin, who argues that a government are obliged not to ignore the fundamental principles such as liberty, justice and equality in terms of which all individuals deserve to be treated with equal concern.³³ According to this theory, the enforcement of constitutional principles by independent judges is a necessary element of a legitimate democracy.³⁴ While one may disagree with Dworkin's set of principles, the point nevertheless remains: constitutional interpretations should give effect to some set of principles in order to be coherent. Thus, we should adapt Dworkin's argument to fit the Namibian constitutional model, and put it thus: those principles expressly set out in Article 1(1) of the Constitution are a minimum condition for our constitutional democracy.

It was indicated earlier that the purposive approach has been endorsed in various constitutional decisions. This approach is contrasted with literalism, a theory that views interpretation as a mechanistic enterprise and which the courts have particularly warned against.

29 (ibid.).

30 (ibid.).

31 (ibid.).

32 (ibid.).

33 Dworkin (1993:123).

34 (ibid.).

Conclusion

To better comprehend the content and essence of Article 81 of the Namibian Constitution, one must not read it in isolation. Rather, this Article can only be better understood if it is read in conjunction with other constitutional provisions which provide for, inter alia, constitutionalism, the rule of law, the separation of powers, and the supremacy of the Constitution in the Namibian politico-legal system. True, a better understanding of Article 81 is only possible if and when the intentions of the framers of the Constitution are considered. In addition, special attention must be focused on both teleological and purposive approaches of interpretation in respect of any constitutional provision.

The debate on Article 81 cannot be complete without a brief overview of the recent Supreme Court ruling in the case of *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*.³⁵ In casu, the Supreme Court struck down section 128 of the Labour Act.³⁶ This section outlawed the practice of labour brokering – or *labour hire*, as it is colloquially referred to in Namibian labour circles. The court ruled that section 128 unjustifiably limited Article 21(1)(j) of the Constitution, i.e. the freedom to practise any profession, or carry on any occupation, trade or business. While the arguments made in this paper have no bearing on the substantive aspect of that judgment, this paper is nevertheless relevant for anyone seeking to understand the implications of that judgment for the legitimate course of action open to Parliament after the judgment. Members of the executive have openly expressed their dismay with the court's ruling, thus creating the possibility that Parliament may invoke Article 81 of the Constitution in order to contradict the judgment.

While it is true that Parliament may contradict Supreme Court rulings in terms of Article 81, Parliament will do well to note that the *Africa Personnel Services* judgment is a constitutional judgment par excellence. This is because that ruling turned on the scope and content of Article 21(1)(j) of the Constitution. Its effect was that if and when Parliament wishes to lawfully prohibit labour brokering, they will have to amend the Constitution so that the freedoms in Article 21(1)(j) will no longer cover the practice of labour brokering. That is, Parliament will have to extricate the practice of labour brokering from the content of Article 21(1)(j), thus placing such brokering beyond constitutional protection. However, even if Parliament does amend the Constitution, the matter will still not be closed. This is because the course is always open for the argument that the freedom in Article 21(1)(j) is part of the basic structure of the Constitution – so it is beyond the reach of Parliament all together. The validity of this argument will be left for another day. Alternatively, the option open to the policymakers in regard to this

35 Case No. SA 51/2008.

36 No. 11 of 2007.

conundrum would be to put in place stringent measures regulating labour brokering.³⁷ These restricting measures must, however, comply with Article 22 of the Constitution.³⁸

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37 At the time of writing, the Namibian government embarked on and endorsed an amendment to the impugned legislation (Labour Act, 2007 [No. 11 of 2007]) as a regulatory solution to the exploitive aspects of the labour-hire system, thus abandoning the option that involved constitutional amendment. The latter would contradict the *Africa Personnel Services* ruling and ban labour brokering altogether. See *The Namibian*, 8 February 2010.

38 Article 22 provides for guidelines on the limitations and restrictions of fundamental rights and freedoms. Briefly, the Article makes it clear that any restriction or limitation on rights and freedoms as per Chapter 3 are to be of general application, and cannot negate the essential content of the right or freedom in question. More importantly, any such limitation cannot be aimed at a particular individual.

International law vis-à-vis municipal law: An appraisal of Article 144 of the Namibian Constitution from a human rights perspective

Yvonne Dausab

Introduction

The interconnectedness of human rights is undeniable. That it permeates all spheres of human existence is sacrosanct. Thus, the subjects of human rights are not members of this or that society, but of the community of humankind.¹ The establishment of an international legal order² to regulate state relations and to afford human rights protection to the individual locates itself within the framework of this reality.

When states accede to or ratify international instruments, they make themselves liable to ensure that treaties in general and customary international law³ practices in particular are implemented at municipal level. This obligation is entrenched in most if not all international law instruments and obligations.⁴ States are enjoined to undertake legislative and other measures to ensure the effective implementation of the rights enunciated in the various international instruments that protect and promote human rights. Namibia is known as having ratified a plethora of international human rights and

1 See Vincent (1986:9).

2 Amoo (2008:114) holds that "... international law ... primarily deals with the relations between States. ... The traditional concept is that only States were considered as subjects of international law ... is no longer tenable in the context of contemporary international relations because with the current emphasis on human rights ... international law puts as much emphasis on the rights and obligations of the individual".

3 *Customary international law* in this paper refers to all human rights treaties that have attained the status of universal ratification and, therefore, universal acceptance. Thus, even states that have not ratified a treaty/norm that has attained such status are bound by it. See Viljoen (2007:26).

4 For example, see Article 1 of the African Charter on Human and Peoples' Rights (African Charter); the African Charter on the Rights and Welfare of the Child (African Children's Charter); the Preamble of the Universal Declaration of Human Rights (UDHR); Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 2(2) of the International Covenant on Civil and Political Rights (ICCPR); Article 2(1)(a)–(e) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Article 2(a)–(g) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 4 of the Convention on the Rights of the Child (CRC); Article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Article 3 of the Slavery Convention; Article V of the Convention on the Prevention and Punishment of the Crime of Genocide; and Article 1 of the Rome Statute of the International Criminal Court.

other treaties, but has been short on the effective implementation or even implementation per se of the instruments it has ratified.

Taking its cue from the tone in which Article 144 of the Namibian Constitution was drafted, this contribution questions whether and, if so, to what extent Namibia has remained true to its pledge to implement directly applicable international law within the framework of its municipal legislation. The paper is also an attempt to clarify the interpretation and understanding of Article 144. For the sake of clarity and focus, this contribution will restrict the discussion to the application of the International Covenant on Civil and Political Rights (ICCPR) in Namibia's municipal set-up.

The paper starts off with what other writers have found when they attempted to discuss this provision or the application of international law in Namibia. Secondly, a brief distinction will be drawn between the *monist* and *dualist* approaches. Then Article 144 will be analysed. This will be followed by a discussion on the international human rights normative framework, in terms of its application, implementation and effect. In the final portion of the paper, the application of Article 144 through case law will be sampled, and then some concluding observations will be made.

What do other writers say about Article 144?

A study of other writings on this subject revealed that the domestication of international law into the municipal set-up of a particular country requires the adoption of either a monist or dualist approach. The adopted approach will establish how international law will be introduced into the municipal legal system.

For instance, Viljoen⁵ argues that –

... for the dualists, international law and national law are fundamentally different and therefore domestic law-making is required to 'transform' or 'incorporate' international law into national law.

Monists, on the other hand, perceive that these two legal orders are inextricably linked, and that international law becomes part of national law upon ratification. Viljoen argues, quite convincingly, that this dichotomy is a fallacy and gives rise to a possible third approach, which is the self-executing nature of some treaties such as the Torture Convention.⁶ Viljoen in fact introduces a concept unfamiliar to this debate, namely the *compatibility study*.⁷ In other words, states ought to conduct a process akin to an environmental scan – i.e. a scan of the domestic legal landscape – to see whether the international law they wish to ratify is in fact compatible with the existing national legislation. Clearly, this pre-ratification process is to assist with what needs to be done in order to allow the municipal scene to comply with the requirements of International

5 See Viljoen (2007).

6 See (ibid.:22).

7 See (ibid.:22).

law. Consequently, this third option/approach may even do away with the theoretical differentiations between the two positions.

Horn,⁸ on the other hand states that “the founding fathers and mothers of Namibia made international and human rights law binding upon Namibia, as part of the laws of the country”. According to Horn,⁹ in terms of the provisions of Article 144, all human rights treaties ratified by Namibia apply directly in the Namibian legal system. In other words, no enacting law is necessary to make the United Nations human rights covenants and treaties apply. However, as he quite correctly points out, this supposition is flawed because the enforcement mechanism is not ready to apply the International instrument, i.e. the administration of justice system and the courts are not quite ready to translate it into the domestic system. Horn uses the Torture Convention as a case in point. It is common cause that the prosecutorial authority has often opted to prosecute for assault with intent to do grievous bodily harm – a common law crime and its attendant consequence – instead of prosecuting for torture. However, *torture*, by definition and scope, is much more serious than assault and may sometimes not even involve a physical attack, whereas the common law crime, to constitute the seriousness that it is often associated with it, requires the physical element. The two, he argues, are totally different. Therefore, to render the Torture Convention applicable/more effective in Namibia as well as the resolution of dealing with torture in the way it is defined in the Torture Convention may require separate legislation to be more effective.

Horn makes another startling revelation: the jurisprudence of Namibian courts shows that international human rights treaties have no effect on our municipal processes.¹⁰ The sufficiency of Article 144 as the norm for domesticating international law is, therefore, called into question.

Contributing to this debate, Bangamwabo¹¹ puts forth that there are only two ways through which states can comply with their international legal obligations contained in treaties:

- By observing or respecting their national laws (the constitution and/or the existing statute laws) that are consistent with international norms, and
- By making those international norms or obligations part of the national legal or political order, in other words, domesticating and/or internalising them.

8 Horn (2008:142).

9 (ibid.).

10 See Horn (2008:144, footnote 292): “A case in point is the now well-known Frank case. The HRC, the treaty body of the ICCPR, and other treaty bodies have given several advisory opinions on the meaning of the word sex as category for protection. Almost without exception [this] included sexual orientation as a category. However, the Namibian Supreme Court opted to ignore the jurisprudence of international human rights law and followed the narrow interpretation of the Zimbabwean courts, defining sex as a category as ‘men and women’”. See *The Chairperson of the Immigration Selection Board v Frank & Another*, 2001 NR 107(SC).

11 Bangamwabo (2008:166–167).

He further argues that these two systems of law – international vis-à-vis national – should be seen for what they really are: as serving two different interests. International law primarily focuses on states, whereas national law is about the relationships among persons within national jurisdictions. Nonetheless, there has recently been a confluence of interest such that both systems are now interested in the well-being of the individual. It is this part of Bangamwabo’s contribution that is most relevant for the purposes of concluding whether Article 144 has fulfilled its object to ensure the effective domestication of international law.

A further view on Article 144 is quite succinctly postulated by Tshosa,¹² who states that Namibia has a positive relationship with international law. He uses examples of constitutional provisions on foreign relations, foreign investments and, more pertinently, Article 144 to buttress this point. He argues that this positive relationship could very well be informed by Namibia’s history of apartheid, which made it necessary to anchor the future firmly on principles of international law.¹³

The founding fathers of the Constitution felt that the intent to introduce the minimum democratic values in the territory long denied by the South African apartheid regime to the great majority of the Namibian people did not stop at the country’s national boundaries, but were to be extended to Namibia’s international conduct – hence the proclaimed adherence of the newly constituted Namibian state to the general standards of behaviour agreed upon by the vast majority of members of the international community.

Notable about Tshosa’s views on Article 144 is that he identifies two exceptions to the general rule that international law automatically applies to Namibian law, namely constitutional supremacy, and legislative authority. In other words, international law that is in conflict with the provisions of the Namibian Constitution cannot apply; also, an Act of Parliament can specifically exclude the operation of international law in Namibia. Whilst one may not necessarily agree with the views and interpretations accorded to these concepts within the meaning of Article 144,¹⁴ Tshosa’s views in this regard are valuable.¹⁵

The above background set the scene for the discussion of whether or not Article 144 has, over the past 20 years, succeeded in its objective to internalise¹⁶ international law. In order to contextualise this debate, it is necessary to establish the approach with which Namibia identifies itself, albeit only in theory, as regards the relationship between International law and national law.

12 See Tshosa (2010:22–25).

13 (ibid.:10).

14 See e.g. discussion under the section entitled “What is the meaning of Article 144?” later herein.

15 For more on the views expressed regarding constitutional supremacy and legislative authority, see Tshosa (2010:22–25).

16 See Viljoen (2007:5, 23): “The greatest challenge is to bring about compliance with the treaty provisions by government officials and nationals alike. International legal norms only become truly effective if compliance is not motivated by coercion or self-interest, but flows from personal motivation brought about by an internal process of norm-acceptance”.

The distinction between *monist* and *dualist* approaches: The Namibian context

More recently, it has become increasingly difficult to maintain the distinction between *monist* and *dualist* approaches in classifying the positions of states in terms of how they apply international law to their municipal set-up. In fact, making this distinction has become almost nugatory, as there is a move towards accepting that the two approaches are simply processes that lead to a similar result in terms of whether –

- one requires enabling legislation
- the international treaty is self-executing, or
- upon its ratification and entry into force, it is incorporated directly into municipal law.

It has become a matter of whether or not the particular treaty that requires implementation is considered part of customary international law *jus cogens*¹⁷ or obligations *erga omnes*.¹⁸ International law instruments that are regarded as practices or instruments that have attained the status of customary international law are applicable to all countries the world over, whether a country has ratified such an instrument or not. Therefore, the issue of the monism or dualism of a country's domestic system does not arise. Still, the slight distinction between *monism* and *dualism*, conceptually at least, has been the subject of much writing and, for the purposes of this contribution, deserves some elucidation.

The postulate is that *monism* means that international and national law are seen as one legal system. In other words, there is no need for any enabling domestic legislation. Once a state has ratified a particular treaty, it is assumed that such treaty now forms part of that country's national legal system and is subject to the enforcement mechanisms of that system. Thus, citizens can approach the courts and the law enforcement agents to assert their rights and receive protection under the treaty concerned by using the domestic systems of enforcement. Proponents of this theory assert for good reason that international law rules supreme¹⁹ over national law. In other words, should the international law offer better protection to the citizens who are the apparent beneficiaries of the system, such law must be applied. At the very least, applying the monist view literally may clash with the general tenets of state sovereignty in that states will be required to comply regardless of what their own position of law and the Constitution will be, given that they have ratified the treaty. This approach will most certainly also erode the underlying complementary nature of the relationship between the two legal orders in that it places international law above national law in the likely event of a conflict between the two systems.

17 See Article 53 of the Vienna Declaration on the Law of Treaties (Vienna Declaration), which provides that “a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

18 See Viljoen (2007:28): “Peremptory norms (*jus cogens*) largely overlap with obligations *erga omnes* and non-derogable rights – these are obligations that are owed to the international community as a whole, such as protection from slavery”.

19 Brownlie (2003:32).

Dualism, on the other hand, means the two systems are different. Thus, in order for international law to be accepted at national level, it has to be ‘translated’ by way of domestic legislation. This has the net result that, without domestication, international law has no force or effect in such a country – which, given the principles of customary international law, is almost impossible. This is because practices and norms that have attained the status of customary international law bind states irrespective of whether or not they have ratified or domesticated such laws. All states are consequently bound by what the international community requires in terms of compliance with such treaties and conventions.²⁰ Equally, the total or partial disregard for rules of public international law in the processes of the nation has the effect that such disregard will make the entire international system of protection and advancement of human rights pointless. In the end, it is a question of commitment – compliance²¹ – and the political will of a state to ensure that its citizens enjoy optimum protection of their rights in tandem with the tone and spirit of what international law wishes to achieve, namely the inherent dignity and inalienable and equal rights of all members of the human family.²²

Applying the literal interpretation of the two approaches of International human rights protection to the municipal scene, Namibia belongs to the species of monist states. This is evident from the wording and tone of Article 144 of its Constitution. It is a well-established fact that the national level is best positioned to implement international standards because of its proximity to the people and the enforcement mechanisms that are in place. At the very least, states have –

- a constitutionally entrenched separation of powers
- an independent judiciary and functional court system, and
- an established rule-of-law culture and enforcement agents such as the police, the prosecuting office, and a prison service.

Monists claim that there is no need for further enabling legislation when applying international law to the domestic legal scenario. This means when Namibia ratifies an international instrument, the enforcement machinery of the Namibian legal system such as the courts and the police are available to ensure there is compliance with that Instrument. On the surface, this is supposed to be the position in Namibia. In fact, arguing differently will result in making Namibia’s implementation approach of international law a dualist one – and this will fly in the face of reaffirming the manifest intent of the legislator, which was to make sure international law becomes part of Namibian law once ratified. But is it possible that, whilst the legislative intent of what Article 144 was to achieve was monism, the pace of implementation has conformed to the dualist approach? In fact, the attitude of courts, when they consider international human rights treaties as part of developing their jurisprudence, leaves much to be desired. A more elaborate discussion on the role of the courts in developing an international-law-friendly jurisprudence follows in the succeeding portions of the contribution below.

20 See Viljoen (2007:26) for a more elaborate discussion of this principle.

21 (ibid.).

22 See the first paragraph of the Preamble to the 1948 Universal Declaration of Human Rights.

What is the meaning of Article 144?

Article 144 of the Namibian Constitution states that –

[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Firstly, in its current form, the Constitution provides that international instruments binding on Namibia, through ratification, become part of Namibian law. In terms of Article 32, the President has the power to “negotiate and sign international agreements, and to delegate such power”.²³ In addition, the National Assembly, as the principal legislative authority, has the power and function to “agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e)”.²⁴ The caveat to these broad powers and functions to ratify international instruments lies in the fact that it is subject to the overriding terms of the Constitution and laws of Namibia.²⁵ The aspirations enunciated in the Preamble and the catalogue of basic human rights protected in Chapter 3 should, therefore, be used as the guiding provisions to determine whether or not a particular international instrument ought to be considered part of Namibian law. Evidently, this line of argument is problematic, as Namibia then has scope to either withdraw or disregard the provisions of international law they do not wish to comply with. This they will have to do by either –

- amending the Constitution²⁶ to make international law subject to the limitation clause, similar to what would be the position for municipal laws of general and other application, or
- by enacting a law specifically excluding either a particular provision in the international law or the international law in its entirety.

Moreover, Namibia has an opportunity in the international arena to limit the application of a treaty at domestic level. This can be done through the system of reservations, which allows a country that has ratified a treaty to exclude certain portions of the treaty from applying in such country. Another option is to simply not ratify or accede to a particular human rights treaty.

Further to the options stated above, and in the unlikely event that an international law provision is not consistent with the Namibian Constitution, the particular international instrument will not be binding. In other words, unless such a provision is part of the body of customary international law practices and principles – which are in any

23 See Article 32(3)(e), Namibian Constitution.

24 (ibid.:Article 63(2)(e)). Article 32 sets out the functions, powers and duties of the President as the Head of State.

25 See Articles 1(6) and 32(1). Not only is the Constitution the Supreme Law, the President also has the primary responsibility to uphold and protect the Constitution: “...the President shall uphold, protect and defend the Constitution as the Supreme Law ... which he or she is constitutionally obliged to protect, to administer and to execute”.

26 See Article 132, Namibian Constitution.

event applicable to all nations regardless of whether they have signed or ratified such instruments – such international law will be of no force or effect.

Additionally, Parliament, as the principal legislator,²⁷ may, by way of an Act of Parliament, not make international law part of Namibian law. The exclusion of international law using an Act of Parliament is, of course, not recommended, although there is provision for such possibility in the Article dealing with international law. It is understandable, however, that the Namibian Parliament is likely to exclude an international agreement that is not consonant with the spirit and tenor of the Namibian Constitution if it was entered into by the pre-Independence apartheid administration and conflicts with Namibia's current environment.²⁸

The principle of *pacta sunt servanda*²⁹ requires of states to perform every treaty binding on them in good faith.³⁰ Thus, the treaty agreement they enter into has to be respected.³¹ It is an established practice and norm of customary international law that a state, as part of the international community, is obliged not to undermine the object and purpose of the treaty it has signed and ratified. The effect of this is that the municipal environment has to comply with the requirements of the international law.³² Even so, the principal legislator has a primary obligation to use its powers to legislate subject to the Constitution, but also in the interest of the people and for peace, order and good government.³³

The second portion of Article 144 states that rules of international law, once binding, become part of Namibian law. The Oxford Dictionary meaning of *binding* is “placing a legal obligation”, and it describes “an agreement or promise that must be carried out or obeyed”. Thus, a state is bound by the terms and provisions of international law once it signs and ratifies it.³⁴ Namibia is bound in terms of each international instrument

27 See Article 44 (*ibid.*), which provides that the “legislative power of Namibia shall be vested in the National Assembly with the power to pass laws with the assent of the President”.

28 See Article 63(2)(d) (*ibid.*), in terms of which the National Assembly has the power and function, subject to the Constitution, “to consider and decide whether or not to succeed to such international agreements as may have been entered into prior to Independence by administrations within Namibia in which the majority of the Namibian people have historically not enjoyed democratic representation and participation”.

29 As at 17 February 2010, Namibia had not yet acceded to the 1969 Vienna Convention on the Law of Treaties. Nonetheless, this Convention is binding on Namibia, as it is the customary international law on treaties; see Article 26, Vienna Convention. See also Aust (2007:79).

30 In terms of Article 27 of the Vienna Convention, read with Article 46.

31 See Viljoen (2007:22).

32 Bayefsky (2002:4) describes the effect of a treaty as follows: “In the case of international human rights treaties, this means that states parties undertake to ensure that their own national legislation, policies or practices meet the requirements of the treaty and are consistent with its human rights standards”.

33 See Article 63(1), Namibian Constitution.

34 In terms of Article 2(b) of the Vienna Convention, “ratification”, “acceptance”, “approval” and “accession” mean, in each case, the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty; see also Article 11 (*ibid.*). In [Continued overleaf]

it has ratified by having become a party,³⁵ through any of the means provided for, to accept the terms and conditions of the international community in respect of specific treaty requirements or treaties of a customary international law nature. Furthermore, this provision should often be read in tandem with Articles 5³⁶ and 25³⁷ of the Namibian Constitution, because they are the apparent pillars of effective implementation of human rights issues in this country. This is because they set out the requirements in terms of who is liable for protection and enforcement, but they also set out what happens if an action or law is not in compliance with the Constitution. To this end, Article 25 states the following:

... any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that: (a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, ... to correct any defect in the impugned law or action ...

It is clear from a holistic reading of the provisions in Article 25 that the position of international law was not envisioned. Hence, international law will only become applicable when it is referred to within the context of Article 144, and by reference to a relevant case or matter where a person was aggrieved.

The third aspect of this provision relates to a definition of the law of Namibia. In its current form, Namibian law consists of a supreme Constitution,³⁸ Roman–Dutch law (which is our common law³⁹), certain pre-Independence South African statute law (which, in terms of our Constitution, remains in force until repealed, amended by an Act of Parliament, or declared unconstitutional by a competent court),⁴⁰ and, over the past 20 years, Namibia’s own jurisprudence and legislative framework, which includes customary law. In this regard it is pertinent to note that, in terms of Article 66 of the Constitution, –

addition, Bayefsky (2002:4–5) states that “a state party will become bound by obligations under the treaty ... on the date the treaty enters into force and the date the treaty enters into force for the particular state”; arguably this entry into force is through ratification or accession.

35 A *party* means a state which has consented to be bound by the treaty and for which the treaty is in force; see Article 2(g), Vienna Convention.

36 Article 5 states that “... rights and freedoms ... shall be respected and upheld by the Executive, Legislature and Judiciary ... and shall be enforceable by the Courts”.

37 “(1) Save in so far as it may be authorised to do so by this Constitution, Parliament ... shall not make any law ... which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom”.

38 Article 1(6) of the Namibian Constitution provides that “This Constitution is the Supreme Law of Namibia”.

39 See a full discussion of the nature of common law in Amoo (2008:62–77).

40 Article 140(1) of the Namibian Constitution states that “[s]ubject 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 an Act of Parliament or until they are declared unconstitutional by a competent Court”.

[b]oth the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

The remaining sources of law in Namibia are case law and juristic writings.⁴¹

Indigenous juristic writings are currently almost non-existent in the Namibian context, but they play an important role⁴² because, in addition to other sources, they are the ones from which the country creates its corpus of laws. It is this set of laws of which international law will become a part.

Firstly, therefore, international law is considered to be an integral source of Namibian law; and secondly, it means that, once a violation covered by international law occurs in Namibia, the aggrieved party can attend on the local court for relief. In this sense, the court will be required to apply the international law in question in order to grant the relief sought, and not just take judicial notice of the relevance or not of such international law.

The international human rights normative framework

When states agree to establish a public international legal order to regulate their external conduct with each other, they consent to a breach of their national boundaries. With globalisation increasingly shrinking the boundaries of human existence, international law has made it virtually impossible for states to cling to their territorial integrity and sovereignty when it comes to whether or not human rights have been violated.⁴³ Accordingly, international law has developed and currently maintains a reasonably solid place in the society of nations and how they interact with each other.⁴⁴ Whilst International law has not replaced the significant role national law plays in the promotion and protection of the rights and welfare of its people, international law does support that role. In some instances, international law even plays the role of Superior Protector of people's rights at a domestic level. Nonetheless, international law is vulnerable: firstly, its effectiveness is dependent on the political will of States to be bound by it. Secondly, it requires a 'buy-in' from the members of society to ensure they are active participants in the implementation of international law at domestic level.⁴⁵

41 See Amoo (2008:106–111).

42 (ibid.).

43 See Viljoen (2007:17): "Although the UN is based on principles of the 'sovereign equality of all its members' and 'non-interference in the domestic affairs', over the last decade the absolute nature of sovereignty has been eroded, especially through the working of international human rights law".

44 See Aust (2007:3).

45 (ibid.). See also Amoo (2008:110): "Some writers, notably Austin, Hobbes and Hart, have raised fundamental theoretical questions relating to the legal character of international law. They have argued that international law is not true law but a code of rules of conduct of moral force only. Their argument is premised on the fact that there is no effective machinery for enforcing the rules of international law. Their observance ... seems to depend on international comity or fear of retaliation".

In order to properly locate the place of international law in the Namibian domestic set-up, the ICCPR and its attendant Protocols will be illustratively used to establish the value of Article 144 in the implementation of international law in Namibia. This will be juxtaposed with other rudimentary text of the body of international law.

The Charter of the United Nations

This Charter was the *raison d'être* of the United Nations (UN), and remains the foundational truth of its member states. The Charter sets out the background to the establishment of the UN, notably to –⁴⁶

... save succeeding generations from the scourge of war, which twice in a lifetime has brought untold sorrow to mankind and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person ... and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.

In broad terms, Article 1 captures the UN's purpose as the maintenance of international peace and security, development of friendly relations among nations, and cooperation in the resolution of international issues. All member states are enjoined to fulfil their obligation under the Charter in good faith and for the benefit of those for whom the Charter is meant.⁴⁷

Vienna Convention on the Law of Treaties

The Vienna Convention sets out the essential content and effects of customary international law on treaties between states. Most states, whether they are party to the Convention or not, recognise it as the pre-eminent "treaty of treaties".⁴⁸ This is important to note, as Namibia is conspicuously absent from the list of states that have signed, ratified, acceded to, or succeeded to the Convention.⁴⁹ Nonetheless, it is argued here that the Convention's provisions apply to Namibia as though the country had ratified the treaty because of the customary international character of the Convention's application to nations. Its preambular provisions essentially capture the guiding principles of the Convention, in recognising –

46 See UN (1945:3).

47 See Article 2 of the UN Charter, which provides that members are to act in accordance with the following principles, amongst others in that Article: The UN is based on the principle of the sovereign equality of all its members; that all members are to fulfil their obligations under the Charter in good faith; that they are to settle their international disputes by peaceful means; that all members refrain from the threat or use of force against the territorial integrity or political independence of any state; that they are to give every assistance to the UN in any action it takes in accordance with the Charter; and that the UN is not authorised to intervene in matters that are essentially domestic, although this principle is not to prejudice the application of enforcement measures under Chapter VII.

48 See http://untreaty.un.org/ilc/summaries/1_1.htm; last accessed 18 February 2010.

49 See http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~...; last accessed 18 February 2010, status as at 17 February 2010.

... the ever increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems.

Namibia has assented to a plethora of international instruments, each of which carries an inherent obligation on the state to ensure domestication of the international law in question. The Vienna Convention assists states in measuring up to this obligation and provides basic guidelines on the interpretation,⁵⁰ implementation, and application of the international law to the municipal legal framework.⁵¹ For our purposes here, two aspects of international law remain controversial, however, namely the provision of reservations,⁵² and the violation of international law in preference to domestic law. These are concepts that have led to the lack of effective implementation of international law at municipal level. The latter aspect has enjoyed some degree of debate in the Article 144 question of the Namibian Constitution and, therefore, will receive some attention in this contribution.

