Beyond a Quarter Century of Constitutional Democracy

Process and Progress in Namibia

Edited by
Nico Horn & Manfred O Hinz

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Foreword

Nico Horn and Manfred Hinz

In 2002, Manfred Hinz, Sam Amoo and Dawid van Wyk published papers analyzing the state of constitutionalism of Namibia after 10 years of independence in a book with the title *The Constitution at Work. 10 years of Namibian nationhood.*[1] The papers were read at a conference in 2000, a conference jointly organized by the University of Namibia and the then Polytechnic under the title *Ten Years of Namibian Nationhood.* For the Faculty of Law of the University of Namibia (UNAM), the conference and the subsequent publication of its papers were also an opportunity to mark the first years of UNAM's Faculty of Law, the first institution to provide legal, and this includes constitutional, education for Namibians on Namibian soil. The book was dedicated to the Founding Dean of the Faculty of Law, Prof. Walter Kamba.

The Constitution at Work gave the readers a good background of the constitutional development of the new nation. While the opening paper by Gerhard Erasmus, who was part of the team to assist the making of the Constitution, dealt with basic questions such as the origins of the constitution, what is a constitution and life under a constitution, Manfred Hinz asked some critical questions on the position of customary law and traditional authorities. He looked at legislation passed in the first ten years in the light of the promises of the Constitution such as article 66, placing customary law on par with common law and article 102, the creation of a Council of Traditional Leaders to advise the president. Sam Amoo and Sid Harring dealt with land issues; Harring discussed the controversial issue of "stolen land", while Amoo compared Namibia with South Africa, Zimbabwe and Zambia to find a way forward in implementing the laws of expropriation. In total, 31 authors contributed to the book that provided guideline, critical comments, failures and hope after the first ten years of nationhood. *The Constitution at Work* is still, 16 years later, quoted when judgments and legislation of the first ten years of Namibian nationhood are discussed.

Ten years later Anton Bösl, Nico Horn and André du Pisani edited a book looking at twenty years of Namibian constitutionalism under the title *Constitutional democracy in Namibia. A critical analysis after two decades*.[2] The book included contributions of several members of the Constituent Assembly, such as its chairperson Hage Geingob, now President of the Republic of Namibia, Theo-Ben Gurirab, later prime minister and speaker of the National Assembly for many years, but also a contribution by the opposition politician Dirk Mudge. Contributors to the first book were also among those who contributed to this second book on constitutionalism in Namibia: Manfred Hinz, this time discussing the limits of law, Sam Amoo and Sid Herring, writing on intellectual property rights,

[1] (2002): Pretoria: VerLoren van Themaat Centre, UNISA.
[2] (2010): Windhoek: Macmillan Education Namibia.

Lazarus Hangula on the constitutionality of Namibia's territorial integrity and Dianne Hubbard on equality in the Namibian Constitution.

The foreword to *The Constitution at Work* had an opening quote from the autobiography of the founder of the Namibian nation and the first democratically elected president of the country, Sam Nujoma: "The Constitution of Namibia is, in many ways, a unique document. The oppressed, the disenfranchised who at last won their struggle for freedom, argued for the enshrining of the fundamental rights in the Constitution. These rights cannot be diluted."[3] The authors of the foreword to *The Constitution at Work* referred to this quote and noted that it was "this sense of optimism that motivated the organisers of the conference on the Namibian Constitution and the publication of its papers to appraise and assess the constitutional and human rights record of the Republic of Namibia after then years of nationhood".[4] The critical analysis of constitutionalism in Namibia after 20 years could look at a different political and societal set-up. The 20 years after independence had resulted in a reality, which was more than just a post-apartheid and post-independence reality, it was a reality in its own rights, with indeed many young Namibians, whose knowledge of what the country was before 1990 was not first-hand knowledge anymore: it was knowledge received through transmission and learning. This is even more the case now, 25 years after the year of independence. The Faculty of Law of the University of Namibia is well-established, its graduates can be found everywhere in the country. The legal profession has been reshaped; parliament has enacted a broad range of statutes; the courts have delivered an amount of judgments, thus creating, what can truly be called Namibian case law.

The book into which this foreword opens the gate *"Beyond a Quarter Century of Constitutional Democracy – Process and Progress in Namibia"* is also a reflection of the status constitutionalism reached in Namibia. It should be read together with at least two recently published works, for which the two editors of *"Beyond a Quarter Century of Constitutional Democracy – Process and Progress in Namibia"* are responsible: Nico Horn, in his *Interpreting the interpreters*[5], linked the constitutional development of Namibia since the beginning of constitutional practice to legal philosophy and its offers to relate constitutional interpretation to societal development. Manfred Hinz and his co-authors Anne Schmidt and Clever Mapaure submitted a comprehensive description and analysis of the constitution in the life of Namibia and the constitutional jurisprudence delivered by the courts of Namibia.[6]

The contributors to *"Beyond a Quarter Century of Constitutional Democracy – Process and Progress in Namibia"* are academics and practitioners, some of them having already

[3] "Nujoma, S. (2001): Where others wavered: The autobiography of Sam Nujoma. London: Panaf Books: 430.
[4] Hinz; Amoo (2002).
[5] (2017): Interpreting the Interpreters. A Critical Analysis of the Interaction Between Formalism and Transformative Adjudication in Namibian Constitutional Jurisprudence 1990 – 2004.
[6] (2016): Constitutional law Namibia. Alphen van den Rijn: Wolters Kluwer.

contributed to the two predecessors of this book:

The author of the first chapter is **Manfred O Hinz**. He presents in his article the so far completed project of ascertaining customary law, a project which Hinz directed since its inception while he was still member of the Faculty of Law of the University of Namibia and very much engaged in its Human Rights and Documentation Centre. After years of work and consultations with all the traditional communities of Namibia and their leaders, the project reached an end in 2016 with the publication of the last, the third volume of Customary Law Ascertained. Many students of the Namibian Faculty of Law assisted the project. It is now to the practitioners in customary law, the communities, their leaders and the judges in community courts to take note of the ascertained law, to review it, and to develop it further as part of the overall law of Namibia.

Henning Melber discusses the discrepancy between what the Constitution says and what the people on the ground believe. He quotes Pierre de Vos, South African constitutional expert and professor at the University of Cape Town, saying that the success of a constitution is that "the change happens not in the courts, but it happens on the ground".[7] The challenge of constitutionalism, Melber concludes, is not first and foremost the challenge of the courts, but of the people. Celebrating constitutional achievements of 25 years means for Melber in particular also to take note of the "courageous and committed individuals in the legal profession, many of whom had been socialized under apartheid and decided to take a stand for justice and human dignity, often at great personal risks and sacrifices. Continuing to execute such advocacy under a new dispensation has not protected them from occasional failures or flaws in their judgments."[8]

Peya Mushelenga is Deputy Minister of International Relations and Co-operation. He analyses the framework of Namibian co-operation in the international arena and its effect on economic growth. He measures the success of the policy documents of government to its effect on economic growth and the opening of opportunities. He concludes that realistic policies aimed at international co-operation, is a good foundation for potential growth.

Heribert Weiland, a political scientist from Germany, has observed the elections in Namibia since the independence of the country. For Weiland, the success of Namibia as a democracy and country with political stability is founded in its Constitution and the regular election. Weiland: "Elections are the means of choosing officials, confirming their mandate and giving them legitimacy in office. At the same time they have also a powerful control function."[9] Weiland concludes his analysis by referring to surveys that show "that almost 80% of Namibians support a multiparty system which is a sign for a democratic consolidation in the Namibian society. Particularly significant is the legitimation function of elections. Despite enormous majorities, the leadership has always shown its willing-

[7] See below at p. 22.
[8] Ibid.: p. 24.
[9] See below at p.45.

ness to gain approval and consent to govern through an official act of voting, thereby submitting to the control of the electorate."[10]

Ndjodi Ndeunyema, Namibia's first Rhodes scholar, investigates the negative effect on constitutionalism if laws (in this case the Electoral Act) are ignored or defied. He discusses the public distrust in electoral process in general, but concentrates on the appointment of commissioners in 2016. Ndeunyema warns against the unconstitutionality of ignoring specific procedures prescribed by the Act: "An even graver consequence is that electoral disputes may trigger conflict and precipitate violence as the public may not regard election processes and outcomes as reflective of the true will of the people prevailing to allow for all power to vest in the Namibian people."[11] For Ndeunyema, elections are the "soul of the constitutional democracy". An electoral commission "that is headed by unconstitutionally appointed commissioners, their individual qualities notwithstanding, would pierce the soul of our constitutional democracy".[12]

Dennis Zaire gives us an overview of the first quarter century of Namibian independence. He deals with the drafting of the Constitution at the difficult task of the authors to balance the interests of all the parties and the ideal of a post-apartheid just and fair state. He discusses the amendments to the Constitution, gives us insight in the economic challenges of the first quarter century and looks at the negative results of corruption in government. Zaire takes us through the elections and the regular legal battles after the elections. Lastly he also analyses the role of civil society and the churches.

Oliver Ruppel, a former member of staff of the Faculty of Law of the University of Namibia and his wife **Katharina Ruppel-Schlichting** relate in their article on the challenges of the environment and the legal responses to this challenge to the Constitution of Namibia: "Namibia's Constitution provides a good example that by way of active application and continuous and progressive interpretation it can serve as the basic foundation to accommodate the topics of our times, even if these could not be foreseen by the drafters of the Constitution.". The 25 years after Independence have produced a legal culture of upholding environmental rights. "A broad variety of laws directed at environmental protection exists and there are many more to come; in principle, the existing legal framework provides for a variety of mechanisms to ensure compliance with and enforcement of environmental laws."[13] However, the authors of the article hold, that that the implementation of the legal instruments remains a challenge.

Anne Schmidt, a German lawyer, who was a student in the Faculty of Law of the University of Namibia for one year, focuses on public procurement from a constitutional per-

[10] Ibid.: p.54.
[11] Ibid.: p.71.
[12] Ibid.: p.71.
[13] See below p. 131.

spective. Public procurement plays an important economic role, it may make up of 10 to 70% of the GDP of a state. "When dealing with the regulation of public procurement, it should always be kept in mind that public procurement is a complex issue taking place at the interface of state and commercial interests, being influenced by and depending on the market of goods and services, and accommodating different stakeholders with partly diverging interests. Additionally, the high amounts of money spent through public procurement makes not only government officials vulnerable to corruption but also other stakeholders such as companies which at all costs want to win government contracts."[14] Schmidt concludes her analysis of the attempts in Namibia to find a statutory response to public procurement by stating that the Public Procurement Act of Namibia constitutes a great improvement to the prior applicable Tender Board Act. However for Schmidt, there are still some matters of concern which could be addressed to satisfy the requirements of the Constitution.

George Coleman raises the unresolved issue of gay and lesbian rights. He compares the judgment of the Supreme Court in the widely discussed *Chairperson of the Immigration Selection Board v Frank and Another*[15] with the Namibian obligations under international law and the fact that "general rules of public international and international agreements binding upon Namibia (of which the ICCPR is one) shall form part of the law of Namibia."[16] Coleman refers to several laws that criminalise gay and lesbian sexual relationships. He also points out that although rare, there are still people serving sentences for sodomy even if it is consensual. Coleman concludes that there is a clear contradiction between Namibian laws.

Harald Sippel, a German lawyer who has visited Namibia regularly for research purposes since 1990, takes up the land question, a question that has occupied politicians, community leaders and academics since the political change of the country accepted the call for corrections of the land tenure system in Namibia, more than most other matters, a product of colonialism and apartheid. Sippel notes: "By the end of 2012 at least 22 per cent or 8,077,163 hectares of commercial farm land were redis-tributed, and for the acquisition of 2.05 million hectares of commercial farm land from 1990 to the end of 2014 the State spent the amount of 829 million Namibian Dollars. Moreover, in the communal areas currently 80,352 customary land rights have been registered."[17] The question about how to deal with ancestral rights is still on the agenda although the National Land Conference of 1991 decided against the possibility of claims for land based on ancestral land rights. Here, Sippel notes the intended class action of the Hai//om which may enable the court to open a new leaf in addressing historical injustices.

[14] See below p. 134.
[15] *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC).
[16] See below p. 153.
[17] See below p. 167.

Job Amupanda asks the question if a mixed economy is a real possibility under what he calls a 'neoliberal' constitution. He concludes that both in content and history, the Constitution is a victory for neoliberalism. The idea of a mixed economy is not defined in the Constitution and was not developed in the constitutional era.

Sam Amoo deals with the role of comparative jurisprudence after independence. He points out that the Supreme Court of South West Africa / Namibia laid the foundation for comparative jurisprudence, but its efforts were nullified by the final authority of the South African Supreme Court of Appeal. After independence the Namibian courts opened the doors for a meaningful comparative process. In the well-known *Kauesa case*[18] the Supreme Court acknowledged its commitment to abide by the rules of international customary law. Amoo points out that not only international law, but also an evaluation of the Namibian norms and values, assisted the Namibian courts in a meaningful comparative process. He warns against a simple comparing of words without looking at the full context.

Dianne Hubbard investigates the development on common law under the Namibian Constitution. She points out that unlike South Africa, the Namibian Constitution does not directly give the Namibian courts a mandate to develop common law in the light of the Constitution. Initially the courts did not agree that it was their duty to develop common law. Hubbard notes that "the (…) question was answered (…) in *Trustco Group International Ltd and Others v Shikongo,*[19] where the Supreme Court held that the Constitution must inform the development of the common law(…)". She concludes: "The developments of the common law considered in this survey are both welcome and a bit worrying – welcome because they ensure that the Constitution is, as intended, the lodestar of all law in Namibia, and worrying because the approach to the development of the common law seems to be very subjective in some cases. Namibia would benefit from formulating and applying a more consistent approach to testing common law against the Constitution."

Finally, **Nico Horn** uses the post-liberal transformative constitutional model as a way to move away from the word-by-word interpretation of the pre-independent South African era. He points to Namibian case *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial*[20] as an example where the model was used to broaden the rights of accused by reading the Constitution primarily in the light of all the protected rights rather than giving meaning to selected sentences or provisions.

[18] *Kauesa V Minister of Home Affairs and Others,* 1996(4) SA965(NMS).
[19] *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC).
[20] 2002 NR 235 (SC)

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MANFRED O HINZ studied Law and Philosophy at the University of Mainz (Germany) where he graduated in 1960. After studying Sociology, Anthropology and African and Oriental Languages at the same university, he was appointed full Professor at the University of Bremen (Germany) in 1971. He joined the Faculty of Law of the University of Namibia with its inception and was Deputy Dean and Dean of the Faculty for several years. Prof. Hinz returned to Germany in 2010. At the University of Bremen, he works as the director of the Centre for African and Migration Studies. In 2014, he was appointed adjunct Professor in Law and African Studies at the Jacobs University in Bremen.

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OLIVER RUPPEL and **KATHARINA RUPPEL-SCHLICHTING** are editors of the book *Environmental law and policy in Namibia – towards making Africa the tree of life* published in its third edition in 2016.
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LIST OF ABBREVIATIONS

ACP	African, Carribean and Pacific states
AST	Additional Sales Tax
CZI	Confederation of Zimbabwean Industry
EEC	European Economic Community
EPA	Economic Partnership Agreement
EPZ	Economic Processing Zone
EU	European Union
FDI	Foreign Direct Investment
GST	General Sales Tax
LDC	Least Developed Country
NDP	National Development Plan
NWR	Namibia Wildlife Resorts SACU Southern Africa Customs Union
SADC	Southern Africa Development Communty
SADC-PF	SADC Parliamentary Forum
SAID	Southern Africa International Dialogue
SANEC	Southern Africa Netherlands Economic Cooperation
SME	Small and Medium Enterprises
SOE	State-Owned Enterprises
TSE	Toronto Stock Exchange
US	United States
WEF	World Economic Forum
WTO	World Trade Organisation

The ascertainment of Namibian customary law completed: What has been done and what lies ahead

Manfred O Hinz[1]

Why ascertaining African customary law? Who needs ascertained customary law and how should ascertainment be done? Do customary law applying traditional leaders need it to be ascertained? Before the many interventions by statutory law, and, more so, before the development of independent nation states, traditional leaders could state with good reasons: "Why ascertain customary law? We know our law. It is only you, the outsiders, who want to impose on us some kind of written versions of the law, which will not be our law anyway!" This attitude to the ascertainment of customary law has changed. More and more traditional leaders understand the reasons for ascertaining customary law, accept ascertainment undertakings, even request to have the laws of their communities ascertained, and take the lead in ascertainment projects.

Traditional communities are not homogeneous communities as they used to be, when basically everybody knew what the law of the community was, and where traditional ways of communicating knowledge provided young people with the necessary education to grow with the value framework of the community. There is also a growing understanding that the legal complexity experienced in urban settlements where various customary laws apply forces to attend to ascertaining and even standardising customary law. There is a growing acceptance that the verdict of the chief is not necessarily the last word anymore; dissatisfied parties may take the verdict of a chief to appeal. The judges sitting on appeals will not necessarily know what the customary law applied by the court a quo is and fail to get knowledge unless there is something in writing to inform them.

The *Customary Law Ascertainment Project* responds to this development. However, it does not respond by offering codified customary law. It responds by grounding an environment that opens space to traditional communities and their authorities for what we call the *self-stating*[2] of customary law. *Self-stating* customary law has a history in Namibia, going back to pre-independence developments in some of the traditional communities. The more or less independently undertaken efforts by some traditional communities eventually resulted in the nation-wide *Customary Law Ascertainment Project*. The Council of Traditional Leaders took it as its project and called on all traditional authorities to start their own projects to ascertain their customary law.

[1] The following is a shortened version of my introductory remarks to the third volume of *Customary law ascertained*. (Hinz 2016a). The third volume of customary law ascertained (as to volume 1 and volume 2 see: Hinz 2010a and Hinz 2013) was published in February 2016. As a former member of the Faculty of Law of the University of Namibia, I was responsible for the *Customary Law Ascertainment Project* of the Human Rights and Documentation Centre of the Faculty.

[2] To the term *self-stating*, see below.

African customary law and the call for codification

African customary law systems have, as African scholars hold, survived thousands of years as orally transmitted systems of law. They will not become 'more' law or law-like by being codified. Common law has survived history and remained a highly valued system of law without being codified. Why then argue, as lawyers do, that African customary law must be codified? This argument has accompanied the discourse in African jurisprudence since the days when many of the now independent African states achieved their independence!

Looking closer, it becomes obvious that many Western-educated lawyers from Europe and Africa never took it on themselves to enquire about the nature of African law. For them, African customary law was very different from the law learned in school and, therefore, had to be changed to become similar to the mainstream of law taught at school. Indeed, African customary laws show differences to Western law because both forms of law are based on different concepts of justice and maintain procedural rules geared towards achieving their concepts of justice. In view of this, and since that there was no administration of justice in Africa comparable to the administration of common law that would produce reliable precedents, the call for codification appeared to be the easiest way to 'uplift' African customary laws to the so-called standard of real law. That African customary laws would lose their flexibility to be applied by the communities in the interest of restoration of peace and harmony among themselves was not of concern to the proponents of codification!