The International Covenant on Civil and Political Rights

The ICCPR⁵³ is part of the International Bill of Human Rights.⁵⁴ As such, it constitutes an important component of the international human rights protection system. The Universal Declaration of Human Rights enumerated a catalogue of general principles anchored on justice, peace and freedom. The adoption and subsequent entry into force of the ICCPR was a legal manifestation of these ideals and broad declarations of intent.⁵⁵ It is an open secret that, in some corners, the indivisible, interdependent and interrelated nature of human rights remains a fallacy. This is so because constitutions of many countries, including Namibia's, still make the enforcement of 'socio-economic rights' subject to

50 See Article 31, Vienna Convention, which states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the its object and purpose".

51 (ibid.:Article 43).

52 (ibid.:Articles 19–23). See also Denmark's objection to reservations made by Guatemala upon the ratification of a law of treaties. These reservations refer to general rules of the Convention, many of which are solidly based on customary international law. A reservation – if accepted – could call into question well-established and universally accepted norms. The Danish government opine that the reservations are not compatible with the object and purpose of the Convention. "It is in the common interest of States that treaties to which they have chosen to become parties are respected, as to their object and purpose, by all Parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties". See Vienna Convention on the Law of Treaties.

53 Adopted and opened for signature, ratification and accession on 16 December 1966, but only entered into force on 23 March 1976. See UN (2002:17).

54 The others are the Universal Declaration of Human Rights (1948), the ICESCR (1966), the First Optional Protocol to the ICCPR, and the Second Optional Protocol to the ICCPR.

55 See paragraph 3 of the Preamble to the ICCPR, which states that "in accordance with the [Universal Declaration of Human Rights], the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his ... civil and political rights".

availability of funds,⁵⁶ and often these rights are not part of a mainstream bill of rights that are usually enforceable through the courts. This makes enforcement of socio-economic rights dependent on rather than interdependent with the other set of civil political rights.

It requires ingenuity on the part of the human rights lawyer to use civil political rights such as the right to life to secure rights of livelihood. Arguably, civil and political rights generally enjoy optimal protection because they do not require resources to implement. These rights require states to simply refrain from violating rights rather than the positive duty imposed by the so-called second-generation rights.⁵⁷ Nonetheless, despite their resource and other limitations states have an obligation to comply with their human rights obligations.

Article 2(2) of the ICCPR requires the following from states:

Where not already provided for by existing legislative or other measures each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative and other measures as may be necessary to give effect to the rights recognised in the present Covenant.

Namibia is a signatory to the ICCPR and its Optional Protocol⁵⁸ and is, therefore, bound by its terms. Similar to Article 25(1) of the Namibian Constitution, Article 5 of the ICCPR implores states not to interpret or undertake any activity that will disadvantage the beneficiaries under the Covenant. Namibia is not known for making reservations, but our courts have been known for both accepting the ICCPR's principles for purposes of interpretation, and making the Covenant apply in the real sense.⁵⁹ So, in Namibia, whilst there may be instances of violations of human rights such as limitations on freedom of information and political activity, there is a general commitment to protect and advance human rights as stipulated in the Namibian Constitution. The content of the Bill of Rights in the Namibian Constitution is similar to those in the ICCPR.⁶⁰

56 In terms of the Namibian Constitution, socio-economic rights are provided for under the "Principles of State Policy"; see Article 95. See also Article 101, which provides that "[t]he principles of state policy contained in this chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them". See also *Government of the Republic of Namibia & Others v Mwilima & Others SA 29/2001* (unreported citation).

57 *Second-generation rights*, as they are referred to traditionally, are rights that focus on the equality and dignity of the person. They are developmentally and economically oriented. According to Nakuta (2008:89), "ESC [economic, social and cultural] rights are the sine qua non for improving people's lives and standard of living".

58 See Volodin (2008:21) and Viljoen (2007:147).

59 See discussion of the *Mwilima* decision below.

60 See Chapter 3 of Namibian Constitution, Articles 5–25. Also see Naldi (1995:10): "The constitution reflects the 1982 Constitutional principles which were themselves inspired by democratic values and a concern for fundamental rights derived from international standards that provide a context within which the Namibian Constitution should be interpreted and applied".

The Human Rights Committee

The Human Rights Committee is the monitoring body established in terms of Article 28(1) of the ICCPR. It is primarily responsible for the receipt and consideration of state reports.⁶¹ In terms of Article 41 of the Covenant, the Committee is also permitted to receive and consider interstate communications if a declaration has been made by the states concerned to accept the Committee's jurisdiction. More importantly, and as provided for under the Optional Protocol to the ICCPR, the Committee can also accept communications from individuals claiming to be victims of violations of any rights set forth in the Covenant,⁶² provided the state allegedly guilty of the violation has ratified the Optional Protocol. The Committee's methodology is to provide concluding observations on reports, make general comments, and develop jurisprudence based on its interpretation of the Covenant provisions. When Namibia submitted its first state report and, later, when two cases⁶³ were submitted under the Optional Protocol, the country was subject to the Committee's scrutiny.

In 2004, Namibia's initial report was presented to the Committee in accordance with Article 40 of the ICCPR,⁶⁴ albeit some eight years after the report was due. The Committee's comments on it included some positive observations, notably that the death penalty had been abolished, that democratic institutions had been established,⁶⁵ and that international law had been transformed into municipal law in a commendable manner. However, the Committee was concerned about the practical effect of Article 144 of the Namibian Constitution, stating that "Article 144 of the Namibian Constitution may negatively affect the implementation of the Covenant at the domestic level". The Committee did not elaborate on what it meant by this observation, but one can safely argue that it possibly referred to Parliament being potentially able to override the provisions of the Covenant if they were in violation of what was perceived to be reasonably justified municipal legislation that was itself not in violation of the Constitution.

The Committee also recommended that torture should be made a domestic-statute-specific crime because the current position, as previously stated herein, is wholly inadequate in terms of addressing the full effects of the crime of torture.⁶⁶ The second periodic report

61 In terms of Article 40 of the ICCPR, states parties undertake to submit reports on the measures they have adopted that give effect to the rights recognised in the Covenant.

62 The Optional Protocol to the ICCPR, adopted on 16 December 1966, entered into force on 23 March 1976. See Article 1.

63 The two cases are discussed in detail in the latter part of the contribution.

64 For the full report, see <http://www1.umn.edu/humanrts/hrcommittee/namibia2004.html>; last accessed 19 February 2010. The Committee considered Namibia's initial report (CCPR/C/NAM/2003/10) at its 2200th, 2201st and 222nd meetings held from 14 to 15 July 2004, and adopted concluding observations at its 2216th meeting on 26 July 2004.

65 See Articles 1(2), 89, 128, 129 of the Namibian Constitution.

66 Namibia's Initial Report, CCPR/C/NAM/2003/10; see para. 11 under "Principal subjects of concern and recommendations"; <http://www1.umn.edu/humanrts/hrcommittee/namibia2004.html>; last accessed 19 February 2010.

was due on 1 August 2008. It would appear this report is still outstanding, and there is no indication whether any of the Committee's recommendations have been implemented.⁶⁷

State reporting is a state's primary duty.⁶⁸ This is the mirror (albeit sometimes lopsided) reflecting the human rights state of the nation. It is a tool used for accountability. It is also the platform created for states to declare whether or not the Covenant has been implemented in their respective countries effectively. The report also presents an opportunity for both the state and the Committee to assess the extent to which violations occur, and whether these would require external intervention.⁶⁹ In other words, there is a need for a special report and/or a rapporteur to monitor the conditions in a country more closely. And finally, the Committee's observations are stepping stones towards improving the human rights situation and/or implementing the treaty at national level.

Another significant role the Committee plays in developing tools to apply and monitor the effective implementation of the ICCPR is to make general comments on the understanding of the Covenant's provisions. Through this process, the Committee interprets and clarifies the Covenant's meaning. For example, in its General Comment 31,⁷⁰ the Committee quite extensively set out the broad principles that guide Article 2 of the Covenant. More pertinently, the Committee said that states parties are prevented from invoking provisions of a constitution or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.⁷¹ Namibia may be liable on this score in the *Müller and Engelhard v Namibia* Communication.

This provision not only caters for the interest of the beneficiaries, but also has an effect on state relations. This is because international law flourishes under the precondition that each member state has to comply with its obligations and that non-compliance is a total disregard of the essential purpose of international law, namely to "realize the political values, interests, and preferences of various international actors. But it also appears as a standard of criticism and means of controlling those in powerful positions".⁷²

From a reading of various general comments offered by the Committee, one finds that the obligations of states to comply with and implement international instruments in

67 (ibid.:paras 23, 24): "The state party should pay particular attention to providing practical information on the implementation of legal standards existing in the country. Also the state party should provide information within one year, on its response to the Committee's recommendations".

68 See Viljoen (2007:104).

69 (ibid.:105): "It is significant that ... states submit themselves to international scrutiny. Viewed in the context of democratization, the reporting obligation takes on a new meaning, and becomes a vehicle for establishing and guarding democratic institutions".

70 *Human Rights Committee, General Comment 31. Nature of the General Legal Obligation on States Parties to the Covenant*. UN Doc. CCPR/C/21/Rev.1/Add.13 (2004). Available at <http://www1.umn.edu/humanrts/gencomm/hrcom31.htm>; last accessed on 19 February 2010.

71 *Communication No. 919/2000*, UN Doc. CCPR/C/74/D/919/2000(2002). Also see *Müller v President of the Republic of Namibia & Another* 1999 NR 190 (SC).

72 See Evans (2006:57).

general is clearly set out in the various treaty obligations. It is equally evident that, in most instances, states do not comply with their obligations under international law. This makes one ask what the problem might be: is it the nature of international law? Is international law toothless?⁷³ The effectiveness and implementation of international law is mostly visible at municipal level: once it is demonstrably applied at that level, it becomes easy to translate its effectiveness on the international platform. The one visible way to illustrate the implementation of international law at municipal level is through the work of competent courts. It is to this which we now turn.

The application of Article 144 through case law

Over a period of 20 years, Namibia has developed and enjoyed constitutional democracy.⁷⁴ The promotion and protection of human rights within this type of culture is the embodiment of respect for the rule of law, justice, and the supremacy of the Constitution.⁷⁵ Given its constitutional history, has Namibia been true to the effective application of Article 144? Have the courts been candid in their application of international law to domestic disputes?

Namibian courts have generally been known for interpreting the Constitution broadly and in a purposeful fashion,⁷⁶ as they are called upon to exercise a value judgment that will provide optimal protection for the individual. This approach to interpreting the Constitution is informed by the values and aspirations of the Namibian people. As a result, courts have generally been reluctant to apply international law directly, especially when it appears to conflict with longstanding practice or tradition in the country. Nonetheless, in the majority of cases, the approach has been to refer to international law and positions in other jurisdictions as guiding examples with persuasive value when courts are called upon to interpret the Namibian Constitution.

A few cases will now be offered to illustrate the approach and attitude Namibian courts have taken when referring either to international law or to examples in comparative jurisdictions in order to support the argument put forward by either party. A brief background will be given for the sample cases, and the manner in which international law and/or comparative case law was regarded by the courts in each case will be indicated. There will be no in-depth discussion of the cases, however.

73 See Aust (2007:2–5) for a fuller discussion of the nature of international law.

74 See Naldi (1995:13).

75 In terms of its Article 1(6), the Constitution is the Supreme Law of Namibia.

76 See *Republic of Namibia & Another v Cultura* 2000 1993 NR (SC) at 340 B–D, where the late Chief Justice Mahomed stated that “a constitution is an organic instrument. ... It must be broadly, liberally, and purposively interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation”.

Minister of Defence v Mwandighi⁷⁷

This case involved Mr M who was shot and seriously injured by members of the South African Defence Force. He sued them for damages prior to Independence in 1990, but the matter was still ongoing after that date. Essentially, the appeal from the High Court to the Supreme Court was against the substitution of the South African Minister of Defence with his Namibian counterpart in light of the provisions of Article 140(3) read with Article 140(1) of the Constitution. After what appeared to be a full consideration of what counsel had argued and in response to the various authorities they had cited, the court had the following to say: ⁷⁸

The Namibian Constitution has a Declaration of Fundamental Human Rights and Freedoms which must be protected. These freedoms and rights are framed in a broad and ample style and are international in character. In their interpretation they call for the application of international human rights norms.

Counsel also made quite extensive reference to principles enunciated in international law and other jurisdictions to support the case they were making. For example, Mr Maritz submitted that –

... Article 145(1)(b) was relevant to the interpretation of Article 140(1) and (3) in so far as a law purports to impose an obligation on the Namibian Government which international law (including the general principles of public international law and international agreements binding upon Namibia referred to in Article 144) recognises as being binding.

It is not immediately clear from the end result of the judgment how much weight was accorded to these submissions and the references that were made to international law. At the very least it is expected that some judicial notice was taken of these observations.

Government of the Republic of Namibia & Another v Cultura 2000 & Another⁷⁹

In this matter, the government, on account of the provisions of Article 140(3) of the Constitution, enacted the State Repudiation (Cultura 2000) Act⁸⁰ against the establishment and workings of Cultura 2000. In particular, and with this piece of legislation, government did not want to recognise or honour obligations that the previous administration had entered into with Cultura. The organisation was established to preserve and promote the cultural practices of Namibians of European descent, e.g. namely those with an Afrikaans, English, German or Portuguese background. The essence of the dispute was anchored on the insidious objective of a N\$4-million loan converted into a donation just three weeks before Independence, and the incumbent government's decision to repudiate the

77 1993 NR 63 (SC).

78 (ibid.:70B).

79 1993 NR 328 (SC).

80 No. 32 of 1991.

aforesaid donation and all its attendant consequences – an act conceived as a violation of a number of rights provided for in the Constitution, e.g. the right to property and culture.

In response to a submission from Cultura 2000 and in support of declaring the activities of an apartheid South Africa as unwanted within the ambit of the principles of international law, the court expressed itself as follows:⁸¹

It is manifest from these and other provisions that the constitutional jurisprudence of a free and independent Namibia is premised on the values of the broad and universalist human rights culture which has begun to emerge in substantial areas of the world in recent times and that based on a total repudiation of the policies of apartheid which had for so long dominated law making and practice during the administration of Namibia by the Republic of South Africa.

This case also referred to Article 144 of the Constitution in specific terms. Its relationship with Article 145, which deals with the Namibian government's obligations "to any other State which would not otherwise have existed under international law",⁸² was also aptly postulated, as follows:⁸³

Clearly many of the laws enacted by the South African Government during its administration of Namibia and many acts performed by that administration during that time were plainly inconsistent with both the ethos and the express provisions of the new Constitution and therefore unacceptable to the new Namibia.

It is hoped that in its effort to "broadly, liberally and purposively interpret the Constitution", the court does effectively consider the principles set out in international law. The uncertainty as to whether or not courts apply the principles they are referred to by counsel comes from the glaring absence at and after judgment of how these principles have influenced the decision. It is possible that they may actually consider such references without necessarily verbalising their use or stating how they apply in the final analysis. The fact that some cases contain quite extensive reference in comparison to others may indicate that they are taking judicial notice, but it is by no means a reflection that international law was used to provide the remedy in this case.

Kauesa v Minister of Home Affairs & Others⁸⁴

The first landmark decision on freedom of expression and speech was set out in *Kauesa*. In this case, courts expressed the overall objective of why they were obliged to consider international law, i.e. to "derive some assistance in the interpretation". This response is not the one expected, namely that the obligation to consider international law derives from the provisions of Article 144 of the Constitution, which regards such law as part of Namibian law, and by that reason alone international law should be in contention every time a court is seized with a particular issue for consideration and decision. Instead, we

81 1993 NR 328 (SC) at 333 H-I.

82 See Article 145(1), Namibian Constitution.

83 1993 NR 328 (SC) at 334 E.

84 1995 NR 175 (SC).

find that international law is considered selectively – and, in most cases, not at all. To this end, the court made the following statement in the *Kauesa* judgment: ⁸⁵

The right to freedom of speech is found in the constitutions of many countries. It is internationally recognised. Many courts in many lands have interpreted human rights provisions pertaining to the right of freedom of speech. Both Mr Smuts and Mr Gauntlett invited us, in order to derive some assistance in the interpretation of Article 21(1)(a) and (2) of the Namibian Constitution to have regard to the interpretation of similar provisions in international human rights instruments and their national constitutions.

Regulation 58(32) of the Police Act,⁸⁶ which inhibited members of the police force from “commenting unfavourably in public upon the administration of the force”, was declared unconstitutional in that it was inconsistent with Articles 21(1) and (2) of the Constitution.

It is also notable that courts are more often inclined to refer to decisions of other jurisdictions such as Canada, India, South Africa, the United Kingdom, the United States of America, Zimbabwe and, on occasion, the European Court of Human Rights, rather than directly applying a provision from a treaty or convention of international law. This may very well be because decisions of other jurisdictions often have only persuasive value. Moreover, decisions of other jurisdictions can be distinguished from a domestic case, depending on the nature of the problem the municipal court is dealing with, and the similarity of the provision in question in regard to the one in the Namibian Constitution. Thus, the application of decisions of other jurisdictions becomes subject to the discretion of the court.

Given the manner in which international law and its treaty bodies operate, once a state ratifies and agrees to be bound by treaty body decisions, their disregard for such decisions will be frowned upon. In other words, it is expected that states would comply with a decision of a treaty body such as the Human Rights Committee. In light of Article 144 of the Namibian Constitution, one would have hoped that courts would spend time perusing the jurisprudence of this Committee in order to determine its views on, for instance, freedom of speech and expression, the limitations thereto, and the obligations Namibia has undertaken in this regard. Whilst one does not want to be restrictive in the understanding of what Article 144 envisaged, over the past 20 years courts have not been entirely alive to what is expected of them within the confines of this provision.

Müller v President of the Republic of Namibia & Another⁸⁷

The *Müller* case, although it referred to international law and quoted the jurisprudence of other countries, made a decision in favour of the status quo. In this regard, the court noted that the legal provision in question –⁸⁸

85 (ibid.:187 G–H).

86 No. 19 of 1990, published under Government Notice R 203, *Government Gazette* 791 of 14 February 1964.

87 1999 NR 190 (SC).

88 See Hubbard (2007:88); see also 1999 NR 190 (SC) at 204 B–E.

... the Aliens Act⁸⁹ gave effect to a tradition of long standing in the Namibian community that the wife normally assumes the surname of the husband. In this regard, there is also the uncontested evidence of Mr Tsheehama that he is not aware of any other husband in Namibia who wanted to assume the surname of his wife. What is more the appellant is not without a remedy.⁹⁰

After a submission by counsel in which he “also relied on certain conventions such as the CEDAW⁹¹ which was acceded to by the National Assembly”,⁹² the court shockingly expressed itself in the following terms: ⁹³

... such Conventions are of course subject to the Constitution and cannot change the situation.

It is clear from this case at least that international law plays second fiddle to traditional usage and custom. This view of the court was subsequently quashed by the Human Rights Committee. Later court decisions were more favourable towards the direct application of the ICCPR.

***Namunjepo & Others v Commanding Officer, Windhoek Prison & Another*⁹⁴**

In the *Namunjepo* case, the courts quite openly made reference to and applied international law. The court was faced with the question as to whether the use of leg irons and chains to restrain prisoners was an acceptable method of control of a human being. In its quest to answer this question, it was stated that “... the Court should also look at the situation in the international community”.⁹⁵

In this case the courts clearly applied their minds to what was found in other jurisdictions; but more importantly, courts expressed themselves quite directly on the position of international law instruments in the following terms:⁹⁶

Although instruments such as the Minimum Standard Rules have no legal standing its provisions are often relied upon as an interpretive help in the application of domestic legislation concerning penal institutions.

They also added that –⁹⁷

89 No. 1 of 1937.

90 See 1999 NR (SC) at 204: “Section 9 of the Aliens Act provides a specific mechanism which would enable the appellant to fulfil his aim”. In other words, the husband just needs to comply with the formalities set out in section 9(1) and then he can adopt his wife’s surname.

91 Convention on the Elimination of All Forms of Discrimination against Women.

92 See Hubbard (2008) and 1999 NR 190 (SC)

93 1999 NR 190 (SC) at 205 E.

94 1999 NR 271 (SC).

95 (ibid.:283 I).

96 (ibid.:284 E–F).

97 (ibid.:H).

[t]herefore the accession of Parliament to both the Convention against Torture and other Cruel[,] Inhuman or Degrading Treatment or Punishment (“CAT”) and the International [Covenant] on Civil and Political Rights (“ICCPR”) on 28 November 1994 is significant. Both these instruments contain provisions similar to our Article 8 and Article 10.1 of the ICCPR provides specifically that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

There is no doubt from the following statement by the courts that they did in fact take the expressions of the international community on this point into consideration:⁹⁸

The acceptance by Parliament of these Conventions as well as the First Optional Protocol to the ICCPR is a continued expression of and confirmation of the high norms and values of the Namibian people as contained in the Constitution and expressed by other institutions. When the Court must now make its value judgment it can also not ignore previous expressions in those judgements which were based on those very norms, sensitivities and aspirations and as a result of which certain constitutional principles were articulated.

In this expression lies the commitment and pact Namibia made with the international community: a commitment to articulate values that are informed by the principles of human rights, humanity, justice and peace – principles that are similar in scope and content with those the international community cherishes.

Ex parte Attorney General: In Re Corporal Punishment by Organs of State⁹⁹

This case is a hallmark of Namibia’s constitutional jurisprudence. Despite being one of the first to be decided after Independence, the decisions of this case are very progressive in the application of international law to domestic problems, which is quite commendable. Thus, some of the decisions enunciated above, which occurred later than this decision, are a retrogression. The extract below is quite telling, in that it shows what is meant by the *progressive v the retrogressive* development of our jurisprudence through the use of interpretive tools.

The legal question in this case was whether a particular form of punishment authorised by law could properly be said to be inhuman or degrading. In order to answer this question, the court took an approach that involved a value judgment, as opposed to a textual or literal interpretation of the law. Consequently, the court had to take account of what the position would have been under an apartheid system that had no regard for the international human rights law, on the one hand, and what it would be in an independent Namibia that had joined the international community and had adopted a culture of human rights promotion and protection on the other:¹⁰⁰

It is however a value judgement which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further

98 (ibid.:285 C–D).

99 1991 NR 178 (SC).

100 (ibid.:188 D–G).

having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.

The provisions of art 8(2) of the Namibian Constitution are not peculiar to Namibia; they articulate a temper throughout the civilised world which has manifested itself consciously since the Second World War.

The court further stated that “there is strong support for the view that the imposition of corporal punishment on adults by organs of State is indeed inhuman and degrading”.¹⁰¹

This case seems not only to have referred to international law and jurisprudence of other jurisdictions quite extensively, but also applied them in its decision. Although this is palatable, it attracted some caution from Berker CJ (as he then was), when he reminded the court in his general comments that, whilst it was useful and instructive to refer to decisions of other courts (including the International Court of Human Rights), –¹⁰²

... the one major and basic consideration in arriving at a decision involves an inquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs of the Namibian people.

Evidently, this appears to be the approach most courts took after 1991. The question, of course, is whether this is necessarily the correct approach – given our position as stipulated in Article 144. It is also a known fact that Parliament has not actually exercised its legislative power to contract itself out of a treaty that was negotiated and signed by the President (this may very well be because “decisions are taken in Cabinet and not in Parliament”¹⁰³). This means that, at least for the moment, Namibia is liable to comply with and consider as part of its law, at domestic level, all the international treaties that it has signed, ratified and acceded to, as well as all those treaties that are binding on Namibia by virtue of customary international norms and practices.

***Government of the Republic of Namibia & Others v Mwilima & Others*¹⁰⁴**

The *Mwilima* decision is a good example of how the courts should interpret and apply the meaning of Article 144. This is a Supreme Court decision that is binding on all other courts of Namibia.¹⁰⁵ Given Namibia's doctrines of stare decisis and judicial precedent,

101 (ibid.:H–I).

102 (ibid.:197 G–H).

103 See *The Namibian*, 16 April 2010, p 6: Speaking about his office, the Prime Minister responded to the question as to why the Head of State in Namibia does not sit in Parliament to participate in debates.

104 See <http://www.saflii.org/na/cases/NASC/2002/8.html>; last accessed 30 October 2009.

105 See Article 81, Namibian Constitution.

this ruling will become an established practice that should be considered each time a similar decision has to be made, particularly with reference to the interrelated nature of rights and the application of international law. In this case, the Supreme Court quite surprisingly accepted the submission that, in the event the domestic legislation does not make provision for a positive obligation on the state to afford better protection to the citizen, then due regard and application should be had to international instruments – in this instance the ICCPR.

With the establishment of the UN in 1948 and the subsequent adoption of the Universal Declaration of Human Rights, the object and purpose was to create an environment in which people felt protected against violations. A decision such as the one in *Mwilima* should be seen as a contribution to making the world a better place. In other words, the various nation states do not simply enter into these agreements without making sure they bring change to the conditions and situations of people back home. In this regard, the peoples of the UN, who, when they adopted the UN Charter, were determined to¹⁰⁶

... establish conditions under which justice and respect for the obligations arising from the treaties and other sources of international law can be maintained.

Conclusion

It is clear from the above that Article 144 still creates uncertainty regarding the status of international law in this country. Some will argue this need not be, as both the contextual and literal interpretation of this provision does not allow for any understanding other than the fact that international law is part of our legal system. On the surface, this may very well be the case. However, reference to national jurisprudence has shown, that in the majority of cases international law, still only plays a role as part of the court's interpretive tools. There is neither an established pattern of how it is applied nor sufficient prominence accorded to it. So much so that, even though there is a Supreme Court decision on how we can accord socio-economic rights the status of justiciable rights, it remains a sore point within the legal environment of Namibia. Parliamentarians still refer us to Article Articles 95 and 101, reducing these rights to mere aspirations and ideals with no legal force and effect.

In other examples we are now forced to provide enabling legislation to ensure effective enforcement of a particular international treaty. The current draft of the International Criminal Court is a case in point¹⁰⁷. Why do we still need additional legislation in order for us to have people prosecuted under the Rome Statute? In fact this statute and others like it, shows, that there are different ways in which states make international law applicable to the municipal set up. But even then the self-executing nature of international

106 See the Preamble and Article 2 of the UN Charter, which states "All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter".

107 There has been a Namibian draft of the Rome Statute Establishing the International Criminal Court Implementation Bill since 2006.

statutes such as the International Convention Against Torture, is not exempted from the requirement of creating enabling legislation so that it can benefit from the more effective municipal enforcement machinery. It is clear that the best way is to have a hybrid of the two approaches rather than insist on a monist system whose aspiration may be considered subject to different interpretations. And to this end, one could boldly call upon the Attorney General, to bring an application in the High or Supreme Court asking for a declaratory order that will provide us guidance on the meaning and effect of Article 144 in the real sense.

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Namibia's constitution, democracy and the electoral process

Gerhard Töttemeyer

Introduction

The electoral process is fundamental to democracy and an integral part of it. Elections have fascinated political analysts for a long time, and with good reason. They determine who is to take control of government.

Namibia has constitutionally committed itself to a multiparty democracy and free elections, which guarantee each voter a free and independent choice. Since the Constitution commits Namibia to multiparty democracy, elections remain an important exercise in pluralism and, as such, an essential element in democratisation.

Namibia's electoral process has a long history, which is etched in the country's narrative of colonial rule and the consequent struggle for liberation. The country gained its independence on 21 March 1990, which was preceded by the first democratic elections for the Constituent Assembly as supervised by the United Nations Transition Assistance Group (UNTAG). At Independence, the Constituent Assembly was converted into the first National Assembly.

With the promulgation of various pieces of legislation,¹ the first Regional and Local Authority Council elections took place in 1992. The Presidential and National Assembly elections followed two years later, during which the first President of Namibia, Dr Shafiqhuna Nujoma, was popularly elected for the first time since independence.

As the first President was not elected when the members of the Constituent Assembly were elected in 1989, it became an issue when President Sam Nujoma was nominated for a third term of office. It was argued that the Constituent Assembly was converted into the first National Assembly in 1990, and not elected. It was further held that the President had only been elected for the first time in the Presidential and National Assembly elections in 1994; in other words, by 1994, he had only been nominated once and popularly elected once.

To play it safe, Article 134 of the Constitution was amended in 1998 to the effect that "notwithstanding Article 29(3), the first President of Namibia may hold office as President for three terms". After President Nujoma had served his third term, Article 134 was again amended to provide that any future President could only serve two terms in office.

1 The Regional Councils Act, 1992 (No. 22 of 1992); the Local Authorities Act, 1992 (No. 23 of 1992) and the Electoral Act, 1992 (No. 24 of 1992).

The first elections after independence – electing regional councillors according to the winner-takes-all (first-past-the-post) electoral system, and local authority councillors on a list, thus applying the proportional electoral system – had a very confident start. The Electoral Act² was hurriedly drawn up before the Regional and Local Authority Council elections commenced. The South African electoral law was simply adapted to suit Namibia.

Elections became a learning process. Mistakes were made and shortcomings identified. Over the years, several amendments have been made to the Electoral Act. Nonetheless, some parties have found it hard to stick to some of the prescribed rules and practices.

Time and again, the Electoral Commission has been accused of having transgressed certain rules and regulations and has been taken to court by opposition parties. The latter parties were usually defeated in court, the judges having been of the opinion that the outcome of the elections would not have been affected by the issue in question or at least not to the effect that the elections should be rerun or could be discredited. The outcome of the most recent case against the Commission, initiated in 2009 by nine opposition parties who accuse it of not complying with all the rules of the Electoral Act, is still awaited.

Except for minor flaws such as the alleged poor handling of tendered votes and the lapse of too much time between elections and the announcement of election results, most international observers have judged that, in general, elections in Namibia have been run in an honest and transparent way and that they have been peaceful – despite some criticism having been expressed on the fairness of some of the elections in the past.

Such positive verdicts do not imply that there is no room for improvement on a number of issues and aspects to which the Electoral Commission and the Directorate of Elections can fruitfully attend. It is an opportune time to review the Electoral Act in its totality, for example, in cooperation with all the stakeholders involved in the electoral process. To a large extent, the Act has served its purpose reasonably, but it is not perfect. For this reason it is still not easy for the Electoral Commission and the Directorate of Elections to fully satisfy all the stakeholders in an election.

One day, while I served as Director of Elections between 1992 and 1998, one of the Ministers – a certain H Pohamba³ representing the SWAPO Party of Namibia⁴ – burst into my office and accused me of favouring the opposition party. The very next day, the Afrikaans daily, *Die Republikein*, which supported the official opposition party, the DTA of Namibia,⁵ accused me of siding with the SWAPO Party. It was then that I knew the Directorate of Elections was on the right track!

2 No. 24 of 1992.

3 Today, President of the Republic of Namibia.

4 Formerly the *South West Africa People's Organisation* (SWAPO).

5 Formerly the *Democratic Turnhalle Alliance* (DTA).

The nexus between democracy and elections

An electoral process in a democracy, culminating in the holding of elections, cannot be separated from the political empowerment of the electorate exercising their constitutionally secured right to vote. The democratic electoral process also cannot be separated from the observance of fundamental human rights and freedoms as enshrined in the Constitution: the promotion of equality, mutual security, and respect for human dignity.

The electoral process is fundamental to any competitive democracy. It is a process whereby eligible voters are mobilised to express their political will and choice. Elections themselves are a mandate for voters to exercise their influence over the orderly and responsible running of the state. The freely elected government is expected to represent the will of the people in the way in which public power is distributed in the common interest. In terms of the doctrine of the sovereignty of the people, government remains answerable to the people at all times. Elections held at regular intervals are intended to provide a principal link between the rulers and the ruled. Hence, a great many questions can and should be asked about voting in elections. Among those that are of vital importance in a representative democracy are the following:

- What is the best way in which to organise democratic elections?
- What is the most efficient voting system?
- Have voting patterns been transformed by recent social, economic or political change?

As Namibia is committed to a multiparty democracy, elections have become an important exercise in pluralism and, as such, an essential element in the democratic process. An electoral process cannot be separated from capacitating and empowering voters: it is only successful and meaningful when people have taken ownership of it. It is a self-identification process with a democratic political system, its structures and institutions. It is the duty of the electoral bodies concerned to ensure that the electoral process is people-friendly and internalised. Nobody should feel marginalised – and this includes physically incapacitated people, as well as voters in old age homes, hospitals, prisons, and at sea, or citizens that find themselves outside the country at election time. Democracy presupposes each citizen has equal value, there is a committed and affirmative state, and that a freely elected, people-driven government exists.

The electoral process is at the heart of democratic capacity-building and involves the whole of society. In the case of Namibia, with its suppressive colonial past, the building and proper functioning of democratic institutions has taken root, but needs constant attention. Although already 20 years old, independent Namibia is still relatively young and it may take time before it is fully mature. Its democracy is still fledging and must be constantly tested. This can be executed through free, transparent, responsible and fair elections at all three levels of governance: national, regional and local.

The building of democracy includes not only the pursuance of political values and political attitudes that uphold democracy, but also the conducting of comprehensive voter

registration, effective electoral campaigns, and proper voter education as an integral part of the electoral process. An electoral process can only be meaningful if voters understand the essence and consequence of democracy as being related to elections.

It is claimed that democracy would be better understood if people could ‘eat it’, in other words if it would deliver tangible benefits such as employment, adequate social care, eradication of poverty, sufficient food, comprehensive medical services, quality education, and other benefits. Namibia, 20 years after independence, is still challenged by principle issues, some of which concern how to fully actualise democracy and to make it optimally credible.

It cannot be denied that a conceptual linkage exists between socio-economic rights, cultural rights and democracy, as it does between a functioning democracy and electoral processes: both are expected to foster and strengthen stability, prosperity, security, and peace in society. It is not only the government that is called upon to foster such rights, but also civic society – through its agencies and organisations, including educational institutions, religious entities, labour unions, peer groups, gender equality organisations, and other non-governmental and community-based organisations.

The preparation for elections includes a process of civic education for democracy. The task is to make the electoral process better known and comprehensible for everyone who lives or wishes to live in a democratic environment. Voters need to be taught the relevance of regular elections in a democracy and what an electoral process entails. The preconditions for transparent and fair democratic elections are demanding, and one should not take them for granted – even in advanced democracies.

The electoral framework in Namibia

The Namibian Constitution is very explicit on a number of issues related to elections. Already in the Preamble, reference is made to “freely elected representatives of the people”. In addition, Article 17(1) states that –

[a]ll citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of Government. All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.

The latter should be done via free, fair, transparent and credible elections.

Also very important is Article 17(2), which says that –

[e]very citizen who has reached the age of eighteen (18) years shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein.⁶

6 For example, presidential candidates are to be at least 35 years of age.

The implication of sub-Article 17(2) is that the state is compelled through its agency, the Electoral Commission, to ensure that all persons 18 years and older are given the opportunity to register as a voter and to vote. The same Commission is also required to enforce the age requirement for political candidates during Presidential as well as national, regional and local government elections.

The Electoral Act, as amended, provides the primary legislative framework for the Presidential and National Assembly elections, as well as the election of members to Regional and Local Authority Councils. The Electoral Commission and its executing agency, the Directorate of Elections, are provided for in sections 3 to 12 of Part II of the Electoral Act and its subsequent amendments, as well as in the Electoral Amendment Act.⁷

The most important stakeholders in an election in the Namibian context are the governing electoral bodies – the Electoral Commission and the Directorate of Elections, along with political parties, the associations and organisations participating in elections, and civic society, particularly the electorate.

Electoral bodies can only operate successfully in an atmosphere that is conducive to a democratic electoral process. It is for the Electoral Commission, in consultation with its executing agency, to determine the presence and nature of any distracting or disturbing factors and report the same to government. Equally important is that electoral bodies play a constructive and supportive role in establishing a free election atmosphere and to make a meaningful contribution towards a credible and lasting election culture devoid of fraud and suspicion. The clientele which the election bodies serve, be they political parties or the electorate, is composed of individuals with their own and often conflicting opinions, feelings, attachments and choices. They all need to be duly respected and accommodated. This is what a democracy demands.

Political parties determine the governance of Namibia, that is, who will rule and who is in opposition. The function of an opposition party in a democratic political system is as important as that of the ruling party. The Namibian Constitution sets no limits to the role opposition parties play. However, it is vital that both the ruling and opposition parties operate and function within the parameters of responsibility and accountability, and within the Constitution and the Electoral Act.

Civil society needs to exercise a control function and ensure that all the stakeholders in an electoral process adhere to the rules of the game. Civil society is also obliged to ensure that the electoral bodies and the political parties adhere to the principles of fairness, equality, transparency, impartiality and accountability.

There was a time when the majority of Namibians were excluded from exercising their democratic rights, when participative democracy was non-existent, and top-down, dictatorial governance prevailed. Today, Namibians live in a dominant-party state –

7 No. 30 of 1998.

which may be tempted to practise democratic centralism and autocratic modernisation. Therefore, it is important that the control function of the electorate is never in doubt, weakened or undermined. The very opposite – the strengthening of democracy – should constantly be adhered to. A working democracy needs proper checks and balances, and a healthy electoral process is one of them.

The state of elections in Namibia: The challenges

Impartiality, efficiency, competency and trustworthiness should be the hallmarks of electoral bodies. This includes the absolutely neutral and independent role the Electoral Commission and its executing agencies are to play in the electoral process. In the past, the Electoral Commission was solely responsible to the President, who appointed its members. The Directorate of Elections, on the other hand, was accountable to the Office of the Prime Minister. After many public complaints, the Electoral Act was amended in order to make the Directorate of Elections accountable to the Speaker of the National Assembly because the Speaker's Office was considered more neutral. Thus, the Speaker is responsible for introducing and defending the Electoral Commission's annual budget in the National Assembly, and tables its annual report in that august house. The disadvantage of this arrangement is that the Speaker is not allowed to table amendments to any Act or to introduce any Bill to the National Assembly: by law, only a Ministry is allowed to perform these two types of tasks. In the case of the Electoral Commission, Cabinet assigned these two tasks to the Ministry of Regional and Local Government, Housing and Rural Development.

One weakness of this arrangement is that the Ministry may be tempted to have a say in electoral matters, which can affect the independence and effectiveness of an electoral body. For example, the Ministry might try to exercise control over what should be amended in an Electoral Act, and when such amendments should be tabled in Parliament. As long as the supreme electoral bodies are dependent on the financial resources allocated to them by the National Assembly, the temptation to exploit such dependency cannot be totally excluded.

Opinions still differ on the composition and the duration of office of the Electoral Commission. Namibia has changed to a system of advertising the five positions in the Electoral Commission publicly. A Selection Committee, appointed by Parliament, selects the eight most suitable candidates via a public hearing process. The names of these candidates are then submitted the President, who chooses five of them. The Chairperson of the Electoral Commission is elected by its members. One weakness of this system of composing the Commission is that there is presently no provision that a High Court judge should be a member. For that reason, and for immediate decisions to be taken – particularly during the registration, voting and counting processes, it is important that Namibia institutes an Electoral Court. Such courts are standard practice in many other African countries.

President H Pohamba expressed thoughts along these lines on 12 November 2008, when he stated that an independent panel should be set up for future elections to which

political parties could turn if grievances arose during the electoral process.⁸ However, such a panel has not yet materialised.

Some recommendations

In the Namibian context, it would be helpful if the respective Electoral and Delimitation Commissions, which are currently totally independent of each other, could amalgamate into one body. The Delimitation Commission determines Namibia's borders, as well as the number of Regions in the country and their various constituencies. This Commission is only appointed for a short period every six years. In the interim, any complaints and suggestions from Regions, constituencies, civic bodies or individuals cannot be attended to. This is a dysfunctional situation.

In Namibia, the proportional electoral system is applicable at national and local level. At regional level, however, the constituency-based first-past-the-post system is applied. Both systems have their advantages and disadvantages. For example, the advantage of applying the proportional party-list system at local level is that, by law,⁹ at least 40% of all candidates are required to be female – a principle that cannot be applied in the winner-takes-all electoral system. Thus, at local government level, more than 40% of all mayors in Namibia at present are women. In addition, political parties have been called upon to apply the 'zebra' method when compiling their lists of candidates, meaning that if the first person on the list is a male, the following person has to be female; if the first is female, the next one must be male. The 'zebra' system has to be applied to the entire list of members each party is allowed to nominate. The same approach has not yet been applied at national level, however.

The disadvantage of the proportional electoral system, as applied at national and local level in Namibia, is that an elected councillor or Member of Parliament is not responsible for a particular ward or constituency and can, as such, not be made accountable to the voters. It would be to the advantage of democratic governance if a mixed electoral system were to be introduced, i.e. where candidates are partly directly elected and partly nominated – at least at national level.

The Electoral Act stipulates that each voter is required to vote in the constituency where s/he was registered. This is relevant to Regional Council elections in particular, where the first-past-the-post electoral system applies. During Presidential and National Assembly elections, on the other hand, the whole of Namibia is one electoral entity.

During any elections, particularly in the rural areas, the general rule applies that no polling station should be further away from a voter than a two-hour walk. Therefore, Namibia makes extensive use of mobile polling stations during voter registration and elections.

8 *The Namibian*, 13 November 2008.

9 Local Authority Act, 1992 (No. 22 of 1992).

The tendered vote system was introduced in consideration of the high mobility of voters in Namibia. A tendered vote makes it possible for any voter to vote from wherever s/he happens to be on election day. In other words, a voter can cast a tendered ballot when outside the constituency in which s/he was registered to vote. One ballot box is assigned to ordinary votes by voters voting inside their registered constituency and one to tendered votes for voters voting outside their registered constituency. Elections in the past have shown that, on average, 25% of all voters have cast their vote via the tendered vote system. Thus, most of the 25% may have been lost if voters had been compelled to vote in their registered constituencies. The tendered vote also has its flaws, however, particularly on the technical and organisational side. If, as an alternative, a postal or special vote or any other absentee voting system is identified as a better system, then it should be considered.

Accountability and transparency are not only applicable to the Electoral Commission and the Directorate of Elections, but also to the contesting parties in an election. All registered and participating parties are legally obliged to sign a Code of Conduct. The weakness of such Code of Conduct is that it lacks enforceability: its application relies on ethical and voluntary principles, and acceptance by the signatories.

One further issue is the financing of political parties, the sources of their income, the amount of income – including donations, how these finances are spent, and how and by whom they are audited. Such issues remain unknown despite public accountability being at stake. Although legal provisions are in place in Namibia to make funding derived from external sources publicly known, political parties do not adhere to them. Political parties should be obliged, if not enforced, to stick to the rules and legal provisions.

Airtime allocation on radio and TV during the electoral process is another burning issue which should best be amicably solved through negotiation between the Electoral Commission and political parties. Some political parties argue that the time allocations should be the same for all parties participating in the elections. Others opine that airtime should be granted according to the representation of parties in the National Assembly.

The issue of equality has also been raised with regard to the annual financing of political parties via public funds, as determined by Parliament. Should such financing be the same for all parties, or according to their representativeness in the National Assembly? Resolving this problem should not be the task of the Electoral Commission but the sole responsibility of Parliament. The Electoral Commission could, however, act in an advisory capacity.

Other considerations

The presence of observers and monitors during elections is an issue that has been intensively debated, particularly by civic organisations. An adjudicating function is allocated to election observers, whose responsibility is to testify and report whether the elections were conducted according to the stipulations of the Electoral Act and the

different codes of conduct for parties and organisations/associations, as well as for electoral officials. Government favours observers only, while some civic organisations insist on the presence of monitors as well.

Monitors are individuals or organised groups mandated to monitor, investigate, report on, and frequently pronounce judgment on the actions of the participants in the electoral process (e.g. voters, political parties, and electoral officials). Although monitors are not able or expected to enforce compliance with accepted standards of conduct, they do play a more activist and interventionist role than observers. Observers are authorised to observe, but cannot intervene in an electoral process. However, both monitors and observers are expected to ensure that the integrity of the electoral process is respected.

In recent amendments to the Electoral Act, provision was made for the duties and responsibilities of observers only, their registration with the Electoral Commission, and their Code of Conduct. Interfering with the electoral process is taboo to election observers.

Namibia has yet to decide whether an electronic voting system should be introduced. The Cabinet has felt that its introduction during the 2009 Presidential and National Assembly elections was not opportune. The consensus was that such a system should be first tested during by-elections for Regional Councils before being rolled out nationwide.

The Electoral Commission and the Directorate of Elections are conscious that they operate in a dominant-political-party system, which characterises the governance of Namibia. Nonetheless, neither this or any other fact should prevent the Electoral Commission from expressing itself on the behaviour or misbehaviour of political parties during the electoral process, and on when the principles of democratic elections are not adhered to. Electoral bodies are independent and should not be dictated to by any political party. Indeed, undermining the authority of electoral bodies would contradict constitutional principles.

Political stakeholders in an electoral process are obliged to respect electoral bodies as non-political institutions – a principle to which electoral bodies are also required to adhere to respect themselves as non-political institutions. Electoral bodies must always remain neutral. They are solely the executor of laws which direct and guide the electoral process. They can, however, also make rules and regulations pertaining to electoral matters. In addition, policymakers can benefit from the experience of electoral bodies and consult them. Moreover, they can make use of the experience electoral bodies gain in the exercise of their duties, particularly when amendments to the Electoral Act are considered.

Accusations against the electoral bodies, such as their being partial, exercising foul play or being incompetent, are well-known phenomena internationally before, during and after elections. These bodies are often used as scapegoats for the failures, faults and frustrations of political stakeholders. A culture of losing an election – and, thus, unconditionally accepting defeat – is still underdeveloped in Namibia.

Electoral bodies are fully aware that they need to guarantee equal rights to all political role players and to all voters. One of the Election Commission's most important tasks, therefore, is to contribute to civil responsibility and civic awareness, while constantly reminding the people of their democratic right and duty to vote.

Electoral bodies are not infallible. For this reason, communication and dialogue are extremely important before, during and after elections, as are understanding and trust between all the stakeholders in an election. Trust rests on confidence, honesty and tolerance.

The binding guideline for both the electoral bodies and the stakeholders in an electoral process is to be totally committed to democratic norms, values and practices. One can state with confidence that Namibia has, since its independence, developed a culture of democratic elections – although, of course, there is always room for improvement.

Shortcomings that require attention

The most recent elections in 2009, namely for the Presidency and National Assembly, are an example of certain shortcomings that continue to exist in the management and administration of elections. These include shortcomings in –

- the accuracy of voters' rolls
- the time management associated with making voters' rolls publicly available before the election date
- compliance with the Electoral Act, such as –
 - » making the results publicly known at each polling station
 - » the electoral efficiency and literacy of election officials
 - » the speed of counting tendered votes
 - » the length of the voting period (one day)
 - » the communication between election officials and the electoral headquarters
 - » mediating and conflict resolution facilities at the office of the Electoral Commission, and
 - » the degree of transparency as regards the whole electoral process.

Another consideration should be to revisit the representativeness of the National Assembly by introducing a mixed electoral system, making provision for both the proportional and the constituency-based first-past-the-post electoral system.

An anomaly that could also be looked at is that the President and the newly elected members of the National Assembly are only sworn into office nearly four months after having been elected. Meanwhile, the previous National Assembly continues to govern the country.

Another issue of concern relates to Article 28(2)(b) of the Constitution, which stipulates that –

... no person shall be elected as President unless he or she has received more than fifty (50) per cent of the votes cast and the necessary number of ballots shall be conducted until such result is reached.

In the worst case, this could lead to elections ad infinitum if no candidate is able to obtain the 50% plus 1 vote. A better arrangement would be that only the two strongest candidates contest the next round of presidential elections if neither of the two were able to achieve the prescribed minimum during the first round.

Legal attention should also be given to whether the National Assembly and the President can be inaugurated if there is still a court case pending on the validity of the elections. A prolonging of the office of both the President and the National Assembly in such a case is not provided for in the Constitution or the Electoral Act. Article 57 of the Constitution, which makes provision for a new election, only applies if “the Government is unable to govern effectively” and the Cabinet so advises the President to that effect.

The Constitution is not absolutely clear on who will govern the country once the National Assembly has been dissolved and when the President has simultaneously vacated his/her office. Article 29(1)(b) states that “[i]n the event of the dissolution of the National Assembly in the circumstances provided for under Article 57(1) hereof, the President’s term of office shall also expire”. Article 57(2) of the Constitution says the following:

Should the National Assembly be dissolved a national election for a new National Assembly and a new President shall take place within a period of ninety (90) days from the date of such dissolution.

The implication of Article 29(1)(b) is seemingly that, during the 90-day period until the elections for a new National Assembly and a new President, the country will be without governance – i.e. without a National Assembly, an Executive, or a President.

What makes the situation ambivalent is that Article 58(a) and (b) state that every member of the National Assembly is required to remain in his/her office until the round of elections following such dissolution, and that the President has the power to summon Parliament. The question arises as to how the President can summon Parliament. It is also not clear from the Constitution whether this summons includes the National Council – since Article 29(1)(b) states that the offices of the President and the National Assembly expire simultaneously. Who, in the interim period leading up to the new elections, will govern the country? Who will be entitled to issue and sign government proclamations such as the date of the next round of elections and other possible issues related to the electoral process? Should the Judiciary perform these functions in the interim period?

It seems obvious that these matters, as well as the prevailing contradiction between Articles 29, 57 and 58, should be addressed.

Concluding remarks

Finally, – and this is crucial for the credibility of elections – the Electoral Commission and the Directorate of Elections need to guarantee the secrecy of the vote. This reminds one of the elderly lady down in Keetmanshoop, who voted for the first time. She entered the polling station, went through all the formalities, made her cross on the ballot paper and, instead of depositing it into the ballot box, she put it under her blouse. The presiding officer intervened. “Excuse me, Madam,” he said, “That is not the right place to put a ballot paper.” She looked at him seriously and said, “Have a look at the poster on the wall. It says ‘Your vote is Your Secret’ – and that is exactly how I’m going to keep it!”

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Intellectual property under the Namibian Constitution

Sam K Amoo and Sidney L Haring

Paragraph 1 of Article 16, “Property”, of the Constitution of the Republic of Namibia begins as a broad-ranging statement of property rights:

All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others ...

Later in this same paragraph, this right is limited by a provision that –

... Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

To some, this language may be clear enough; but in the area of intellectual property, it raises important issues, leaves some key questions unanswered, and renders some forms of property potentially unprotected.

Article 16 is best approached as a brilliant political move on the part of the SWAPO Party of Namibia¹ – the dominant political party since the country’s independence in 1990 – to end the liberation war, reassure white property owners that their land and investments would be protected, and provide a sound legal footing for a multiracial and prosperous independent Namibia, with full access to world markets. It is less satisfying as a careful statement of property rights in a modern African country, although, if one compares this constitutional provision with others around the world, it is completely adequate for the purpose it was intended to serve.

This adequacy also reflects the intention of those who drafted Article 16: that it serve this foundational political and legal purpose – and not to purport to be any kind of a model property clause for world constitutions. Future interpretation could be left to a strong legal system, completely competent for that purpose, and able to interpret the property provision as new problems developed.

The language used for the Article, e.g. “own and dispose of all forms of immovable and movable property”, might not have been the best possible, however, for it is bound up in outdated conceptions of *property*. The two terms *movable* and *immovable*, for example, refer to two distinct forms of ‘tangible’ property. *Immovable* property is real property: the basis of modern European property law, originating in feudal society, and intended to protect the landowning feudal class from the idea that kings had unlimited power, and

1 Formerly the *South West Africa People’s Organisation*.

to recognise the dispossession of those who formerly lived on that same land.² *Movable* property serves as a catchall phrase for all other goods and, later, the commercial paper representing those goods. Both forms of property, movable and immovable, were *tangible* in that they were material and could be touched and held.

There was no concept of *intellectual property* in this property regime. Over time, without explicit constitutional provision, courts around the world have very consistently interpreted this general definition of *property* to extend to intellectual property never conceived of at the time the law of property began to evolve.³ Traditional South African Roman–Dutch law’s conceptualisation of ‘things’ as the centrality of the province of property law tended to put more emphasis on corporeality as the determining factor in delimiting that province than on the totality of the patrimony or estate of the individual. Contemporary South African jurisprudence⁴ on property law recognises intellectual property as a species of real right that serves as the object of ownership by a legal subject. Since South African Roman–Dutch law has been recognised as one of the sources of law in Namibia, subject, of course, to its consistency with the provisions of the Constitution and legislation, the language of the Namibian Constitution is sufficient to include all forms of modern intellectual property under the protection of Article 16.

While this might be an appropriate starting position for interpreting intellectual property rights under the Namibian Constitution, it is neither completely clear nor without some significant problems of interpretation. To begin with, the Constitution, as a whole, is intended to create a new legal order in Namibia that recognises that all races are equal; however, it simultaneously aims to redress the evils of apartheid-era racism that left black citizens without the property rights of white citizens. Secondly, Namibia is an African and developing nation, with limited access to modern science, the vast array of laws that developed in Europe and the United States to protect that science, and the rights pertaining to patent and copyright. We shall address these two problem areas below.

The racial structure of property rights under Article 16

Property rights are inherently conservative. They legally recognise the legitimacy of the status quo, i.e. those already holding property. Literally as soon as the German colonisers of South West Africa had dispossessed the original inhabitants of their lands, they initiated a careful and detailed land recording system, and embodied it in their colonial law. Thus, the virtually genocidal dispossession of thousands of Namibian blacks from their lands was ‘legal’ under German law. The South Africans, in violation of international law, expanded this legal regime, making it even more racist and a principal element in their infamous apartheid regime, separating every aspect of life in the colony along racial lines. In 1989, at the time of the drafting of the Constitution, virtually all property rights were held by whites in Namibia, gained under the apartheid-era political order that legally entrenched white supremacy in every area, including property rights.

2 Andreasson (2006).

3 Sprankling et al. (2006:8).

4 Badenhorst et al. (2006:2).

In fact, there was an entirely separate system of black property rights, i.e. ‘communal rights’ held by black communities, with the underlying title held ‘in trust’ or on some other basis by the South African state. Over 100 or more years of colonial dispossession, originally under the Germans and later under South Africa, black property had been taken from its original owners through various devices, including genocide, murder, threats of murder, theft, fraud, alcohol-fuelled treaties, and almost any other illegality that can be named. Namibians have faced a long and sad history of the loss of their lands.⁵

At Independence, these facts clearly existed in a national political discussion. In fact, they had been central to the formation of SWAPO and the war for independence. The very legitimacy of existing – white – property rights had been challenged by SWAPO during the war. The promise of land reform, of the return of stolen lands, among other ideals, underscored the social revolution that SWAPO led. Once the war for independence had been won, it was the incorporation of Article 16 property rights that gave legitimacy to the existing, racially structured, property regime in Namibia. Thus, the political expediency of ending the war at the expense of recognising white property rights was a political compromise. This cannot be judged backwards against the flow of history: it is what occurred and it is now embodied in the Constitution.

In this compromise, Article 16 did not take adequate account of the property rights of the black majority because that was not its political object. This can be shown in the law of intellectual property, but it is even more obvious in the failure of Article 16 in particular and the Constitution in general to explicitly recognise the various forms of black land rights that are collectively lumped under the label *communal land rights*. One view, of course, is that the phrase “*all* forms of movable and immovable property individually or in association with others”⁶ included a constitutional recognition of communal land rights. One may argue that communal land rights are clearly immovable, and that the word *all* has an unambiguous meaning: it includes all forms of land rights that were known at the time of the drafting of the Constitution. Clearly, a wide range of communal land rights was known to all parties at the time, since South African apartheid-era law dealt with such rights in a number of contexts.

Indeed, since other sections of the Constitution require equality (Article 10) and affirmative action (Article 13) to abolish the vestiges of apartheid, it seems impossible that the Supreme Law of the land could have intended to protect one system of property rights held by whites and, at the same time, fail to recognise and protect the property rights held by blacks.⁷ Similarly, while Article 16 specifically recognises property held “in association with others”, it is not clear whether it protects communal or tribal or traditional associations with others as much as it protects corporations or partnerships or other Eurocentric associations, long recognised by the law.

5 For an extensive history of the dispossession of the lands of the peoples of Namibia, see Amoo & Harring (2009).

6 Emphasis added.

7 These arguments are developed in more detail in Harring (1996).

This lack of clarity has a parallel in intellectual property rights. White inventors, including farmers with ideas for new agricultural methods or products, had full access to the South African system of intellectual property rights protection, including patent and copyright law. But black inventors, with their own unique experience concerning the land, both as farmers and as hunters and foragers, did not have access to this system. Now, as modern agriculture and medicine have come to look to indigenous knowledge, this indigenous knowledge is not legally protected in the same way that other forms of intellectual property are.⁸

The situation is even more complex when it is recognised that patent and copyright law exists to protect individual initiative in seizing new ideas and legally registering some property right in them. However, if a group or collective of individuals develop similar ideas and choose to use them for the benefit of the group, no such registration occurs. Therefore, it is not just that black Namibians lacked access to the law of patents and copyrights: they also held property in a different way, and held different world views on the concept of *property* itself, which made it impossible to use the law to protect their intellectual property rights. As with communal land rights, this failure to recognise black intellectual property rights under Article 16 contradicts Articles 10 and 23 and the entire spirit of the anti-apartheid Constitution.

This failure becomes particularly significant in the modern international arena in the rapid development of European and North American scientific institutions with great research capacity who focus on developing new agricultural methods or new forms of medicine, and focusing on the experience of various peoples in developing and underdeveloped nations as a source of knowledge about these techniques.⁹ They are, bluntly, stealing and patenting indigenous peoples' knowledge – all of which is unprotected by Article 16. Indeed, such knowledge is beyond the entire scope of constitutional protection in Namibia.

There is a growing body of literature on this issue in the world, with a specific chapter of it grounded in Namibia. The San, in particular, have raised the issue of *biopiracy* – the theft of biological knowledge and materials from the San – and other peoples in the developing world – by Western corporations.¹⁰ Some companies in developing nations, including Namibia, are beginning to react by motivating the enactment of legislation to protect these intellectual property rights, but statutory protection cannot compare with explicit constitutional protection.

The San situation bears some more discussion here because it illustrates how remote their intellectual property rights are from the reach of Article 16, especially when compared with the rights to be discussed in the next section, namely the expansion of international intellectual property rights from developed nations to poor developing nations. This remoteness from Article 16 protection, it is argued, remains inconsistent with Articles

8 Kuyek (2002).

9 Wynberg (2000).

10 Hoving (2004).

10 and 23 of the Constitution, indicating that the 1990 failure to protect black property rights on par with white property rights is still an issue 20 years later.