There are important lessons which legal anthropological research has developed over the years and which have also been acknowledged by courts of law. These lessons support the voices today who speak against the codification of customary law, because codification will destroy one of the most important qualities of customary law, namely its openness to accommodate reconciliatory solutions to problems instead of allowing the law to win the parties over. It is worthwhile to mention that South African courts support the vote against codification. South African[3] courts were faced with the situation where the law, as lived in communities, had developed away from the law as it was offered in old records of customary law. It was found that the living law was the customary law to be accepted by courts and not the so-called official laws 'of the books'. This really challenging jurisprudential development accepts – as promoted by legal pluralism – that customary law as the local law of the people would lose its quality of being people's law if it were codified into a statutory type of document.

It is interesting to note that some self-stated customary laws refer to their respective laws as codification. In editing the laws, we were tempted to suggest the removal of the word *codification* to the community which used the term. We eventually left *codification*

[3] Cf *Mthembu v Letsela* 1997 (2) SA 936 (T); *Hlohe v Mahlalela* 1998 (1) SA 449 (T); *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

in the submitted text. We did this in line with the general policy of the *Customary Law Ascertainment Project* to leave the submitted text as it is wherever possible. The rules in the self-stated laws may be challenged in court when decisions of the community courts go on appeal to state courts. Customary law may also be challenged through public debates to which traditional authorities may respond. Apart from statutory amendments to the law by parliament, the way the legal system of Namibia provides for problems when they arise as to whether or not a law exists or whether or not a piece of law is in accordance with the law prevailing over customary law. In other words, it is left to the interpretation by the respective traditional authority or the competent court to decide whether the qualification of the self-stated law as codification is a mere folk qualification. Whatever the result, one needs to bear in mind that it is up to the discretion of the traditional community to change the contents of their self-stated law in exercising their authority in terms of section 3(3)(c) of the Traditional Authorities Act, according to which they have the power "to make customary law".

Article 66 Sub-article (1) of the Constitution of Namibia recognises that the legal order of Namibia is pluralistic: there is, on the one hand, the system of general law (the Roman-Dutch common law and the statutory enactments) and, on the other hand, a plurality of customary laws. Both spheres do not only co-exist, they are interlinked. A number of rules have also been explicitly set by the state to regulate the relationship between the general law and the customary laws. This regulation starts with the constitutional rule just quoted, which subjects customary law to the constitution and other statutory law, and extends to such statutory enactments that deal with matters under customary law.[4]There are also many rules of common law that offer themselves for application to customary law.

However, statutory law in place leaves us without answers to many questions. [5]Before we accept offers of common law for the application of customary law, we have to question the rationale behind those offers, and we have to consider whether or not the rationale behind is reasonable to justify the application to customary law. [6]Filling of statutory gaps and applying rules of common law to customary law, however, require the jurisprudential understanding of legal pluralism. Accepting legal pluralism means accepting the differences in the operating and functioning of the plural legal strata. As much as the ascertainment of customary law by way of various traditional communities

[4] Such as the Traditional Authorities Act, 25 of 2000, and the Community Courts Act, 10 of 2003.

[5] The jurisdiction in murder or rape cases is one of those questions: The law of the state and some customary laws require jurisdiction. What is to happen when a person has spent time in prison after conviction of murder and is thereafter called by a community court to pay compensation? Horn ends his review of the first volume of *Customary law ascertained* by stating: "If one consults Customary *law ascertained* one thing is clear: the line between the jurisdictions of common law and customary law still needs to be drawn." (N Horn 2011:140).

[6] The common law doctrine of *stare decisis* according to which certain statements of higher state courts have the quality of binding law is an example for this. Whether and if so to what extent *stare decisis* will apply in matters of customary law is, indeed, debatable!

self-stating their laws may be welcomed as a contribution to legal certainty and the rule of law, the fact that customary law has been ascertained in the manner described does not automatically imply that the concepts and rules in operating the general law should similarly be applied to customary law - at least as long as the operation of customary law remains within the framework provided for by the general confirmation and recognition of customary law in Article 66 of the Constitution!

Conventionally arguing legal minds may have difficulties with what is called the flexibility of customary law and may plead for one straightforward legal system without such flexibility, but legal anthropology has dismantled this centralist understanding of law as an illusion! What this leaves us with are the jurisprudential challenges of legal pluralism. *Customary law ascertained* can only open for the debate on the said challenges, a debate to which all concerned must contribute! The coexistence of the various strata of law will only lead to a functioning legal system - a system that provides justice and, with this, the enjoyment of human rights as they are guaranteed in the Namibian Constitution and international instruments to which Namibia is a signatory - if research, legal education, the law-applying profession and the public at large take note of these challenges[7].

What is meaning of ascertaining customary law?

What do we refer to when talking about the ascertainment of customary law? What do we expect when suggesting the ascertainment of customary law?

The Community Courts Act[8] deals with the ascertainment of customary law in its Section 13. This section prescribes the procedures to be applied by courts in case of doubt as to the existence or content of a rule of customary law. In such cases, courts have the power to ascertain customary law by consulting cases, text books and other sources or by call- ing for oral or written opinions. In other words, from a legal point of view, ascertainment of customary law means more than having customary law recorded in one way or the other: The act of ascertainment also awards the ascertained version of customary law a legal qualification.

Mere academic records of customary law based on questionnaires, court observations, analyses of case books of traditional courts, collections of cases and cases-complementary information from parties to cases, cannot be considered as an ascertainment of customary law. As useful as records of this nature may be, and as much as they may potentially contribute to the ascertainment as evidence a court may or may not rely on, they remain mere aids to a possible subsequent ascertainment in the above-stated legal sense.

[7] Cf here Hinz (2011).
[8] Act No 10 of 2003.

The Traditional Authorities Act[9] supports this view. According to the Act, *ascertainment* can be defined as any kind of authoritative transfer of orally transmitted customary law into a written form. According to section 3(1) of the Act, it is one of the tasks of traditional authorities:

> "to ascertain the customary law applicable in that traditional authority after consultations with the members of that community, and assist in its codification; ..."

From this language, it is clear that *ascertainment* is not synonymous with *codification*. *Codification* is just one - and a very specific one at that - of consolidating customary law. Codification transforms customary law into an act of parliament. With this, customary law ceases to be owned by the communities in which it developed and can only be changed by an amending act of parliament. Although the call for codification is still being heard up to today, there is not much of codification of customary law to which we could refer. To the knowledge of the author of these introductory remarks and despite the calls for codification of customary law, as far as Africa goes, only the law of the Zulu in South Africa and the law of some groups in Southern Sudan have been codified to date[10].

Apart from codification, we can also speak of the *ascertainment* of customary law when customary law is transferred into what has become known as the *restatement* of customary law. I refer here to the Restatement Project conducted by the School of Oriental and African Studies (SOAS) of the University of London under Antony Allott. Allott defines the restatement approach, borrowed, as he says, from the American Restatements, as follows: Restatements

> "were authoritative, comprehensive, careful and systematic statements of common-law rules in such fields as torts, contracts and property. Necessarily cast in semi-codified form, they were still not codes, as they lacked the force of legislated law. Instead they were the most accurate and precise statements of what those producing them had concluded were the main principles and rules as evolved by the courts, and, as such, courts and practitioners alike could turn to them as guides."[11]

Customary law restatements were achieved in several African countries in the 1970s. However, the restatement approach fell into disuse for various reasons, one being that the restatement of customary law made today will not necessarily reflect the customary of tomorrow[12].

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[9] Act No 25 of 2000.

[10] Cf. to the Zulu code: Bennett (2004:46f.); for the codification of customary law in Southern Sudan, see my above quoted report on customary law in Southern Sudan. A special case are the Laws of Lerotholi (the customary law of the Basotho in Lesotho), the first part of which was put into writing by the Basutoland Council in 1903. The legal status of the Laws of Lerotholi is still a matter of debate. See. Duncan (2006).

[11] International development in customary law: Allott (1995:33).

[12] Bennett (2004:48) notes what the Law Commission of South Africa said on the possible restatement of customary law in South Africa. According to Bennett the Commission held that "the facili-

Finally, we can also speak of *ascertainment* of customary law when traditional communities produce their own versions of their customary law in writing - versions of customary law, for which, in the Namibian context, the term *self-statement* of customary law has been accepted. *Self-stating* customary law refers to a process of ascertaining customary law by the owners of the law to be ascertained: the people, the community, the traditional leaders as the custodians of customary law. The procedures of self-stating may differ from community to community. Nonetheless, the most important element in self-stating is that the end result will be a product created in the community which is to follow and apply the law. Instead of injecting into the communities what the law ought to be, it is left to the community to decide what part of their law is to be consolidated in writing, since the community and community stakeholders will know best what their law is, and where certainty through writing is needed.

The result of self-stating is binding to the community as part of their customary law. It is, however, important to note that the binding quality of the self-stated laws is neither an implicit repeal of the orally transmitted customary law or even only parts of it, nor does it imply a change in the nature of customary law as a set of rather flexible principles and rules, nor will it prevent the community to amend their law as need arises[13].

It is part of the philosophy behind the approach to leave the ascertainment of customary law to the communities that the communities decide what part of customary law they want to have in writing and how they want the content of the self-statement be worded. Therefore, what we find in the self-statements are only aspects of the respective customary law. The fact that certain rules of customary law have been ascertained in writing will keep the so far practiced application of the now ascertained rules untouched. That is, the applying authorities will still handle the ascertained rules in the manner that appears appropriate to them in view of the interest to achieve the restoration of societal peace[14].

Legislative drafting has developed to a very specialized art in many modern jurisdictions. However, the reader of the self-stated laws should not expect that these laws follow the sophisticated techniques of modern legislative drafting. In many instances, the self-stated customary laws give educative explanations or even state rather general societal aspirations - a fact, which will be a challenge to interpretation!

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ties for such a project were not available in South Africa, and that, unless regularly updated, the restatement would fall behind social practice to become yet another 'official' version" of customary law, i. e. a version that would not be in line with the law lived by the communities.

[13] d'Engelbronner-Kolff (1997:149ff.) shows how traditional courts of the Shambyu community navigate between the self-stated version of their law and the legal principles behind the statement – thus allowing decisions appropriate to the cases to be decided.

[14] Which is the main objective in adjudicating cases under customary law! Cf. Hinz (2010b:11ff.).

Traditional authority and customary law: a complex reality[15]

When looking at the traditional landscape as it was inherited from the time before independence, the *Commission of Inquiry into Matters Relating to Chiefs, Headmen and Other Traditional and Tribal Leaders* established in 1991[16] found two different types of traditional authority: territorially-based traditional authorities, i.e. traditional authorities "settled in a particular area of jurisdiction" and traditional authorities the chief of which is a "Chief of the tribe and not of a particular area"[17]. The Ovaherero and the Damara and their "paramount chiefs at large" were the obvious examples for the latter. The draft bill on traditional authority submitted by the Commission, therefore, recognised both: the position of chief and the position of paramount chief being the "principal Chief or an overall traditional leader of a Community"[18]. The main point of reference for chieftaincy is the "recognized area of jurisdiction (...) for a Community". Whether a chief will be the chief of a community at large will depend on the wishes of the community[19]. An area or territory of jurisdiction is "such [an] area or territory set aside by the laws of the Republic for the settlement and occupation on a communal basis by a group or Community for the purpose and under the terms defined by the law governing the usage of land"[20]. Each community in such a recognized area of jurisdiction "shall" have an office of chief[21].

What is a community? A community is "a group of people whose common interests are determined by origin and settlement and who may be linked but not exclusively through culture, tradition and language and recognized by law as such"[22]. It is the right of any group of persons "who represents a substantial number of persons" to apply for recognition "on grounds of common culture, common origin, tradition or language".

As much as the general result of the Commission of Inquiry – the recommendation that the "traditional system" should be retained – was appreciated in the public debate and the subsequent enactment of law, the concept of "area or territory of jurisdiction" to be "set aside by the laws of the Republic" as the entry point for the establishment of an office of chief was not[23]. Instead, the legislative focus moved to the communities and their

[15] The following paragraphs rely on Hinz (2016b), forthcoming.
[16] Cf. GN 32 of 1991 by which the commission was appointed and also Report (1991). - The commission was chaired by Adv F. J. Kozonguizi and is commonly referred to as the Kozonguizi Commission and the report as the Kozonguizi Report.
[17] Ibid. 3.9.
[18] See the definitions in Sec 1 of the draft bill, see: Report (1991):111.
[19] Sec 2(1) of the draft bill.
[20] Sec 1.
[21] Sec 2(1).
[22] Sec 1.
[23] See the Technical Committee on Traditional Leaders Act which worked in advice to the Ministry of Regional and Local Government and Housing while, at the same time, the Ministry of Justice was occupied preparing an act on the administration of justice by traditional courts (later named: community courts). See e.g. Minutes of 25 June 1993, on file with the author. See further the Traditional Authori-

wishes to organise themselves as traditional community with a chief, or, in the language of the Traditional Authorities Act in force, a "chief" or "head" meaning the "supreme traditional leader of a traditional community"[24]. The position of paramount chief was not confirmed in the subsequently enacted Traditional Authorities Act: the act knows only one supreme leader for each community and traditional councillors under the supreme leader[25].

A sophisticated-worded definition for "traditional community" came into the act, the act of 1995, the act of 2000, and was also repeated in another piece of legislation relevant for traditional authorities: the Community Courts Act[26]. According to this a "traditional community"

> "means an indigenous homogeneous, endogamous social grouping of persons comprising families from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, recognizes a common traditional authority and inhabits a common communal area; and includes the members of that community residing outside the common communal area."

This is not the place to investigate to what extent this definition and the anthropological language used in the definition ever reflected the social reality of traditional communities. It is enough to state that the definition does certainly not correspond to the reality of today[27]. There is hardly a traditional community with people who have their own line of ancestors, who have joined the community for whatever reason years ago or recently, and by joining it have either accepted the prevailing tradition or created new traditions on the basis of the ones in place, adding new elements to them from their traditions.

Further: Since Meyer Fortes and Evens-Pritchard[28], we basically distinguish between three types of political systems in African anthropology: Firstly, there are "very small societies" the members of which are kinship-related and in which the political organisation and the organisation of kinship are – so Fortes and Evans-Pritchard - "completely fused"[29]. Secondly, we find societies in which "the lineage structure is the framework of the political system". However, although the two structures are well-coordinated, "each

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ties Bill, Republic of Namibia, National Assembly, B.33- 94 and the minutes of the debates in the National Assembly and the National Council.

[24] The Traditional Authorities Act, 25 of 2000, defines "chief" and "head" in two subsections identically. The definition of "head" was introduced to cater for traditional communities which do not have "royal families". The original act (Act 17 of 1995) defined "chief" as "chief" designed in accordance with the act. The amendment to this act (Act 8 of 1997), replaced "chief" in the definition with "supreme traditional leader".

[25] See Sec 2 of Act 17 of 1995; 8 of 1997; and 25 of 2000.

[26] Nr 10 of 2003.

[27] See here already: Shamena (1998):323-327.

[28] Fortes; Evans-Pritchard (1940):1ff.

[29] Ibid.:8f.

remains distinct and autonomous in its own sphere"[30]. In the third type of political system, "an administrative organization is the framework of the political structure"[31].

The typology of political organisation introduced by Fortes and Evans-Pritchard has remained influential in the analyses of political formations in Africa and other parts of the world up to today although it does not reflect colonial interventions into the various forms of traditional government. The socio-political developments under colonialism and by the post-colonial orders resulted, indeed, in structural changes of all the societies that represented political formations of the quoted typology. They were all made part of so-called modern political organisations, i.e. the states that claimed sovereignty over traditional governments, being them kingdoms or differently organised political formations. Colonial rule deprived the so far sovereign traditional political entities of their sovereignty. Indirect rule rendered or, at least had the intention to render, independent kingdoms and non-centralised political entities the task to administer their territories in the interest of the coloniser.

Although the degree of change following colonial interventions depended on the respective circumstances, it is fact that tradition is still very much part of the post-colonial reality, as it was proved by the above-quoted Kozonguizi report in the case of Namibia[32]: The traditional foundation of the various communities survived colonial transformations and subsequent inroads into the political, cultural and social set-up of the communities in many cases.

The reconstitutionalisations that followed colonialism did not lead to the abolition of the traditional political formations. Countries, such as Namibia, are democracies with political institutions that are expected to exist in democracies, but, nevertheless, accommodate traditional political formations. Looking at the Traditional Authorities Act, all these formations appear now to be formations with centralised authorities in so far as they all are to have a "supreme leader" in terms of the said act[33]. Nevertheless, the shape and format of authority differ depending on the political history of the respective community.

Most of the Owambo communities and the communities of the Kavango and Caprivi Regions have a widely undisturbed history of succeeding members of their respective royal families[34]. They have a history of succeeding traditional leaders within a structure of leadership, either affiliated to royal families or, where such a family does not exist, consolidated on an ancestrally determined territory.

[30] Ibid:9.
[31] Ibid.
[32] See fn 17.
[33] Cf. Section 1 of the Act (No. 25 of 2000): defining "chief".
[34] This paragraph and the following rely on Hinz; Schmidt; Mapaure (2016).

As far as the political structure of the speaking communities[35] is concerned, one can agree with Malan, that these communities were historically *non-centralised* societies[36]. The position of paramount chief emerged late and to some extent as response to colonial policy. It has, nevertheless, been maintained in the tradition of the Ovaherero, although it does not enjoy acceptance under the Traditional Authorities Act[37] and is also not appreciated by all the Ovaherero. The attempts of the late Paramount Chief Kuaima Riruako to be recognised failed for many years [38]. Eventually, Riruako was accepted as chief of the Ovaherero Traditional Authority. Despite this name that could be read as meaning the traditional authority of all Ovaherero, the Ovaherero Traditional authority is just one community next to others recognised under the Traditional Authorities Act.

Budack holds that the political organisation of the Nama belongs to the centralised forms of government in terms of the typology of Fortes and Evans-Pritchard[39]. Indeed, various Nama communities developed permanent centres of authority with an organised structure of officials with special functions for governing the communities. However, there are differences if one compares, the governments of the Nama communities, e.g. with the governments of the Oshiwambo-speaking groups. The Nama communities are smaller in size and were under much more pressure in colonial times that did not allow their traditional structures to function as it was possible in the northern parts of the country.