The San are among the indigenous inhabitants of Namibia, with distinct San groups living in many places in the northern, central, and eastern parts of the country. They have traditionally lived away from the sources of law and government, and few San have had the education or money to engage the law. Nonetheless, they have had good cause to do so: they have been subject to dislocation and war, and about 40,000 members of San communities are widely dispersed in the country and across Namibia's borders.¹¹ But the San, as traditional hunters and foragers, have a unique relationship to the land and to its plants and animals. They were adept at using plants for survival and know of thousands of medicinal and other uses for various local plants. Some of these medicinal uses have become extremely valuable, while others have that potential.

Perhaps the most well known of these plants is the hoodia, a genus of succulents that the San have eaten for perhaps thousands of years to stave off hunger and thirst – a necessity on their long hunting and foraging journeys in a harsh desert climate. In 1963, under the apartheid regime, a South African scientific organisation began a large research project to document the uses of wild plants in the southern African region. Hoodia were included in this project, which was run by colonial botanists and ethnographers. In 1995, i.e. five years after Namibia's independence, the organisation patented the active elements of the plant responsible for appetite suppression – without any consent from the San, and without recognising any property rights of the San in the patent.¹² The patent was sold to Phytopharm, a company based in the United Kingdom, which in turn, entered into a joint development agreement in 2004 with Unilever, a Dutch company, which intends to market appetite suppressant products based on various hoodia extracts to overweight Europeans and North Americans. Clinical trials have begun, and the product will now enjoy a share in this US\$65-billion pharmaceutical industry. After an article in a British newspaper exposed the deal, and Pfizer, an American company, withdrew from the arrangement, an agreement was reached to pay a miniscule royalty¹³ to the San – the first agreement of its kind in the world. While this can clearly be seen as a positive step, the San apparently had no legal protection for their rights under existing South African or Namibian law, and the amount of money was small in relation to the potential value of the knowledge.¹⁴ Moreover, although a *royalty* is a type of property interest, it is not the legal equivalent of a patent or copyright.

The San have knowledge of other plants that may be of equal value, including various uses of devil's claw, another medicinal plant found in the Kalahari Desert.¹⁵ They also have artistic designs that are being used by commercial interests without licence. This knowledge is currently unprotected by the Namibian Constitution. A statute has been

11 Haring & Odendaal (2006).

12 Convention on Biological Diversity (2008).

13 "The San people are set to receive less than 0.003% of net sales of the product" (Hall 2006).

14 Wynberg (2008).

15 Krugmann (2001).

proposed to address this shortcoming, but as previously mentioned, statutory protection is not constitutional protection. Ironically, while Namibia fails to protect San intellectual property, international intellectual property regimes protect the patents and copyrights of foreign corporations on that same San property.

Legislative sources of intellectual property rights in Namibia

In most jurisdictions, including Namibia's, the most direct source of protection for intellectual property – including patents, industrial designs, trademarks and trade names – is the municipal law. Other sources include legal instruments of regional and multilateral bodies which contain provisions on intellectual property, such as the North American Free Trade Agreement, the Berne Convention, and the Agreement on the Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement). As the Namibian law currently stands, however, there is no specific legislation protecting indigenous intellectual property rights.

The words of Maritz J in the Namibian case of *Gemfarm Investments (Pty) Ltd v Trans Hex Group Ltd & Another*¹⁶ aptly describe the current status of legislative sources governing intellectual property rights in the country. In tracing the applicable Namibian legislation, Maritz J made the following statement:

All the exceptions raised in this action concern the application or interpretation of probably the most neglected area of statutory regulation in Namibia: patent legislation. In a world increasingly driven by globalised economies and markets; in an age where more technological advances have been made in a single century than in all the centuries which have preceded it combined; at a time when commerce and industries are increasingly based on and benefiting from the power of knowledge converted into ideas, inventions and technologies for the benefit of humankind and its environment, it should be a serious legislative concern that our statutory laws designed to record, preserve and protect those ideas, inventions and technologies are marooned in outdated, vague and patently inadequate enactments passed by colonial authorities in this country about a century ago.

Although Maritz J's observation refers specifically to patent law in Namibia, the same may apply to legislation *sui generis*. The latest legislation on intellectual property is the Copyright and Neighbouring Rights Protection Act,¹⁷ which provides for the protection of copyright and performers' rights.

It must be mentioned, however, that Namibia is in the process of promulgating a piece of legislation on intellectual property.¹⁸ The expectation is that there will be adequate provision made to protect the rights of indigenous people to traditional or indigenous knowledge.

16 Case No. PI 445/2005

17 No. 6 of 1994.

18 An Industrial Property Bill has been drafted and is being processed.

The recognition of foreign intellectual property rights in Namibia

Nothing in the Namibian Constitution requires recognition of foreign property rights. In fact, Article 16 expressly permits Parliament to “by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens”. Thus, a foreign patent may expressly not be protected, and a foreign company may be denied the right to patent protection in Namibia – but only if Parliament so legislates.

If foreign property interests are present in Namibia, they are protected by the Constitution until Parliament legislates otherwise. The same is true of foreign land ownership, as the case of *Kessl & Ors v The Ministry of Lands and Resettlement* makes clear.¹⁹ This makes sound policy sense for a number of reasons, most of which relate to the benefits of an open economy and the free flow of foreign capital into Namibia.

The problem with this approach is that the European and North American intellectual property rights regime prices many developing – particularly African – nations out of the market for technology, medicine, and ideas that they need for development. A computer program costing US\$1,000 may be easily affordable in the United States or Europe, but in a developing economy, may be beyond what almost the entire population can afford. The high cost of AIDS²⁰ medications is one area in which there has been a great amount of attention, and has led Western pharmaceutical corporations to make available cheaper – but, by local standards, still expensive – drugs.²¹

Namibia, in accordance with South African law that remained valid post-Independence, has always recognised international intellectual property rights. Modern international intellectual property rights regimes, particularly the TRIPS Agreement, have further imposed North American and European intellectual property rights on developing countries as an aspect of trade relations, leaving many of these nations little choice but to comply with such agreements because they produce little and are very dependent not only on foreign trade but also, particularly, Western technology, medicine, agricultural methods, and ideas.

Namibia, however, is among the few countries that have not followed this international trend. For this reason, the Namibian Registrar of Companies, Patents, Trademarks and Designs has simply declined to register patents on plants and other living organisms. In this regard, Edward Tueutjiua Kamboua, Deputy Director in the Ministry of Trade and Industry, commented as follows:²²

19 Case No. (P) A 27/2006. (P) A 266/2006 cited in Harring & Odendaal (2008).

20 Acquired immune deficiency syndrome.

21 Musungu (2007).

22 Quoted in Kuyek (2002:11).

By their very essence, patent rights are monopoly rights that are given to individuals and those individuals are from the developed world ... As such our indigenous biodiversity is then surrendered by way of patent rights to people that are living in other countries.

This administrative policy of giving away indigenous biodiversity rights, for example, has never been challenged in the Namibian courts, so it is currently law. This is despite the fact that a statute on biodiversity in relation to the patent law system that supports the protection of indigenous biodiversity has been before Parliament for several years.

Under Article 144 of the Constitution –

... the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Therefore, the TRIPS or any other international agreement that Namibia signs are protected by the Constitution and are incorporated into domestic law. Beyond this, the reference to “the general rules of public international law” may well cover all property rights protected under international law. This would include a wide range of human rights protected in various international agreements, including rights to life, indigenous land, culture, equality, family, and privacy. Potentially, this puts this recognition of human rights in conflict with patent rights – whether Namibian or international – recognised under the TRIPS Agreement. Article 25, entitled “Enforcement of Fundamental Rights and Freedoms”, forbids both Parliament and the Executive from making or enforcing any law that violates a fundamental right or freedom enumerated in Articles 5 through 24 of the Constitution.

Thus, if an intellectual property right is protected under Article 16, then there is a conflict of fundamental rights that will need to be resolved by the courts. For example, if an intellectual property right under the TRIPS Agreement is protected by statute alone or additionally by another provision of the Constitution such as Article 144, the fundamental right must be given preference. Depending on how the courts construe various intellectual property rights, this issue can become even more complex, adding new layers of protection. Such fundamental rights as that to free expression in Article 21, to culture in Article 19, to education in Article 20, and to privacy in Article 19 have all been argued to protect intellectual property rights, giving intellectual property rights the status of a fundamental freedom, specially protected under the Constitution.²³ No Namibian court has so held, however. In fact, it is doubtful that such an expansive view should even be held: it would provide an inflated level of protection that would endear Namibia to foreign corporations, but would make protected items beyond the reach of most Namibians. This, in turn, raises constitutional issues in such areas as equality (Article 10) and affirmative action (Article 23).

At this point, another set of issues needs to be considered: that of administrative justice (Article 18) and of legal capacity. Assuming that intellectual property is protected in Namibia by statute only and that these statutes are not protected by Article 16, intellectual

23 Nwauche (2009).

property law is an extremely complex area of law, requiring highly specialised and educated administration, and necessitating the existence of a highly trained subspecialty of law – that of patent and copyright lawyers. Namibia has a strong legal profession and a highly regarded judiciary, so this is not impossible, but it is a very expensive regulatory regime. The civil service, especially, has had difficulty with training in legal capacity, again as *Kessl* revealed within the Ministry of Lands and Resettlement. Training staff in this capacity is also not going to be a simple or inexpensive matter.

The sum of this discussion is that there are potential conflicts between international patent law under the TRIPS Agreement and Namibian law that may ultimately come before the Namibian courts. The extent to which the Constitution protects various intellectual property rights, particularly foreign rights, when in conflict with the various rights of Namibian citizens – especially in the context of biodiversity issues – is unresolved.

Intellectual property rights in the Namibian courts

The *Gemfarm* case, delivered on 7 April 2009, describes patent law as “probably the most neglected area of statutory regulation in Namibia”. Indeed, it is the only reported case interpreting Namibian patent law. As such, the case makes clear that patent law is protected under Namibian law, while at the same time, it also calls for a modern revision of Namibia’s patent laws, dated from section 18 of the Union Patents, Designs, Trademarks and Copyright Act of 1916, imposed on the Territory of South West Africa by the Government of South Africa, acting under its League of Nations Mandate. The subsequent layering of various revisions has created an interpretive nightmare. But, as Maritz J demonstrated in his lengthy and detailed opinion referred to earlier herein, difficulty of interpretation does not stop any modern court from rendering a judgment.

While not referring to Article 16 in the opinion, Judge Maritz described a patent as “incorporeal property”, which would bring it within the scope of Article 16. Indeed, this is so obvious that neither party raised any Article 16 issue. Therefore, the case demonstrates that intellectual property law, even if it is rarely raised in Namibian courts, will receive the careful and full protection of Namibian law, under both statutory law and, presumably, under Article 16 of the Namibian Constitution.

Conclusion

Article 16 of the Namibian Constitution protects intellectual property rights as “incorporeal property”, included in the phrase “all forms of property, movable or immovable”. This said, the constitutional language is sparse and requires a revised and modern series of intellectual property statutes, appropriate to the needs of the people of Namibia. The detail and care evident in the legal analysis in *Gemfarm* required no less than seven firms of advocates, all well paid by parties with a large investment in the case. This is most often true of intellectual property litigation in the modern world. The courts are obliged to take cases as they are presented and, if the involvement of so much legal talent is a requirement of intellectual property law, this will have an unequal impact on

such law and on those requiring and deserving access to it – which will inevitably protect the rich at the expense of the poor.

The intellectual property of the poor people of Namibia cannot be defended in this same process or under existing statutory law. The Union Patents, Designs, Trademarks and Copyright Act gave no concern to black property rights, whether relating to intellectual property or land. Full attention has to be paid to the intellectual property rights of the indigenous peoples of Namibia in future revisions of intellectual property law in the country. It can be argued that this is constitutionally required under Article 16, especially when read together with Articles 10 and 21, because the Constitution was adopted as an instrument to end the vestiges of apartheid, racism, and inequality.

The issue of biodiversity may pose the most pointed challenge yet to Namibian courts in applying the Constitution to intellectual property rights. Here, the basic property and human rights of the poorest in Namibia – the traditional farmers – are potentially in conflict with international corporate interests and the protection of the latter's intellectual property rights under international law.

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Labour hire in Namibia: Constitutional right or modern slavery?¹

Fritz Nghiishililwa

Introduction

In *Africa Personnel Services v Government of Namibia and Others*,² the High Court ruled that section 128 of the Labour Act, 2007,³ which outlawed labour hire activities in Namibia, was constitutional.

This means that it is unconstitutional and illegal to engage or conduct business as a labour broker or to hire workers to a third party for a reward.

Amongst the reasons given by the court were the following:

- That the contract of employment had only two parties: the employer and the employee
- That labour hire had no legal basis in Namibian common law, which is based on Roman law
- That the imposition of a third person, i.e. the labour hire company, in the employer–employee was unlawful, and
- That the right protected by Article 21(1)(j) of the Constitution of the Republic of Namibia did not include labour hire companies.

Examining the court’s decision from a different perspective, one could argue that the approach employed was conservative and unrealistic. Secondly, the court’s interpretation of Article 21(1)(j) was very narrow: surprisingly, it overlooked or omitted to consider the position of the International Labour Organisation (ILO) Conventions, which represent the law at international level in terms of labour hire. How does the ILO deal with this issue, therefore?

Labour broking or labour hire in the context of the ILO

The ILO called for the abolition of profit-driven employment agencies shortly after its founding in 1919. This was given effect by ILO Convention 34 (1935), proposing the abolition of profit-making employment agencies in favour of a State monopoly. However, the demand for contingent labour created a demand for service providers: a demand not efficiently met by State actors and to which private entrepreneurs responded, despite

1 This paper was previously published in the *Namibia Law Journal*, 2(2):87–94. Only the postscript is new.

2 Case No. A4/2008.

3 No. 11 of 2007.

legal restrictions or prohibitions. The demand for change could no longer be ignored. Thus, the Convention Concerning Fee-charging Employment Agencies (No. 96) – which formed the legal basis of an ILO tenet that labour is not a commodity – was revised. Adopted in 1949, Convention 96 only regulated work recruitment and placement; basically, it authorised limited exceptions to the rule laid down in Convention 34.⁴

The ILO's main concern has been focused on workers who find themselves outside the protection of labour legislation. Among them are workers employed in a triangular employment relationship, namely when they are –⁵

... employees of an enterprise (“the provider”) perform work for a third party (“the user enterprise”) to whom their employer provides labour or services.

As mentioned earlier, debates over the role and function of private employment agencies in the labour market have a long history. The departure point for this was the Treaty of Versailles, which entrenched various core principles surrounding the rights of workers at the end of World War I.⁶

The ILO's adoption of Convention 181 served as a response to the serious tension within the prevailing regulatory regimes associated with the standard employment relationship. Raday pointed out that this tension centres on the perceived necessity to transform the normative model of employment, while simultaneously preserving security for workers engaged in employment relationships where responsibility could not be placed squarely on one entity in full.⁷

Convention 181 not only recognises private employment agencies as employers, but also establishes a minimum level of protection of their employees, who are made available to a user enterprise to perform contract labour. By adopting Convention 181, the ILO reversed its historic stance against labour market intermediaries and revised its sceptical view of non-standard forms of employment. In a way, Convention 181 also legitimises a triangular employment relationship, shifting from the standard employment relationship towards a new model which embraces more ‘flexible’ forms of employment.⁸ Article 1 of Convention 181 defines the term *private employment agency* as –⁹

... any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

4 See Finkin & Jacoby (2001:3–4).

5 Theron (2008:16–17).

6 Vosko (1997:48–49). The clause concerning the rights of workers’ included freedom of association, the eight-hour day, weekly rest, the abolition of child labour, equal remuneration for work of equal value, and the general principle that labour was not a commodity.

7 (ibid.:44–47); see also Raday (1999:1–2).

8 Vosko (1997:44).

9 Article 1, ILO Convention 181 Concerning Private Employment Agencies, 1997.

- (a) services for matching offers and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
- (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person which assigns their tasks and supervises the execution of these tasks;
- (c) other services relating to jobseekers, as determined by the competent authority after consulting the most representative employers and workers' organisations, such as the provision of information that does not set out to match specific offers of and applications for employment.

The purpose of Convention 181 is to allow the operations of private employment agencies as well as the protection of the workers using their services, within the framework of its provisions.¹⁰ It is the responsibility of member states to determine the conditions governing the operations of private employment agencies in accordance with the system of licensing or certification, except where they are otherwise regulated or determined by appropriate national laws.¹¹ The Convention further provides that workers recruited by private employment agencies should not be denied the right to freedom of association and the right to bargain collectively.¹² Private agencies are prohibited to charge directly or indirectly, in whole or in part, any fees or fees or costs to workers.¹³ Member states are obliged to ensure that the necessary measures are taken to provide adequate protection for workers employed by private employment agencies in relation to their working conditions.¹⁴

Options open to the court

The first option was to follow the ILO stance by not banning the labour hire industry, but rather to suggest stricter regulation. Other countries have done the same.¹⁵ Thus, to

10 See Article 2.

11 See Article 3.

12 See Article 4.

13 See Article 7.

14 The *protection* referred to in Article 11 is in relation to freedom of association; collective bargaining; minimum wage; working time and working conditions; statutory social security benefits; access to training; occupational health and safety; compensation in case of occupational accidents or disease; compensation in case of insolvency and protection of workers' claims; maternity protection and benefits; and parental protection and benefits.

15 In France, for example, if a company is engaged in hiring temporary workers, it is obliged to declare this to the labour administration, and to provide some financial guarantee to ensure payment of wages to the workers and tax contributions to the state if the temporary work firm is ever declared insolvent. Hiring temporary work is the prerogative of the company. For more information on the French system, see Vigneau (2001:2–3). In South Africa, labour hire is regulated. Theron (2008:9), for example, points out that, in 1983, an amendment to the Labour Relations Act (LRA), 1956 was introduced to regulate labour broking (as temporary employment services, or TESs, were then known). Today, the relevant provision is section 198 of the LRA, 1995 (No. 66 of 1995).

interpret Article 21(1)(j) in a purposive, broad and generous manner¹⁶ so as to include the protection of the rights of all the parties to the labour hire relationship was crucial if

the court was to arrive at an objective analysis of the issues raised in order to make the correct finding.

Protection of fundamental rights was tested in the case of *Kauesa v the Minister of Home Affairs and others*,¹⁷ where a police officer challenged a police regulation that prohibited members of the force to publicly criticise its top leadership. The plaintiff, a police officer, participated in a televised discussion on police-related issues. During the debate, the latter criticised the top leadership of the force, which resulted in him being brought before a disciplinary hearing – at which he was found guilty. The officer challenged the regulation concerned, arguing that it infringed on his fundamental right to freedom of speech and expression as guaranteed in Article 21(1)(a) of the Constitution. The court ruled in favour of the protection of the fundamental right.

The court could have arrived at a different verdict had it exercised its discretion, as provided in Article 25 of the Constitution, which reads as follows:

- (1) Save in so far [sic] as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any other law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:
 - (a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid.

It may validly be argued that section 128(1) of the Labour Act, 2007 operates retrospectively in the sense that it has effectively taken away a fundamental right that existed before its enactment, namely the right to practise any profession, or carry any occupation, trade or business.

16 *Minister of Defence v Mwandighi* 1998 NR 96 (HC).

17 *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC). The Supreme Court overruled the High Court decision. See also *Fantasy Enterprises CC t/a Hustler 'The Shop' v Minister of Home Affairs & Another; Nasilowki & Others v Minister of Justice & Others* 1998 NR 96 (HC).

Section 128(1) appears unrealistic and unreasonable because it ignores what is happening in the labour market, thus rendering it defective. Roman law, on which our Namibian law is based, is outdated. Secondly, the law is not static: it is dynamic in the sense that it must address the legal, social and economic needs of the society it serves.

The High Court did not find it necessary to balance the right of the labour hire companies as protected in Article 21 with the disadvantages that labour hire has on the workforce – which was one of the fundamental issues in the *Africa Personnel Services* case. It is not realistic to argue that, once labour hire was found to be against the law and alien to the Namibian common law, the debate was over.¹⁸ In my opinion, the debate is not over: it has only just started. There are many unanswered questions, one of which is this: is labour hire relevant to the global economy of the future? Should the answer be in the affirmative, are the available labour laws sufficient to regulate the industry or do we need additional laws?

Parliament sought to justify the prohibition of labour hire on the grounds that the practice was against public policy (*contra bonis mores*) because it offended decency and morality. Unfortunately, the law is silent here in the sense that it does not provide for or define which aspects of labour practices are actually guilty of such offence against decency and morality.

Do labour hire activities constitute a crime? In his book, *Principles of Criminal Law*, Burchell defines *crime* as follows:¹⁹

... a crime is any conduct which is defined by the law to be a crime for which punishment is prescribed.

He points out that certain conduct is a crime because the law pronounces it to be so. Conduct becomes a crime when society, acting through its chosen representatives, decides that a particular type of conduct is bad and ought to be repressed through the medium of criminal law.²⁰ It is true, therefore, that “the criminal law is the formal cause of crime ... Without a criminal code there would be no crime”.²¹

In an attempt to provide some clarity, Snyman noted that the concept of *unlawfulness* embraces a negative or disapproving judgment by the legal order of the act. The law either approves or disapproves of the act: it is simply either *lawful* or *unlawful*.²²

Under common law, all persons are free to enter into lawful agreements, whether these individuals are two or more – including juristic persons such as labour hire companies.

18 (ibid.:103).

19 Burchell (2005:58).

20 (ibid.).

21 (ibid.).

22 Snyman (2002:97).

The argument directed against labour hire companies refers to the exploitative nature of the industry as well as its similarities with the now defunct migrant labour system that existed before Namibia's independence, which commoditised labour. Obviously, no Namibian of sound mind would support exploitation or the sale of labour.

But the colonial masters have now left, and Namibia is a sovereign and democratic state, founded upon the principles of democracy, the rule of law, and justice for all.²³ Parliament has the power to pass appropriate and sound laws to regulate and guide social and economic activities. The question to ask, therefore, is whether Roman law is still relevant in Namibia today.

Relevance of Roman law

Hoeflich gave the following warning to those who wanted to study Roman law:²⁴

With the decline in the mercantile empires and the concomitant decline in comparative law during this period, no compelling reason remained for a jurist to study Roman and Civil law.

This appears to suggest that the relevance of Roman law in today's economic, political and legal set-up is diminishing, and relying on it may retard development.

In support of the existence of a triangular relationship in employment, Roskam explained that, in essence, —²⁵

[i]f there is a labour broker or temporary employee services (TES), then there is a triangular relationship. The relationship between the labour broker and the workers is one of employment. The relationship between the labour broker and the client is regulated by commercial contract. The relationship between the client and the workers is governed by statute in terms of which the client is jointly and severally liable with the labour broker in respect of certain contraventions of labour-related agreements, awards, statutes, or sectoral determinations. Therefore the client acquires the status of employer in certain circumstances.

In a study conducted in 2006 by the Labour Resources and Research Institute (LaRRI) for the Ministry of Labour, the Institute pointed out the following:²⁶

... [o]utlawing labour hire while allowing other forms of outsourcing to continue might thus not solve the problem. Instead, the general practice of outsourcing would have to be severely limited by placing restrictions on companies. This would certainly be vehemently opposed by the private sector and given

23 Article 1(1).

24 Hoeflich (1997:146).

25 Roskam (2007:41).

26 LaRRI (2006:72).

Namibia's pronouncements in favour of "free market policies" it is unlikely that the Namibian government would be prepared to take such a step.

The report has criticised the exploitative nature of the labour hire system²⁷ and that labour laws are not adhered to; however, it acknowledges that the system offers many advantages to client companies. The report proposed strict regulations for the industry. These cover –

- a licensing regime for labour hire companies
- compulsory licence fees
- the specification of responsibilities and liabilities of labour hire and client companies towards their workers, especially with regard to issues of occupational health and safety as well as retrenchments, and
- the role of trade unions in terms of negotiating on behalf of labour hire workers.

The complexity of the labour hire industry demands that a new but separate legal instrument be enacted to govern and regulate the industry.

Laplagne et al.²⁸ observed that changes in the industrial relations environment and practices by firms had contributed to an increase in the number of firms using labour hire. They also noted that, in addition to these changes in the labour environment and practice, widespread technological change and increased pressures on firms had influenced their employment strategies, including the use of labour hire.²⁹ The same is true in Namibia.

In South Africa, the term *temporary employment services* (TESS) is used rather than *labour hire*.

Section 198 of the South African Labour Relations Act³⁰ defines *temporary employment services* as follows:

- (1) In this section, "temporary employment service" means any person who, for reward, procures for or provides to a client other persons –
 - (a) who render services to, or perform work for, the client; and
 - (b) who are remunerated by the temporary employment service.

The interesting part in the latter law is found in section 198(2), which provides that the labour broker/TESS is the employer of the workers – and not the client. Furthermore, in terms of section 98(4), the client is jointly responsible with the broker if there is a contravention of –

- a collective agreement concluded in a bargaining council that regulates terms and conditions of employment, or
- a binding arbitration award that regulates terms and conditions of employment.

27 (ibid.:15–19).

28 Laplagne et al. (2005:33).

29 (ibid.:34).

30 No. 66 of 1995.

Shortly after learning of the Namibian court's ruling, South Africa expressed her support for the prospect of banning labour broking after the general elections. In South Africa, the industry employs approximately 500,000³¹ people per year, in Namibia it employs about 20,000.³² Looking at the number of workers affected, the disbandment of the industry will have a devastating effect on both nations in respect of their already high unemployment rates. The question that remains unanswered is this: whose interests is the ban serving?

Postscript

*Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others*³³

In the light of the history of labour hire and the profound suffering it had caused the Namibian people, the High Court had concluded that the banning of labour hire by section 128 of the Labour Act was justified.

On 14 December 2009, however, a full bench³⁴ of the Namibian Supreme Court declared section 128 of the Labour Act unconstitutional. Although the Supreme Court agreed that the labour hire system of the colonial era offended the dignity of an individual and was resented by the majority of Namibians, it found that the present operations of so-called labour hire businesses could not be compared and had little in common with the labour hire system of the colonial era.

The first question the Supreme Court had to answer was whether the right envisaged in Article 21(1)(j) of the Namibian Constitution applied to juristic persons. In its broad interpretation of this Article and, more specifically, Chapter 3 therein, to give to subjects the full measure of the rights set out therein, the Supreme Court found no reason to limit the words "All persons" in that Article to *natural persons*. The appellant, as an aggrieved person, had locus standi, the Supreme Court found.

The Supreme Court also found that a mere statutory prohibition of an economic activity could not place the prohibition outside the ambit of constitutional review. Thus, the said Court was obliged to ask a second question: Was the statutory limitation of a freedom permissible in terms of Article 21(2)³⁵ of the Constitution? In this case, the question

31 Palmer (2009).

32 LaRRI (2006:26).

33 Case No. SA 51/2008.

34 Shivute, CJ; Maritz, JA; Strydom, AJA; Chomba, AJA; and Mtambanengwe, AJA.

35 "The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic [Continued overleaf]

that needed to be answered was whether or not the limitation of the appellant's right "to practise any profession, or carry on any occupation, trade or business", as stated in Article 21(1)(j), by the prohibition of labour hire in section 128 of the Labour Act could be justified in terms of Article 21(2). Indeed, if section 128 of the Labour Act was found to be constitutional, it would be impossible for APS to proceed with its business.

The Supreme Court accepted that section 128 of the Labour Act fell within the ambit of government policy as described in Article 95 of the Constitution, and that the objectives of the Act could be seen as an action to impose reasonable restrictions on economic freedom because they were necessary in a democratic society and required in the interests of decency or morality.

However, even if there is a rational connection between the prohibition of labour hire and the permissible objective of morality and decency as constitutional reasons for the restriction of freedoms and rights, the Supreme Court had to be satisfied that such restrictions were reasonable. In other words, the restrictions had to be limited to what was reasonably necessary to achieve the objective.

Comparing the nature of the appellant's business with the old system of labour hire, the Supreme Court concluded that modern agency work could not be equated to labour hire as epitomised by the despised the South West African Native Labour Association (SWANLA) system. Both parties accepted that labour hire or agency work was nevertheless open to abuse. However, while the appellant suggested that the abuses could be controlled by regulation, the respondents insisted that section 128 of the Labour Act was a legitimate means to deal with past and possible future abuse.