The History and format of the political organisation of the Damara is comparable to the one of the Otjiherero-speaking communities. It was still under the German colonial administration that Kornelius Goreseb was made chief of the Damara, a position later claimed to be the position of paramount chief of all Damara. The position of paramount chief was changed to king in 1976. Justus //Garoëb acted as king from that date to 1993 when he was appointed as king. The Damara were recognised under the Tradi- tional Authorities Act as one community led by King //Garoëb and a number of Damara chiefs as senior councillors in 1998. as one community, the Royal Damara House[40].This lasted for some years; the Royal Damara House was deregistered in 2002[41]. A process of restructuring the Damara community led to the registration of various Damara communities under their own and independent supreme leaders. [42]King //Garoëb remained in his position although his position is disputed in the Damara community.

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[35] We use *Otjiherero-speaking communities* as the term to refer to the Ovaherero and the Ovambanderu, which, despite linguistic differences, speak a language commonly called Otjiherero.
[36] Malan (1995):78.
[37] The Traditional Authorities Act knows only the positions of chief and senior councillor. See Section 2 of the Act, No. 25 of 2000.
[38] The application for recognition was subject to a (non successful) court case, cf.: Kuaima Riruako v Minister of Regional, Local Government and Housing, Case No (P) 336/2001 (unreported case in the High Court of Namibia).
[39] Budack (1972):13f.
[40] See GN 65 of 1998 at 4.1.
[41] GN No 64 of 2002 (see Part II amending GN 65 of 1998).
[42] See Proclamation No 3 of 2002.

The traditional life as the San as hunters and gatherers did not support the establishment of centralised governmental structures. The San used to live in small groups without a centralised authority. There were people who led the group because they were respected as skilled hunters or because of other personal qualities from which the community profited. Under the Traditional Authorities Act several San groups received recognition. They all have now opted for having one "supreme traditional leader".

The position of the Batswana ba Namibia and the Bakgalagadi is special as they moved to Namibia only towards the end of the 19th century. They settled in the Gobabis area and established their centralised political structure as they had it before their move to Namibia. Both groups are recognised under the Traditional Authorities Act.

The texts submitted by the various communities, their legal texts and their profiles, reflect this difficult socio-political history: Quite a number of the communities of the central and southern part of the country offer very elaborated community profiles for the *Customary Law Ascertainment Project*. The complex history of communities, indeed, requires special efforts to set the framework of the respective group identity. Their laws have many sections on the constitutional structure of the communities, including provisions on succession to the position of their supreme leader. [43]Some of the laws are very detailed: result of the need to establish the administration of law in a way, which was not practiced so far. The socio-political history of most of the communities in central and southern Namiba is a history of territorial expropriation, forced removal and concentration in reserves and of political degradation in the interest of colonial expansion and settlement. All these inroads into the traditional structures of the communities resulted in substantial changes in their political organisation, their understanding of the law, and the administration of it. Mechanisms closer to indirect rule were only implemented in central and southern Namibia by the South African government with the introduction of the apartheid-based separate development that culminated in the establishment of the second tier governments in 1980. [44]Although the implementation of second tier governments applied country-wide. However, the different exposure to colonialism created special problems to the efforts of the central and southern traditional communities to re-appropriate their traditional foundation and its application to changed times[45].

The work ahead

The publication of the laws of the Nama, Otjiherero-speaking communities and the San communities marks the end of the *Customary Law Ascertainment Project*. The project has been completed in the sense that the three volumes with the customary laws of Na-

[43] See Proclamation No 3 of 2002.
[44] Cf. Representative Authority Proclamation, AG 8 of 1980 and the various subsequent proclamations establishing representative authorities for 11 population groups. AG 8 of 1980 and the subsequent proclamations were repealed by the Constitution of Namibia of 1990. (See Article 148 of the Constitution and its Schedule 8).
[45] Cf.: Hinz (2003):31ff.; 101ff.

mibian traditional communities contain what was received by the various communities in accordance with agreements decided upon in the various meetings the Human Rights and Documentation Centre was able to organise over the last years. Most of the communities honoured the agreements and delivered what was expected from them. Some, for different reasons, have not. Nevertheless, and despite the gaps, what has been assembled in the three volumes of *Customary law ascertained* is extraordinary. It is extraordinary as the three volumes assemble a portfolio of customary law that Namibia has never seen before, and which has no match yet in any other African country.

However, what is being presented by *Customary law ascertained* is certainly not the last word about customary law in Namibia. The communities will, of course, continue to develop their laws. Some communities meet regularly to decide on amendments to their laws. In particular, they meet to consult on changes to the value of the fines to be levied by the courts to remedy wrongs committed, or the so-called official price for one head of cattle, which is, to some extent, subject to changes in the market value of cattle.

The unification of customary law by the some of the Kavango communities[46] may influence other clusters of communities to embark upon a similar process. Statutory changes by the Namibian parliament may provoke changes in customary law. Court decisions may have consequences for certain parts of customary law, as it was not the task of *Customary Law Ascertainment Project* to scrutinise the various pieces of customary law against existing statutes - including the Constitution of Namibia. Testing customary law against the Constitution and, in particular, the human rights in the Constitution to which customary law is subject is a very demanding undertaking which is left to the public discourse and, ultimately, to the competent courts.

The publication of the laws as they were submitted to the *Customary Law Ascertainment Project* will also generate revision processes by the communities themselves. The drafters and experts of customary law of the various communities will take note of the laws of other communities, compare them with their own laws, and most probably suggest amendments for improvement. They will also pay attention to the wording of their laws, the texts in their indigenous languages and the translations of which quite a number were done by the Project. We realised that there were some almost unsolvable language problems in certain instances. We hope that the English translations are as true as possible to the original texts, although it has to be noted that the indigenous language terms for certain legal concepts do not always express the same as the English concepts used[47]. Only further discussions, interpretations, applications and cases brought to the state courts will help to clarify any complexities. We were also very reluctant to make changes in the texts submitted to us. We changed, e.g., the use of *tribal* into *traditional* and *tribe* into *traditional community* or just *community*. We did not alter references to headmen or senior headmen although these terms have not been kept in the language of the law-

[46] See: the first volume of *Customary law ascertained* (Hinz) 2010:369ff.
[47] *Ownership* is an example to illustrate this.

maker, i.e the language of the Traditional Authorities Act. Our reason for doing so was that both terms are very much still in use and reflect social reality, which is not necessarily identically reflected in the terms of the Act, which talks of *traditional* and *senior traditional councillors*. We also did not intervene when self-stated customary laws dealt with the question of ownership of communal land, and this not always in line with sections 17, 21 and 24 of the Communal Land Reform Act[48].

It is, therefore, important that all who will make use of this publication understand it as a work in progress, progress in the service to improve and develop the customary law of the various Namibian communities further. Looking back to developments in self-stating customary laws in Namibia, one sees features, which can be expected to influence further steps in this work in progress. Earlier versions of self-stated laws concentrated very much on fines for the usual catalogue of wrongs, which we find in any textbook on criminal law or the law of delict. Later versions have added in particular wrongs from environmental law in particular. Later versions have also paid attention to constitutional matters relevant to traditional governance, meaning that there is a growing awareness to consider rule-of-law principles in the application of customary law and the administration under this law. Community participation has been noted in many of the more recently drafted self-statements. The community profiles which introduce the laws of the various communities illustrate a growing awareness of the foundation of the community, including their philosophical foundations on which their laws are built.

Some years ago, some of us working with traditional communities on their customary laws were criticised when we communicated the self-stated laws of some communities, which we had collected at the time, in meetings with other communities. We were said to have violated customary law by circulating documents which were seen to be secret of some kind. We objected to this and see now that many communities have obviously taken note of what others were doing and even integrated rules developed by other communities into their own laws. Today, in some drafts of self-stated documents, we even see references to scholarly work (such as work done by me or the Legal Assistance Centre). This is very encouraging although we also note that some of the drafts show the handwriting of knowledgeable local personalities, handwriting, which might not always be in agreement with the aspirations of the members of the community.

We will certainly observe as the time goes on what will happen to the self-stated laws when more and more references to them can be expected within the communities and from outside. These references may challenge communities to reconsider not only their approaches to their laws, but also to their profiles. What Advocate B Gawanas wrote in her foreword to the second volume of *Customary Law Ascertained* summarise this challenge in the following clear words[49]:

[48] Act No 5 of 2003.

[49] See volume 2 of *Customary* law ascertained (fn 1):XIII.

> "Taking what we have now in front of us (…) we will look more closely at the laws applied by our communities. We will be able to raise questions with community leaders; we will be able to have informed discussions with the members of the communities; and we will be able to suggest changes for the better – particularly as regards the lives of women and children in particular – in terms of what we have in our Constitution and its fundamental rights and freedoms."

In one of the scholarly comments on the first volume of *Customary law ascertained*, it was held that the translation of orally transmitted customary law into writing may carry the danger of changing the attitude towards customary law by regarding the written version of it as inflexible - as it is the case with acts of parliament. [50]It was argued that, although the *writing down* of customary law was not meant as its *codification*, it would gain this quality in practice and, thus, replace other, particularly oral, sources of customary law. State courts are also expected to contribute to this development, as they may take the self-stated versions of customary law as the last word on the respective law. Whether or not this will happen will become evident when the community courts become fully operational, and decisions will be taken on appeal to the state courts. What happens then will depend on how the traditional communities and their courts will apply their laws, but also on how they may make use of the power "to make customary law" as spelled out in the Traditional Authorities Act. The legal outcomes will also depend on the general development of the jurisprudential reflections on the operation of customary law.

When compiling the documents received from the Traditional Authorities for the publication, the *Customary Law Ascertainment Project* was approached by some concerned members of certain communities who even requested to stop the publication. "I was not consulted," was the reason for that request. The reader will see when going through the self-stated customary laws of the various communities that, indeed, some of the communities have rules on how to make customary law. Responding to such requests, we explained that we did not see it to be our task to control whether or not the communities followed their rules when ascertaining their laws and making customary law. All that we expected was a certificate of consent to publish the documents submitted to us, duly signed and stamped by the respective Traditional Authority. Incidents of this nature will certainly contribute to improvements in the process of traditional law-making.

Another point submitted to us was whether the self-stated laws were 'old' or 'new' customary law, that is, the law stated as the law of the olden days and, therefore, not of relevance today, or the law assembled in *Customary law ascertained*, i.e. the law as applied today. The reader will find that some documents in *Customary law ascertained* recall a time of the ancestors. However, this appears to be only points of reference on which statements for today are built. The many consultations conducted during the Ascertainment of Customary Law Project left no doubt that *Customary law ascertained* was not meant to be a contribution to the history of customary law, but a reflection

[50] See here: Horn (2011):137ff.

of the customary law as it is currently being applied. To what extent the communities met the expectation to self-state the presently applicable law must be left to the further process on the various customary laws.

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Why we need a Constitution - and those bringing constitutional democracy to life

Henning Melber

> "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."[1]

Introduction

Two decades into Independence, a remarkable collection of essays had been published in recognition of Namibia's Constitutional democracy. [2]The contributions testify to the relevance of a Constitution, in contributing to a democracy in practice. As the ultimate normative framework, which in the case of Namibia was established in January 1990 as one of the last steps towards Independence, it creates a fundamental reference point in pursuance of justice, the protection of civil freedoms and liberties and the promotion of rights. It is the foundation of Namibian society, on which all pillars of accountable and transparent governance rest. It also is the point of departure, which provides citizens the moral and legal compass concerning their rights and duties. To guard the meaning and essentials of the Constitution, the Namibian judiciary has the High Court, which has jurisdiction to hear and determine all civil and criminal, including constitutional matters[3], and the Supreme Court, who can hear and adjudicate appeals from the High Court, including appeals about constitutional issues[4]. An independent judiciary is a necessary complementing institutional prerequisite to safeguard the constitutional principles on which governance of societies is based. But while having both a Constitution and an independent judiciary in place is a necessary prerequisite for such governance, it is not a guarantee that constitutional principles are indeed an integral part of daily life. The sobering assessment of the Chief Executive of the South African Human Rights Commission 20 years into democratic South Africa seems as true for Namibia:

> "South Africans often proudly proclaim that our Constitution is one of the most progressive in the world. Yet if you ask most South Africans how they really feel about gay rights,

[1] 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, p. 46 [42].
[2] Anton Bösl, Nico Horn and André du Pisani (eds.) (2010), *Constitutional Democracy in Namibia. A critical analysis after two decades*. Windhoek: Macmillan Education Namibia 2010.
[3] Article 80(2) of the Namibian Constitution.
[4] Article 79(2) of the Namibian Constitution.

> abortion and the death penalty, their answers, more often than not, contradict the values enshrined in the Constitution."[5]

One could also add that those asked had often limited knowledge of the Constitution and its importance. Taking stock, 25 years after the Constitution of the sovereign Republic of Namibia had been adopted by the members of the Constituent Assembly, the degree of awareness among Namibians seems hardly different. Constitutionality seems to have not yet been deeply and firmly anchored in public awareness or ingrained into a social fabric guiding the fundamental values, ethics and norms as reflected by ordinary public perception and opinion. Nor have policy makers yet internalised an unconditional respect for and recognition of the governance principles enshrined in this Constitution, as some recent examples seem to suggest. The current controversies how civil liberties should be understood with regard to same sex relations, including diametrically opposing views of the Ombudsman and the State Attorney as well as the legal exchange at the highest level over the question, who should be entitled to Namibian citizenship[6] are obvious tips of the iceberg and display different approaches to how the rule of law is understood.

Such current discourses are at the same time a mirror image of the ongoing struggles over the power of definition and the interpretation, as well as adherence, to the rules of the game as laid down in the normative framework – as well as its interpretation and application in ordinary life and within the judiciary. As constitutions elsewhere, there is a discrepancy between what is stated, how it ought to be understood and interpreted, how it should be adhered to and applied, and what the intended effects, as well as the real consequences are. It therefore is not by accident that debates and contestations over the meaning and implications of constitutional principles are an eminently political affair and an integral part of governance as well as civil society. It would be more worrying, if this would not be the case, since this would suggest that those in control over society reign supreme in the sense of governing without checks and balances.

The following parts offer a closer look at the issues at stake. By doing so, examples are used from the South African discussion over constitutional principles and the role of a constitutional court[7].

Promoting Human Dignity

"Mind the gap", the warning announced since many years by a recorded voice message routinely for the London subway and elsewhere, has emerged as a popular slogan to

[5] Kayum Ahmed, "Mind the values gap: Do we really believe in the Constitution?", *Daily Maverick*, 9 July 2014.
[6] See Henning Melber, "Changing a Law Can Undermine Rule of Law", *The Namibian*, 5 August 2016.
[7] See Henning Melber, "Constitutionalism in Democratic South Africa. Celebrations, Contestations and Challenges", *Strategic Review for Southern Africa*, Vol. 36, No. 2, 2014, pp. 203-218.

alert for discrepancies between stated objectives or declarations and the actual realities and practices. This is true also for those frameworks governing institutions, including the state. Despite such concerns, the Namibian Constitution remains a marker for the post-colonial democratic society to promote and protect human dignity through the implementation of the law as conceptualized and codified during the initial preparations for anchoring a sovereign pluralist state. The essentials of the Constitution have since then been to a large extent observed and protected by an independent judiciary. The constitutional law and its guardian as institutionalized in the High Court and the Supreme Court have left a strong imprint on society.

Stu Woolman, who holds the Elizabeth Bradley Chair of Ethics, Governance and Sustainable Development at Wits Business School reminds us at the end of a lengthy philosophical-legal engagement with constitutional matters that, "only a decidedly significant degree of common beliefs and common property — a 'commons' — will allow us all to flourish".[8] During his tour de force he applies essentials of the moral and political philosophy of, most prominently, Amartya Sen and Martha Nussbaum (but also Ludwig Wittgenstein, Michael Walzer and others) as his guiding compass and shows his familiarity with the humanist deliberations. This elevates the comprehensive volume above the narrow engagement within the South African social and political context and uses the empirical basis for a much more principled interrogation of the meaning of a rule of law. In particular chapter seven[9] makes a pioneering link between the constitutional principles and their implementation with the guiding notion of securing human dignity and flourishing. He acknowledges the "transformation of the Court's dignity jurisprudence - from an initial, basic concern with the manner in which the law denied the majority of South Africans their dignity to a more robust set of doctrines designed to foster the flourishing of each and every person".[10]And he suggests:

> "However imperfect our current union may be, however ill equipped our current one party-dominance might be to deliver fully upon the aspirations of our basic law, we ought to view the Cassandra-like predictions of political scientists and comparative constitutional law scholars with a healthy dose of skepticism. That's not to say that my peers and betters who engage in comparative constitutionalism are wrong. Their bracing assessments of how recently created constitutional courts have failed to operate as hedges against democratic authoritarianism are often spot on the mark. The problem is the framing of the picture, of zooming in too tight. These scholars inevitably concentrate on too limited a period of time in assessing the merits of newly minted constitutional democracies and the demerits of what we have long acknowledged as "the weakest branch": a constitutional court without the arms to execute its orders or the bread and butter for those who require such sustenance in order to pursue lives worthy valuing."[11]

[8] Stu Woolman, *The Selfless Constitution. Experimentalism and Flourishing as Foundations of South Africa's Basic Law*. Cape Town: Juta 2003, p. 508.
[9] *Ibid.*, pp. 381- 421.
[10] *Ibid.*, p. 398.
[11] *Ibid.*, p. 507; Italics in the original.

Woolman uses in this context the laugh line by the US-American comedian Chevy Chase, who in 1975 reminded an audience that, "Generalissimo Francisco Franco is still dead". [12]In a similar vein, apartheid is not on the verge of making a comeback, despite many features still reminiscent of the structural legacies, mindsets and behavioral patterns rooted in this era. Many significant cases in the Court and the legal precedence they were setting during the last years speak to the major achievement this Constitution represents when compared to the apartheid days under white minority rule. The Bill of Rights, defined in section 7 of the South African Constitution as rights to Human Dignity, Equality and Freedom, prioritize and pursue an all-encompassing humanist agenda. The same holds true for the fundamental rights enshrined in Namibia's Constitution, which the lawmakers of the Constituent Assembly even declared as a taboo in as far as they cannot be removed or changed by any amendments. Chapter 3 ("Fundamental Human Rights and Freedoms"), comprising of articles 5 to 25, is protected against change: "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", as article 25 (1) stipulates.

Laurie Ackermann spent time and energy since 2005, after his retirement as Justice of the first South African Constitutional Court, to draft an impressive celebration of the achievements of the South African Constitution by giving recognition to its judgments concerning the application of a concept of equality in human dignity among citizens. He draws extensively on a comparison mainly with German and to a lesser extent Canadian approaches to this equation. Especially the notion of Menschenwürde is introduced in much detail with regard to German Basic Law, while Human Worth as Dignity under Canadian law features less prominently. Like Woolman, Ackermann resorts to a discourse on secular philosophical perspectives from Aristotle via Kant to Roland Dworkin and John Rawls (with Bernard Williams, Amartya Sen, Martha Nussbaum and Louis Henkin as stop overs) in his second chapter. This ends by also devoting some pages to the notion of Ubuntu, currently so en vogue in South African humanist, philosophical and even legal/judicial deliberations. He concludes the conceptual exploration by suggesting that human worth (dignity) is the answer to the question, in respect of which human beings are equal and may not be discriminated against[13].

As he clarified already at the beginning, when addressing the Constitution's provisions on equality, non-discrimination and dignity, his contention is

> "that human beings, regardless of their many other differences, are equal in law with regard to their human dignity (worth) and may not be discriminated against in a manner that negatively affects their human dignity. Differently stated, human dignity (worth) is the criterion of reference, or the criterion of attribution in seeking to answer (as one must), the ques-

[12] *Ibid.*

[13] Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa.* Cape Town: Juta 2013, p. 85.

> tion (which one cannot avoid asking): "In respect of what are all human beings equal and in respect of what may no one be discriminated against?" If this criterion of reference proposition is correct, then this close linkage between equality and dignity makes it implausible to discuss equality without some reference to dignity and vice versa."[14]

This brings us again to the question raised at the beginning: how much has a Constitution, which is considered among the most progressive and enlightened in our world, been able to graft and enforce a rights-based social culture, which fosters respect, recognition and the promotion of justice guided by the notion of human dignity for all in real terms?

Between ideal and reality

As alerted by Meyer: "Having the right to something is only relevant when we are in a position to realize that right" and "when all people have equal capacity to access the means through which choices are presented, only then are they free to choose"[15]. After all,

> "… where citizens are unaware of what the law offers them and how it protects them; do not have immediate access to courts and; cannot afford legal representation, it cannot convincingly be said that all citizens are equal before the law. It is a concern when our constitutional rights do not translate to practical, realized rights and, more so that we are not actively and pragmatically looking for ways to change this."[16]

Not surprisingly, the protection of the autonomy for those on the bench, is therefore concerned foremost about the independence of the judiciary and the appointment of judges. After all, the best constitutional framework is of little value and impact if those who are supposed to give it meaning and power are guided by party political loyalty towards those occupying the commanding heights of the legislative and the executive. The risk grows accordingly, that the rule of law might degenerate into the law of the rulers.[17]

Would then the Court play a supportive role towards further party dominance by moving away from the praised principles of the Constitution and be more passive and less interventionist? This is a matter of enquiry, which deserves closer scrutiny through further scholarly undertakings in the near future. While identifying a growing tendency within government to not fully respect the constitutional provisions and institutions is certainly a correct observation, this is not sufficient reason to blame the judicial institutions for this trend. Rather, it is the sphere of the policy, which modifies the agenda and impacts more so on the limitations of the Judiciary than the Justices in their common and shared

[14] *Ibid.*, p. 19f; Italics in the original.
[15] Amy Meyer, "Social Inclusion and the Constitution: A Deconstruction", *The Journal of the Helen Suzman Foundation*, Issue 73, August 2014, pp. 19 and 20.
[16] Ibid., p. 17.
[17] See for this argument in the context of a specific Namibian case Henning Melber, "Changing a Law", *op. cit*.

understanding as concerns their role.

The predatory behavior of a party-state bourgeoisie might result in a turn to populism, which represents another threat to constitutionalism: "If constitutional rule is to survive and advance in Southern Africa, it will need the support of counter-elites and wider society to contest the repressive components of liberation movement culture in order to secure the freedoms for which the liberation movements themselves claim to have fought"[18] Similarly, Suttner ends with the appeal that as "a way out of the present morass

> "(…) one should try to identify agreement on a range of core issues, like constitutionalism, (…) and build a coalition of forces, on a non-sectarian basis to clamp down on the violence and illegality, the corruption and abuse of the dignity and attacks on the very lives of people".[19]

In a comparative, historically rooted in-depth review of the trajectory of settler-colonial regimes, the anti-colonial struggle and former liberation movements as governments in Southern Africa, Southall deals with the legacies of these former regimes under the new dispensation and the impact of negotiated transitions on the new institutions established under majority rule[20]. He warns of the policy of these new dominant party agencies entrenched by the former liberation movements as a threat to the constitutions adopted in the course of the negotiated transition towards popular democracy. In Zimbabwe, Namibia and South Africa, the movements turned parties had a "predisposition to exclusive nationalism, defining themselves as representatives of fused conceptions of 'the nation' and 'the people', reinforce majoritarian conceptions of democracy, and hence are at odds with central tenets of constitutionalism"[21]. Levels of inequality and the all too limited and often ineffective social redistributive policies sacrificed on the altar of neoliberal socio-economic priorities for the benefit also of a new privileged black elite can undermine the legitimacy and authority of democratic constitutionalism.

Progress or regression?

This brings us once again to the fundamental question, which had been raised at the beginning: How relevant and effective is a Constitution and a Constitutional Court — or a constitutional democracy, for that matter — in a society characterized by widespread ignorance of the constitutional norms and principles (both in terms of rights and entitlements as well as obligations). A society, to which gross inequalities in all spheres of life are determining factors in terms of access to opportunities. A society in which "minding

[18] Roger Southall, "Threat to Constitutionalism by Liberation Movements in Southern Africa",*Africa Spectrum*, Vol. 49, No. 1, 2014, p. 97.
[19] Raymond Suttner, "Twenty Years of Democracy and the Question of Popular Participation", *Grace & Truth*, No. 1, 2014, p. 17.
[20] Roger Southall, *Liberation Movements in Power: Party and State in Southern Africa*. Woolbridge: James Currey and Pietermaritzburg: UKZN Press 2013.
[21] Roger Southall, "Threat to Constitutionalism", *op. cit*., p. 89.

the gap" is not necessarily an insight that by itself is already an enabling tool to reduce the inherent inequalities?

Pierre de Vos pointed out that, "the change happens not in the courts, but it happens on the ground". As he argued further: "The constitution is not really the document that is going to change the economic policies of the government. The voters are the ones that will change that because voters … have the power"[22].This does of course not render the Constitution irrelevant. The Constitution is the document that demarcates the borders of social principles that are supposed to guide governance. The Court is upon initiative of claimants able to rule if government is respecting these principles. But it is the people that should be the ultimate sovereign. [23]Twenty years of constitutional democracy in South Africa has offered credible evidence as to the relevance, but also the limitations of both, the Constitution and the Court.

As Woolman already clarified:

> "The responsibility for delivering on the promise of liberation and the delivery of basic goods lies elsewhere with the politically accountable branches of government, with those parties who control the public fiscus, and with those members of society (natural persons and juristic persons such as our largest firms) with sufficient capital to contrive solutions to the widespread deprivations that beset all of us. The ongoing contempt that the coordinate branches of government and organs of state have shown for court-declared remedies in this arena suggests that it is our politics and politicians — and those individuals and juristic persons that run our largest corporations — that remain culpable (in large part) for this failure to deliver the goods. Delivery of these basic goods (…) constitutes the minimal material condition for flourishing."[24]

It is therefore misleading to blame a Constitution for the social evils, which exist without doubt. It nevertheless seems to remain a strong temptation among policy makers to resort to a great deal to pseudo-revolutionary jargon while addressing the shortcomings of social progress since Independence. The demand for a change of the Namibian Constitution remains a prominent and popular topic – as if such change in the regulatory framework would serve as a panacea to all social evils (or as a necessary precondition for a better society). But the Constitution is not the problem, despite its many inherent limitations and shortcomings preventing certain ways and means of radical social trans-

[22] Pierre de Vos, "Can the Constitution Respond to the Challenge of Addressing South Africa's Inequality?", *The South African Civil Society Information Service (SACSIS)*, 29 August 2014.

[23] When I had the privilege to participate in an annual Ubuntu conference at the Faculty of Law of the University of Pretoria in mid-2012 and mid-2013 respectively with several previous and current Justices from the Constitutional Court, the notion of human dignity was at the core of the discussions. I was deeply impressed by the repeatedly articulated views of the Justices, that they can only respond and react to what is brought to the Court, but not initiate the cases, in pursuance of further promoting human dignity. They made the point that the Court cannot and should not replace civil society and its struggles, but rather be a forum and arena where among others the struggle is fought.

[24] Stu Woolman, *op. cit.*, p. 410; Italics in the original.

formation as regards the existing property rights and relations it protects. Social change, after all, is not implemented by constitutional principles, but by politics.

On the other hand, one should recognize that despite all genuine achievements Namibia's Constitution represents in terms of political freedom, human rights, and individual liberties, at the very same time, the constitutional system and its in-built political and economic values have an ambivalence, which in tendency serves those already better off. This is so, as these constitutional principles are components of a bourgeois society. As a result, the individual and collective rights enshrined are most efficiently and effectively claimed, utilized and at times exploited by those familiar with exercise power (be it political or economic).

Recalling the process of decolonization of Namibia as controlled change, the drafting of the Constitution was the final part of a deal between the colonial South African power, its original Western allies and the forces of national liberation. The package, which paved the way for a sovereign state under a Swapo government included a socio-economic and political regulatory framework, which had emerged as a negotiated compromise between basically antagonistic social forces. The declared policy of national reconciliation acknowledged this social contract as the point of departure for the (re-) organization of the post-colonial Namibian state and the (re-)formation of the structures of society, including the property and ownership issues at stake.

The Namibian Constitution did not change the underlying mode of production- no constitution can do that, even if it would be the intention. It is therefore misleading to suggest that by means of modified constitutional principles the existing social inequalities might already be addressed. Socio-economic issues are policy issues. They therefore require a political will aiming at the transformation of structures. Poverty reduction (or even, as presently claimed, eradication) is not achieved by constitutional amendments but by a carefully designed and implemented socio-economic strategy. There is plenty of room for such policies under the given circumstances, which do not require any constitutional changes. – Put differently: "to blame the Constitution for what are essentially various failures of governance, is a bit like blaming an umbrella for the rain".[25]

Cheap rhetoric does not help. Political initiative is still more useful than pharisaical phraseology. One needs to go beyond debating the evils of Namibian society and start to contribute to change by more than merely talking. Namibia's Constitution, though neither a sacred document nor untouchable, is not by any means a decisive factor in efforts towards greater equality, but much more abused as a convenient scapegoat for the promotion and protection of particularistic individual ambitions. In contrast to this, it requires courageous men and women in civil society aware of the rights and entitlements

[25] Pierre de Vos, "Student protests staunchly backed by Constitution", *Daily Maverick*, 21 September 2016.

in the Constitution, to advocate the emancipatory values the Constitution contains.

Conclusion

Trying to celebrate constitutional achievements 25 years into Namibia's democratic order by assessing the constraints and the challenges the constitutional framework is exposed to, displays other stories too: It is over and above the examples by civil society activists also the tale of courageous and committed individuals in the legal profession, many of whom had been socialized under apartheid and decided to take a stand for justice and human dignity, often at great personal risks and sacrifices. Continuing to execute such advocacy under a new dispensation has not protected them from occasional failures or flaws in their judgments. But they remain guided by a personal integrity, which permeates their decisions in the soul searching effort to find the best way in promoting the fundamental values and norms finally institutionalized in the Constitution in response to the denial of such values under the previous regime. Often they were — to borrow a phrase from the former Constitutional Justice Albie Sachs — 'A Mensch on the Bench'.

But the look at the constitutional ideals and the social realities also reveals that the efforts of those sitting on the bench committed to the new legal system and its aspirations as well as the efforts of other like-minded people outside of the judiciary remain an uphill battle. The fight for democracy, human rights, dignity and justice will always continue, in different forms and degrees, under whichever social and political order. While a Constitution cannot really guarantee bringing fundamental changes in society to life, it can protect those efforts seeking to induce such changes by peaceful means within the defined normative values. And it can object to those, who as policy makers or other persons of far-reaching influence are violating constitutional principles. The story of a constitutional democracy promoting human dignity therefore includes, beyond the principles enshrined in the Constitution and Justices giving them meaning in practice by their ruling, first and foremost all those individual heroes and heroines, who are willing to stand up to claim their rights and thereby dare to speak truth to power. After all: "Where there's no fight for it there's no freedom."[26]

[26] Bernard Malamud, *The Fixer*. New York: Dell 1966: 271.

Appraising 25 Years of Foreign Policy Implementation in Namibia: A Glimpse of a New State's Economic Diplomacy

Peya Mushelenga

Introduction

The making of foreign policy and the pursuing of economic diplomacy is a process that includes from policy formulation, documentation and implementation thereof. The independence of Namibia on 21 March 1990 marked the beginning of foreign policy-making of a sovereign Namibian state. Prior to independence, issues of Namibia's foreign relations were handled by South African colonial regime in Pretoria in some instances. In other instances, SWAPO as a liberation movement for an independent Namibia engaged in diplomatic initiatives that kept Namibia on international relations agenda.

Namibia's independence was preceded by the adoption of the Namibian Constitution, the supreme law that embodies the principles of foreign policy. Since independence, the Government has been developing sectoral policies governing Namibia's various socio-economic and political matters, including her foreign relations.

The implementation of policies is subject to available resources, both human and capital. This chapter contextualises foreign policy implementation in Namibia within the framework of the enacted legislation and adopted policies. The actual implementation of these policies will be discussed and assessed to provide an overview of success and challenges of policy implementation. The chapter further attempt to explain the concept of national interests, which is generally mentioned by national leaders and government officials when they refer to Namibia's foreign relations.

From 21 March 1990 to 20 March 2015, the name of the ministry responsible for foreign relations was 'Ministry of Foreign Affairs' and from 21 March 2015 it changed to 'Ministry of International Relations and Cooperation'. Accordingly, in this chapter, reference to the Ministry will state the name applicable to a specific period.

Sources of foreign policy

The foundation of Namibia's foreign policy is laid in the Namibian Constitution as the supreme law of the land. It was further expounded in national laws that were enacted after independence and national policy documents that were formulated and adopted by the executive and/or legislative branch of the government. In addition to the Namibian Constitution, other sources of Namibia's foreign policy and economic diplomacy in-

clude the Foreign Investment Act (No. 27 of 1990), Economic Processing Zone (EPZ) Act, No. 9 of 1995, the White Paper on Foreign Policy and Diplomacy Management, Vision 2030, and the National Development Plans (NDP) 1, 2, 3, and 4 adopted in 1995, 2002, 2008 and 2012, respectively.

Legislation

The basis of Namibia's economic diplomacy and foreign policy in general is article 96 of the Namibian Constitution, which stipulates that the Namibian state should:

(a) adopt and maintain a policy of non-alignment;
(b) promote international cooperation, peace and security;
(c) create and maintain just and mutually beneficial relations among nations;
(d) foster respect for international law and treaty obligations;
(e) encourage the settlement of international disputes by peaceful means (Ministry of Information and Broadcasting, 1990: 53).

The third and fourth foreign policy principles are related to economic diplomacy. The third principle provides a win-win solution whereby as other states gains from their relations with Namibia, Namibia too gains from relations with those states. The first Deputy Minister of Foreign Affairs, Netumbo Nandi-Ndaitwah, underscored this when she addressed Parliament, during the Budget debate in 1992, stating that in pursuing economic diplomacy, Namibia adopts mutual cooperation with the international community in the area of trade and investment, tourism and development cooperation[1].

Soon after independence, in 1990, Parliament passed the Investment Act (No. 27 of 1990), which provides a conducive environment for investors and thus, became a vehicle for investment promotion. It guarantees repatriation of profits and independent arbitration in case of disputes. These provisions in the Act are favourable to investors, thus making Namibia an attractive haven for investment. The government or Namibian nationals are precluded from demanding participation in foreign businesses as a condition for their investment in Namibia, except in the case of exploration of natural resources, where government may require a stake in the enterprise that is acquiring rights over natural resources[2].

In 1995, Parliament passed the Economic Processing Zone (EPZ) Act, providing for the creation of the EPZs, which serves as a vehicle for industrial investments and ensure the increase of manufacturing exports. The Namibian EPZs are unique that they do not have restrictive ring-fenced zones that traditionally characterise EPZs in many countries. Accordingly, in this incentive-filled regime attractive characteristic, investors can have single factories operation outside the demarcated EPZ area. Goods manufactured in the

[1] National Assembly, 1992: 33.
[2] Government Gazette, 1990.

EPZ, destined for exports are exempted from the General Sales Tax (GST) and Additional Sales Tax (AST)[3].

National Policy documents

The first term of the government (1990 – 1995), was spent on establishing government structure, without adopting major policy documents. During that period, the pursuing of economic diplomacy was, thus, based only on legislation stated above. In 1995, the Namibia government adopted the NDP 1, which state that the government plans to increase its trade and investment profile. By then, Namibia's Foreign Direct Investment (FDI) has risen from N$ 270 million in 1990 to N$ 1.4 billion in 1995[4].

The NDP 1 further reiterates the foreign policy principle of mutual beneficial relation enshrined in the Namibian Constitution. It is stated that,

> "For a small country whose economy relies on international trade and support in an increasingly competitive and interdependent international economy, it is important that Namibia promotes itself through just and mutual beneficial relations with other countries."[5]

The NDP 1 recognises the private sector as an important stakeholder in pursuing economic diplomacy[6].It further spells out government plans related to economic diplomacy to include, among others:

- Making the Walvis Bay port as a point of entry in the Southern African market;
- Diversifying sources of imports;
- Diversifying trade links;
- Charging diplomatic missions with the task of promoting trade and investment;
- Avoid dependency on aid[7];

In 2002, the Government adopted the NDP 2, which states that investment strategies and seminars will be among the strategies adopted, thereby adopting conference diplomacy as one of the types of diplomacy discussed by Du Plessis (2006: 140) in his typology of diplomacy. The NDP2 recognises the role of non-state actors in trade and investment. It states that State-Owned Enterprises (SOEs) and private companies will play a major role in the energy projects[8].

[3] Government Gazette, 1995.
[4] Mushelenga, 2015: 118.
[5] National Planning Commission, 1995: 18.
[6] Ibid, 3.
[7] Ibid, , 6, 7, 55, 56 and 255.
[8] National Planning Commission 2002a: 341.

The goals and targets set by the NDP 2 that relate to economic diplomacy include,

- The growth of the EPZ in order to address job creation;
- The development of the tourism industry to contribute effectively to the economic development of Namibia;
- The establishment of the Namibia Tourism Board (NTB), which will serve as the link between the government and tourism activities;
- Increasing intra-trade relations in the Southern Africa region and sign bilateral agreements with other states;
- Increasing Namibia's exports and secure access to new markets states;
- Investment in the manufacturing sector and working towards increased trade;
- Opening an office at the World Trade Organisation (WTO) to address complexities of trade negotiations (National Planning Commission 2002a: 282; 315 – 317[9].