If one looks at the regulatory suggestions of the ILO's Private Employment Agencies Convention³⁶ and a judgment by the European Court of Human Rights quoted by the Supreme Court, where the word *necessary* in the phrase "necessary in a democratic society" was discussed and a conclusion was reached with reference to case law, the requirement of reasonableness in terms of Article 21(2) requires that a limitation should not only be reasonable, but also necessary. The Supreme Court also looked at regulatory measures in other democratic countries and concluded that the prohibition imposed restrictions on commercial activities protected by Article 21(1)(j) that were grossly unreasonable and overly broad. Given the suggested scope for regulatory measures in the ILO Convention, the objectives of the Act could be achieved without a total prohibition.

society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

36 Convention No 181 of 1997, which defines the term *private employment agency* as follows in Article 1:

"For the purpose of this Convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

[Continued overleaf]

The Supreme Court therefore made the following closing comment:³⁷

Given the scope of regulation contemplated in the 1997-Convention [sic] to facilitate agency work and to prevent potential abuses[,] the wide-ranging regulative measures introduced in other democratic societies to demarcate the areas of economic activity and the categories of employees in relation to which agency work may properly be engaged in and the potential to effectively regulate agency work in Namibia without compromising the objects of the Act or the legitimate objectives of “decency and morality” in Article 21(2) of the Constitution, the blanket prohibition of agency work by s. 128 of the Act substantially overshoots permissible restrictions which, in terms of that Sub-Article, may be placed on the exercise of the freedom to carry on any trade or business protected under Article 21(1)(j) of the Constitution. The prohibition is tailored much wider than that which reasonable restrictions would require for the achievement of the same objectives and is disproportionately severe compared to what is necessary in a democratic society for those purposes. Even if a generous margin of appreciation would be allowed in favour of Parliament, as the respondents urge us to do, the unreasonable extent of the prohibition’s sweep would still fall well outside it.

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- (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
 - (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a “user enterprise”) which assigns their tasks and supervises the execution of these tasks;
 - (c) other services relating to jobseeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.”

37 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others* Case No. SA 51/2008.

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Environmental rights and justice under the Namibian Constitution

Oliver C Ruppel

Introduction

Colonialism, apartheid and the unequal distribution of resources have curbed human rights and challenged progress in Namibia for a long time. Today, that is, 20 years after Independence¹ and the promulgation of the Constitution of the Republic of Namibia,² the country still faces challenges that impede, inter alia, the development of environmental justice and the explicit recognition of environmental (human) rights.

The adoption of a human rights framework and culture in terms of the Namibian Constitution of 1990 has without doubt been a positive attribute of the country since it gained independence. The Constitution serves as the fundamental and supreme law, and the Namibian Government is subordinate to it.³ The Constitution also established a new regime relating to natural resources in the country.⁴ Regardless of the aforementioned, the legal milieu in support of environmental rights and justice is still far from perfect.

In its first part, this article examines the categorisation and concept of *environmental rights and justice* in general, and then views the Namibian constitutional dispensation in that light. The article intends to establish whether and to what extent environmental (human) rights are explicitly or implicitly recognised in Namibia, demonstrating at the same time how human rights and the environment are interrelated and indivisible.

Environmental rights: What category do they belong to?

The categorisation of human rights into generations has not been without criticism;⁵ and it must be admitted that the attempt to relegate human rights into categories, be it into generations or other classifications, always bears the risk of not being capable of determining exactly which rights belong to which category. This is inherent in the very nature of human rights in general, as human rights are universal, inalienable, indivisible, interrelated and interdependent.⁶

1 Namibia became independent on 21 March 1990.

2 No. 1 of 1990.

3 Naldi (1995:15–19).

4 Carpenter (1991:56–57).

5 Scheinin (2009:25).

6 These important characteristics of human rights were formulated and reaffirmed by the World Conference on Human Rights held in Vienna in 1993, and are laid down in Section I(5) of the Vienna Declaration and Programme of Action. See [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/A.CONF.157.23.En?OpenDocument); last accessed 25 November 2009.

The categorisation of human rights into three generations goes back to the Czech-French lawyer Karel Vasak, the first Secretary-General of the International Institute for Human Rights in Strasbourg. As early as 1977, he divided human rights into three generations. The so-called *first-generation* (human) rights⁷ refer to traditional civil and political liberties prominent in Western liberal democracies, such as freedom of speech, religion, and the press; and freedom from torture, which presuppose a duty of non-interference on the part of government towards individuals. These rights are the ‘classical’ human rights contained in notable instruments such as Chapter 3 of the Namibian Constitution. For many years, the dominant position was that only these rights were genuine human rights.⁸

Second-generation rights, namely economic, social and cultural rights, have generally been considered as rights which require affirmative government action for their realisation. Second-generation rights are often styled as group rights or collective rights, in that they pertain to the well-being of whole societies. They contrast with first-generation rights that have been perceived as individual entitlements, particularly the prerogatives of individuals, as they refer to rights which are held and exercised by all the people collectively or by specific subsets of people. Examples of second-generation rights include the right to education, work, social security, food, self-determination, and an adequate standard of living. These rights are codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹ and also in Articles 23–29 of the Universal Declaration of Human Rights.¹⁰ Writers reluctant to recognise second-generation rights as human rights have often based their arguments on the assumption that courts are unable to enforce affirmative duties on states and, therefore, that such rights are mere aspirational statements. Similarly, critics have opined that, regardless of the political system or level of economic development, all states are able to comply with civil and political rights, but not all states have the ability to provide the financial and technical resources for the realisation of affirmative obligations such as education and an adequate standard of living.¹¹

*Third-generation*¹² or ‘solidarity’ rights are the most recently recognised category of human rights.¹³ This grouping has been distinguished from the other two categories of human rights in that its realisation is predicated not only upon both the affirmative and negative duties of the state, but also upon the behaviour of each individual. Rights in this category include self-determination as well as a host of normative expressions whose status as human rights is still controversial. Third-generation rights include the right to development, the right to peace, and environmental rights.¹⁴

7 Vasak (1977).

8 Steiner et al. (2008).

9 1966 United Nations International Covenant on Economic, Social and Cultural Rights; see www.unhchr.ch/html/menu3/b/a_ceschr.htm; last accessed 29 December 2009.

10 1948 United Nations Universal Declaration of Human Rights; see <http://www.unhchr.ch/udhr/lang/eng.htm>; last accessed 29 December 2009.

11 On the classification of human rights, see Parker (2002).

12 See Ruppel (2008a:101ff).

13 Recent reference has been made to so-called fourth-generation human rights or ‘communication rights’, which are concerned with human rights in the information society.

14 Vasak (1977).

However, strictly speaking, environmental rights actually do not really fit into any one particular category or generation of human rights. These third-generation rights can be viewed from different angles, somehow touching all of the above-mentioned generations of rights. Thus, through existing civil and political rights,¹⁵ it should be possible to give individuals and groups access to environmental information, judicial remedies, and political participation. In this context, environmental rights should be seen as empowerment rights that grant participation in environmental decision-making, compelling governments to meet minimum standards of protecting life and property from environmental harm. This anthropocentric approach¹⁶ focuses on harmful impacts on individuals rather than on the environment, thus leading to a ‘greening’ of human rights law. Another possibility of dealing with environmental rights would be in treating a healthy environment as an economic, social or cultural right, comparable to those codified in the ICESCR. This approach values the environment as a good in its own that is vulnerable and at the same time linked to development. Like (other) economic, social and cultural rights, environmental rights are still largely of an aspirational nature and in many cases enforceable only through the relatively weak international supervisory mechanisms.

The fact that environmental rights are usually not expressly recognised by the 1966 Conventions,¹⁷ meaning that their status and content are often still seen to be contentious.¹⁸ As a collective or solidarity right, environmental quality provides communities rather than individuals with the right to determine how their environment and natural resources should be managed and protected.¹⁹

Environmental rights – for the purpose of this article and, more importantly, for their improved recognition and application in Namibia – should not be seen in isolation from the other human rights. They are Janus-faced, embracing simultaneously morality and the law. They are constructions rather than moral truths to be discovered and, as such, have an inherently juridical character, which entails an orientation towards a positive conceptualisation.²⁰

The concept of *environmental justice*

Modern human rights law is commonly considered to have its roots in the 1945 Charter of the United Nations (UN), whereas environmental concerns started to move to the centre

15 1966 United Nations International Covenant on Civil and Political Rights; see <http://untreaty.un.org/cod/avl/ha/iccpr/iccpr.html>; last accessed 29 December 2009.

16 Also a human-centred approach, as opposed to an ecocentric approach that is focused on the environment, or a theocultural approach that is focused on religion, philosophy and culture. See Theron (1997:23–44).

17 Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted by the United Nations General Assembly on 16 December 1966.

18 Scheinin (2009:25).

19 See also Boyle (2007:471).

20 Mushkat (2009:119ff).

of international activities with the UN Conference on the Human Environment held in Stockholm in 1972. More than 30 African countries²¹ participated at this conference and, thus, committed themselves – at least to some extent – to recognising and promoting environmental concerns on the international level.²² At the Conference, the then Indian Prime Minister Indira Gandhi stated the following:²³

We do not want to impoverish the environment any further, but we cannot forget the grim of poverty of large numbers of people. When they themselves feel deprived how can we urge the preservation of animals? How can we speak to those who live ... in slums about keeping our oceans, rivers and the air clean when their own lives are contaminated at the source? Environment cannot be improved in conditions of poverty.

Today, in both the industrialised and developing parts of the world, a growing body of evidence still demonstrates that poor and other disenfranchised groups have been the greatest victims of environmental degradation.²⁴ The poor and marginalised still lack access to justice, especially environmental justice. The North/South divide still needs to be bridged in this respect.²⁵ The social impacts of degradation increase the vulnerability of specific groups and populations. This vulnerability has become a key element in human rights discussions.²⁶ Rights and responsibilities regarding the utilisation of environmental resources need to be distributed with greater fairness among communities, both globally and domestically. Therefore, human rights movements increasingly apply a rights-based

21 Some 113 states were invited, in accordance with UN General Assembly Resolution 2850 (XXVI). The following African states took part in the Conference: Algeria, Botswana, Burundi, Cameroon, Central African Republic, Chad, Congo, Egypt, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab Republic, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Niger, Nigeria, Senegal, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zaire, and Zambia.

22 It should be noted that the Stockholm Declaration is legally only a non-mandatory document.

23 Quoted in Anand (1980:10).

24 Globally, contaminated water remains the greatest single cause of human disease and death. About 1.2 billion people still lack access to clean drinking water, 80% of whom are the rural poor. Some 2.4 billion people lack adequate sanitation. In many developing countries, poor health conditions prevail as a result of contaminated water, poor sanitation, severe air pollution, malaria and other infectious diseases, and the spread of HIV. Two thirds of the world population will live in water-stressed areas by 2025, and there are already an estimated 25 million environmental refugees resulting from changing rain patterns, floods, storms and rising tides, and this figure is likely to rise significantly (UNDP 2006). Flooding, housing collapse, alterations of freshwater and irrigation water supplies, infectious diseases, prolonged drought and subsequent forced migration, deforestation and flooding; poverty and hunger due to reduced livelihood assets; insufficient primary education caused by deteriorated infrastructure and displacement; child mortality as a result of extreme weather events; and maternal health problems stemming from the effects of weather and drought are only some of the possible impacts of climate change, which specifically threaten people living in rural settings, most of whom are poor (UNDP 2007).

25 Beyerlein (2006:259–296).

26 Thus, the Human Rights and Documentation Centre conducted a study in 2009–2010 on human vulnerability and climate change.

strategy to confront global environmental devastation and to protect ecological habitats and the planet for future generations.²⁷

The concept of *environmental justice* embraces two objectives. The first is to ensure that rights and responsibilities regarding the utilisation of environmental resources are distributed with greater fairness among communities, both globally and domestically. This entails ensuring that poor and marginalised communities do not suffer a disproportionate burden of the costs associated with the development of resources, while not enjoying equivalent benefits from their utilisation. The second is to reduce the overall amount of environmental damage, again globally and domestically.²⁸ Recognition of the link between the abuse of the human rights of various vulnerable communities and related damage to their environment is expressed in the concept *environmental justice*. The scale and urgency of environmental justice are beyond past challenges: solving them will mean destabilising and reorienting global economic growth.²⁹

Only recently, the Council of Europe stated that “living in a healthy environment should be made a legally enforceable human right”.³⁰ On 30 September 2009, the Parliamentary Assembly of the Council of Europe (PACE) called for the “right to live in a healthy and viable environment” to be enshrined in the European Convention on Human Rights – which would make it legally enforceable in courts across Europe. It was further said that “society as a whole ... must pass on a healthy and viable environment to future generations, in accordance with the principle of solidarity between generations”.³¹ Yet, the Legal Affairs Committee expressed a dissenting opinion, raising concerns about defining any new right in a way that could be enforced.³²

Although the European Convention on Human Rights does not include any provisions on the environment, the European Court of Human Rights (ECHR) has upheld the right to a healthy environment in an indirect manner. In its *Powell & Rayner v The United Kingdom* judgment of 21 February 1990, it acknowledged the potential link between certain forms of environmental pollution and the human rights enshrined in the

27 Kiss & Shelton (2004:12ff).

28 (ibid.).

29 Thus, the issue of climate change prompts significant questions about justice and distribution. There is an acute need for intelligent collective action focusing on the human suffering that climate change will cause in future. As a matter of law, the human rights of individuals need to be viewed in terms of state obligations: it is the state that is responsible for human rights fulfilment. This assignation of responsibility may seem inadequate in the context of climate change, where social and economic rights in poor countries are threatened primarily by actions undertaken elsewhere. The special responsibility of wealthy countries to mitigate climate change remains – and is widely accepted. See also Kiss & Shelton (2004:12ff).

30 <http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2206>, last accessed 3 January 2010.

31 (ibid.).

32 (ibid.).

Convention, in particular with regard to the right to respect for people's homes (Article 8). It has confirmed this position in several subsequent rulings.³³

Environmental justice includes two complementary dimensions: *procedural* and *substantive*. The *procedural* dimension is divided into three rights: the right to information, the right to participate in decision-making, and the right of access to justice in environmental matters. Environmental rights still face a multitude of challenges of a procedural nature. To what extent these challenges are relevant depends on the following aspects, inter alia:

- The question of whether and under what conditions an individual, organisation or state has the right to commence action regarding a right to environment needs to be addressed. The issue of locus standi is of great relevance in respect of judicial enforcement of the right to environment and needs specific attention. The Indian experience with the establishment of public interest litigation has shown that environmental concerns can be advanced more efficiently by enabling any citizen to appeal directly to the Supreme Court.³⁴
- Another focal point deals with the question of who would be the proper addressee of claims dealing with a right to environment, and whether a right to environment is to be enforced vertically between individuals and/or horizontally between individuals and states. Moreover, the question whether environmental rights can be enforced at the national or international level is of particular interest in the globalising world, also with regard to human rights law and the concept of *regional integration*, which is playing an increasingly important role in sub-Saharan Africa.³⁵

The substantive dimension will be monitored from a Namibian perspective in the following paragraphs.

Environmental rights and justice under the Namibian Constitution

Many national constitutions cover environmental protection and establish it as a constitutional objective, an individual right, or both. These include Brazil, Ecuador, Peru, the Philippines, South Africa, and South Korea. Among Council of Europe member countries, the constitutions of Belgium, Hungary, Norway, Poland, Portugal, Slovakia, Slovenia, Spain and Turkey acknowledge a fundamental individual right to environmental protection, while those of Austria, Finland, France, Germany, Greece, the Netherlands,

33 Here one could mention the judgments in *López Ostra v Spain* of 9 December 1994, which dealt with the relationship between the right to a healthy environment and the right to respect for private life; *Guerra & Others v Italy* of 19 February 1998, which put forward the theory of the "positive obligations" of states; *Hatton & Others v The United Kingdom* of 8 July 2003, in which the Grand Chamber employed the term environmental human rights; and *Öneryıldız v Turkey* of 30 November 2004, for an approach to environmental degradation from the angle of Article 2 of the Convention enshrining the right to life.

34 Rosencranz & Jackson (2003:228).

35 Ruppel (2009c:275–318).

Sweden and Switzerland enshrine environmental protection as a constitutional objective. In southern Africa, it can be observed that, during the past few decades, states have placed a strong emphasis on including environmental provisions in their respective legal frameworks. While some constitutions explicitly recognise the existence of such right within their respective Bills of Rights,³⁶ others include environmental concerns in the principles of state policy³⁷ rather than formulating a human right to environment as a fundamental human right.

In some legal systems it can be observed that a human right to environment is established on the basis of other fundamental human rights. More often than not, international provisions binding on states serve to establish a human right to environment. Besides a rather historic aspect – namely that a human right to environment has only been recognised during recent decades and, therefore, is subsequent to the drafting process of many constitutions – the reasons for such different approaches include being rooted in considerations relating to limitations or derogation of other rights, as well as with regard to state obligations and the enforcement mechanisms available specifically for fundamental human rights. The discussion of whether to equip the citizen with a subjective and enforceable human right to environment is ongoing and highly relevant, particularly with regard to the potential impacts of climate change.³⁸

When the Namibian Constitution came into force, it was lauded as a model for Africa based on its drafting process and content. The Constitution as adopted by the Constituent Assembly came into force on the date of Independence, namely 21 March 1990.³⁹ The Constitution can be considered to be among the most liberal and democratic in the world. It enjoys hierarchical primacy amongst the sources of law by virtue of its Article 1(6). It is thematically organised into 21 chapters that contain 148 Articles relating to the chapter title. Together, they organise the state and outline the rights and freedoms of the Namibian people.⁴⁰

The Namibian Constitution is special in several ways. Firstly, it was developed largely under the eyes and with the assistance of the international community. This is closely related to the fact that Namibia's decolonisation process was strongly supported by the implementation of UN Resolution 435. Secondly, the Namibian Constitution was certainly an experiment in southern Africa in putting an end to racial discrimination and apartheid.⁴¹ Namibia has not totally relinquished its South African legal legacy, however. Article 140 provides for legal continuity, stating that all existing laws prior to Independence are to remain in force until repealed by Parliament. This does not only mean that Roman–Dutch law continues to be the ordinary law of the land, but also that

36 One example of a human right to environment codified on the national level is Article 24 of the 1996 Constitution of the Republic of South Africa.

37 Such as Article 95 of the Namibian Constitution on the promotion of the welfare of the people in the Chapter entitled “Principles of State Policy”.

38 Frenz (2009:232–260); Global Humanitarian Forum (2009).

39 Article 130.

40 Bukurura (2002:57).

41 Watz (2004:21).

Namibia has a considerable amount of pre-Independence legislation that still needs renewal.

The constitutional rights relevant to environmental rights and justice will be analysed in several steps. Since the Namibian Constitution does not provide explicitly for an entrenched and enforceable environmental right, it has to be determined whether (and to what extent) these rights are covered by the fundamental rights and freedoms or whether the respective rights form part of the Constitution at other stages, e.g. as principles of state policy. In this context, the rights to life, human dignity and equality in the Constitution *inter alia* fortify the claims that people may have to an environment of a certain quality, even if that supreme law does not, *per se*, impose positive obligations on the part of the state. International aspects of environmental rights applicable in Namibia, e.g. via Article 144 of the Constitution, will also be outlined below.

The Preamble

The preamble of a constitution is an important tool for the interpretation of such document, because it reflects the general spirit of the drafter.⁴² The Namibian Constitution makes no clear reference to the environment in its Preamble. However, it explicitly recognises that “the inherent dignity” and “the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace”. The reference to *inalienable rights* leads immediately to Chapter 3 and Article 5 therein, the states that –

[t]he fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

The 1996 South African Constitution, in which it is also adopted as the supreme law of the Republic, aims to –

... establish a society based on democratic values, social justice and fundamental human rights[.]

Here, the reference to *fundamental human rights* also opens the way for Chapter 2, the South African Bill of Rights, and therein to Section 24.⁴³ Compared with the Namibian Constitution, the 1996 South African Constitution makes it very clear from the outset in

42 (ibid.). He further quotes Hartmut Ruppel, Namibia’s first Attorney-General after Independence, and the Chairman of the Standing Committee on the issue that the content of the Preamble was critically debated at the time. Some members raised the question whether the Preamble had been influenced predominantly by Western values.

43 Section 24 reads as follows: “Everyone has right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

its Preamble that not only the Bill of Rights but also the environmental rights in Section 24 thereof apply to all laws in the country, and binds all the organs of the state.

However, Section 24 jurisprudence in South Africa has not always been applauded when it comes to understanding the nature of such right and how it operates vis-à-vis other rights.⁴⁴ In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others*,⁴⁵ for example, the court held that Section 24(b) was akin to a directive principle and was “aspirational in form”. The aforementioned view of the court is, however, incorrect.⁴⁶ Firstly, the rights in the Bill of Rights are justiciable rights, which can be distinguished from directive principles in two ways:

- While fundamental rights may either prohibit the state from doing something or may place a positive obligation on the state, directive principles are simply affirmative instructions to the state.
- While fundamental principles are legally binding, directive principles are not.

Secondly, Section 24(b) is clearly not aspirational in nature. The mandate stemming from Section 24(b) “falls within the realm of real expectations”.⁴⁷

Fundamental rights and freedoms

Chapter 3 of the Namibian Constitution outlines 16 fundamental rights and freedoms, reflecting the carpet values and spirit of the independent Namibian nation. The Constitution excels in being one guaranteeing human rights by comprehensive coverage and provisions set out in clear language. Human rights are justifiable as their protection can be secured through the courts.⁴⁸ This gives citizens the right to take executive agencies to court, and the judiciary reigns as the authority to adjudicate such matters.

The set of enforceable fundamental human rights and freedoms should be respected and upheld by the executive, legislative and judiciary, all organs of government, its agencies, and, where applicable, by all natural and legal persons in Namibia.⁴⁹ Apart from the right to culture (Article 19) and the right to education (Article 20), Chapter 3 does not contain any typical socio-economic rights – such as rights to housing, water or access to health services.⁵⁰ Instead, such socio-economic considerations are addressed elsewhere in the Constitution, especially in the principles of state policy.⁵¹

The following section deals with those Articles in the Namibian Constitution that in one way or another are related with promoting the protection of environmental rights and justice.

44 Ferris (2009:132).

45 2006 (5) SA 512 (T).

46 Ferris (2009:132).

47 (ibid.).

48 Bukurura (2002:21).

49 Article 5.

50 See Erasmus (1991:13).

51 Watz (2004:75).

Article 6: The right to life

Article 6 regulates inter alia that –

[t]he right to life shall be respected and protected.

It is clear that human life depends strongly on the state of the environment, including water, air, natural resources, plant and animal life. Environmental degradation threatens people's lives and livelihoods. The right to life is the most basic human right: a person can exercise no other right unless this most primary of rights is adequately protected. The right to life is one that should be interpreted narrowly. It arguably requires the state to adopt positive measures. Presenting compelling facts, however, is critical for an individual. Obviously, the most compelling cases involve environmental harm that is likely to cause death in the short term.⁵²

Article 8: Respect for human dignity

Article 8 states as follows:

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
- (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

In the words of Kofi Annan, former Secretary-General of the United Nations, whereas –⁵³

[a]ccess to safe water is a fundamental human need and, therefore, a basic human right. Contaminated water jeopardises both the physical and social health of all people. It is an affront to human dignity.

Dignity has to be read in conjunction with other fundamental rights set out in the Constitution, such as the right to equality and to non-discrimination (Article 10). The dignity of a person is inseparably linked to environmental rights and environmental justice. A person's health, well-being and respect-worthiness are subject to environmental rights and justice. To mention but a few in this context, access to clean and sufficient water, sanitation services, and waste disposal are aspects relevant to human dignity.⁵⁴

52 Herz (2008:173–281).

53 See <http://www.un.org/waterforlifedecade/background.html>; last accessed 8 January 2010.

54 Thus, the Legal Assistance Centre (LAC) intends taking the Otavi Municipality to court for allegedly failing to adequately service the town's informal settlement residents. The LAC – representing the community members of Otavi's informal settlements – says that, during consultations with community members this year, it witnessed that municipal facilities were in a “deplorable state”. Water in the toilets, built to service the more than 4,000 residents, had been turned off. Instead, people used the entrance and surrounding area of the toilets to relieve themselves, leaving a pool of human waste surrounding the area, according to an LAC statement. Residents said that the waste – worse during the rainy season – “flows with the water

Water is needed for food, hygiene, securing livelihoods, households, etc.⁵⁵

In 2002, the UN Committee on Economic, Social and Cultural Rights concluded that there was a human right to water embedded in Article 11 of the ICESCR, which defined the right to livelihood as including adequate food, clothing and housing. The General Comment on the right to water was adopted by this Committee in 2002, so the 145 countries that ratified the Covenant agree that the human right to water entitles everyone to sufficient, affordable, physically accessible, safe water acceptable for personal and domestic use, and that they are required to develop mechanisms to ensure that this goal is realised.⁵⁶ The Committee recognised that —⁵⁷

... the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.

In the recent South African case of *Lindiwe Mazibuko & Others v City of Johannesburg & Others*,⁵⁸ the Constitutional Court had to decide over an alleged violation of the right to have access to sufficient water under Section 27 of that country's Constitution. This case was the first in which the Constitutional Court had considered the obligations imposed by the right to access sufficient water, as set out in Section 27(2) of the Constitution.

Under the Namibian Constitution, the right to water is not explicitly included in the fundamental rights, but is an implicit component of existing fundamental human rights. Such requires the right to water accessibility. In respect of adequate quality, water for personal or domestic use must be assured in a quantity of supply that is sufficient and continuous.⁵⁹ The protection of the right to water is an essential prerequisite to the fulfilment of many other human rights.⁶⁰ Without guaranteeing access to a sufficient quantity of safe water, respect for human dignity and other human rights may be jeopardised. Formal recognition of the right to water would mean acknowledging the environmental dimension of existing human rights.⁶¹

into our yards", and that those most affected were the children and the elderly. The LAC said the situation was so dire that community members were being affected by diseases such as malaria and cholera. See Shejvali (2009).

55 WHO (2003:18ff).

56 See http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf; last accessed 8 January 2010.

57 (ibid.).

58 *Lindiwe Mazibuko & Others v City of Johannesburg & Others* Case CCT 39/09 [2009] ZACC 28.

59 See Mapaure (2010). Mapaure's research on hydropolitics formed part of his LLM thesis being co-supervised by the author of this article.

60 Ruppel (2008a:107).

61 Mapaure (2010). Through a rights-based approach, victims of water pollution and people deprived of essential water to meet their basic needs are provided with access to remedies. The explicit recognition of water as a human right could represent a tool for civil society to hold governments accountable for ensuring access to sufficient water of adequate quality.

In 2002, Namibia adopted a National Water Policy that states that all Namibians have a right to access sufficient safe water for a healthy and productive life. Moreover, sections 2 and 3 of the Water Resources Management Act⁶² state that the state has an obligation to ensure that water resources are managed in ways consistent with fundamental principles so that to ensure equitable access to water resources by every citizen. Although Parliament approved the Water Resources Management Act, the rather outdated Water Act⁶³ remains in force until the new Water Resources Management Act comes into force upon signature by the Minister.⁶⁴

Article 10: Equality and freedom from discrimination

As part of the Bill of Rights under Chapter 3 of the Constitution, Article 10 provides as follows:

- (1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

The equality clause strongly supports the notion of *environmental rights and justice*, and puts the state under the obligation to protect its people equally and to ensure that benefits are distributed fairly, that is to the greatest possible extent.⁶⁵ Human vulnerability, also endangered by means of global warming and climate change, is felt most acutely by those segments of the population who are already in vulnerable situations due to factors such as poverty, gender, age, minority status, and disability. Vulnerability and impact assessments in the context of climate change largely focus on the economic sector, i.e. impacts on health and water, for example, rather than on the vulnerabilities of specific segments of the population, such as women, children and indigenous peoples.⁶⁶

Article 15: Children's rights

A recently conducted, rather comprehensive study on children's rights has shown that Namibia can be applauded for initiating law reform for the improvement of such rights.⁶⁷ This reflects Namibia's remarkable commitment to protecting children's rights by, amongst other things, incorporating a broad variety of international legal instruments into the domestic system. Namibia is a State Party to the most relevant legal instruments on the protection of children's rights at the global, regional and sub-regional level. Thus, the Convention on the Rights of the Child (CRC) explicitly states that the child has a right to "clean drinking water, taking into consideration the dangers and risks of

62 No. 24 of 2004.

63 No. 54 of 1956.

64 The Water Act was still applied by the High Court in Windhoek in the recently decided case concerning the use of groundwater by the Valencia Uranium Mine; see Hinz & Ruppel (2008:48) with further references.

65 Bilchitz (2003:1–26).

66 Ruppel (2008c).

67 Ruppel (2009a).

environmental pollution”.⁶⁸ Of course, effective implementation and the entire reporting system, which are imperative for enhancing the situation of children, can only work if States Parties collaborate to improve the situation in which children find themselves.⁶⁹ In this context, there can be no doubt that the recognition of environmental rights and justice are not only supportive to, but in all means in the best interest of, the child. Although the Namibian Constitution does not seem to envisage the concept of the *best interest of the child* to be of paramount consideration,⁷⁰ international human rights standards must be applied accordingly.⁷¹

Article 16: Property

Article 16(1) regulates that –

[a]ll persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

Although the Namibian state welcomes foreign investment,⁷² it reserves the right to limit the acquisition of property by foreign nationals. What is the relevance of this restriction to the environment? Namibia is not only known for its considerable resources such as diamonds, copper, uranium, zinc, and fish,⁷³ but also for its water scarcity. Like climate change, water scarcity poses a significant threat to the environment, human vulnerability and sustainable development in the country.⁷⁴ Moreover, the Southern African Development Community (SADC) region is one of the poorest in the world: approximately 35% of the total population live on US\$1 per day.⁷⁵ This makes Namibia a lower-middle-income economy, which is particularly attractive to foreign companies.

The case of Ramatex, a Malaysian multinational company that operated in Namibia, demonstrated how globalised investment can intersect with human rights and environmental damage. Ramatex’s decision to locate production in southern Africa was motivated by the objective to benefit from the Africa Growth and Opportunity Act (AGOA), which allows for duty-free exports to the United States (US) from selected African countries who meet certain conditions, set by the US Government.⁷⁶ The plant turned cotton – imported duty-free from West Africa – into textiles for the US market.

68 Article 24(2)(c).

69 Ruppel (2009a:2–3).

70 Naldi (1995:79).

71 Ruppel (2009b:53–100).

72 See e.g. Article 99 of the Constitution.

73 Hinz & Ruppel (2008).

74 Mfune et al. (2009a; 2009b); Ruppel & Bethune (2007).

75 UNDP (2008).

76 AGOA was signed into law on 18 May 2000 as Title 1 of the Trade and Development Act of 2000. The Act offers tangible incentives for African countries to continue their efforts to open their economies and build free markets.

This was achieved by offering concessions in the form of an export processing zone (EPZ).⁷⁷ The Namibian Export Processing Zones Act⁷⁸ exempts companies from sales or value added tax payable in Namibia, and from all customs or excise duties for goods imported into the EPZ or manufactured in the EPZ. In order to attract the foreign direct investment, the City of Windhoek and the Ministry of Trade and Industry put together a scheme with an incentive package that included subsidised water and electricity, a 99-year tax exemption on land use, and over N\$1 billion to prepare the site, including the setting up of electricity, water and sewerage infrastructure. From the beginning, a debate focused on controversies surrounding the Malaysian textile company's environmental impact and working conditions. Since 2002, disputes concerning human rights protection and labour standards⁷⁹ were topped by alleged environmental offences.⁸⁰

Textile dyes and other chemicals used in textile processing are known to contain heavy metals and other dangerous substances which can be highly toxic to the environment and, thus, to human beings. Accusations against the factory included their disposal of excess waste water carelessly on its property. Residents in the neighbourhood of the works complained not only of the stench emanating from the disposed waste water, but also recorded irritation to their skin and respiratory tracts.⁸¹ Streams emanating from the factory carried contaminated water, in turn polluting the water at the Goreangab Dam, one of Windhoek's major water reservoirs.

The closure of the Ramatex factory in Windhoek marked the end of one of the most controversial investments in Namibia since Independence.⁸² The case characterises aggressive foreign investment driven by mere profit motives that can seriously threaten ecosystems, intergenerational equity, and the right to a clean environment.⁸³ The

77 See also *New Era*, 14 March 2008.

78 No. 9 of 1995.

79 According to *The Namibian* on 12 March 2008, a study carried out in 2003 found widespread abuses of workers' rights, including forced pregnancy tests for women who applied for jobs; non-payment for workers on sick leave; very low wages and no benefits; insufficient health and safety measures; no compensation in case of accidents; abuse by supervisors; and open hostility towards trade unions. Tensions reached breaking point on several occasions. After spontaneous work stoppages in 2002 and 2003, Ramatex finally recognised the Namibia Food and Allied Worker's Union (NAFAU) as the workers' exclusive bargaining agent in October 2003. The recognition agreement was supposed to pave the way for improved labour relations and collective bargaining. However, the union was unable to make progress on substantive issues, and on several occasions reported Ramatex to the Office of the Labour Commissioner for unfair labour practices and the company's unwillingness to negotiate in good faith.

80 Winterfeldt (2007:65ff).

81 *The Namibian*, 21 December 2004; 4 November 2005.

82 *The Namibian*, 12 March 2008.

83 On 27 January 2009, a team of consultants commissioned by the City of Windhoek publicly presented an Environmental Audit on the Ramatex site and its historical operations. The study aimed to determine and address concerns associated with past activities, including health investigations. It concluded that "the environmental impacts were minor" and "no significant affects on humans could be detected", whereas "no occupational health effects were monitored for the audit". The author of this article was present at this public event, as was Advocate John

company managed to mislead Namibia – and the government in particular – by providing false information to hide its true intentions of using the country merely as a temporary production location.⁸⁴

Especially in the wider context of land, water and related reform, as well as equitable access to Namibia's natural resources, the onus rests on the state to protect the environment for the benefit of the Namibian people on the one hand, and to enable and capacitate the individual citizen (and especially the previously disadvantaged citizen) to gain equitable access to land on the other.⁸⁵

To this end, Article 16(2) provides the state or a competent body authorised by the law – which surely refers to authorities responsible for, for instance, the railway, roads and water – to expropriate property in the public interest, subject to the payment of just compensation. Such expropriation may also become relevant in cases where the environmental rights of a group or certain individuals are negatively affected by activities that cause harm to the environment.

Articles 18 and 5: Administrative justice

The Constitution deals with administrative justice in two of its Articles: 18 and 5. Article 18 requires that administrative bodies act fairly and reasonably, and that they comply with the requirements stipulated in common law and relevant legislation. Article 18 obviously plays an eminent role in the proper implementation of administrative measures, by serving as a means of achieving compliance with environmental laws and, thus, promoting environmental rights in Namibia.

Article 5 contains the fundamental obligation enshrined in modern constitutionalism according to which the three organs of the state – thus, including the executive – are obliged to uphold and respect the fundamental rights and freedoms set out in Chapter 3 of the Constitution. Thus, Article 5 reaches beyond Article 18: the yardsticks of Article 5 are the fundamental rights and freedoms. Article 5 requires substantial compliance by confronting administrative actions and the law authorising such actions with the comprehensive catalogue of human rights. The placement of Article 5, as an integral part of Chapter 3's fundamental freedoms, expresses – in line with what follows later, namely in Article 21(1) and Article 22 – that the fundamental rights and freedoms are at the very centre of constitutional gravity.⁸⁶

Administrative justice is a prerequisite for environmental justice. Directives, abatement notices, compliance notices and statutory provisions empowering the granting or withdrawal of authorisations such as licences, permits and exemptions are administrative

Walters, the Ombudsman of Namibia. During the presentation, the question was raised whether the audit had been conducted independently or with a specific aim, namely to downscale the violations.

84 *The Namibian*, 12 March 2008.

85 See, among others, Gutto (1995).

86 Hinz (2009a:81–89).

measures that regulate specific aspects of human activity that have an impact both on the environment and on individuals.⁸⁷ Special mention needs to be made of the provision of Article 18 of the Constitution in relation to Rule 53 of the High Court Rules, which vests in the High Court the jurisdiction to review administrative action. Thus, the High Court has original jurisdiction not only over cases involving the fundamental rights of the individual, but also in the development of the law relating to administrative justice by Namibian courts.

Also left over to the court are the terms of interpretation of common law principles. However, these principles often provide the administrator with an unclear mandate in terms of what the administrative action requires in certain instances. Furthermore, judicial review and access to administrative justice is not clearly regulated under the Namibian legal set-up, meaning that the procedures and remedies for judicial review against administrative action are not stipulated in a specific piece of legislation dealing with administrative law and procedure.⁸⁸ In order to promote environmental justice, efficient administration and good governance, as well as to create a culture of accountability, openness and transparency in public administration or in the exercise of public power, Namibian administrative law and procedure needs to be reviewed.⁸⁹

Article 19: The right to culture

With Article 19 the right to culture is guaranteed under the Bill of Rights in the Constitution, as well as in Article 15(1)(a) of the ICESCR. In terms of these two legal obligations, the government is required to take legislative and administrative measures to ensure the fulfilment of these rights. Although Chapter 3 is not primarily aimed at protecting economic, cultural and social rights (such as Article 19), it is important to remember that Article 5 makes those listed within Chapter 3 enforceable by courts. Such arose the right to profess, maintain and promote a language in the case of *Government of the Republic of Namibia v Cultura 2000*.⁹⁰ Cultural diversity is also closely linked to ecological biodiversity.⁹¹ The collective knowledge of biodiversity, its use and its

87 Winstanley (2009:225ff).

88 A recent initiative of the Ministry of Justice and its Law Reform and Development Commission opened the debate on whether or not Namibia should follow the approach adopted by other countries and introduce a statutory framework to give more meaning and content to the right to administrative justice. The initiative was the result of a joint effort by the said Ministry of Justice and the Konrad Adenauer Foundation's Rule of Law Programme for Sub-Saharan Africa, and led to an international conference on the theme "Promoting Administrative Justice in Namibia". The almost unanimous opinion of the Conference was that Namibia should indeed pursue the option of introducing an administrative law statute, while at the same time taking note of the country's socio-economic conditions; cf. Hinz (2009a:81) with further references. To this end, on 25 March 2009, the Committee on the Promotion of Administrative Law and Justice in Namibia was officially constituted.

89 Such problems are not only specific to Namibia, but occur in other developing countries as well; cf. Winter (2009).

90 1994 (1) SA 407 (NmS).

91 See in detail Hinz & Ruppel (2008).

management rests in cultural diversity, and can also be regarded as an (indigenous) environmental right.⁹²

The right to tradition also falls under Article 19, which seeks to ensure that the traditions and way of life of the different indigenous groups comprising Namibia's society are protected. Article 19 is in line with Article 17(3) of the Banjul Charter, which proclaims that the state has the duty to protect traditional values.⁹³ Traditional knowledge, without doubt, is such a value.

So far, Namibian courts have been reluctant to consider the right to culture as a means of protecting traditional knowledge. In a case decided by a Magistrate's Court,⁹⁴ the harvesting of almost 400 kg of hoodia was at issue. *Hoodia gordonii*, a cactus-like plant native to the Namib Desert, is widely believed to be an appetite suppressant that was used by some traditional communities.⁹⁵

All *Hoodia* species are protected under the Convention on the Illegal Trade of Endangered Species (CITES), to which Namibia is a signatory. Accordingly, it is listed as a protected plant under Schedule 9 of the Namibian Nature Conservation Ordinance,⁹⁶ as amended after Independence by the Nature Conservation Amendment Act.⁹⁷ Thus, according to section 73(1) of the Ordinance, no person other than the lawful holder of a permit granted by the Executive Committee is permitted at any time to pick or transport any protected plant. The Magistrate's Court, however, discharged two alleged thieves of almost 400 kg of hoodia. In its ruling, the court held that it could not be proved that the confiscated plants were of the specific *Hoodia gordonii* species. Taking into consideration that Schedule 9 of the Ordinance lists all *Hoodia* species as protected plants, the reasoning

92 (ibid.:57).

93 Naldi (1995:97).

94 The case was decided at the end of 2007 by the Mariental Magistrates' Court; cf. *Allgemeine Zeitung*, 8 January 2008.

95 Members of the San community used this plant for centuries when hunting. As hunting usually took several days, they used to eat the hoodia to still their hunger. The San name for the hoodia is *!khoba*. The events related to the hoodia plant are one of the cases dealing with bioprospecting (also described as *biopiracy*), describing the appropriation, generally by means of patents, of legal rights over indigenous biomedical knowledge without compensation to the indigenous groups who originally developed such knowledge. However, hoodia is registered in the name of the Council for Scientific and Industrial Research (CSIR). In 2003, after years of disputes with the CSIR, the latter concluded an agreement with the San, granting them 6% of the royalties paid to the CSIR by Phytopharm, in addition to 8% of the 'milestone income' paid by Phytopharm in case the development of the product made substantial progress. This agreement was the first of its kind, granting participation in profits to indigenous people resulting from traditional knowledge. Nonetheless, the CSIR, despite having signed the agreement with the San for good reasons, at a later stage alleged within proceedings before the European Patent Office that it was doubtful whether the San really did have knowledge about the effect of hoodia. See also Hoering (2004).

96 No. 4 of 1975.

97 No. 5 of 1996.

for the ruling in this case is hardly traceable.⁹⁸ The Ordinance deals with in situ and ex situ conservation by providing for the declaration of protected habitats as national parks and reserves, and for the protection of scheduled species. It regulates hunting and harvesting, possession of and trade in listed species for the propagation, protection, study and preservation of wild animal life, wild plant life, and objects of geological, ethnological, archaeological, historical and other scientific interest and for the benefit and enjoyment of the inhabitants of Namibia and other persons.

Traditional knowledge is an important part of cultural identity. CITES has links to traditional knowledge (e.g. traditional medicine) and culture (folklore, artefacts), with the essential purpose and operation of the Convention noting that Appendix III provides a practical mechanism for States Parties to list specific species for specific purposes, e.g. the protection of intellectual property rights. Notwithstanding the question whether the protection of traditional knowledge actually lies within the logic of the intellectual property system or the human rights system, intellectual property law uses the language of economic incentives to justify intellectual property protection. Apart from the economic value of protecting traditional knowledge, it must be protected for cultural reasons as well, as stated in Article 19 of the Constitution.

The Bill on Access to Biological Resources and Associated Traditional Knowledge drafted in 2000 aims at protecting biodiversity and traditional knowledge.⁹⁹ The Bill applies to biological resources in both in situ and ex situ conditions, the derivatives of the biological resources, community knowledge and technologies, local and indigenous farming communities, and plant breeders.¹⁰⁰ Furthermore, the Bill recognises the rights of local and indigenous communities.¹⁰¹ Those rights include the right to collectively benefit from the use of biological resources, as well as from such communities' innovations, practices, knowledge and technology acquired through generations. Among these rights, benefit-sharing is recognised and emphasised, but the Bill does not indicate as to how such activities should be administered.¹⁰²

Moreover, the Parks and Wildlife Management Bill of 2005 intends to protect all indigenous species and control the exploitation of all plants and other wildlife.¹⁰³ The preamble of the Bill clearly states that it intends to give effect to paragraph (1) of Article 95 of the Constitution by establishing a legal framework to provide for and promote the maintenance of ecosystems, essential ecological processes, and the biological diversity of Namibia; and to promote the mutually beneficial coexistence of humans with wildlife,

98 This corresponds to the view held by Ben Beytell of the Ministry of Environment and Tourism; see article in the *Allgemeine Zeitung*, 8 January 2008.

99 The Bill has not been passed yet.

100 Section 1 of the Bill.

101 Section 17 of the Bill.

102 However, section 23 of the Bill elaborates on how the benefit should be obtained, and who should deal with the issue of contracts as far as the collector, the state and the local community or communities involved are concerned.

103 The Bill has not been passed yet.

in order to give effect to Namibia's obligations under relevant international legal instruments, including CITES.¹⁰⁴

Article 25: Enforcement of fundamental rights and freedoms

Article 25(2) of the Constitution provides that –

[a]grieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

Article 25(2) plays an important role in the constitutional framework, as it makes clear reference to the Ombudsman. Chapter 10 of the Constitution deals with the Ombudsman in more detail. In Namibia, ombudsmanship was already introduced in 1986 by the enactment of the Ombudsman of South West Africa Act.¹⁰⁵ After Independence in 1990, the Office of the Ombudsman was established as a constitutional Office. The legal foundations of the institution of the Ombudsman in Namibia are to be found in Articles 89–94 of the Constitution. In addition to the constitutional provisions, the Ombudsman Act¹⁰⁶ defines and prescribes the powers, duties and functions of the Ombudsman, and provides for matters incidental thereto.¹⁰⁷

Article 25(3) obliges the state to make all necessary and appropriate orders to respect and uphold fundamental rights and freedoms, including by interdict and injunction. Namibian courts have stated in the past that the Constitution requires a generous interpretation, avoiding the austerity of tabulated legalism, in order to give individuals the full measure of their rights. However, Namibian courts also adhere to the presumption of constitutionality, meaning that the onus is on the applicant to prove that a fundamental right or freedom has been infringed upon and that s/he has locus standi as an aggrieved person under Article 25(2). Generally speaking, the common law test for locus standi is that the person applying for standing either has a private right or is able to demonstrate that s/he has a special interest in the subject matter of the action before the relevant court.¹⁰⁸ The special interest does not need to involve a legal or pecuniary right, but can also be of an intellectual or emotional concern. It must, however, be an interest that is different from that of an ordinary member of the public,¹⁰⁹ especially since Namibia does not know the actio popularis. Environmentalists often want to take action in the interests of the environment or in the public interest, rather than in their own interest. They are,

104 Hinz & Ruppel (2008:55).

105 No. 26 of 1986, as amended by the Ombudsman of South West Africa Amendment Act, 1988 (No. 11 of 1988).

106 No. 7 of 1990.

107 See the discussion on this earlier herein.

108 Fisher & Kirk (1997:372).

109 (ibid).

however, largely barred from doing so because they do not have a personal (special) interest in the relief claimed and, thus, do not have legal standing.¹¹⁰

Article 66: Customary law

After Independence, Namibia provided the necessary space for the recognition of customary law (Article 66), if it is in line with the country's new constitutional dispensation. Customary law is the law according to which most of the Namibian population live.¹¹¹

Customary law has been found to play an important role in the wider context of the environment, for the sustainable development of natural resources, and for the protection of biological diversity.¹¹² Thus, customary law is the type of law that is closest to the very peculiarities of traditional knowledge.¹¹³ It has the capacity to accommodate what is special to traditional knowledge: its grounding in tradition, and its being bound to a societal (collective) network. Most customary rules are not written down but are transmitted orally from generation to generation. However, some exceptions exist in Namibia in terms of what have become known as the *self-stated*¹¹⁴ laws of traditional communities.¹¹⁵ The Laws of Oukwanyama¹¹⁶ provide for the protection of trees – fruit trees in particular – and other plants and water. It is an offence to cut fruit trees, for example, and all water has to be kept clean.¹¹⁷ The Laws of Ondonga¹¹⁸ provide for the protection of trees with specific reference to fruit trees, palm trees and the marula tree (section 8), and the use of fishing nets in the river is prohibited without permission from the Traditional Authority (section 19). The Laws of Uukwambi provide for the protection of water (section 13), the protection of trees (section 14A), wild animals (section 14B), and grass (section 14C). The Laws of the Sambyu provide for the protection of water: anyone who pollutes or contaminates water commits an offence (section 16). In the Caprivi Region, the Laws of the Masubiya prohibit the cutting of fruit trees (section 37), causing veld fires (section 36), and the use of fishing nets to catch small fish (section 39).¹¹⁹ These are only some examples. Since the quoted self-stated laws are not a codification of the

110 In this respect, the Namibian legal set-up is quite different from many others. Such contains the 1996 South African Constitution, for example, a rather generous allocation of legal standing. People seeking protection for their environmental right need not prove a direct interest in proceedings in order to have locus standi; see Du Plessis (2008:261) with further references.

111 Hinz (2003a).

112 Hinz & Ruppel (2008).

113 (ibid.:56ff).

114 As to the concept of *self-stating customary law*, cf. Hinz (2009b:109ff).

115 The ascertainment of customary law is currently in progress within a project of the University of Namibia's Human Rights and Documentation Centre (HRDC). A first collection of self-stated customary laws will be published in 2010. For further information, see also Ruppel (2008b:131ff) and Hinz (2009b:109ff).

116 *Evetamango dhOukwanyama*; a copy of the laws can be inspected at the HRDC.

117 Sections II 8 and 15, *Laws of Oukwanyama*.

118 *OoVeta (OoMpango) dhoShilongo shOndonga*.

119 Copies of various self-stated laws can be inspected at the HRDC.

respective customary law, meaning that they reflect only certain principles of customary law while the body of unwritten law remains in force,¹²⁰ one can anticipate that, in addition to what has been referred to, there are many unwritten rules of importance for the protection of natural resources and biodiversity.¹²¹ They form part of the environmental rights of the people of Namibia. Thus, section 3(2)(g) of the Environmental Management Act regulates that –

Namibia's cultural and natural heritage[, including] its biological diversity, must be protected and respected for the benefit of present and future generations.

Article 78: The judiciary

Chapter 9 of the Constitution deals with the administration of justice.¹²² The administration of justice is required to be independent from the other organs of state. The sacrosanct nature of this value was expressed by the Supreme Court.¹²³ As was already elaborated in the paragraph on the concept *environmental justice*,¹²⁴ the judiciary is most essential in the protection and promotion of environmental rights and justice. It leads the way in interpreting relevant legislation and settles disputes arising between citizens and/or between citizens and the state. For this reason, the United Nations Environment Programme (UNEP) has paid increasing attention to the judiciary and other legal stakeholders as a focal point for the promotion of environmental rights at national level. Indeed, –¹²⁵

UNEP has thus started a Judges Programme, targeted at the more specific needs of judicial stakeholders. The initiative is based on the idea that the role of the Judiciary is fundamental in the promotion of compliance with and enforcement of international and national environmental law. It aims at promoting judiciary networking, sharing of legal information, and harmonisation of the approach to the implementation of global and regional instruments. Courts of Law of many countries have demonstrated sensitivity to promoting the rule of law in the field of sustainable development through their judgments and pronouncements, e.g. through applying international environmental law principles such as the polluter pays principle, the precautionary principle and the principle of intergenerational equity.

In 2007, UNEP conducted a Symposium for Judges and Magistrates on Environmental Law in Namibia.¹²⁶ The Symposium was the first of its kind in Namibia's history.¹²⁷ In

120 Hinz (2003b:46ff).

121 Hinz & Ruppel (2008:58–59); Ruppel (2006).

122 Amoo (2008:69–95).

123 See *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmSC).

124 See *supra*.

125 http://www.unep.org/law/Programme_work/Judges_programme/index.asp; last accessed 8 February 2010.

126 <http://www.unep.org/law/Calendar/indexpast.asp>, last accessed 28 December 2009.

127 The symposium was opened by Mr Simon Nhongo, the UN Resident Coordinator in Namibia; Dr Iwona Rummel-Bulska, UNEP's Principal Legal Officer and Chief of the Environmental Law Programme, and Namibia's Chief Justice Peter Shivute.

its quest, the platform sensitised judges and magistrates in the country about current national and international issues pertaining to environmental rights and justice.¹²⁸ It ultimately transpired at the Symposium that the judiciary played an important role in interpreting existing laws in a way that needed to take into account recent developments incorporating environmental concerns.

Article 91: Mandates of the Ombudsman¹²⁹

The institution of the Ombudsman in Namibia intends to be characterised as independent, impartial, fair, and acting confidentially in terms of the investigation process.¹³⁰ Negotiation and compromise between the parties concerned are the main objectives when handling complaints.¹³¹ Through investigating and resolving complaints, the institution of the Ombudsman in Namibia promotes and protects human rights, and fair and effective public administration; it also protects the environment and natural resources. In order to effectively fulfil all these functions, the Ombudsman has to be impartial, fair, and independent.¹³² The underlying rationale for independence in this context is that an Ombudsman has to be capable, within the institution's field of competence, of conducting fair and impartial investigations that are credible to both the complainant and the authorities.¹³³

Complaints may be submitted to the Office of the Ombudsman by any person free of charge and without specific form requirements. The Office cannot investigate complaints regarding court decisions, however. Neither can it assist complainants financially or represent a complainant in criminal or civil proceedings. Authorities that may be complained about include government institutions,¹³⁴ parastatals,¹³⁵ local authorities, and – in case of the violation of human rights or freedoms – private institutions and persons.¹³⁶ It is important to note that, although neither the Constitution nor the Ombudsman Act contain an explicit provision allowing the Ombudsman to investigate without having received a complaint, the Ombudsman may decide to undertake an own-motion (*ex mero motu*) investigation, in case such investigation is about issues and authorities that would be within the institution's competence if they had been brought by a complainant.¹³⁷

128 The author of this article had the opportunity to give two presentations during the symposium.

129 The following passage(is based largely on an article by Ruppel-Schlichting (2008:271–289).

130 As to the characteristics of the classic Ombudsman in general, see Gottehrer & Hostina (1998).

131 Article 91(e) of the Constitution and section 5(1) of the Act.

132 For a more detailed discussion on the independence of the Ombudsman in Namibia, see Ruppel-Schlichting (2008).

133 UNDP (2006:12).

134 These include all Offices, Ministries and Agencies; the National Assembly; the National Planning Commission; and the Attorney-General.

135 These include NamPower, Telecom, NamWater, NamPost, and the Namibian Broadcasting Corporation.

136 Gawanas (2002:104).

137 Especially in cases of human rights violations, own-motion investigations have been conducted repeatedly; cf. interview with J Walters, Ombudsman of Namibia, conducted by OC Ruppel on 12 August 2008. Cf. Ruppel-Schlichting (2008:283f).

The Office of the Ombudsman is intended to ensure that citizens have an avenue open to them, free of red tape, and free of political interference.¹³⁸ The Ombudsman has relatively broad mandates and corresponding powers. According to Article 91 of the Namibian Constitution, the mandates of the Ombudsman mainly relate to four broad categories: human rights, administrative practices, corruption,¹³⁹ and the environment. At this stage, an imbalance as to complaints by specific mandates can clearly be pointed out.¹⁴⁰ Although the categories of maladministration and human-rights-related issues play the most important role in the Office's work,¹⁴¹ the other categories deserve equal attention. In 2006, a total of 2,060 complaints were brought to the Office of the Ombudsman.¹⁴² A statistical breakdown of complaints by mandates¹⁴³ shows that, of this total, 1,286 related to the mandate of maladministration, 177 to human-rights-related issues, 39 to the mandate of corruption, and only 2 referred to environmental matters. The remaining 556 complaints covered miscellaneous issues.

Environmental concerns have significantly gained in importance within the legal environment worldwide for the past few decades. In Namibia, the Constitution – besides a multitude of statutory enactments and policies – underlines the importance of environmental matters in the country.¹⁴⁴ Part of these legal provisions endows the Ombudsman with the constitutional power to play a significant role within the wide field of environmental protection. Article 91(c) of the Constitution and section 3(1)(c) of the Act provide that the Ombudsman has –

... the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia[.]

The power granted to the Ombudsman to investigate complaints concerning the environmental issues mentioned in Article 91(c) represents a unique provision that goes beyond the traditional powers and functions of an Ombudsman institution. The Ombudsman's environmental mandate is a progressive and innovative step towards environmental protection, and may have the character of a role model. However, the provision could be given a more vital role within the Ombudsman's activities. Two major points can be made in this context. Firstly, to date, the Office of the Ombudsman has

138 Tjitendero (1996:10).

139 With the Namibian Constitution Second Amendment Bill, "corruption" is removed from the list of the functions of the Ombudsman; see http://www.parliament.gov.na/bills_documents/36_namibian_constitution_second_amendment_bill.pdf, last accessed 10 January 2010. The intention behind this amendment is to avoid concurrent overlapping competences between the Office of the Ombudsman and the Anti-corruption Commission, and to divert all corruption-related complaints to the Commission. The latter was established by the Anti-corruption Act, 2003 (No. 8 of 2003), and inaugurated in early 2006.

140 Cf. Office of the Ombudsman (2007:37).

141 Walters (2008:121ff).

142 Office of the Ombudsman (2007:4).

143 (ibid.:37).

144 For further reference, see Ruppel (2008a:101ff).

not dealt with many complaints under the environmental mandate – despite the fact that the Office endeavours to raise public awareness of the institution and takes its function to the grass-roots level.¹⁴⁵ Indeed, the awareness of the potential of the Ombudsman in environmental matters is very scant: many are completely unaware that the institution can be enlisted to deal with environmental matters.¹⁴⁶ Secondly, the lack of sufficient, specifically trained staff,¹⁴⁷ inadequate financial resources, and the heavy workload are further challenges to the Ombudsman’s activities in environmental matters. Nevertheless, the environmental mandate provides an opportunity for the promotion of rights and environmental protection in Namibia, and it is hoped that despite – or rather because of – the multifunctionality of the Office, this mandate receives the necessary prominence.

Fulfilling the Ombudsman’s environmental mandate may be one way of effectively addressing environmental rights in Namibia. For this purpose the Office needs to become more proactive, especially in view of its role as a national human rights institution.

Article 95(1): The environmental principle of state policy

Chapter 11 contains principles of state policy that cannot be categorised as constitutional rights in the strictest sense.¹⁴⁸ Such states Article 101 that the principles of state policy are not legally enforceable, but merely serve as societal goals in making and applying laws to give effect to the fundamental objectives of the different principles. The principles must also be employed in the interpretation of Namibian law and guide the state in its decision-making processes.¹⁴⁹

Article 95(l) compels state organs to be directed by the environmental principle of state policy.¹⁵⁰ Article 95 stipulates that –

145 Tours all over the country are taken by the Office of the Ombudsman from time to time to expose the Office to the population and to enhance publicity. Besides the main Office of the Ombudsman in Windhoek, the institution maintains branches in Keetmanshoop and Oshakati.

146 Many cases of environmental concern regrettably still do not find their way to the Office of the Ombudsman. The case of the Epupa Dam might serve as a prominent example. In the latter case, a hydropower scheme was proposed by NamPower (the Namibian parastatal for the bulk supply of electrical power) for the lower Kunene River in north-western Namibia. Local and international attention was focused on the issue when the Himba community opposed the project in 1998. However, in this case, the Office of the Ombudsman was not approached by Chief Hikumunue Kapika of the Himba. For further reference on the case, see Daniels (2003:52). For more details on traditional government, customary law and the administration of natural resources, see Hinz (2003b:82ff). The Ombudsman was also approached in respect of Ramatex: a complaint was brought to the Office of the Ombudsman by Earthlife Namibia, an environmental non-governmental organisation (NGO). In this regard, see Ruppel (2008a: 116ff).

147 However, this author has conducted several training courses on environmental issues, such as a workshop on environmental law in Namibia, in order to educate staff. Further projects of this kind are on the Ombudsman’s agenda for the near future.

148 Naldi (1995:99).

149 Watz (2004:186).

150 Hinz (2001:77).

[t]he State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:

...