In 2004, the Government adopted the Vision 2030 policy document outlining government plans and goals by the year 2030. The policy document reiterated the increased bilateral relations listed in the NDP 2 goals stated above. Vison 2030 further sets the following goals related to pursuing economic diplomacy:

- Contributing to an effective regional integration and play a meaningful role in regional institutions;
- Provide road linkages to neighbouring countries. Such goal will enhance the transportation of goods and, therefore, intra-regional trade;
- Increase and maintain bilateral relations;
- Avoid reducing Namibia's interests in international platforms for promoting trade and investment[10];

In 2004, the Namibian Parliament adopted the White Paper on Foreign Policy and Diplomacy Management, providing a general framework for Namibia's economic diplomacy. It conceptualises economic diplomacy to include the marketing strategy to attract trade and investment in a number of areas like economic relations, tourism and investment. It further states that Namibia's bilateral diplomacy will be pursued in accordance with the country's national interests[11];

The White Paper on Foreign Policy and Diplomacy Management underscores regional economic relations, stating that Namibia prioritises bilateral relations with countries in the Southern Africa Development community (SADC) (Ministry of Foreign Affairs 2004: 64 – 65). Regional diplomacy is further underscored in Vision 2030 which aims for Namibia's contribution to an effective regional integration. This policy document

[9] National Planning Commission 2002b: 127.
[10] Office of the President 2004b: 66, 183, 193.
[11] Ministry of Foreign Affairs 2004: 63 – 64.

further suggests that Namibia should play a meaningful role in regional institutions[12].In order to confine Namibia's economic diplomacy to the region, the White Paper further states that Namibia covers a wide geographical area for bilateral relations that include Africa, Europe, America and Asia[13].

The NDP 3 was adopted in 2008, which focuses on multilateral economic diplomacy, especially the export of Namibian products to the EU market and attracting increased investment in the mining sector (National Planning Commission, 2008a: 101, 120). Goals related to economic diplomacy that have been set by the NDP 3 include,

- Consolidation of Namibia's economic diplomacy in the region through high-level bilateral visits and joint-commissions of cooperation, among others;
- Striving for a just global trading environment under the auspices of the WTO and ensure fair trading agreements with the EU;
- Expansion of Namibia's commerce and diversify her export products[14];
- Opening diplomatic establishments in Egypt and Tanzania[15];

With regard to diplomatic representation and the promotion of trade and investment, Vision 2030, too, states that Namibia will increase bilateral relations (Office of the President 2004: 183). In the White Paper on Foreign Policy and Diplomacy Management, it is stated that priority of bilateral relations will be given to countries in SADC, but in general they will spread over a broader geographical area, covering Africa, Europe, America and Asia[16].

Conference diplomacy

The NDP 2 states that Namibia's economic diplomacy strategies include convening investment seminars and workshops[17]. These workshops serve the purpose of disseminating information and creating a platform for local and foreign investors to meet. Accordingly, in November 2012, Namibia convened the International Investment Conference under the auspices of the Ministry of Trade and Industry. This conference was attended by foreign investors. Whilst it was attended by some Commercial Counsellors, its participants did not include Heads of Missions. But attendance of Head of Missions was necessary, given the fact that they assume overall responsibilities of the Missions' duties of pursuing economic diplomacy, including supervising the work of the Commercial Counsellors. Customarily, there is a need for diplomats to follow up on the investments emanating from this type of conferences. The challenges arise when not even

[12] Office of the President 2004b: 193.
[13] Ministry of Foreign Affairs 2004: 64 – 65.
[14] National Planning Commission, 2008b: 154.
[15] National Planning Commission, 2008a: 267; National Planning Commission, 2008b: 153, 154, 156.
[16] Ministry of Foreign Affairs 2004: 64 – 73.
[17] National Planning Commission, 2002a: 337.

reports of such conferences are shared with diplomatic missions.

The successes of investment seminars are measured on the investments that follow thereafter. For example, soon after independence, February 1991, Namibia convened the Private Sectors Conference that resulted in investments by Pescanova and ENERKOR companies from Spain and France[18]. Further, the Conference on Mineral Investment in Namibia held in March 1993 resulted in the investment by Diamond Fields International, a Canadian company listed on Toronto Stock Exchange (TSE). This company established a local company in Namibia, Diamond Field Resources, to carry out mining activities in Namibia and it also purchased Angra Pequena Diamond Company to mine diamond offshore near Lüderitz[19].

Investment seminars as conference diplomacy are platforms that diplomatic missions should have a drive for. The Namibian embassy in Belgium, for example, worked closely with the Southern Africa Netherlands Economic Co-operation (SANEC) to organise a second Namibia-Netherlands Business Forum in Zoeterwoude, The Netherlands in 2005[20]. The convening of investment seminars provide an opportunity for businesspersons from various countries to interact with each other.

Conference diplomacy aimed at promoting trade and investments had further been pursued through Smart Partnership Dialogues, with a National Hub drawn from various stakeholders that included the Ministry of Foreign Affairs. In 1998, Namibia hosted the Southern Africa International Dialogue (SAID) '98. Namibia's participation in the Dialogues was active during the presidential tenure of President Sam Nujoma. The interest from the Government withered when the Ministry of Foreign Affairs and Trade and Industry left the coordination of smart partnership to individual businesspersons. Without central coordination form the government, the momentum that the Smart Partnership carried till the early 2000s had disappeared. Such decline in participation, arguably, neglect the aspirations of Vision 2030, which state that Namibia will avoid decreasing her interest in international platforms for promoting trade and investment.[21]

Conference diplomacy has further been pursued through the World Economic Forum (WEF) meetings. In 1998, Namibia hosted the Southern Economic Forum Summit, of the WEF, under the banner 'competitiveness in the 21st century', where President Nujoma emphasised the need for focusing on industrialisation[22]. The benefits of conference diplomacy to the host countries is that it partly contributes to the tourism industry, as some participants may prolong their stay after conferences, to explore various sites in the host country.

[18] National Assembly, 1991b: 146.
[19] Sherbourne, 2009: 132.
[20] Hendriks, 2006: 105.
[21] National Planning Commission, 2004b: 183.
[22] Office of the President 1999b: 372.

Current NDP priorities

The NDP 4 does not have specific sections on the goals and targets of international relations as previous NDPs. Instead, it sets four economic priorities for the Namibian government in general, namely, agriculture, logistics, manufacturing and tourism[23].

Since manufacturing is part of the EPZ programme, the Namibian missions have a daunting task to promoting EPZ, both in terms of attracting investors and finding markets for EPZ companies' products. In the NDP 4, the roles and responsibilities for carrying out strategies for the development of manufacturing industry is distrib-uted among economic Ministries of Finance, Mines and Energy and Trade and Industry. They include, inter alia, issues of trade negotiations and creating manufacturing base at home[24]. However, trade negotiations cannot be concluded excluding the Ministry of Foreign Affairs. Berridge avers that unlike negotiators from the home capital, diplomats in foreign capitals have valuable information about the negotiation ability and behaviour of the negotiation teams in their countries of posting[25].

The issue of promoting manufacturing industry was at the core of Namibia's stance in the Economic Partnership Agreement (EPA) negotiations between the European Union (EU) and Africa, Caribbean, and Pacific states (ACP), in which the Namibian Mission in Brussels has been fully involved. During the EPA negotiation rounds held in Swakopmund in 2009, the ACP and EU negotiators reached an agreement to include a clause on export taxes[26]. This is to allow ACP states to impose high tax on raw materials exports. This is to encourage value addition to raw material products before exports, thereby helping to grow local manufacturing industries.

There is a need for Namibian diplomats to internalise the EPZ legislation, and visit EPZ companies, listen to presentations and understand the operations of EPZ companies so that when they market Namibians an ideal investment destination they are also able to explain the EPZ regime. This should be made part of their diplomatic induction programme, prior to their posting to foreign capitals.

The NDP 4 stipulates that the Government should drive tourism investment and promotion. Because of their locations, the Namibian Missions are better placed to pro- mote tourism to Namibia. In order to carry out that function effectively, it is important that the Namibian diplomats have basic knowledge about the tourism industry and are equipped with tourism marketing skills. Accordingly, in 2012, the Namibia Wildlife Resorts (NWR) took five diplomats from Namibian embassies in Austria, Belgium, France, Germany, and the UK to brief them and show them its tourism facilities in order to equip

[23] National Planning Commission, 2012: 81.
[24] Ibid, 103.
[25] Berridge, 2010: 115, quoted in Mushelenga 2015: 150
[26] Ministry of Trade and Industry, 2009.

them with the necessary information needed for promoting tourism. Similarly, all diplomats that were posted in 2015 were taken through an induction programme, which included a visit to tourism facilities in the southern and northern part of the country, so that the can appreciate the tourism industry and be able to effectively promote Namibia as a tourist destination.

With regard to logistic distribution, Namibia wants the port of Walvis Bay to become a preferred west coast port. Namibian diplomats should acquaint themselves with essential information that makes Walvis Bay a competitive market, in order to be able to effectively market the port as an ideal logistics and distribution port. These competitive information are, inter alia, that the port was ranked the number one port in Africa in terms of cost and efficiency in the Africa Competitiveness Report which is compiled by the Harvard University[27]. The port has further recorded successive years of zero-theft, non-pilferage and non-violation of cargo. As Deputy Minister of Foreign affairs and later International Relations and Cooperation, the researcher of this chapter stresses this competitive information during official exchange visits with foreign counterparts. Further, the researcher and previous Deputy Ministers of Foreign Affairs have led Namibian delegations to the ministerial meetings of the Atlantic Peace Zone, which brings together coastal countries of the Atlantic Ocean to discuss matters related to peace and security. Coastal peace and security is important for the peaceful transportation of cargos along the coast.

As agriculture has become a priority, the Ministries of International Relations and Cooperation, of Industrialisation, Trade and Small and Medium Enterprises (SME) Development, and of Agriculture, Water and Forestry need to closely work together to ensure that Namibian agricultural products find favourable trade terms among Namibia's trade partners. Namibia is Africa's largest supplier of beef to the European market[28] and major beef market in Europe include the UK and Denmark, which are overall respective third and fourth largest customers of the Namibian beef, after South Africa and Angola.[29]

A large portion of Namibia's agricultural products of grapes have over the past years been exported to The Netherlands, with other major customers including the US, United Arab Emirates and Germany. Namibian trade negotiators should underscore during the negotiations the advantages of importing Namibian grapes as they are harvested in November, a month earlier than other grapes in the southern hemisphere and are available to the United States (US) market during the winter season, when that region's production is low.[30]

Namibia is currently facing challenges of low production of pelt for exports, which

[27] Office of the President, undated: 93.
[28] Kandenge, 2012: 4.
[29] Namibia Statistics Agency, 2014.
[30] Sherbourne, 2009:88; 90.

dropped from 112 067 pelts in 2008 to 97 128 tons in 2012[31]. More investment should, therefore, be made in this sector to ensure that there is sufficient production capacity and that existing markets are retained and expanded. In order to facilitate trade negotiations on agricultural products between Namibia and the EU, the Ministry of Agriculture deployed an official to the Namibian Mission in Belgium, thereby ensuring that the work of political diplomats is complemented by a specialised diplomat. Specialised diplomats add value to diplomatic establishments, given their expertise in their respective fields. Their knowledge about the capacity, type and competitive advantages of economic sectors at home stand them in a good stead to make valuable contribution to the conduct of economic diplomacy.

Foreign policy implementation and the concept of national interest

There is a concept of "national interest" that is stated in policy documents and that Namibian leaders refer to in their statements. However, neither the policy documents, nor in the statements of national leaders have this concept been defined and clarified. The White Paper on Foreign Policy and Diplomacy Management merely states that Namibia's bilateral diplomacy will be pursued with prior consideration of national interests, but fall short of explaining what these interests are[32]. Similarly, the NDP 4 only states that the Namibian policies serve the objective of the Government, which is national interest (Government of the Republic of Namibia: 92). But, what does this interest entails? National interest as a concept refers to interests that serve public good and are of collective concern. There should, thus be a distinction between these and private or sub-national interests that favour individuals or just a group within a nation.[33]

A renowned scholar of International Relations studies, Hans J. Morgenthau asserts that in pursuing of national interests, caution should be exercised, not offend the interest of others. He surmises that,

> "The national interest of a nation which is conscious not only of its own interests but also that of other nations must be defined in terms compatible with the latter."[34]

Pham[35] propounds that large states generally define their interest in terms of power. But Namibia is a small state, and, accordingly, power cannot determine her interests. The limitation imposed by her smallness compels Namibia to cautiously define her interests, without provoking negative political and economic reactions from others. Deducing from national policies and speeches by national leaders Namibia's interests in conducting

[31] Swakara, 2014: 51.
[32] Government of the Republic of Namibia, 2004: 63.
[33] Hill, 2003: 119.
[34] Pham, 2008: 262.
[35] Ibid, 258.

foreign relations and diplomacy could be summed up to be:

- Enhancing national security;
- Securing export markets for Namibian products;
- Attracting Foreign Direct Investments to Namibia ;
- Maintaining good neighbourliness;
- Ensuring the welfare of her citizens, and
- Striving for a just global trade system;

The aforesaid interests are not only beneficial to Namibia, both also to other countries with which she engages with in both bilateral and multilateral diplomacy.

Assessment of implementation of national legislation and policies on economic diplomacy

The inclination to the principle of mutual beneficial relations enshrined in the Namibian Constitution is evident in the speeches of Namibia's key foreign policy-makers. For example, as part of his personal diplomacy trademark, Namibia's Founding President, Sam Nujoma, underscores the principle of cooperation and mutual beneficial relations principles during both outbound visits by him to foreign countries and inbound visits by foreign Heads of State. During the visit by President Quett Masire of Botswana to Namibia, in June 1990, which was a first visit by the foreign Heads of State, President Nujoma alluded to the mutual beneficial relations principle when he called for cooperation between Namibia and Botswana on the construction of the Trans-Kalahari highway that will be used by the two states. He further suggested reciprocal filling of each other's beef export quotas to the European Economic Community (EEC), in the event either of the two states unable to fill its quota.[36]

The principle of mutual beneficial relations further guided Namibia's negotiations for the EPAs between the ACP states with the European Union (EU). Namibia pursued the EPA negotiations striving for the end results that will be beneficial not only to the EU, but also to Namibia and other the ACP states at large. The Ministry of Foreign Affairs have been party to the EPA negotiations, as the Ambassador to the EU and the Mission staff have attended a number of rounds of negotiations, and presented papers on Namibia's position during the EPA negotiations.[37]

The realisation of the NDP 2 targets stated above is illustrated by the enactment of the Namibia Tourism Board Act 21 of 2000 and the subsequent establishment of the NTB April 2001 to serve as a regulatory body for tourism activities in Namibia. Meanwhile, the targets for the EPZ reflect minor realisation and more failures. In term of job creation, EPZ employees grew from 372 employees in 1998, to 2 591 employees, in 2011,

[36] Office of the President, 1999: 39; 41.
[37] Mushelenga, 2015: 236 – 240.

whereby 2 424 of these employees belongs to the minerals processing sector.[38]

However, the EPZ generally faces a challenge of job creation as only 400 had been created by 1999, when the Government had initially set the target at 25 0000 employees by that time[39]. Further, a number of companies that were issued with EPZ certificates never commenced operations. Only 32 out of 116 registered companies have been operational, with the rest going out of business, failed to become operational or being deregistered.[40]

Overall, the decline of EPZ companies did not realise the EPZ's objectives of creating full employment and an industrial based economy for Namibia (Ministry of Foreign Affairs 2004: 19). Although the NDP 4 states that the manufacturing industry growth envisaged by the NDP 3 was 5.3 percent, but the industry's outturn was 5.6 percent, this percentage could arguably have been higher if there was no decline in the EPZ companies.[41]

The realisation of the goal set in the NDP 2 regarding expanding Namibian markets and diplomatic establishment is reported in the White Paper on Foreign Policy and Diplomacy Management when it states that Namibia's diplomacy stretches over a large geographical area covering Africa, Europe, America and Asia.[42] The diversification of the export products is illustrated by the fact that Namibia's products are exported to markets across the globe. For example, largest markets of the Namibian agricultural products stretches from Africa, through to America, Europe and Asia. The top four largest destination for grape exports are The Netherlands, US, United Arab Emirates and Germany, while largest customers for the Namibian beef is South Africa, UK, Angola and Denmark. Denmark is further the top destination for the Karakul pelt exports. Namibia is currently negotiating for new markets for her beef exports with Russia and China.[43]

In fulfilling the afore-mentioned goals of expanding markets stated in the White Paper on Foreign Policy and Diplomacy Management, over the period of the past 10 years Namibia opened additional diplomatic establishments in Congo (Brazzaville), Ghana, Egypt, Finland, Japan, Senegal, Switzerland and Tanzania. Consulates have also been opened in Ondjiva and Menongue, Angola, and Cape Town, South Africa. These diplomatic establishments have economic diplomacy tasks of finding new markets for Namibian products. Permanent diplomatic establishments provide opportunities to diplomats to have primary information on the business and political environment, with a view to develop plans on the focus and intensity of diplomatic relations between the sending and

[38] Offshore Development Company, 2013. 39
[39] Jauch, 2002: 105.
[40] Sherbourne, 2013: 248.
[41] National Planning Commission, 2012: 99.
[42] Ministry of Foreign Affairs, 2004a: 64 – 73.
[43] Namibia Statistics Agency, 2014; !Gaeb, 2014; Mushelenga, 2009: 186 – 191; Sherbourne, 2009: 88 – 90.

receiving state.

Although Vision 2030 states that Namibia will avoid reducing interests in international platforms for promoting trade and investment, the Namibian Government's participation in the Smart Partnership Dialogues had scaled down during the term of President Pohamba[44]. This reflects the challenges for the Government to fulfil the objectives set in the Vision 2030 blueprint.

The targets of NDP 3 regarding just trading system stated above were met when Namibia served as Chair of the Working Parties on State Trading Enterprise at the WTO, from 2005 to 2008, where she led negotiations in WTO aimed at redressing the imbalances of trade. These imbalances were created when SOEs from Least Developed Countries (LDCs) and developing countries had an unfair competition from SOEs from developed countries that receive government subsidies. The negotiations at the WTO with Namibia at the helm resulted in the regulation of the SOEs trading to guard against trade monopoly.[45] The targets on diplomatic establishments were met when diplomatic missions in Egypt and Tanzania were opened in 2008.