- (l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future;

Constitutional principles of state policy serve as a stimulus for new initiatives or endeavours – especially where existing policy, law or programmes seem inadequate to attain the principles’ objectives.¹⁵¹ The principles must similarly be employed as direction indicators in setting government priorities. Also, the judiciary should apply the principles of state policy in constitutional interpretation and use them to fill gaps in the legislative framework when and where necessary. These generic features of constitutional principles of state policy arguably also apply to the environmental principle of state policy in the Constitution of Namibia. The language used in Article 95 indicates that the fulfilment of the principles of state policy requires positive action on the part of government, i.e. “[t]he State *shall* ... promote and maintain” [emphasis added]. At first sight, this creates the impression that such state principles create enforceable obligations that must be fulfilled.¹⁵² Although this is not the case in Namibia, the state is expected to promote and maintain the welfare of the people by adopting policies aimed at maintenance.¹⁵³

Recent policy and legislative reforms have created a unique opportunity for Namibia to incorporate environmental sensitivity, including that aimed at human rights protection. Namibia’s Vision 2030¹⁵⁴ was launched by the Founding President, Dr Sam Nujoma, in June 2004. The Vision’s rationale is to provide long-term alternative policy scenarios on the future course of development in the country at different points in time up until the target year of 2030. Chapter 5 of Vision 2030 states the following:¹⁵⁵

The integrity of vital ecological processes, natural habitats and wild species throughout Namibia is maintained whilst significantly supporting national socio-economic development through sustainable low-impact, consumptive and non-consumptive uses, as well as providing diversity for rural and urban livelihoods.

One of the long-term aims of Vision 2030 is the availability of clean, unpolluted water, and productive and healthy natural wetlands with rich biodiversity.¹⁵⁶ Vision 2030 regards the sequential five-year National Development Plans (NDPs) as the main vehicles for achieving its long-term objectives.

The successive NDPs will contain the goals and intermediate targets (milestones) that will eventually lead to the realisation of Vision 2030. The NDP2,¹⁵⁷ which spanned the

151 Du Plessis (2008:177–179).

152 (ibid.).

153 (ibid.).

154 GRN (2004); text also available at <http://www.npc.gov.na/>; last accessed 10 January 2010.

155 (ibid.:167).

156 For more detailed information on wetlands in Namibia, cf. Ruppel & Bethune (2007:14).

157 GRN (2002).

period 2001/2– 2005/6, sought sustainable and equitable improvement in the quality of life of all of the country’s inhabitants. The national development objectives were to –¹⁵⁸

- reduce poverty
- create employment
- promote economic empowerment
- stimulate and sustain economic growth
- reduce inequalities in income distribution and regional development
- promote gender equality and equity
- enhance environmental and ecological sustainability, and
- combat the further spread of HIV/AIDS.

The NDP3 spans the five-year period 2007/8–2011/2.¹⁵⁹ The draft guidelines for the formulation of the NDP3 were prepared in the latter part of 2006, and approved by Cabinet in December that year.¹⁶⁰ The predominant theme of the NDP3 is defined as accelerated economic growth through deepening rural development,¹⁶¹ while the productive utilisation of natural resources and environmental conservation are key result areas. Principal environmental concerns include water, land, marine, natural resources, biodiversity and ecosystems, drought, and climate change. Waste management and pollution will grow in significance with increasing industrialisation.

The NDP3 recognises that, with the country’s scarce and fragile natural resource base, the risk of overexploitation is considerable, and that sustained growth is highly dependent on sound management of these resources. The guidelines for preparing the NDP3 stipulate that the renewable resource capital needs to be maintained in quantity and quality. This is to be achieved by reinvesting benefits into natural resources by way of diversifying the economy away from resource-intensive primary sector activities, and by increasing productivity per unit of natural resource input. Two NDP3 goals ensuring the protection of environmental concerns are the optimal and sustainable utilisation of renewable and non-renewable resources on the one hand, and environmental sustainability on the other.

The sectoral legislation relevant to environmental rights is wide-ranging. Namibia has numerous legislative instruments that provide for the equitable use of natural resources for the benefit of all. Within its legislative framework, Namibia has provided extensively for safeguard measures to protect the environment. The implementation of this legislative framework is a mammoth task, however. Although this article is not the forum to introduce the said statutory instruments dealing with the environment in the country, one particular law worth mentioning is the Environmental Management Act.¹⁶² Its aim is to –

- promote the sustainable management of the environment and the use of natural resources by establishing principles for decision-making on matters affecting the environment
- establish the Sustainable Development Advisory Council

158 Ruppel & Bethune (2007:14).

159 GRN (2007).

160 (ibid.).

161 (ibid.).

162 No. 7 of 2007.

- provide for the appointment of an Environmental Commissioner and Environmental Officers, and
- provide for the process of assessment and control of activities which may have significant effects on the environment.

Only time will tell how far this piece of environmental legislation will cross-fertilise in respect of protecting and implementing human rights.¹⁶³ The Environmental Management Act is expected to give effect to Article 95(1) of the Namibian Constitution by establishing general principles for the management of the environment and natural resources. It will promote the coordinated and integrated management of the environment and sets out responsibilities in this regard. Furthermore, it is intended to give statutory effect to Namibia's Environmental Assessment Policy, and to enable the Minister responsible for the environment to give effect to Namibia's obligations under international environmental conventions, and to provide for associated matters. Environmental impact assessments and consultations with communities and relevant regional and local authorities are provided for to monitor the development of projects that potentially impact on the environment. According to the Act, Namibia's cultural and natural heritage – including its biological diversity – is required to be protected and respected for the benefit of present and future generations. A Sustainable Development Advisory Council (still) is to be established to advise the Minister on the development of a policy and strategy for the management, protection and use of the environment, as well as on the conservation of biological diversity, access to genetic resources in Namibia, and the use of components of the environment, in a way and at a rate that does not lead to long-term environmental decline. However, the delayed promulgation and implementation of this important piece of legislation hampered the development of environmental law and justice in Namibia.¹⁶⁴

Article 100: Sovereign ownership of natural resources

The land, the water, and the natural resources below and above the land, in the continental shelf and within the territorial waters as well as within the exclusive economic zone of Namibia belong to the state in terms of the Constitution, if not otherwise lawfully owned. To this extent, the Namibian Constitution establishes sovereign state ownership of natural resources not under the control of others.¹⁶⁵

The international run for Namibia's natural resources continues.¹⁶⁶ The expected depletion of fossil fuels like oil and gas and the resulting increase in electricity prices are forcing the world's energy industry to look at nuclear power to meet future needs for electricity provision. Namibia also came under the spotlight, with foreign investors hailing from Canada, China, Japan and Russia, among other countries, arriving in droves to secure supplies or mining rights.¹⁶⁷

163 Ruppel (2008a:111).

164 See also Du Plessis (2008:199).

165 Watz (2004:182–186).

166 Goanikontes, Langer Heinrich, Rössing, and Trekkopje are names related to major Namibian mining projects.

167 *The Namibian*, 4 January 2008.

The Namibian reported in June 2009¹⁶⁸ that Namibia had now overtaken Russia as the fourth largest uranium supplier in the world, on track to meet its target of becoming the world's third largest supplier by 2015. Uranium production in Namibia increased by 6% in 2009, and total uranium production for Namibia rose to 5,429 t in the same year.¹⁶⁹ Uranium undoubtedly means huge sums of money for investments. Mega-investments in uranium projects also mean new job opportunities. However, such extensive natural exploitation of resources does not only bring benefits: it is also deemed to have destructive effects to ecosystems and habitats that support essential living resources. Mining activities also need to be monitored with regard to their impacts on human – and, thus, environmental – rights. In regard to the state ownership of natural resources, this entails that the state should accordingly take environmentally related responsibility with a special focus on the principle of sustainability and respect for the rights of present and future generations.¹⁷⁰

Articles 102–111: Regional and local government

It would certainly go beyond the scope of this article to address and elaborate on the issues relating to the environmental rights of regional and local government structures. One aspect that may, however, be worthwhile mentioning is that, following the inception of Chapter 12 in the Namibian Constitution, Parliament enacted the Regional Councils Act¹⁷¹ and the Local Authorities Act.¹⁷² Both laws introduced decentralisation and its administration. These enactments were subsequently followed by a Decentralisation Policy that was given legal force through a series of new laws, most notably the Decentralisation Enabling Act.¹⁷³

Decentralisation contributes to creating participatory democracy in which people at the grass roots can have a direct say in decisions that affect their lives, giving more powers to regional councils. Regional councillors, who have clear links to their constituents, can play an important role in this process.¹⁷⁴

The Traditional Authorities Act¹⁷⁵ addresses traditional leadership and its functions. These functions include promoting welfare amongst the community members who fall under a particular Traditional Authority, and supervising and ensuring the observance of customary law. According to section 3(2)(c) of the Traditional Authorities Act, traditional leaders have the –

... duty to ensure that the members of the respective communities use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons in Namibia.

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- 168 Duddy (2009).
169 *The Namibian*, 28 January 2010.
170 Ruppel (2008a:119).
171 No. 22 of 1992.
172 No. 23 of 1992.
173 No. 33 of 2000.
174 Hopwood (2005).
175 No. 25 of 2000.

In addition, the Communal Land Reform Act¹⁷⁶ provides for the allocation and administration of all communal land.

The aforementioned acts make it clear what an important role traditional leadership and local governance play in the context of environmental governance.¹⁷⁷

Article 144: International law

International law refers to the vast body of rules which binds the actions and reciprocal relations of nation states to certain common principles, procedures and standards. These rules are implicit in many international and regional instruments, the decisions of international and regional courts and tribunals, and international customs and practices.¹⁷⁸

Environmental rights are covered by and regulated in many international and regional legal instruments and, even though the Namibian Constitution does not explicitly mention these rights, they exist by way of application of international law. Namibia is party to various international human rights¹⁷⁹ and environmental covenants,¹⁸⁰ treaties, conventions and protocols and is, therefore, obliged to conform to their objectives and obligations. As to the application of international law, a new approach was formulated after Independence, as embodied in the Namibian Constitution. Article 144 therein provides that –

[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Thus, the Constitution explicitly incorporates international law and makes it part of the law of the land. *Ab initio*, public international law is part of the law of Namibia.¹⁸¹ No transformation or subsequent legislative act is needed.¹⁸² A treaty will become binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and constitutional requirements have been met.

The 1981 African (Banjul) Charter on Human and Peoples' Rights¹⁸³ is a human rights treaty that proclaims environmental rights in broadly qualitative terms. It protects the right of peoples both to the "best attainable state of physical and mental health"

176 No. 5 of 2002.

177 See also Du Plessis (2008:203ff).

178 See Dugard (2005:7–46).

179 As far as can be established, Namibia has formally recognised the African Charter in accordance with Article 143 read with Article 63(2)(d) of the Constitution. Thus, the provisions of the Charter have become binding on Namibia, and form part of Namibian law in accordance with Articles 143 and 144 of the Constitution. See also Viljoen (2007:549f).

180 See e.g. Hinz & Ruppel (2008:13ff).

181 See Tshosa (2001:79ff).

182 Erasmus (1991:94).

183 Hereafter *African Charter*.

(Article 16) and to a “general satisfactory environment favourable to their development” (Article 24). Article 24 of the African Charter establishes a binding human-rights-based approach to environmental protection, linking the right to environment to the right to development.¹⁸⁴

In the *Ogoni* case, for example, the African Commission on Human and Peoples’ Rights held, inter alia, that Article 24 of the African Charter imposed an obligation on the state to take reasonable measures to “prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources”.¹⁸⁵ The *Ogoni* case decided by the African Commission on Human and Peoples’ Rights in 2001 and communicated to the parties in 2002 is considered to be a landmark decision with regard to the effective protection of economic, social and cultural rights in Africa, particularly the protection of the right of peoples to a satisfactory environment.

Article 24 of the African Charter should also be viewed together with the Bamako Convention and the first Organisation of African Unity (OAU) treaty on the environment, the Convention on the Conservation of Nature and Natural Resources, which predates the African Charter.¹⁸⁶ It has to be noted that Namibia is not a signatory to the original Convention. However, Namibia has signed the Revised African Convention on the Conservation of Nature and Natural Resources. The latter was adopted by the Second Ordinary Session of the African Union (AU) Assembly of Heads of State and Government in Maputo, Mozambique, in July 2003. It has, however, not yet come into force. The Bamako Convention, which was adopted after the African Charter, was drafted in reaction to the human suffering caused by the dumping of petrochemical waste. It bans the import of waste to the continent.

The Southern African Development Community (SADC) was established in Windhoek in 1992 as the successor to the Southern African Development Coordination Conference (SADCC), which was founded in 1980. SADC’s objectives include the achievement of development and economic growth; the alleviation of poverty; the enhancement of the standard and quality of life; support of the socially disadvantaged through regional integration; the evolution of common political values, systems and institutions; the promotion and defence of peace and security; and achieving the sustainable utilisation of natural resources and effective protection of the environment.¹⁸⁷

It might appear that the promotion and protection of human rights are not SADC’s top priority as an organisation that furthers socio-economic cooperation and integration as well as political and security cooperation among its 15 member states. However, the

184 Van der Linde & Louw (2003:169).

185 See Communication 155/96 available at <http://www.cesr.org/ESCR/africancommission.htm>. For further details see *The Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria* (27 October 2001); Coomans (2003:749–760); Ebeku (2003:149–166).

186 Viljoen (2007:287ff).

187 These are some of the SADC objectives laid down in Article 5 of the SADC Treaty.

protection of human rights plays an essential role in economic development as it has an impact on the investment climate, which in turn contributes to growth, productivity and employment creation – all being essential for sustainable reductions in poverty. Other SADC objectives such as the maintenance of democracy, peace, security and stability refer to human rights, as do the sustainable utilisation of natural resources and the effective protection of the environment. With the 2003 Declaration on Agriculture and Food Security, the Heads of State and Government in SADC have given substantial means to some specific objectives laid down in Article 5 of the SADC Treaty, namely the promotion of sustainable and equitable economic growth and socio-economic development to ensure poverty alleviation with the ultimate objective of its eradication; the achievement of sustainable utilisation of natural resources and effective protection of the environment; and mainstreaming of gender perspectives in the process of community- and nation-building. The Declaration is of specific importance for the human right to food, and covers a broad range of human-rights-relevant issues. The SADC Tribunal is the judicial institution within SADC.¹⁸⁸

The African Charter and, AU and SADC law automatically form part of Namibian law in so far as the relevant legal instruments have been adopted by the country.¹⁸⁹ Despite the absence of a justiciable environmental right in the Namibian Constitution, government incurs environmental-rights-based duties in terms of Article 24 of the African Charter.¹⁹⁰ Thus, Namibian courts are under the obligation to take judicial notice of the aforementioned international instruments as a source of national law.¹⁹¹ In this context, Article 144 is an important constitutional mechanism.¹⁹²

Strengthening environmental rights

It seems that Namibia is at the dawn of environmental advocacy, which refers to the act of speaking out in favour of, supporting, and defending the environment with the aim of having an impact on a decision or policy. Environmental advocates seek to preserve the natural and man-made environment, and to protect the relationships that people have with their environment. One of the principle aims of this article was to demonstrate that human rights concerns are closely related to environmental issues. Cities, villages, communities and individuals can experience a wide array of threats to the environment that may require advocacy. Business interests may be moving forward with a development project such as a dam, without addressing the needs and interests of the communities that will be affected by it. A factory may be polluting air or water, thereby posing risks to public health; or the government or other resource users might be proposing an activity that threatens humans and wildlife alike. Many problems can potentially be addressed through environmental advocacy. Through environmental

188 For a more detailed review of the SADC Tribunal, see Ruppel (2009c, 2009d, 2009e); Ruppel & Bangamwabo (2008).

189 Ruppel (2008a:101ff).

190 Du Plessis (2008:193).

191 (ibid.) with further references.

192 Ruppel (2008a:108–111).

advocacy, environmental rights can be strengthened. Through more public participation in environmental affairs, more participatory democracy¹⁹³ and environmental justice can be achieved. Unfortunately, more often than not, the people who suffer from violations of their environmental rights are incapable of instituting litigation due to a number of factors, including poverty, access to information, and access to justice.

Conclusion

Undoubtedly, the recognition of a real individual right to an environment of a reasonable standard involves confirmation of the emergence of a new generation of rights. However, the interconnection between the environment and human rights clearly highlights their interdependence and indivisibility. In Namibia, 20 years after Independence, a legal culture upholding environmental rights still needs to be created. Moreover, the holistic fulfilment of the constitutional environmental principles of state policy requires even more political will at different levels. There is also a need for the Namibian society as a whole and each individual in particular to live in and pass on a healthy and viable environment to future generations. For this purpose, it is imperative that Namibia reaffirms its international commitment to issues regarding the environment, considers it (at least implicitly) a fundamental right of citizens, and accepts it as a duty to enable them to live in a healthy environment. The right to information, public participation and the right of access to justice should also be underlined in this respect.

Whatever the approach may be at statutory level in terms of granting a human right to environment, the courts' role cannot be overestimated. Internationally, the experience of courts that have been asked to decide on cases with regard to a human right to environment show that the judiciary is crucial when it comes to interpreting existing laws in a way that takes into account recent developments incorporating environmental concerns. While the inclusion of environmental concerns into human rights jurisdiction is still in its infancy in African jurisprudence, relevant rulings from other courts in the world such as the European Court of Human Rights¹⁹⁴ and the Indian Supreme Court¹⁹⁵ may be taken

193 Ruppel & De Klerk (2009:2–4).

194 *TATAR v Romania* (Application No. 67021/01) Judgment 27.1.2009; *Okyay & Others* (Application No. 36220/97) Judgment 12.07.2005; *Fadeyeva v Russia* (Application No. 55723/00) Judgment 9.06.2005; *Öneryildiz v Turkey* (Application No. 48939/99) Judgment 30.11.2004; *Moreno Gómez v Spain* (Application No. 143/02) Judgment 16.11.2004; *Taskin and others v Turkey* (Application No. 46117/99) Judgment 10.11.2004; *Hatton & Others v United Kingdom* (Application No. 36022/97) Judgment 02.10.2001, see Heselhaus & Marauhn (2005:549); *Athanassoglou & Others v Switzerland* (Application No. 27644/95) Judgment 06.04.2000; *Guerra & Others v Italy* (Application No. 14967/89) Judgment 19.02.1998; *Balmer-Schafroth & Others v Switzerland* (Application No. 22110/93) Judgment 26.08.1997, Reports 1997–IV; *López Ostra v Spain* (Application No. 6798/90) Judgment 09.12.1994; *Powell & Rayner v United Kingdom* (Application No. 9310/81) Judgment 21.02.1990.

195 One prominent example of Indian jurisdiction on environmental concerns and fundamental rights is the Delhi vehicular pollution case of *MC Mehta v Union of India* (No. 13029/1985) Judgment 28.07.1998. For further details see Rosencranz & Jackson (2003:228).

as examples when it comes to the linkage between human rights and environmental concerns and the recognition and judicial enforcement of a right to environment.

In the recent 2009 South African case of *Lindiwe Mazibuko & Others v City of Johannesburg & Others*, O’Reagan J held that –¹⁹⁶

[t]he purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections [for] specific aspects of government policy. When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable

Litigation concerning environmental rights cannot only lead to more environmental justice for the individual, but will also exact more detailed accounting from government and, in doing so, impact beneficially on the policymaking process.

In so far as the Namibian Constitution does not include an enforceable environmental right, it may be necessary to consider constitutional environmental protection in a more holistic manner to optimise its meaning. In this context, the Namibian jurisdiction will inevitably be confronted with the dilemma of *judicial activism* versus *judicial self-restraint*.¹⁹⁷ While the latter refers to a situation in which the judge tries to avoid developing the law beyond its clearly established parameters in order not to take over a lawmaker’s function, *judicial activism* describes a situation in which judges extend or modify certain legal provisions as living legal instruments by interpreting them in the light of present-day conditions.¹⁹⁸ Specifically with regard to environmental concerns linked to fundamental human rights, a certain degree of judicial activism is indispensable.

In this spirit, it is hoped that, in the course of dealing with practical cases through an increase of environmental rights litigation, Namibian courts will gradually clarify the substance of those rights, drawing together approaches from international experience.

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196 *Lindiwe Mazibuko & Others v City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28.

197 The term was coined by Mahoney (1990:57–88).

198 White & Boussiakou (2009:42).

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Amendments to the Namibian Constitution: Objectives, motivations and implications

Sacky Shanghala

Introduction

The members of the Constituent Assembly¹ that drew up the Namibian Constitution foresaw the need to wire into the text the possibility of amendments being made in the future as times change and as circumstances require. As a wise man in a far away land once said, –²

[n]o organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate nor [can] any document of reasonable length contain express provisions for all possible questions.

Even the courts, in interpreting the Namibian Constitution, have recognised the need for it to “continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation”³ and “in the articulation of the values bonding its peoples”.⁴ The Supreme Court has stated that regard must be had to –⁵

... contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution ... It is a continually evolving dynamic.

1 On 12 July 1982, the Western Contact Group (Canada, France, Germany, the United Kingdom and the United States of America) wrote to the Secretary General of the United Nations (UN), proposing that an elected Constituent Assembly of Namibians should “formulate the Constitution for an independent Namibia”, and submitted the *Principles concerning the Constituent Assembly and the Constitution for an independent Namibia*, referenced as Document S/15287 in the UN Document System. The UN Security Council implicitly approved the report of the Secretary General containing the Western Contact Group proposals in Security Council Resolution 632 on 16 February 1989 (refer to Document S/INF/45). The Frontline States (Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe) and SWAPO, together with the Western Contact Group, then drew up the Constitutional Principles to guide the process for the election of the Constituent Assembly and the drafting of the Namibian Constitution.

2 Inaugural Speech by President Abraham Lincoln, 16th President of the United States of America, delivered on 4 March 1861.

3 *Government of the Republic of Namibia v Cultura* 2000 1994 (1) SA 407.

4 (ibid.).

5 *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) 76 (NmSC) at 86.

Notwithstanding the powers of the courts in relation to deciding constitutional matters,⁶ provision is made for elected representatives to make amendments to the Constitution. Chapter 19, aptly titled “Amendment of the Constitution”, details how it can be amended, with what majorities this can be done, and where it can and cannot be amended.

Hitherto, the Namibian Constitution has been amended twice: once by the Namibian Constitution First Amendment Act,⁷ allowing for the first President of Namibia, Dr Sam Shafiqhuna Nujoma, to serve another term of office as President; and then by the Namibian Constitution Second Amendment Act,⁸ allowing for more amendments to the Constitution relating to the following, inter alia:

- Extension of the period required for the acquisition of Namibian citizenship by spouses of Namibians and for naturalisation
- Alignment of the period of tenure of members of the National Council with those of members of the National Assembly
- Subjecting the appointment of foreign judges to a fixed-term contract
- Removal of the function of investigating corruption matters from the Ombudsman’s powers and functions
- Establishment of the Anti-corruption Commission as an institution of state
- Decreasing the term of office of members of the Management Committees of Regional Councils to two years and six months
- Redefinition of prison service as correctional service
- Elevation of the head of the Prison Service to the rank of Commissioner-General of Correctional Service, and
- Provision for incidental matters relating to the amendments.

India, the world’s largest democracy, has amended its Constitution 94 times;⁹ and in the United States of America, the oldest democracy, they have gone back to their founding fathers’ text 27 times.¹⁰ Namibia is still a young nation: it has only been 20 years since its Independence on 21 March 1990.¹¹ There can be no doubt that, in the future, further amendments will be made to the Constitution.

6 Per Articles 79(2) and 80(2) of the Constitution, the Supreme Court and the High Court have jurisdiction to hear and adjudicate upon the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder. This notwithstanding, even the highest court of the country can have its decisions reversed by an Act of Parliament lawfully enacted, pursuant to Article 81 of the Constitution.

7 No. 34 of 1998. This is popularly known as the *third term amendment*, referring to Dr Sam Nujoma’s last term of office as a result of the said amendment.

8 No. 7 of 2010.

9 The 94th amendment provides for a Minister of Tribal Welfare in the Jharkand and Chattisgarh States. The Indian President assented to the amendment on 12 June 2006.

10 The 27th amendment prevents laws affecting Congressional salaries from taking effect before the beginning of the next session of Congress. It was passed on 7 May 1992.

11 According to Article 130 of the Namibian Constitution, it came into force on the date of Independence, 21 March 1990.

Amending the Namibian Constitution

As indicated earlier, the process of amending the Namibian Constitution is self-contained in Chapter 19 of its text. The Chapter contains only two but very necessary Articles which, perhaps understandably, do not get as much attention as others. Yet their significance is such that any constitutional amendment is obliged to comply with them to the letter.

It is important to note that every single part of the Constitution is capable of being amended, including Chapter 3 on fundamental human rights and freedoms. However, in respect of Chapter 3, any proposed amendment and/or repeal can only add to and embellish the existing fundamental rights and freedoms contained therein. Any repeal and/or amendment that seeks to diminish or detract from such fundamental rights and freedoms is not only impermissible under the Constitution, it is also invalid and has no force or effect.¹² The fundamental rights and freedoms are, therefore, inviolably “entrenched”¹³ and cannot be detracted from and/or diminished unless a new Constitution replaces the current one. Thus, the existing Constitution survives or falls with Chapter 3.¹⁴

Chapter 19, “Amendment of the Constitution”, provides as follows:

Article 131 Entrenchment of Fundamental Rights and Freedoms

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

Article 132 Repeal and Amendment of the Constitution

- (1) Any bill seeking to repeal or amend any provision of this Constitution shall indicate the proposed repeals and/or amendments with reference to the specific Articles sought to be repealed and/or amended and shall not deal with any matter other than the proposed repeals or amendments.
- (2) The majorities required in Parliament for the repeal and/or amendment of any of the provisions of this Constitution shall be:
 - (a) two-thirds of all the members of the National Assembly; and
 - (b) two-thirds of all the members of the National Council.
- (3) (a) Notwithstanding the provisions of Sub-Article (2) hereof, if a bill proposing a repeal and/or amendment of any of the provisions of this Constitution secures a majority of two-thirds of all the members of the National Assembly, but fails to

12 Articles 131 and 132(5), Namibian Constitution.

13 Per Naldi (1995:23).

14 (ibid.). Naldi uses the example of the reintroduction of the death penalty, popularised by O’Linn J in *S v Tcoeb* 1993 (1) SACR 274 (NmHC), to conclude that only a “revolution” can see the reintroduction of such detraction from the fundamental rights and freedoms. I concur entirely with him. In fact, the suggestion from the bench can at best be termed bizarre if one has regard for Article 63, which imposes upon members of the National Assembly the function of upholding and defending the Constitution. A new Constitution would have to be brought into being.

secure a majority of two-thirds of all the members of the National Council, the President may by Proclamation make the bill containing the proposed repeals and/or amendments the subject of a national referendum.

- (b) The national referendum referred to in Sub-Article (a) hereof shall be conducted in accordance with procedures prescribed for the holding of referenda by Act of Parliament.
- (c) If upon the holding of such a referendum the bill containing the proposed repeals and/or amendments is approved by a two-thirds majority of all the votes cast in the referendum, the bill shall be deemed to have been passed in accordance with the provisions of this Constitution, and the President shall deal with it in terms of Article 56 hereof.
- (4) No repeal or amendment of this Sub-Article or Sub-Articles (2) or (3) hereof in so far as it seeks to diminish or detract from the majorities required in Parliament or in a referendum shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.
- (5) Nothing contained in this Article:
 - (a) shall detract in any way from the entrenchment provided for in Article 131 hereof of the fundamental rights and freedoms contained and defined in Chapter 3 hereof;
 - (b) shall prevent Parliament from changing its own composition or structures by amending or repealing any of the provisions of this Constitution: provided always that such repeals or amendments are effected in accordance with the provisions of this Constitution.

A number of observations can be made from Article 132. It is clear that any attempt to repeal and/or amend the Constitution has to be direct and point to the Articles and Sub-Articles sought to be repealed and/or amended: there can be no lack of clarity in expression in the text of the Article in ordaining the how of repealing and/or amending any constitutional provision.

Twenty years on, there is still no referendum framework provided for by an Act of Parliament. Therefore, the President would not be exercising his discretion any time soon. One can enquire in the abstract whether National Council members would have given the two constitutional Amendment Bills the required majority if referendum legislation had existed – particularly with reference to the popular/infamous¹⁵ ‘third term’ amendment.

Also, the National Assembly and the National Council, collectively as Parliament, cannot amend the Sub-Articles dealing with the requisite majorities. These Sub-Articles join Chapter 3 in their unique protection under the Constitution. That notwithstanding, Article 136(1)(c) permits the National Assembly to act as if the National Council does not exist in a case where a constitutional amendment arises and the National Council is not yet composed of membership due to pending elections. However, due to section

15 The choice depends on which side of the debate one found oneself. Given the public interest in the matter, could they have opted to peer into the mind of the nation – or had the preceding SWAPO Congress done so adequately? The Parliament *Hansard* dated 15 October 1998 reveals a very vivid discussion, led by the then Prime Minister, Dr Hage G Geingob, who moved the amendment.

6 of the Namibian Constitution Second Amendment Act,¹⁶ this may now have become an academic matter, as both the National Assembly and the National Council now have similar terms of office.¹⁷

However, the most important part of Chapter 19 are Sub-Articles 2(a) and (b) of Article 132 dictating the majorities for the repeal and/or amendment of any of the provisions of the Constitution, namely where it states that “two-thirds of *all of the members* of the National Assembly [or National Council, as the case may be]”.¹⁸ This means that all of the members of the house in question are obliged to participate in the vote. The Namibian Constitution First Amendment Act was passed with 51 members of the National Assembly voting for it and 13 against.¹⁹ What, one might ponder, would have been the impact of a walkout staged during the first amendment to the Constitution?

The First Constitutional Amendment

The first amendment to the Constitution was made possible by the Namibian Constitution First Amendment Act. The amendment was embroiled in controversial discussion, both in the National Assembly and in the public realm, due to its purport: to permit Dr Sam Nujoma, as first President of an independent Namibia, to serve a third term of office as President of the Republic of Namibia. The text of the amendment reads as follows:

Amendment of Article 134 of the Namibian Constitution

1. Article 134 of the Namibian Constitution is amended by the addition of the following Sub-Article:

...

- (3) Notwithstanding Article 29(3), the first President of Namibia may hold office as President for three terms.

The necessity of this amendment stems from Article 29(3) of the Namibian Constitution, which provides as follows:

A person shall hold office as President for not more than two terms.

Article 134 of the Constitution provides the following:

16 It amends Article 70(1) of the Namibian Constitution on the term of office for National Council members.

17 The National Council is composed of two Regional Councillors from each of the regions of Namibia. Article 106(1) and (2) of the Namibian Constitution stipulates that every region shall have a minimum of six constituencies (one councillor per constituency). With 13 Regions, it means that there should be 26 members of the National Council. There are 107 constituencies countrywide, therefore 107 councillors. Is it really possible that there will be no composed National Council?

18 Emphasis added.

19 By virtue of Article 46 of the Namibian Constitution, the National Assembly should have a total of 78 members, 72 of such voting members and 6 non-voting members.

Article 134 Election of the First President

- (1) Notwithstanding the provisions of Article 28 hereof, the first President of Namibia shall be the person elected to that office by the Constituent Assembly by a simple majority of all its members.
- (2) The first President of Namibia shall be deemed to have been elected under Article 28 hereof and upon assuming office shall have all the powers, functions, duties and immunities of a President elected under that Article.

The first President's term of office commenced on Independence Day, 21 March 1990,²⁰ and his first term of office would, therefore, be calculated from 21 March 1990 to 20 March 1995, and his second term from 21 March 1995 to 20 March 2000.

The Namibian Constitution First Amendment Act paved the way for the first President to serve from 21 March 2000 to 20 March 2005, which he did. This amendment did not suspend the holding of elections. The elections took place as scheduled in 2004, although they were not without drama.²¹ The first President, Dr Sam Nujoma, defeated his opponents and won comfortably.

Dr Geingob advanced a number of arguments in support of the Namibian Constitution First Amendment Bill, most poignant of them being the following:²²

Even some of our white compatriots have also whispered to me that: "We are with you, we support our President to be given one more five year term presidential [sic] term of office to consolidate national reconciliation and peace and stability ... as for the few minority newspaper editors, and professors who are engaging in sophistry, I must say, I did not see any thing [sic] of rational substance or logic that can make me think that the Swapo Party is not doing the right thing in tabling this proposed constitutional amendment to enable our founding father to seek re-election in the 1999 Presidential elections. None of the editors, nor professors, have pointed out any concrete fact that demonstrates that what we are proposing is undemocratic, unconstitutional or illegal in any way ... Furthermore, I would like to restate that any Constitution is a living document, and is not a document cast in stone, and therefore it must change with changing times or circumstances.

The Opposition did not accept the amendments lying down. None other than Honourable Katuutire Kaura, President of the Democratic Turnhalle Alliance (DTA) of Namibia, was able to match the lingual mettle of Dr Geingob when he said the following in opposition to the amendment:²³

20 By virtue of Article 133, Namibian Constitution.

21 Ballot papers were found in a river bed in the District of Okahandja. The High Court ordered a recount. See *Republican Party of Namibia & Another v Electoral Commission of Namibia & 7 Others* NmHC (2005) Case No. A 387/2005. It also needs to be mentioned that every National Assembly election since the election of members of the Constituent Assembly has been occasioned with an election challenge, merits notwithstanding. Could it be symptomatic of the ideological interpretation of the exercise of democratic rights?

22 Parliament of the Republic of Namibia. *Hansard*. 15 October 1998, pp 207–208.

23 (*ibid.*:45, 28 October 1998).

What has been said thus far, as a means of justifying a third term for His Excellency Mr Nujoma, borders on deification ... I concur with those who say the Constitution is amendable. It is a dynamic living document which is not cast in concrete, that is true. The *sine quo* [sic] *non* for the amendment of any Constitution is public interest, not the interest of an individual. The clear example is the Fifth Amendment of the American Constitution ... This proposed amendment to the Namibian Constitution, on the other hand, is immoral, illogical, myopic, self-serving and a lot of supercilious palaver.

The Namibian Constitution Second Amendment Bill was passed with fewer theatrics in the National Assembly, perhaps due to its less controversial objects. The National Council, however, made certain changes to it and referred it back to the National Assembly in terms of Article 74(5)(a) of the Constitution.

The Second Constitutional Amendment

Both the first and the second constitutional amendments have commonality in their introduction having been done by the Prime Minister of the day. In casu, the Namibian Constitution Amendment Act was moved by the Right Honourable Nahas Angula.²⁴ The Bill introducing the amendment was summed up by the Prime Minister in the following words:²⁵

In order to refresh your minds, the Bill aims at amending the Namibian Constitution so as to:

- extend the waiting period required for acquiring Namibian citizenship by marriage from a period of not less than two years to a period of not less than ten years ordinarily residing in Namibia as spouse subsequent t[o] such marriage;
- extend a waiting period required for non-Namibian citizens who may apply for Namibian citizenship by naturalization from a period of not less than five years to a period of not less than ten years of continuous residence in Namibia;
- decrease the limit of tenure of members of the National Council from six years to five years;
- subject the appointment of non-Namibian citizens as Judges to a fixed term contract of employment;
- delete the word “*corruption*” from the functions of Ombudsman;
- insert an Article on Anti-Corruption Measures;
- increase the term of office of members of Management Committee from the three years to two years and six months;
- substitute the terms “*correctional service*” and “*Commissioner General of Correctional Service*” for the terms “*prison Services*” and “*Commissioner of Prisons*[”].]

Other technical amendments have been effected on Articles 115 and 123 for improved sequencing of Forces in terms of command authority, namely by rearranging the order: Defence, Police and Correctional Services.

24 In his capacity, Dr Geingob was the leader of government business in Parliament by virtue of Article 36 (“Functions of the Prime Minister”) of the Constitution. Discussion resumed in the National Assembly on 11 March 2010, according to the *Hansard*, p 4.

25 (ibid.:4–5). The apparent mistakes are in the text of the *Hansard* itself.

As I mentioned in my introduction last year, these amendments are technical in nature and I believe this House will approve them accordingly.

The lacklustre public interest that met the Bill was matched (or even outdone) by the quality of debate that eventuated in the National Assembly. One cannot glean with certainty the rationale for the amendment of Article 4 of the Constitution, namely extending the periods from two to ten years in respect of subparagraph (bb) of paragraph (a) of Sub-Article (3), and from five to ten years in respect of paragraph (b) of Sub-Article (5). The war in neighbouring Angola is over, and as a result, one would assume that the number of refugees flocking in has abated. The same applies in relation to the Democratic Republic of Congo. Perhaps it was the economic situation in these countries along with Zimbabwe drawing economic refugees that prompted the Minister of Home Affairs and Immigration to request this amendment.²⁶

The above notwithstanding, the new text of Sub-Article (3) of Article 4 of the Constitution now reads as follows:²⁷

The following persons shall be citizens of Namibia by marriage:

- (a) those who are not Namibian citizens under Sub-Article (1) or (2) hereof and who:
 - (aa) in good faith marry a Namibian citizen or, prior to the coming into force of this Constitution, in good faith married a person who would have qualified for Namibian citizenship if this Constitution had been in force; and
 - (bb) subsequent to such marriage have ordinarily resided in Namibia as the spouse of such person for a period of not less than ten (10) years; and
 - (cc) apply to become citizens of Namibia;
- (b) for the purposes of this Sub-Article (and without derogating from any effect that it may have for any other purposes) a marriage by customary law shall be deemed to be a marriage: provide that nothing in this Constitution shall preclude Parliament from enacting legislation which defines the requirements which need to be satisfied for a marriage by customary law to be recognized as such for the purposes of this Sub-Article.

Sub-Articles (1) and (2) of Article 2 deal with citizenship by birth and descent, respectively. Sub-Article (3) deals with citizenship by marriage. While the amendment left the principle of the Sub-Article intact and only raised the time frames therein, it would be of interest to repeat here from the text the purport of it, namely that, if a person in good faith marries a person who would have qualified for citizenship when the Namibian Constitution came into being, that person has ordinarily resided in Namibia for over ten years, and such person has in the appropriate manner applied for citizenship, then that person can become a citizen, marriages of customary law being recognised in this respect.

Sub-Article (5) of Article 4 now reads as follows:

26 One thankfully relies on the understanding of the staff of the National Assembly to access the *Hansard*. Perhaps when the *Hansard* becomes available online, one can research freely, in more depth, and with more enthusiasm.

27 Per section 1 of the Namibian Constitution Second Amendment Act.

Citizenship by naturalization may be applied for by persons who are not Namibian citizens under Sub-Articles (1), (2), (3) or (4) hereof and who:

- (a) are ordinarily resident in Namibia at the time when the application for naturalization is made; and
- (b) have been so resident in Namibia for a continuous period of not less than ten (10) years; and
- (c) satisfy any other criteria pertaining to health, morality, security or legality of residence as may be prescribed by law.

Sub-Article (5) was initially intended to deal with naturalisation, and it, too, has retained its purport that any person not a citizen by birth, descent, marriage, or those who have not filed for admission 12 months after Independence can become a citizen if such person ordinarily resided in Namibia at the time of the application – and that period should not be less than ten years, and has satisfied all other statutory requirements (health, morality, security or residence).

The other object of this Act is to redefine the Prison Service as a Correctional Service, elevate the rank of the head of the said service to Commissioner General, and make the necessary lexicon changes in the text of the Constitution to achieve the said objects.²⁸ Chapter 15 is realigned to achieve sequencing along the authority of the Defence Force, Police Force and Correctional Service.

The alignment of the terms of office of the National Council members with those of the National Assembly²⁹ is aimed at having those members' offices vacant for elections later this year, alongside the elections of members of local authorities. The purport of this amendment is that, in the year after the Presidential and National Assembly elections, the Regional Council and Local Authority elections occur, bringing a smoother alignment between the respective terms of office.³⁰ Section 17(2) of the Namibian Constitution Second Amendment Act applies the amendments to Articles 70 and 109 to the current term of office of such members.³¹

The debate in the National Assembly homed in on the freedom of ministerial drivers to buy bread³² when the other object of the Act was discussed – to remove all matters relating to corruption away from the Ombudsman, and to insert a new chapter on anti-corruption measures in the Constitution between Article 94 and Chapter 11 (“Principles

28 (ibid.:sections 2, 3, 4, 5, 9, 13, 14 and 15).

29 This is achieved by section 6, which amends Article 70 of the Constitution, and by section 12, which amends Article 109 of the Constitution, to provide for a five-year term of office for members of the National Council, and a 2.5-year term of office for members of the Management Committee of Regional Councils.

30 Per Article 29 of the Constitution, the Presidential term of office is five years. The term of office for members of the National Assembly is also five years, as per Article 50.

31 It should be noted that members of the National Council are derived from the Regional constituencies.

32 Refer to page 11 of the *Hansard* of 16 March 2010 and the discussion that ensues between the Speaker and the Deputy Minister of Justice.

of State Policy”). The result is Chapter 10A (“Anti-corruption Measures”), which provides the following:

Article 94A Anti-corruption Measures

- (1) The State shall put in place administrative and legislative measures necessary to prevent and combat corruption.
- (2) There shall be established by an Act of Parliament an Anti-Corruption Commission with its powers and functions provided for in such Act.
- (3) The Anti-Corruption Commission shall be an independent and impartial body.
- (4) The Anti-Corruption Commission shall consist of a Director, a Deputy Director and other staff members of the Commission.
- (5) The National Assembly shall appoint the Director of the Anti-Corruption Commission and the Deputy Director upon nomination by the President.
- (6) The Director of the Anti-Corruption Commission and the Deputy Director shall be appointed for a period of five years and their qualifications for appointment and conditions and termination of service shall be determined in accordance with an Act of Parliament.

It is common cause that an Act of Parliament established the Anti-Corruption Commission in 2003.³³ The effect of this amendment is, firstly, to make the Anti-Corruption Commission an institution of state, independent and impartial. Secondly, the amendment imposes upon the “State”³⁴ the obligation to take measures to prevent and combat corruption. Thirdly, it validates all action done by the Anti-corruption Commission, given that it existed before this amendment was passed by Parliament. The lawmaker then added section 16 to the Namibian Constitution Second Amendment Act, which provides as follows:

Savings and transitional provisions

16. The Anti-Corruption Act, 2003 (Act No. 8 of 2003), is deemed to have been enacted pursuant to Article 94A, and –
 - (a) the Anti-Corruption Commission established by that Act and which exists at the commencement of this Act is deemed to have been established as contemplated in that Article and continues to exist;
 - (b) the Director of the Anti-Corruption Commission and the Deputy Director holding office at the commencement of this Act by virtue of their appointment under that Act continue to so hold office and are deemed to have been appointed in terms of that Article;
 - (c) anything made or done in terms of or under that Act continues as such and is not affected by this Act.

Given what is contained in Article 132(1) of the Constitution, it follows that one would enquire whether or not the insertion of section 16 in the Namibian Constitution Second Amendment Act was not erroneous: was it not required that a separate General Law or Anti-corruption Commission amendment legislation be passed, and if so, what then is the effect of section 16 of the said Act?

33 The Anti-Corruption Commission Act, 2003 (No. 8 of 2003).

34 One wonders why the word *Government* was deemed undesirable here.

The other and last object of the amendment³⁵ was to cap the ages of permanent judges to 70 in the first instance,³⁶ and in the second instance, to ensure that foreign judges were all put on a fixed term of contractual employment. However, the amendment excludes acting judges, who can be appointed above the age of 70, and who need to be contracted for a fixed term of employment if they are foreigners – whether before or after the retirement age of 70.³⁷ The amendment reads as follows:

All Judges, except Acting Judges, appointed under this Constitution shall hold office until the age of sixty-five (65) but the President shall be entitled to extend the retiring age of any judge to seventy (70): provided that non-Namibian citizens are appointed as Judges under a fixed term contract of employment.

The first question that comes to the fore is whether foreign judges are now employees under the Labour Act.³⁸ If so, who is their employer? Also, does this amendment in any way affect the independence of the judiciary pronounced in Article 78(2) of the Constitution?³⁹

A peek into the future: Issues arising from constitutional provisions

At the present day students of the constitution wish neither to criticize, nor to venerate, but to understand; and a professor whose duty it is to lecture on constitutional law, must feel that he is called upon to perform the part neither of a critic nor of an apologist, nor of an eulogist, but simply of an expounder; his duty is neither to attack nor to defend the constitution, but simply to explain its laws.⁴⁰

The above dictum forms the basis upon which a cursory discussion can be conducted on issues arising from the constitutional Articles, most of them not yet subjected to the scrutiny of a court.

35 Although not in the particular order of the discussion here. Section 7 of the Namibian Constitution Second Amendment Act amends Article 82(4) of the Constitution.

36 Previously, an Act of Parliament could extend the age of retirement and the age up until which a judge could hold office.

37 See also the High Court Act, 1990 (No. 16 of 1990), particularly sections 6–8.

38 No. 11 of 2007.

39 “The Courts shall be independent and subject only to this Constitution and the law”. See also *Hannah v Government of the Republic of Namibia* 2000 NR 46 (LC). Refer to *R v Valente* 1985 24 DLR (4th) 161 SCC, which laid the foundation for three essentialia for the independence of the judiciary in Canada: security of tenure and removal only on good cause; financial security; and institutional independence in judicial functions. In the case *Re Judges of the Provincial Court of Newfoundland et al: Newfoundland Association of Provincial Court Judges v Newfoundland* 1998 160 DLR (4th) 337, it was found that government’s reduction of contributions to the judges’ pensions were unconstitutional to the extent that they affected the financial security of the Provincial Judges without recourse to an independent commission. Even the reclassification of the judges’ salary scale on a civil service pay scale was found to violate judicial independence.

40 Dicey (1956:3).

Establishment of the Republic of Namibia and Identification of its Territory

Article 1(1) states the following:

The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.

How does this interrelate with Article 27(2), which vests executive power in the President and the Cabinet, if regard is had to Article 108, which provides the following?

Article 108 Powers of Regional Councils

Regional Councils shall have the following powers:

- (a) to elect members of the National Council;
- (b) to exercise within the region for which they have been constituted such executive powers and to perform such duties in connection therewith as may be assigned to them by Act of Parliament and as may be delegated to them by the President;
- (c) to raise revenue, or share in the revenue raised by the central Government within the regions for which they have been established, as may be determined by Act of Parliament;
- (d) to exercise powers, perform any other functions and make such by-laws or regulations as may be determined by Act of Parliament.

The question begs an answer: Is Namibia a quasi-federal state? Regional governments can raise revenue,⁴¹ exercise executive powers, and are certainly independent – if for a moment the political dispensation is not one of uniformity.

One another point flowing from Article 1 is the issue of secularism. If that is indeed what the text of the Constitution intended, what is the justification for the prayers at the commencement of the sessions of the National Assembly or the inclusion of religious leaders in official programmes of state functions?

National symbols

Article 2 provides for a national flag and other national symbols. Pursuant to this Article, the National Coat of Arms of the Republic of Namibia Act⁴² was promulgated. Also in force is the Merchandise Marks Act,⁴³ the Trade Marks in South West Africa Act,⁴⁴ the Heraldry Act,⁴⁵ and certain portions of the Patents and Designs Proclamation.⁴⁶

41 This revenue, by virtue of Article 125(2) of the Constitution, is separate from central government revenue. This begs a further question: Does the State Finance Act, 1990 (No. 31 of 1990) apply to Regional Council finances?

42 No. 1 of 1990.

43 No. 17 of 1941.

44 No. 48 of 1973.

45 No. 18 of 1962.

46 No. 17 of 1923.

One would have thought that, with the passing of the Copyright and Neighbouring Rights Protection Act,⁴⁷ the consolidation of all matters relating to the issuance of permission to utilise parts of the national symbols would have been sorted out. Instead, individuals may even copyright content that ought to be in the public realm. Movement on this Article is needed, even if only to elaborate on the crimes relating to the unlawful use of the coat of arms in a better context than the common law crimes of fraud or uttering currently prosecuted in the courts.

Language

Although many Namibians cannot proficiently converse in English, and notwithstanding the imposition of English as the only official language by Article 3, the same Article read together with Article 23 – titled *Apartheid and Affirmative Action* – makes it possible for the enactment of a law to advance persons if the object of that law is to make another language (i.e. their native language) the official language in a particular region or area. Why has this not been utilised thus far?

Citizenship

Undoubtedly, the most provocative matter arising in relation to citizenship stems not from Article 4 itself, but from section 26 of the Namibia Citizenship Act,⁴⁸ which prohibits Namibians from bearing dual citizenship. Particularly in a globalised perspective of the world, a child born in the United Kingdom of a Namibian (by birth) and a North American parent is entitled at least to British, US/Canadian and Namibian nationalities. This discussion can, however, get deeper than it first appears possible. Perhaps the time has come to have that discussion.

Life

Abortion – otherwise known as *the debate we never had but should have* – continues to be ignored by all politicians, irrespective of party affiliation, while young teenagers continue to be arraigned before the courts for having dumped babies. Debate around this subject should be one of the most vivid, yet it fails to attract a serious reaction from Namibians.

Family

Is it a foregone conclusion that the issue of gays and lesbians is settled in Namibia? With no definition of *family* in Article 14, how can it still be possible that the Rainbow Coalition – together with the Mauritians and Palestinians – the only remaining freedom fighters?

47 No. 6 of 1994.

48 No. 14 of 1990.

Property rights

Known to some as the Achilles heel of land reform, but championed by others as the most important ingredient to stability in our economy: whatever the case may be, Article 16 and its in-built just compensation criterion needs to be considered against the backdrop of the deprivation that occurred against the ‘natives’ in the first place – or at least in the context of Article 19 on culture and ancestral rights⁴⁹ that ought to have survived colonisation.

Education

The right to education is currently being put to the test in South Africa in the Bhishe High Court. The question is, given the unqualified nature of Article 20, can one challenge the government as having breached its constitutional obligations if regard is had to the quality of such education? How about the facilities?

Fundamental freedoms

With regard to the freedom to practise any religion, is Namibia prepared for a Muslim student in a public school – needing a Halaal menu, prayer time not impinged by the curriculum, etc.?

With regard to practising any profession, or occupation, trade or business, when will a mature discussion on the profession of commercial sex workers commence?

Black economic empowerment

Is it not legible that Article 23 on apartheid and Affirmative Action already caters for Parliament to pass laws providing, directly or indirectly, for the advancement – a synonym for *empowerment* – of persons socially, economically or educationally disadvantaged by past discriminatory laws or practices, as well as, at the same time, providing for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances arising as a result of past discriminatory laws or practices?

Therefore, the ongoing debate on black economic empowerment can be solved. Those that seek empowerment and those that seek to deal socially with the disadvantaged need not fight: the two objectives are not mutually exclusive. However, the acquisition of wealth needs to be achieved in accordance with the law, transparently, and on the basis

49 The courts could adopt the approach taken in *Mabo & Others v Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1 FC 92/014. The Australian High Court ruled that the traditional title of the Meriam people of the Murray Islands survived annexation to Queensland, and it was not extinguished by subsequent legislation or executive act. The High Court also held that it could only be extinguished with compensation or damages to the traditional titleholders of the Murray Islands, and concluded, therefore, that the Murray Islands were not Crown land in the meaning of section 5 of the Australian Land Act, 1962.

of equal access to opportunity, since the blanket aggrandisement of a few at the expense of the deprived majority will not achieve the purport of Article 23. In any event, the acquisition of wealth is obliged to be accompanied by social welfare programmes. When will the debate cease and actions commence, one asks? Is this a case for paralysis by analysis?⁵⁰

Powers of the President

Was it intended that –

- executive powers be split between the President and his Cabinet (and, to a certain extent, Regional Councils)
- the President’s executive powers only be exercised in consultation with Cabinet, and
- the above treatment be made in relation to the President’s powers as Commander-in-Chief?⁵¹

What is a *Cabinet*?⁵² What is the effect of failure on the part of the President to announce his/her actions in the *Gazette*?⁵³

Functions of Cabinet

Perhaps the greatest injury⁵⁴ to the common law was committed when the State-owned Enterprises Governance Act⁵⁵ was promulgated, possibly in the belief that it advances the purport of Article 40(a) of the Constitution. Instead, a Minister for Public Entities could have sufficed. The function of the State-owned Enterprise Governance Council and its secretariat remains a convenient mystery.

Election of members of the National Assembly

The election of members of the National Assembly is subjected to both principles and to procedures.⁵⁶ The principles are contained in Article 49 and Schedule 4 of the Namibian

50 Credited to Harold S Geneen (1910–1997), an American businessman, and Chief Executive Officer of International Telephone and Telegraph (ITT) from 1959 to 1977.

51 Refer to Articles 27 and 115(2).

52 Do Cabinet Committees suffice?

53 Required by Article 32(8) of the Constitution. What if all the judges ever appointed are not gazetted? Perhaps regularity will be assumed, given the Supreme Court ruling in *Rally for Democracy and Progress & 17 Others v Electoral Commission of Namibia & 8 Others* Case No. SA 6/2010 NmSC. The Supreme Court remitted the matter for adjudication by the High Court.

54 The State-owned Enterprise Governance Council directs, approves and disapproves investments and budgets, yet the Council occupies the enviable position of having no fiduciary duty towards the companies and entities: that remains the responsibility of the directors.

55 No. 2 of 2006, as amended.

56 Article 46(2), Namibian Constitution.

Constitution, while the procedures are contained in the Electoral Act.⁵⁷ Again, if one refers to Article 132(1) of the Constitution, is it possible that section 85(10) of the Electoral Amendment Act⁵⁸ is unconstitutional? The relevant text of section 85(10) reads as follows:

If, in the case of an election of members of the National Assembly or of members of a local authority council two or more political parties have received –

(a) after the counting of votes ...; or

(b) after the recounting of votes ...,

an equal number of surplus votes and the result of the election cannot by virtue thereof be determined, –

(i) the Chairperson of the Commission, in the case of an election of members of the National Assembly, shall determine by lot the result of the election;

(ii) the returning officer, in the case of an election of members of a local authority council, shall determine by lot the result of the election.

Should there not have been a specific amendment to Schedule 4? There is perhaps a need to deal more thoroughly with Schedule 4 in terms of how seats are allocated in accordance with a formula in which all votes cast⁵⁹ are relevant, and in relation to surpluses which have been used erroneously to grant seats to parties that never made the quota/threshold in the first place. Also, it is important to detail what should occur if a political party disappears from the scene after it has secured seats in the National Assembly.⁶⁰

The Prosecutor-General and the Attorney-General (and, for that matter, the Minister of Justice)

Is it not time that this function is amalgamated and prosecutorial code adopted? After all, the fear was unfounded that SWAPO would prosecute the former leaders of the ethnic (“Bantu”) governments since, as 20 years on, a plethora of institutions has mushroomed. Was it really necessary to have an Anti-corruption Commission when there was already an Ombudsman? Who prosecutes the Prosecutor-General, or is this constitutional office above the law? What is left of the Ministry of Justice once the Legal Drafters fall under the Attorney-General? Law Reform⁶¹ is separate in function, so is the magistracy,⁶²

57 No. 24 of 1992, as amended.

58 No. 7 of 2009.

59 A blank vote put in the box by a duly registered voter is also a vote cast.

60 Should the competing surpluses take the seats? Should there be National Assembly ‘by-elections’?

61 Refer to the Law Reform and Development Commission Act, 1991 (No. 29 of 1991).

62 Refer to the Magistrates Act, 2003 (No. 3 of 2003). See also *Walter Mostert v The Minister of Justice*, Case No. SA 3/2002 NmSC.

the prosecutors,⁶³ legal aid⁶⁴ and the Government Attorney.⁶⁵ Perhaps only matters of international cooperation⁶⁶ remain with the clerks⁶⁷ and cleaners?

Conclusion

Normally, conclusions shed light and educate the reader on what s/he has just consumed. This conclusion is different: it continues to ask, curiously, perhaps provocatively, as evinced in the discussion, yet all for the purpose of a better constitutional discourse out of the classroom, out of the courtroom, and out of the offices where – with difficulty, more often than not – the administrators are confronted with the need to take action in accordance with the Constitution.

The following questions should also be answered:

- Is the Preamble part of the text of the Constitution? Is it part of the Constitution at all, or was this a separate declaration by the Constituent Assembly?
- Given that Schedule 5(1) of the Namibian Constitution vests property in the Namibian Government, what is the legal consequence of the non-production of a title deed before the Registrar of Deeds, as envisaged under Schedule 5(4) of the Constitution?
- Where are the ancestral rights of the indigenous peoples protected under the Namibian Constitution? Do such assertions of indigenous rights stand up to the property rights contained in Article 16?
- Is the recognised international boundary of Namibia with the Republic of South Africa positioned in the middle of the Orange River?
- Since the judiciary is not part of central Government, why is the High Court at Windhoek the main office and the High Court at Oshakati a ‘satellite court’? After all, there are more citizens up there than the number residing in Windhoek.

As Namibian nationhood grows, so will its constitutional law and jurisprudence, hopefully fanned by academics, researchers and commentators who eagerly await the pronouncements of the courts to critique, analyse and expound upon. Only in their written form will such robust opinions be captured and shared with the next generation of eager thinkers.

63 Refer to Article 88, Namibian Constitution. See also the case of *Ex Parte: Attorney-General In Re: Constitutional Relationship between Attorney-General and the Prosecutor-General* (SA 7/93) [1995] NASC 1; 1995 (8) BCLR 1070 (NmSC) (13 July 1995).

64 Refer to the Legal Aid Act, 1990 (No. 29 of 1990), as amended. See also *Government of the Republic of Namibia & 2 Others v Geoffrey Kupuzo Mwilima & 127 Others*, Case No. SA 29/2001 NmSC.

65 Refer to the Government Attorney Proclamation, 1982 (R161 of 1982), albeit that the interpretation of Article 87 of the Constitution places the Office of the Government Attorney under the aegis of the Attorney-General.

66 The Department of International Cooperation in the Ministry of Justice dealing with extradition matters, cooperation in judicial matters, reciprocal enforcement of judgments, etc.

67 Even then, the Magistrates’ Commission and the Minister of Justice may in future find themselves discussing their positioning vis-à-vis the independence of the magistracy as part of the judiciary.

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