However, other targets have not been realised, like the joint commissions of cooperation that have not been effective. The only active joint commissions are the Bi-National Commission between Namibia and South Africa, and the Joint Commission of Cooperation between Namibia and Zimbabwe. The Joint Commissions of cooperation between Namibia and Angola Namibia and Congo and Namibia and DRC. The joint commission of cooperation between Namibia and Kenya has been due for inauguration for the past five years. The Joint Commissions of Cooperation between Namibia and Angola, Namibia and Nigeria and have been inactive for more than five years. The 6th session of the Joint Commission between Namibia and Russia has been postponed several times. Similarly, diplomatic consultations between Namibia and a number of countries have scaled down, from 2013. This includes diplomatic consultations that were held annually between Namibia and China. The failure to realise the targets of bilateral relations in respect of joint commissions and diplomatic consultations are sometimes attributed to other countries, than to Namibia. For example, the inauguration of the joint commissions of cooperation between Namibia and Kenya had been continuously postponed form the side of Kenya. The diplomatic consultation with China had been postponed for more than one occasion from the side of China, as a result of the reshuffles of the line Vice-Ministers.

The realisation of targets set in Vision 2030 regarding Namibia's role in regional institutions are illustrated by Namibia's hosting of the SADC Parliamentary Forum (SADC-PF) and the Southern Africa Customs Union (SACU) Headquarters, whose land and facilities were provided by the government. Further, the Ministries of Finance and of

[44] Office of the President 2004b: 183.
[45] Mushelenga, 2015: 241.

Trade and Industry ensured that Namibia plays a significant role in the formulation of SACU trade policies. As far as back in 1993, Namibia presented the draft paper on the SACU structure, which became the working document for setting the revenue sharing formula used in SACU.[46]

There has also been a slow pace in fulfilling some targets set in national policy documents. For example, the NDP 2 sets the target that Namibia will open an office at the WTO by 2001.[47] However, it is only in 2004 that a Commercial Office was opened in Geneva, with a full diplomatic mission opened in only in 2010.

There were times when Namibia did not make use of the full potential of conference diplomacy in promoting trade and investment. For example, Namibia was allocated a time slot at the WEF conference held in Tanzania, in May, 2010, to showcase business opportunities. But there was no register kept for potential investors who attended and, thus, their details remained unknown. This deprives Namibia an opportunity to make follow-ups with potential investors at a later stage.

Towards effective implementation of national policies on foreign relations

In order to improve on the implementation of national policies in respect of enhancing the pursuing of economic diplomacy, diplomats need to comprehend these policies. The general observation, upon enquiries during the staff meetings of the Ministry of Affairs about staff members who read policy documents like NDPs, Vision 2030 and the White Paper on Foreign Policy and Diplomacy Management is that less than 5% of the staff members read the policy documents. Diplomats cannot effectively implement policies that they have not read and comprehend. Lack of knowledge about what is entailed in policy documents result in minimal knowledge regarding the focus, expectation and vision of the Government. Accordingly, diplomats will not be able to make an informed self-assessment regarding their performance.

The Ministry should guard against what the researcher of this chapter term "emotional foreign policy-making". Emotional foreign policy-making refers to when policy makers suggest or take decisions that are based on their perception of what should be done, whilst disregarding what the law and policy requires. Further, foreign policy-makers should guard against making populist statement that has implications on national legislation and policies governing foreign policy and economic diplomacy. If there is a need to deviate from policies, first there is a need to amend such policies, but consideration of national interests as outlined above should be taken into account. Foreign policy conduct should be principle and policy-based, to avoid taking arbitrary decisions that affect the essentials and fundamentals of the nation's foreign policy goals.

[46] Mushelenga, 2015: 97; 251.
[47] National Planning Commission, 2001: 315.

Namibia should live up to the aspirations of the NDP 1 in respect of moving away from developmental aid diplomacy. This type of diplomacy has its own disadvantages as benefactors sometimes use it to patronise the diplomacy of aid recipients. Failure of dependent states to comply with the directives of donor states, the latter adopt measures like sanctions or aid withdrawal.[48] Meanwhile, Namibia should maintain result-oriented economic diplomacy, in response to the call for promoting trade and attracting FDI by Namibia's national policies. This should be illustrated by the new market for exports or increased export value and new investors, as mentioned above in respect of some investments that resulted from conference diplomacy, for example. Economic diplomacy seminars and conferences should be properly coordinated among the line Ministries and the Ministry of International Relations and Cooperation, who should complement each other's activities.

The inactive Joint Commissions of Cooperation and diplomatic consultations should be activated and be properly divided among the Minister, Deputy Minister(s) and Permanent Secretary, to avoid dormancy resulting from concentrating too many activities in the hands of either one of these key actors. These type of diplomatic activities should be institutionalised and regularised and not be carried out at the behest of individual actors.

This is to avoid subjective decisions on broader matters of foreign policy and economic diplomacy. Economic diplomacy and political diplomacy should complement each other. While Namibia and Mozambique has closely worked together in the fisheries sector, their economic diplomacy lacks a complementing political diplomacy. Neither the Ministers, nor Deputy Ministers of Foreign Affairs have exchanged official visits with their Mozambican counterparts for a period of more than 15 years. The last ministerial exchange visit was when Namibia's first Minister of Foreign Affairs, Theo-Ben Gurirab paid an official visit to Mozambique in 1998, where he also delivered a public lecture on Namibia's foreign policy at the Superior Institute of International Relations and Diplomacy in Maputo, Mozambique, in 1998[49]. Mozambique is an important partner in the political diplomacy arena, given the fact that the ruling parties of the two countries maintain sound relations and both are part of the forum for former liberations movements in southern Africa. Ministerial exchange visits by the Minister and Deputy Ministers of International Relations and Cooperation will be in accordance with the goals set by the NDP 3, of intensifying economic diplomacy in the southern Africa region through high-level bilateral visits and joint-commissions of cooperation.[50]

It is necessary to consider the inclusion of the business sector in the official visits of the Minister, or Deputy Minister of International Relations, rather than only including this sector in the visits by the Minister of Trade. The first Minister of Foreign Affairs, Theo-

[48] Badwin, 1971: 23.
[49] Gurirab 1998.
[50] National Planning Commission, 2008a: 267.

Ben Gurirab stressed this issues, stating that the Government will identify business opportunities, but it is the private sector that carries out the import and export of commodities, Accordingly at the inaugural session of the Namibia/Zimbabwe Joint Commission of Cooperation and Trade in Harare in 1994, his delegation included executives from Namibia Breweries Limited, Meat Board, Profoods Holding, Namibian Horse Mackerel Group and TNP Fishing Company.[51] Similarly, during the meeting of the Joint Commission of Cooperation between Namibia and Zimbabwe held in Namibia in 2011, the Confederation of Zimbabwean Industry (CZI) formed part of the Zimbabwean delegation, thereby underscoring the relevance of this sector to the pursuing of economic diplomacy.[52]

Whilst talking about the issue of implementing agreements, it is important to state that some bilateral agreements are not implementable or difficult to implement because of their implications for domestic or international law. Yet, some negotiators do pursue such type of agreements. This contradicts the constitutional principle of fostering the respect of international law and treaty obligation.[53] The idea of inter-ministerial committee will, arguably, address some of these challenges as line ministries will be appraised on the implications of bilateral agreements with international treaties. In 2011, the researcher of this chapter had proposed this structure of an inter-ministerial committee that will discuss cross-cutting issues. The committee should, ideally, be comprised of economic ministries and be chaired by the Ministry of Foreign Affairs at the level of Permanent Secretary[54]. Issues should first be digested in the Ministry of Foreign Affairs, which should have its own intra-ministerial 'thin-tank' that is responsible for policy formulation and coordination and then issues that cut across various ministries that impact on economic diplomacy should be taken to the inter-ministerial committee to coordinate policy implementation.

The NDP 3 provides for the review of the operations of diplomatic missions[55]. Currently, this exercise is not being carried out. Missions should be assessed looking at how aggressively they pursue available business opportunities within their respective environments. It is necessary to state that a country can make informed changes for improvements largely when its strengths and weakness in bilateral and multilateral economic diplomacy have been identified. It is, therefore, imperative to have performance review to assess the effectiveness of individual diplomatic missions.

[51] Gurirab 1998.
[52] Ekongo 2011: 7.
[53] Ministry of Information and Broadcasting, 1990: 54.
[54] Mushelenga, 2011.
[55] Ministry of Information and Broadcasting, 2008a: 273.

Conclusion

Namibia has endeavoured to pursue a policy-based economic diplomacy over the past twenty five years of her existence as a sovereign state. Successive NDP documents have a section making an overview of the previous NDP documents. Typical of a small state, she has challenges of meeting the targets of her policy documents, illustrated by slow implementation of policies and targets. But overall, the policy framework has substantially been realised. The policy documents are anchored in the Namibian Constitution's principles of foreign policy.

Policies like the NDP and Vision 2030 has time frame, which makes sections on foreign policy in these documents realistic, as foreign policy evolves with time. When there are changes in the trends and developments in foreign policy, this should be realised and be addressed in the next NDP. Meanwhile, the White Paper has no time frame and is a general policy framework. Accordingly, political departments in the Ministry of Foreign Affairs need to develop specific policies on specific issues or countries, which should be discussed and be adopted at a high level of Government. The formulation of specific policies will be made on a need basis.

In addition to policies, Parliament enacted legislation that facilitates the conduct of economic diplomacy. The laws provides for prudent business conduct framework and the growth of the manufacturing industry. Like in the case of policies, there have been challenges in realising legislative provisions and, therefore, strategies should be devised to ensure that there is achievement in implementing the legislative provisions governing economic diplomacy.

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Elections in Namibia: Linchpins and catalysts for democratic development?

Heribert Weiland

After a quarter of a century of independence Namibia can look back on a history of overall success. Compared with a number of other African states its record attests to a considerable degree of political stability and, with certain restrictions, a high level of democracy. No one foresaw such a generally peaceful development, so how can it be explained. This article presents the thesis that despite all — readily admitted — shortcomings the key to Namibia's overall success is the institutional linchpin of a liberal constitution and regular elections. Elections are the means of choosing officials, confirming their mandate and giving them legitimacy in office. At the same time they have also a powerful control function.

Even the first general elections that led to independence require some explanation. In the 1970s and 1980s the likelihood of overcoming apartheid through peaceful change appeared to be impossible. The primary factor promoting a peaceful transition, which essentially followed the proposals put forward by UN Security Council Resolution 435, was an international arrangement between the major powers that viewed peace in Namibia as one important stage on the path to the larger goal of resolving the ongoing crisis in Southern Africa. After years of negotiation the parties to the conflict submitted to international pressure and signed an internationally recognised peace agreement (Tripartite Accord) that paved the way for the white settler community and the liberation movement under SWAPO leadership to reach a political compromise on free elections under UN supervision. Right up to the elections from 7 to 11 November 1989 the opponents were bitterly divided and mistrustful. Despite some allegations of electoral manipulation, the result was accepted by all parties, not least because of the relatively balanced result. SWAPO with 57.3% of the vote was declared the winner, but the opposition parties, led by the DTA with just under 30%, got enough votes to raise hopes of a functioning multi-party system. Particularly important was the fact that SWAPO did not win a constitutionally relevant two-thirds majority.

Another contributing factor in this international effort, which the UN still celebrates as one of its most successful peacekeeping operations, was the convening of the newly elected constituent assembly just a week after the elections. Contrary to the fears of sceptical DTA politicians, without a long discussion it gave the country a constitution that, according to western experts, is still one of the most liberal passed by any parliament in Africa. The basis was the Constitutional Principles agreed already in 1982 that codified democratic freedoms and civil rights, independent courts and a multiparty system based on free and regular elections.

In retrospect it is clear that the successful elections and the euphoric independence celebrations on 21 March 1990 got the country off to a very good start. President Nujoma's policy of National Reconciliation propagated peaceful coexistence between blacks and whites in keeping with international concepts of democratic development. The constitutionally guaranteed civil rights were fundamentally respected and the democratic rules observed in principle. The institutions necessary for a separation of powers were established and a far-reaching policy of decentralisation was launched that provided for parliamentary control of government bodies and elections at the regional and municipal levels.[1] Even if in the interim these favourable initial circumstances were not always maintained and the hopes placed in democratic consolidation began to fray in some areas, Namibia has largely maintained its image as a successful democratic enterprise, a fact regularly affirmed by the rankings of recognised international agencies such as Freedom House.[2]

In political transition theory elections are the crucial factor for peaceful regime change, which is deemed to constitute the basis for the consolidation of democratic structures and behaviour. That said, the focus on elections as the starting signal for democratic development in many states, especially on the African continent, has also proved to be misplaced. In particular, elections during transitions in conflict situations, even if monitored by international observers, do not necessarily guarantee democratic development. The insight from this experience has led to a shift in emphasis: only after the second election free of conflict can one speak of a successful start to democratic transformation. If this experience is the yardstick, it must be stated that after a few years Namibia evinced a considerable degree of political maturity. In contrast to the elections of 1989, which were organised and supervised by the UNTAG, the Namibian state itself organised and conducted the parliamentary and presidential elections of December 1994. Despite a few glitches here and there — e.g. in the registration of voters and the coordination of the vote count — internationally it was unanimously confirmed that the country had organised the elections very well and that on the whole they had been free and fair.

But the praise was premature. It turned out that in the announcement of the final results for the four northern constituencies of Ogongo, Okatjali, Okalongo and Oshikango more votes were cast than there were registered voters. Although only about 1,000 votes were involved, which had little effect on the overall results and none on the distribution of seats, the opposition used these discrepancies to fiercely criticise the organisation of the elections and took the irregularities in the north as grounds to question the legitimacy of the results.[3] Even though a few months later the public prosecutor dismissed the objec-

[1] This article will discuss only presidential and parliamentary elections. A constitutional amendment introduced a multi-level system of government in 1992. The country was divided into new regions and provision made for regional and municipal elections. The present analysis ignores these.

[2] Freedom House scores; Status: Free; Freedom Rating 2; Civil Liberties 2; Political Rights 2 (1 = best; 6 = worst).

[3] See Weiland, H. Namibias Demokratie auf dem Prüfstand. Ist das Experiment gescheitert? In: Aus Politik und Zeitgeschichte, B27/99, p.16.The dispute about the legitimacy of the elections was further

tions as irrelevant, the opposition's initiative is understandable. The irregularities fed the long-held suspicion that the almost 100-percent pro-SWAPO results in the northern constituencies possibly reflected attempts at massive social manipulation. From their early attempts to campaign in the north the DTA and other opposition candidates had learnt that in some areas electioneering and political criticism of SWAPO or the government could involve a very real threat to life and limb. This assessment was confirmed on numerous occasions and even today has not been completely reversed. On account of the extremely strong support for SWAPO in some of its strongholds in the north voting there can be termed "free and fair" only with reservations.

However, the evaluation of the first self-organised elections five years after independence was less concerned with the conduct of the elections than with the result: SWAPO won not only the absolute majority, but a full two-thirds of all seats. In the presidential election the successful incumbent, Sam Nujoma, garnered almost three quarters of the vote: 74.5% of the votes cast. These results of overall free elections set off alarm bells among critics, because they feared that the country was drifting towards a one-party state, albeit it a "constitutional one-party state".

Notwithstanding such fears, the results did not trigger any panic. The result reflected the overwhelming will of the voters and the balance of power in Namibia in the mid-1990s. It was the result of the successful first parliamentary period, during which the economic privileges of the white minority were not threatened and many black opposition supporters switched their allegiance to Nujoma.

The inbuilt Ovambo majority ensures election results that are normally associated with unfree or authoritarian states. In other words, although the constitution prescribes democratic rules for free elections between competing parties in a system of proportional representation, they hardly apply because political leadership can count on the unconditional support of the majority of the population, especially in the north of the country. Interestingly, opinion surveys show that trust in leadership, at least in the 1990 was very high.[4] Thus, the majority of voters accepted a charismatic leader with an authoritarian leadership style but the same voters were also satisfied with democratic institutions. Accordingly, in terms of supply and demand political reality in Namibia can be described as a "democracy without democrats" (Christiaan Keulder). In recent years this attitude of strong leadership orientation has moderately changed but it is still a visible characteristic of Namibian democracy.[5]

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fuelled by a single, apparently valid ballot paper cast for the DTA that was fished out of the Atlantic Ocean almost four weeks later. Needless to say, this rekindled the rumours of electoral fraud in favour of the governing party.

[4] See Weiland, H. 2006, Die Saat geht auf. Die Namibier sind demokratischer geworden. Umfrageergebnisse 1989 bis 2005, in Molt, P /Dickow,H. (Hrsg.) Kulturen und Konflikte im Vergleich, Baden-Baden, p.480.

[5] See different findings of Afrobarometer.

What became apparent after a couple of years can be called the temptation of power. The President and the dominant SWAPO-Party had gradually taken control of almost all positions in the state and parastatal sectors not only in the north and the capital Windhoek, but throughout the country. The party had made itself comfortable in the seats of power and this extended beyond political office to include access to economic privileges. As political morals declined, the "authoritarian democracy" became more pronounced. The growing concentration of power increasingly assumed characteristics of an "arrogance of power", as reflected particularly in the president's occasional outbursts of fury and his offensive remarks about opposition newspapers and foreign journalists. In keeping with President Sam Nujoma's character, this development coincided with his highly disputed nomination for a third term in office, which reflected Nujoma's desire and will as well as that of his supporters — but not the constitution. Article 29 limited a president to two terms of office. This controversial step, involving as it did a potential breach of the constitution, threatened the foundations of the rule of law. In the end a pragmatic solution was found. As the president was elected to his first term of office by the constituent assembly and not in a regular presidential election, his term of office from 1994 to 1999 was declared to be his first and appropriately sanctioned by a constitutional change (Article 134) — which in some quarters was viewed as questionable.

However, the change was reversed after the end of Nujoma's last term of office to prevent subsequent abuse. This pragmatic approach demonstrates in the final analysis a fundamental respect for the law and the recognition that the terms of office as laid down by the constitution fulfil a legitimacy function. The pragmatic solution avoided the probability of a breach of the law by the charismatic, but at the time increasingly authoritarian head of state.

This constitutional crisis triggered another development that overshadowed the 1999 elections. Ben Ulenga, a prominent SWAPO politician from the Oshana region in the north of the country, who was incarcerated on Robben Island for 15 years, protested not only against Nujoma's re-election, but also against Namibia's involvement in the Congo, which was very controversial at the time. His spectacular resignation from SWAPO and founding of a new party, the Congress of Democrats (CoD), in March 1999 was the first crucial test for the ruling party, which had not exhibited any cracks up to that point. On account of his background, his past as a freedom fighter and his charisma, particularly among the youth, many hoped that his action would break open the all-powerful SWAPO block. Thanks to the correspond-ingly controversial election campaign, the challenger won 10.5% of the vote, a considerable achievement, but by far not the desired break- through. From a standing start the CoD became the largest opposition party (official opposition), but in the following years failed to fulfill its voters expectations and subsequently declined into political irrelevance.

In short, the irritating developments surrounding the 1999 elections illustrate the significance of elections in two ways. First, in their mobilizing function they generated political articulation and participation and, second, in their stabilizing function they encourage

competing political alliances to close ranks in the face of strong competition, thereby promoting the continuity in the political system.

The controversial, but in the final analysis constitutional developments surrounding the president's third term of office postponed the question of succession to the elections in 2004. It was taken for granted that Nujoma's successor had to be an Ovambo and a freedom fighter. However, he or she had to prevail in the inner circle of power and win the approval of the party leadership. For a long time the favourite appeared to be Hidipo Hamutenya, a SWAPO veteran, although his political past concerning pre-independence SWAPO's notorious dungeons were not uncontentious. But after 17 years as a successful minister, he saw himself best suited to be Nujoma's successor. But he obviously underestimated the role of ethnic competition within the party's leadership. He lost the crucial vote to Hifikepunye Pohamba, who had Nujoma's support. Nujoma managed to brand Hamutenya's candidacy an inner-party intrigue. On a trip abroad he was unceremoniously relieved of his ministerial post. As Nujoma's favourite, Pohamba was chosen as SWAPO's candidate for president.

After what was clearly a decision of SWAPO's central committee, the 2004 presidential and parliamentary elections were a mere formality. Nujoma's old comrade Pohamba had been secretary-general of SWAPO for many years and was vice-president of SWAPO from 2002 to 2007. The campaign was calm and orderly. Alone the topic of land reform engendered excitement because Pohamba, who had previously been Minister of Lands, Resettlement and Rehabilitation, regularly raised this topic during his stump speeches, which aroused fears of possible expropriation among white landowners in particular. For the black majority it sounded like a hidden promise for an intensified policy of land redistribution. To what extent this topic contributed to his record election victory of 76.4% of the votes (SWAPO 76.1%) cannot, of course, be established. Be that as it may, the election results contributed significantly to the legitimacy of the new office holder and of SWAPO, the party that nominated him. The opposition won 23.4%, but was incapable of formulating and advocating a common, constructive counterposition.

President Pohamba, who adopted a more conservative stance than his predecessor, played an extremely important role inasmuch as he rooted the country's achieve-ments in democratic stability. Under his leadership Namibia's democratic institutions and rules suffered little, so that one can speak of a strengthening and consolidation of the government machinery. Many hopes were connected to Pohambas announcement of giving priority to combatting corruption. However, the promised measures hardly went beyond drawing up large-scale campaigns, and are unlikely to have had much effect on the existing system of clientelism that distributed political and economic privileges behind the scenes. The neo-patriarchal network that Nujoma created during his time in office continued to function. Pohamba obviously lacked the power to change it, not least because he himself may have been part and parcel of it.

In principle, nothing stood in the way of Pohamba's easy re-election — apart, that is,

from Hidipo Hamutenya, who could not accept the humiliation of his failed candidacy in 2004. In 2007 he resigned from SWAPO and founded the Rally for Democracy and Progress (RDP), which, like Ben Ulenga's CoD eight years earlier was intended to break apart the monolithic SWAPO block. This upheaval followed much the same path as the earlier effort. Still centralistically organised and led by Nujoma in the background, the SWAPO Party ("liberation movement in government") could not be forced apart. Like the CoD in 1999, the RDP in 2009 won only a protest vote of 11%.

But, unlike the 1999 elections, the 2009 elections were marked by intolerance and at times even sporadic violence that created a new image of elections in Namibia, which up to then had a reputation for being generally peaceable. A further drawback was that the institutions responsible for elections, the Electoral Commission of Namibia (ECN) and its administrative arm the Directorate of Elections, were not optimally equipped in terms of personnel and infrastructure. Notwithstanding the declaration by all election monitoring commissions, with the exception of the National Society for Human Rights (now NamRights), that the elections were free and fair, a complaint was filed that the ECN had committed electoral fraud in favour of the governing party. The complaint was filed by a total of nine opposition parties under the leadership of the RDP. The substantive point was the public availability and transparency of the voters roll, which had long been a subject of criticism. The ECN had to admit that prior to the 2009 elections four different lists had existed containing the names of between 1.8 to 2.1 million registered voters. The ECN had failed to properly maintain the voters rolls for the last ten years, with the result that many voters were registered more than once and some deceased persons had not been removed. Furthermore, the complaint pointed out that whereas the Government Gazette of 9 November 2009 stated that the voters roll contained 1,181,803 voters, just two days before the election on 27 and 28 November the ECN had provided the parties with the final list of 822,344 voters.

The complaint also alleged that the use of incorrect voters rolls knowingly gave support to the governing party and disadvantaged the opposition. The opposition's call for new elections or at least a recount was dismissed by the High Court on a technicality. On appeal to the Supreme Court the case was referred back to the High Court. Once again the High Court dismissed the complaint on the grounds that the affidavits and evidence were insufficient to prove fraud and challenge the election results. However, the High Court expressed his concern regarding the ability of the ECN and its director to organise elections. The opposition parties persisted, and in October 2011 the Supreme Court finally did hear the appeal, but reserved judgement.

At the end of 2014, 25 years after the founding of the state, national elections were held for the sixth time. It was an opportunity for a fresh start. The ENC moved into a new building with cutting-edge infrastructure and with a new director; furthermore, a number of innovations and reforms were introduced. Of course, the elections took place in the glare of publicity: only few African states could claim such a degree of political stability and democratic continuity. A new president had to be elected. As Pohamba approached

the end of his two terms of office, the presidential office initiated discussions about his successor in good time. The inner party search for a suitable candidate was complicated by the fact that in addition to a number of serious candidates from the north for the first time there was a contender from the minority ethnic group of the Damara, Hage Geingob. His prominent political background as prime minister, his skillful performance before the election and not least the approval of Nujoma, the still influential founder of the nation, won him the support of the SWAPO Central Committee for his candidacy. There was great suspense and excitement about how the voters would react to this new situation.

In the run-up to the elections three important political decisions caused a stir. A constitutional amendment increased the number of parliamentarians by 24[6]; SWAPO, the ruling party, decided to increase the quota for female candidates on its list to 50%; [7]and electronic voting machines would be used in the elections for the first time. However, although these innovations are fundamentally democratic and ostensibly progressive, their implementation was not as smooth and undisputed as anticipated. The elections were held on 28 November 2014: 1.24 million eligible voters casted their ballots in 1,200 polling stations and 2,700 mobile polling stations. A total of 16 parties contested the 96 parliamentary seats. In the presidential election voters had a choice of nine presidential candidates.

In contrast to previous elections, this time voting took place on a single day. This was possible thanks to the decision to introduce electronic voting machines (EVM), which enabled voters to cast their ballots by pressing a button to elect the presidential candidate and the party, respectively. The results could be directly forwarded to the central offices of the Electoral Commission of Namibia (ECN) in Windhoek soon after the polls closed. In previous elections it took several days to count the votes, which gave rise to accusations of manipulation; this time it was hoped that everything would take place more quickly and there would be fewer problems. The intention was, as far as possible, to complete counting and announce results on the day after the election. However, this hope quickly had to be abandoned.

[6] There were 84 members of parliament, of which six were appointed by the president. Shortly before the parliamentary elections the number of members elected via party lists was increased to 96 and the number of appointed members to eight. The increase in the number of parliamentarians is a sensible step. Because all members of the government, including deputy ministers, must be members of parliament, the institution would cease to exercise its control function if almost half the members of parliament hold government posts as ministers and deputy ministers in more than 20 ministries.

[7] The underrepresentation of women was criticised primarily by women's associations. The number of women members of parliament never exceeded 30% of the total. SWAPO's decision to introduce a women's quota of 50% is very progressive. It is one of the first so called zebra lists in Africa. But one consequence of this decision was that in conjunction with party lists in a proportional system many long-standing members of parliament were not re-nominated. That said, thanks to the increase in the number of parliamentarians by 24 this effect was less radical.

The polling stations were supposed to be open from 7 a.m. to 9 p.m. Although the voting process was generally well prepared at most polling stations, delays soon arose. Owing to unexpected technical difficulties, voters took two to three times longer on average to cast their votes in the different elections. The problem was not so much the voting machines, as intensive voter education and a well-organized media campaign before the elections had instructed voters on how to use the machines, which they did relatively quickly, despite some uncertainty. As reports from across the country confirm, the crucial bottleneck lay in establishing voters' identity prior to the actual act of voting. Each individual voter's identity was established by fingerprint, — one of the security-related innovations — which required biometrical comparison with each voter's registered ballot paper. This was a very time-consuming procedure. Consequently, voting was a slow process. Long queues formed in front of the polling stations. People often had to wait several hours to vote. Although the polling stations were supposed to close at 9 p.m., in many places the voting process continued into the early hours of the morning to ensure that all the voters in line had the opportunity to vote as laid down in the electoral law. Particular mention must be made of the incredible patience of voters, both black and white, who queued for many hours to cast their ballot. This is a significant indication of the will of the electorate and attests to the seriousness that people attach to democratic participation. Given the length of the queues, it is not surprising that some potential voters were unable to stay the course. However, it would to be an exaggeration to ascribe a substantially lower turnout to this fact, with the corollary that this could possibly have affected the result of the elections. Even compared to earlier elections, the turnout of 72% is quite satisfactory.[8]

Several hundred Namibian and international election observers (from the African Union, the SADC and the EU), observers from all the political parties and Namibian civil society representatives monitored the elections. The observers' reports broadly concur: despite organisational and logistical shortcomings, the elections were deemed to be peaceful, free and fair. However, given the decision to introduce a new electronic voting format, the lead time was criticised as too short and the testing of the technical apparatuses as inadequate. It was recommended that the number of polling stations be increased.

What was the advantage of electronic voting machines? They were supposed to guarantee quick, accurate results. However, in this case the objective of announcing the election results within a day or two of the vote thanks to the technical innovation was not achieved. Apart from the aforementioned delays in casting ballots on election day, the cumbersome verification process involved comparing the results sent directly to the Electoral Commission, with the manually recorded voting card numbers and voters' signatures at the time of voting in the constituency offices. Despite these widely criticised delays, one notable success of the electronic tabulation of results is the general absence of accusations of electoral fraud. Hence, the elections are widely regarded as credible.

[8] 1999 the turnout was was 61% and 2009 it was 69%. Only in 1989 in the elections for the Constituent Assembly the turnout was 97%.

This time the results were not challenged, unlike in the aftermath of all previous elections. This creates hope for the future. It was never expected that the elections would result in fundamental political change. The primary interest was whether 25 years after independence there would be indications of change in voting patterns in the existing system, under which SWAPO has always won an enormous majority. There were reasons enough for disappointment. Modest economic growth and the argument of political stability were not enough to paper over the growing social disparities in the population: poverty, unemployment and inadequate health care and in particular the huge increase in the cost of property and accommodation in the urban centres. Moreover, people were very aware of corruption in government circles. Despite such irritations, the fact is that social dissatisfaction and bread-and-butter issues did not trigger an anti-government vote in previous elections and did not do so this time either. On the contrary, compared to previous elections SWAPO was able to strengthen its dominant position: it won 80% of the vote and a solid three-quarters majority of 77 seats in parliament. The result for Hage Geingob, the party's presidential candidate, was even more impressive: with 86.7% of the vote he did better than all of his predecessors. These results underscore the ambiguity in the electorate. On the one hand the myth of SWAPO as the liberation movement that led the country to independence continues to have an impact. This is particularly true in respect of older voters, the rural population and the inhabitants of the so-called O-Regions, who bore the brunt of the liberation struggle, all of whom remain rock-solid SWAPO supporters, as election results of more than 90% demonstrate. All political opponents are, when the occasion arises, left in no doubt about this unwavering allegiance.

On the other hand, SWAPO's election promises were tailored to the expectations of dissatisfied city dwellers. Hage Geingob is the embodiment of this need. Twice prime minster and a pragmatist and technocrat, he is viewed as someone able to reduce the massive social inequalities and introduce new initiatives to improve the investment climate in the country. This was of particular interest to the younger generation, the so-called "born free", who for the first time since independence constituted a significant part of the electorate, and clearly have not turned their backs on SWAPO. In the light of such high expectations, and his unexpectedly strong result, the elected president has taken up a tough job as became obvious a few months later when the protest against the allocation of municipal land and property culminated in well-organised mass demonstrations initiated by Job Amupanda.[9]

As a Damara the new president will not necessarily be able to count on the unreserved support of the SWAPO rank and file, which surely harbours many envious people. His success is based on the political calculation of — possibly fragile — consensus within

[9] Students and university teachers in the SWAPO Youth League dared to give the government an ultimatum concerning the promised housing programme, a novel experience for a SWAPO government. President Hage Geingob successfully dealt with the situation calming down the conflict by meeting the dissidents. See Weiland H. (2016) Affirmative Repositioning: Eine machtbewusste Jugendbewegung erschreckt das Establishment. In: Namibia Magazin 2/2016, p. 30/31 and the article in this volume.

SWAPO. In the election campaign this consensus was expressed in large posters showing Nujoma, Pohamba und Geingob, the three leaders, next to one another, and under each the word characteristic of his period in office: "Peace – Stability – Prosperity". The genial election slogan made the desired impression.

In view of the overwhelming performance of the ruling party the question of a political alternative is always in the background. The opposition, which has splintered into nine parties, won a total of just 19 seats, whereby the leading opposition party, the RDP dropped from nine to only three seats. It was replaced as the official opposition by the DTA, which won five seats. It appears impossible for the opposition to make any headway in this immutable environment, in which for the time being the ruling elite's hold on power is entrenched. Once again, the proportional system has ensured that the opposition is represented in parliament but without any political power. Three parties have one seat each and four two seats. These parties, some of which are represented by tribal elders, have never understood how to form a coherent, effective opposition with an alternative political programme to that of the government. The hopes of the opposition are now pinned on the youthful leader of the DTA, McHenry Venaani. Although he displayed remarkable charisma during the election campaign, it is unlikely that he will find the backing for constructive opposition policies, not least because to date the DTA has not been able to break completely with the colonial past and embrace the future.

Given such a parliamentary majority and such a strong presidential candidate, whether the parliamentary system of public debate, checks and balances and public control of the government can still function remains an open question. However, notwithstanding some organisational shortcomings and defects, it can be unequivocally stated that over time elections have played a very important role in Namibia's democracy. They have promoted great discipline in the selection and appointment of members of the political elite, even though the opposition has never succeeded in seriously challenging the government. "Institutions matter": Surveys show that almost 80% of Namibians support a multiparty system which is a sign for a democratic consolidation in the Namibian society[10] Particularly significant is the legitimation function of elections. Despite enormous majorities, the leadership has always shown its willingness to gain approval and consent to govern through an official act of voting, thereby submitting to the control of the electorate. In a system with an inbuilt majority, it is not expected that the opposition can win. Nonetheless, this is not a reason to deny the system the attribute democratic.

[10] Weiland, H.,2006, Die Saat geht auf. Die Namibier sind demokratischer geworden. Umfrageergebnisse 1989 bis 2005, ibidem p.483.

The constitutionalisation of the Electoral Commission of Namibia, the appointment of Commissioners, and the erosion of constitutional democracy

Ndjodi M.L Ndeunyema

Introduction

Elections[1] are a key ingredient for constitutional democracies the world over. Without elections, democracy would be soulless. Namibia is no exception as regular elections have been a feature of her democracy since the advent of constitutional democracy. It is through the exercise of franchise that those with voting rights are most efficaciously able to directly decide on those who would exercises public power on their behalf.[2] Article 1(2) of the Namibian Constitution (hereinafter 'the Constitution') aptly captures this in stating that "all power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State" various institutions are integral on giving effect to the 'power to the people' principle. This chapter is dedicated to exploring the Electoral Commission of Namibia (ECN) as such an institution in light of its 2014 constitutionalisation as a result of the Namibian Constitution Third Amendment.[3]

The chapter is divided into eight sections, the first being this introduction. The second section briefly locates the history of voting rights, elections and electoral management in Namibia. The constitutionalisation process and result is considered in section three. Section four explores the substantive meaning of three constitutional attributes of the ECN - independent, transparent and impartial - in the context of commissioner's appointment. Sections five and six consider the 2016 appointment of ECN commissioners, arguing that the relevant legislation is constitutionally wanting by not delivering independence and transparency in their processes of appointment, and that the process followed failed to comply with the independence and transparency requirements. Section seven considers consequences for the unconstitutional legislative provisions and subsequent appointments, asserting that this undermines the credibility of the electoral process and its outcomes, thereby eroding Namibia's constitutional democracy. Lastly, section eight concludes with reflections on key arguments advanced in the chapter.

[1] The term "elections" is employed herein to refer to voting for persons to public office, for instance, the President, the Members of Parliament, and Regional and Local Authority councillors as well as voting in a national referendum in terms of the Constitution.

[2] For the nexus between elections and democracy, see Tötemeyer, G. 2010. "Namibia's Constitution, democracy and the electoral process" in Horn, N & Bösl, A. *The Independence of the Judiciary in Namibia*. Windhoek: Macmillan Education Namibia, p. 290.

[3] Namibian Constitution Third Amendment, 2014 (Act No. 8 of 2014). Save for certain provisions, the Act came into operation on 13 October 2014.

Voting, elections and electoral management: a brief Namibian history

Although it is a universally accepted feature in democracies,[4] the right to vote is of special prominence in the history of Namibian and African peoples' generally.[5] Since the imposition of nation states on the continent, Africa's natives were long denied their inherent right to exercise their collective agency, sovereignty and self-determination. Consequently, the various liberation struggles waged against colonial, white supremacist, and racist regimes across the African continent were to a significant extent aimed at achieving equality of one person, one vote. The Namibian Supreme Court, in Rally for Democracy and Progress and Others v The Electoral Commission of Namibia & Others, recollects this dark history in stating that:[6]

> "[W]e need not be reminded that democracy in this country was attained through great sacrifice and suffering. The price thereof cannot be measured in currency and we cannot - and shall not - allow it to be surrendered or compromised for the sake thereof."

Moving into an era of constitutional democracy, the Constitution—adopted in the annus mirabilis year 1990 and accurately described as a transformative document—entrenches the right to vote in elections and referenda for all Namibian citizens over the age of 18.[7] It further guarantees the freedom of association within a political party setting.[8] In an earlier decision of Rally for Democracy and Progress & Others v The Electoral Commission of

[4] Article 21(1) of the Universal Declaration of Human Rights provides that: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." Article 21(3) continues that: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." See also Article 25 of the International Covenant on Civil and Political Rights.

[5] Arguably, it is this history and special prominence that may have informed the Namibian legislatures caution in not curtailing prisoners' right to vote, an issue that remains vigorously debated and litigated upon extensively in other democracies. Blanket bans on rights of prisoners to vote has been addressed in a number of cases including the South African decision of *August and Another v The Electoral Commission and Others* 1999 (3) SA 1 (CC) and in the European Court of Human Rights decision of *Hirst v the United Kingdom* (No 2) [2005] ECHR 681. The Electoral Act, 2014 (Act No. 5 of 2014), in section 22(34) takes a definitive position on this issue by prescribing that any person convicted under any law to a correctional facility for a period of time, whether such period of imprisonment has been served or is being served, can prohibit their registration as a voter in presidential elections, National Assembly elections or referenda.

[6] *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* (SA 12/2011) [2012] NASC 21 (25 October 2012) at para. 7.

[7] Article 17 of the Constitution.

[8] Article 21(1)(e) of the Constitution.

Namibia, the Namibian Supreme Court concisely captured the importance of democracy by stating:[9]

> "[T]he right accorded to people on the basis of equal and universal adult suffrage to freely assert their political will in elections regularly held and fairly conducted is a fundamental and immutable premise for the legitimacy of government in any representative democracy. It is by secret ballot in elections otherwise transparently and accountably conducted that the socio-political will of individuals and, ultimately, that of all enfranchised citizens as a political collective, is transformed into representative government: a "government of the people, by the people, for the people". It is through the electoral process that policies of governance are shaped and endorsed or rejected; that political representation in constitutional structures of governance is reaffirmed or rearranged and that the will of the people is demonstratively expressed and credibly ascertained."

With this, it is undeniable that the right to vote is at the core of Namibia's democratic dispensation, but it is also trite that the right is not self-executing. As is the case with all human rights, voting rights invoke various correlative duties.[10] For example, there are negative duties of restraint on the part of natural and juristic persons not to interfere with the exercise of one's right to vote but also positive duties to actively realise the right to vote.[11] The process of administering, organising and conducting any election or referendum is no doubt a daunting one. For this purpose, since WWII, the norm amongst democratic States has been that a dedicated, independent electoral management body (EMB) be assigned this duty.[12] EMBs serve to promote peaceful transition and institutionalise elections as the only legitimate manner of attaining political power.[13] Owing to the imposition of a system of white minority rule predicated upon a parliamentary sovereignty model, Namibia has been a Johnny-come-lately to this democratic norm and has only followed this EMB approach since the 1989 elections for members of the Constituent Assembly that drafted the Constitution, which were conducted by an ad hoc administration under the supervision of the United Nations Transition Assistance Group (UNTAG).[14] With the attainment of political independence and self-governance, a permanent EMB to replace that ad hoc administration was created with the promulgation of the Electoral Act, 1992.[15]

[9] *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) at para. 1 (internal footnotes omitted).
[10] Shue, H. 1980. *Basic Rights*. Princeton: University Press, p. 51.
[11] *August and Another v Electoral Commission and Others* 1999 (3) SA 1; 1999 (4) BCLR 363, para. 16.
[12] Pastor, R. 1999. "The role of electoral administration in democratic transitions: Implications for policy and research" *Democratization*, Vol. 6(1), 1-27 at p. 5.
[13] Debrah, E. 2011. "Measuring Governance Institutions' Success in Ghana: The Case of the Electoral Commission, 1993–2008" *African Studies*, Vol. 70(1), p. 26.
[14] López-Pintor, R. 2000. *Electoral Management Bodies as Institutions of Governance*. Bureau for Development Policy: United Nations Development Programme, p. 42.
[15] Act No. 24 of 1992.

Constitutionalising the ECN in Namibia

As mentioned above, EMBs respond to the reality that the history of domestic and international politics reveals an irrefutable conclusion that political transitions are barely smooth. Pastor summates the common explanations for electoral failure stem from: (i) an incumbent regime refusing to give up power; (ii) opposition parties boycott or protest because they were weak and knew they would lose a free election; (iii) the EMB was biased and/or was perceived to be biased in favour of one party, usually the incumbent or more broadly; or (iv) the country lacked a democratic political culture[16]. Although it is a crude summation of the issues that cause electoral failure, Pastor's typology is useful in reflecting what role the EMB is to play in ensuring that neither of these explanations for breakdown manifest during the electoral cycle, but it is explanation (iii) that the EMB as an institution has the most direct control over.

To that end, 2014 saw the ECN being established as a constitutional institution in terms of Article 94B of the Constitution that was introduced by the Namibian Constitution Third Amendment. Article 94B provides as follows:

1. There shall be an Electoral Commission of Namibia, which shall be the exclusive body to direct, supervise, manage, control the conduct of elections and referenda, subject to this Constitution and an Act of Parliament which shall further define its powers, functions and duties.
2. *The Electoral Commission of Namibia shall be an independent, transparent and impartial body.*
3. *The Electoral Commission of Namibia shall consist of five Commissioners appointed by the President in terms of an Act of Parliament with the approval of the National Assembly,* and such Commissioners shall be entitled to serve for a five (5) year term provided that no Commissioner shall serve more than two (2) terms.
4. The Chairperson shall serve in a full time capacity for a term of five years and shall be eligible for reappointment.
5. The depository of the records, minutes, documents of the Electoral Commission, as well as the electoral and referenda material shall be the Chief Electoral Officer.
6. The qualifications for appointment, conditions and termination of service for the Chairperson, Commissioners and the Chief Electoral Officer shall be determined in accordance with an Act of Parliament. (*Emphasis added*)

Article 94B interminably establishes the ECN[17] following an independent EMB model,[18] and prescribes key features of its existence. The constitutionalisation of EMBs has long

[16] Pastor (n11) 1.

[17] Read together with section 2 of the Electoral Act, 2014 (Act No. 5 of 2014) (hereinafter "the Act"), which vests the ECN with juristic personhood allowing it to sue and be sued. The ECN is the successor institution to the ECN created under the Electoral Act of 1992.

[18] Alternative models of EMBs considered in Tötemeyer are the governmental model where elections are organised and managed by the executive branch through one of the ministries or the mixed model which mostly comprises two components: one policy and monitoring EMB, independent of the government (the executive branch), and one implementation EMB that is part of a department of state and/or regional/local government. Tötemeyer, GKH. 2012. "Electoral Law Reform Project (ELRP) Revision and Reform of the Namibian Electoral Act (Act No. 24 of 1992): A Background and Consultative Discussion Paper." LRDC 19, ISBN 978-99945-0-053-6 p. 22 (Tötemeyer Report).

been advocated for continentally. In terms of treaty international law, chronic electoral institutional deficiencies which have, and continue to, plague Africa's developing democracies[19] has prompted the African Union to adopt the African Charter on Democracy, Elections and Governance in 2007. It calls upon State Parties to ensure that the independence or autonomy of national EMBs is guaranteed in their Constitution, and that they be independent and impartial, but at the same time be accountable to competent national organs[20]. It is worth adding that although crucial, when considered in isolation, these attributes outlined in the African Charter would remain inadequate for delivering an effective electoral administration institution.

Expressed politically, Article 94B's raison d'être is neatly captured in the National Assembly address by the then Attorney General Dr. Albert Kawana when motivating the Third Constitutional Amendment, who stated as follows:[21]

> "[…] may I turn your attention to the proposed Article 94B on the Electoral Commission of Namibia. All of the political parties suggested that the Electoral Commission become a constitutional body so as to enhance its integrity and independence in keeping with other electoral management bodies (EMB) in the region and beyond. We have been convinced by this suggestion, and we provide that the President appoints the Members of the Electoral Commission of Namibia, including the Chairperson, with the approval of the National Assembly. We also suggest that the Chairperson is the only Member of the Commission to be engaged in a fulltime capacity, while further details relating to the Electoral Commission of Namibia will be discussed and contained under the Electoral Matters Bill, 2014. Unfortunately, we could not agree with the suggestion that the Chairperson be a Judge, because, and as I will soon explain, it is better that we leave the judicial officers out of these matters. Also, we do not have many Judges to spare from the Courts, and as it is, we are in dire need of more Judges. I hope my compatriots will understand this situation."

Read together with Article 1(3) of the Constitution establishing the principle of constitutional supremacy, the ECNs constitutional entrenchment serves the added purpose of being a mechanism that limits the possibility of arbitrary reform of ordinary electoral legislation or pressure from the executive for its political expediency.[22] It is only limiting as the Constitution itself allows for the amendment of some provisions such as Article 94B by way of a two-thirds National Assembly and National Council majority vote, and with the President's assent. An added purpose of the ECN is to respond to vigorous con-

[19] This is not to suggest that developing, African countries have a monopoly over democratic deficiency as is often perceived.

[20] Article 15(2) and Article 17(2) of the *African Charter on Democracy, Elections and Governance*. Namibia has signed but has not yet ratified the Charter (however, as a customary international law principle of treaty interpretation, Namibia is under an obligation not to defeat the provisions of the treaty prior to its entry into force as per Article 18 of the *Vienna Convention on the Law of Treaties*, 1969). Similar motivations have been echoed in other non-binding forms for example in the *Principles and Guidelines on the Independence of Election Management Bodies (EMBs) in the SADC Region*, Adopted by the Annual General Conference, August 2007, Luanda Angola.

[21] Albert Kawana, MP *Motivation of the Namibian Constitution Third Amendment Bill, 2014 in the National Assembly*. July 29, 2014.

[22] López-Pintor (n 9 above) 120.

testations and the inherent divisiveness of elections which are implicit features of a thriving constitutional democracy as it features multiple centers of power, choices and involves groups' interests.[23] Therefore, ECN constitutionalisation is "designed to channel conflict across factions in productive direction"[24] with the ECN thereby promoting and safeguarding peaceful transition of political power and institutionalising elections as the only legitimate 'game in town'[25].

Since 1989, elections in Namibia have proved to be a work in progress. Mistakes have been made and shortcomings in the electoral system exposed.[26] However, those aspects where elections have been found wanting have, fortunately, not proven to be fatal. Tötemeyer finds that:[27]

> "[e]xcept 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."

Tötemeyer's assessment, in this author's view, is generous at best as it does not fully appreciate the significance of "minor flaws", which can be magnified so as to bring into question both the legality and legitimacy of an election and its acceptance. This in light of the reality that all National Assembly and Presidential elections conducted under the 1992 Electoral Act, and prior to the enactment of the Article 94B and the 2014 Electoral Act, have been disputed with relief being sought in Namibian Courts.[28] The most recent legal challenge that arose out of the 2009 elections had left Namibia on the precipice of a constitutional crisis as the outcome of the election that determined the President-elect was litigiously disputed[29].

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[23] Debrah (n 9 above) 28.
[24] ibid, 29.
[25] ibid, 26.
[26] Tötemeyer G. 2010. "Namibia's Constitution, democracy and the electoral process" In Horn, N. and Bösl, A. *The Independence of the Judiciary in Namibia*. Windhoek. Macmillan Education Namibia, 288.
[27] ibid.
[28] *Garoeb and Others v President of the Republic of Namibia and Others* 1992 NR 342 (HC) concerning the simultaneous holding of 1992 regional council elections and local authority elections; *DTA of Namibia and Another v SWAPO Party of Namibia and Others* 2005 NR 1 (HC) concerning an application for the election result in that a 2000 Regional Council election be set aside and a new election be held; *Congress of Democrats and Others v Electoral Commission* 2005 NR 44 (HC) where the applicants brought an urgent application before the High Court for an order that the Electoral Commission makes available to the applicants and allows the applicants to make copies of the certain electoral material and documents for the purpose of bringing an election application in the High Court; *Republican Party of Namibia and Another v Electoral Commission of Namibia and Others* 2010 (1) NR 73 (HC) the applicants sought an order declaring the election for the National Assembly be set aside, or an order for the recount of the said election.
[29] The court challenges stemming from the 2009 Presidential and National Assembly elections, and where the applicants sought a declaration of nullity for both results, were arguably the most disputed and indicting of the ECN. These case were *Rally for Democracy and Progress and Others v Electoral Com-*

As seen above, Article 94B constitutionally prescribes the requirements of independence, transparency and impartiality. From an interpretative viewpoint, their status of importance is elevated from mere statutory expression to constitutional principles. Previously, the repealed Electoral Act, 1992 had prescribed their approximate equivalent principles of elections: free, fair and transparent.[30] In applying these principles case law evidences that these were approached as questions of statutory interpretation.[31] Constitutional entrenchment ensures a departure from the traditional approaches of interpreting statutes to constitutional interpretation. In S v Acheson—a pioneering case on constitutional interpretation—Mohamed J (as he then was) in an eloquent dictum, stated:[32]

> "[T]he Constitution of a nation […] 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 tenor of the Constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion."

In Government of the Republic of Namibia and Another v Cultura 2000, Mahomed CJ expanded upon this approach to constitutional interpretation, referring to the Constitution as—although enacted in statute form—an organic and sui generis instrument which 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, in the articulation of the values bonding its people and in disciplining its Government".[33] It is with this extraordinary understanding of constitutionalism that attributes of the ECNs independence, transparency and impartiality are to be understood.

The principles of the ECN: independence, transparency and impartiality

Like the right to vote, electoral independence, transparency and impartiality do not manifest and are not realised merely through their constitutional or legislative declarations. The vanguards of the ECN are its five Commissioners mentioned in Article 94B(3) who have primacy in how these principles manifest throughout the execution of the ECN's mandate. This discussion is a direct response to Pastor's criticism of EMB neglect in de-

mission of Namibia and Others 2009 (2) NR 793 (HC); *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* (A 01/2010) [2010] NAHC 7 (4 March 2010); *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC); *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2013 (2) NR 390 (HC); and *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* (SA 12/2011) [2012] NASC 21 (25 October 2012).

[30] Section 95 of the Electoral Act, 1992.

[31] *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* (SA 12/2011) [2012] NASC 21 (25 October 2012), para. 12.

[32] *S v Acheson* 1991 NR 1 (HC) para 10A-B. See Amoo, SK 'The constitutional Jurisprudential Development in Namibia since 1985' in Bosl, A et al (eds) 2010 *Human Rights and the Rule of Law in Namibia*, Macmillan: Windhoek, p. 39.

[33] 1993 NR (SC) at 340 B–D.

veloping-country scholarship in favour of a "focus on big questions like designing democratic institutions rather than on the outwardly procedural issues of whether nations possess the capacity to implement free and fair elections".[34]

Therefore, there is a need to materially define and deconstruct the meaning of these attendant principles in order to determine how they should find application throughout the electoral cycle. Upon fleshing out the substance of these barebones principles, the discussion will expound upon how these are to be given expression in the selection and appointment process of Commissioners in subsidiary legislation. The principal features of the ECN as contained in Article 94B must exist in substance (during the actual election itself), in process (the procedures around elections), and within the institution (the ECN as the primary body responsible for realising their substance and process). Therefore, in the avoidance of doubt, the ECNs antecedent process of Commissioner selection and appointment is also subject to Article 94B(2). Notably, the below interpretative exercise is informed by Article 146 of the Constitution which provides that unless the context indicates otherwise, any constitutional word or expression shall bear the meaning given to such word or expression in the law that deals with the interpretation of statutes which law is the Interpretation of Laws of Proclamation, 1920.[35]

An independent ECN

Although frequently cited as the most important attribute of an EMB, the literature reveals that what qualifies as independent remains the subject of debate.[36] This integral place may have informed other EMBs conspicuously employing the adjective 'independent' in their institutional nomenclature, such as Botswana's Independent Electoral Commission, South Africa's Independent Electoral Commission and Nigeria's Independent National Electoral Commission. The Constitution does not define independence. The Shorter Oxford English Dictionary defines independent as to "not be subject to the authority or control of any person; free to act as one pleases; autonomous".[37] Although a helpful starting point, a crude dictionary definition is not decisive as, interpretatively, independence should be understood as meaning that the ECN is subject only to the Constitution and the law, insofar as such laws are constitutional (this provision is material as shall be seen later in this Chapter). Institutional independence is, however, implied as forming part of the constitutional guarantee due to reference in Article 94B(2) to the ECN being an "independent […] body".[38] Regional international law can assist here as the African Union Charter on Democracy, Elections and Governance[39] outlines some of the attributes that institutions that

[34] Pastor (n 11 above) 2.
[35] Proclamation 37 of 1920.
[36] Balule, BT 2008. "Election Management Bodies in the SADC Region - an Appraisal of the Independence of Botswana's Independent Electoral Commission." *South African Human Rights Law Journal* Vol. 24, 104 at p. 106.
[37] *The Shorter Oxford English Dictionary*, 2007. Oxford University Press, Oxford.
[38] Section 2(5) of the Electoral Act, 2014 speaks to this in stating that the ECN is not subject to the State-owned Enterprises Governance Act, 2006 (Act No. 2 of 2006).
[39] African Union Charter on Democracy, Elections and Governance (n 20 above).

promote and support democracy and constitutional order, of which the ECN is one, should have including that the ECN should:

a) Retain constitutionally guaranteed independence and autonomy;
b) Be accountable to competent national organs; and
c) Be provided with resources to enable them to perform their mandate effectively and efficiently.

In this authors view, it has accurately been stated that "it is … incorrect to assume that an organization either is, or is not, institutionally independent. The extent of its independence will rather fall on a continuum, ranging from highly independent to not at all independent, and its location on the continuum will depend on the extent of its institutional independence in a number of different dimensions".[40] This therefore, requires an understanding of independence as one of extent but that certain minimum standards that must be complied with. In Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa,[41] the South African Constitutional Court, in a dictum on the independence of institutions in the 1996 South African Constitution stated that "factors that may be relevant to independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, tenure and removal as well as those concerning institutional independence". Taking independence further, it must be both administrative and financial. First, administrative independence concerns its status not to be subject to the control of the government of the day, a political establishment or any other party.[42] Secondly, financial independence "implies the ability to have access to funds reasonably required to enable the institution to discharge the functions it is obliged to perform under the law."[43]

While independence is still to be fully settled, there are emerging standards on what attributes and characteristics should underpin the legislative framework establishing an EMB in order to ensure its independence.[44] Independence is closely linked to autonomy. The Ghanaian Constitution, for example, explicitly states that the Ghanaian Electoral Commission is autonomous.[45] The security of tenure that Commissioners are given speaks

[40] Makulilo, A. 2009. "Independent Electoral Commission in Tanzania: A False Debate?" *Representation* vol. 45(4), pp. 435-453 at p. 436.
[41] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para. 160.
[42] Balule (n 36 above) 106.
[43] ibid. The financial independence of the ECN is, however, outside the scope of this chapter.
[44] ibid.
[45] Article 46 of the Constitution of Ghana provides that: "Except as provided in this Constitution or in any other law not inconsistent with this Constitution, in the performance of its functions the Electoral Commission shall not be subject to the direction or control of any person or authority".

to such independence.[46] However, it is debatable whether Article 94B itself takes the correct approach in allowing for Commissioners to be eligible for reappointment.

Important to highlight is that independence can take at least two forms: actual (or substantive) independence and perceived independence. Whereas institutional, financial and administrative independence generally fall within the former category, perceived independence is a question of the public trust, confidence, and assurance in the ECN as an institution that would give truthful meaning to their voting rights. Although public perceptions are notoriously difficult to measure and counter, in concurrence with Balule,[47] the public's perception of the ECN's independence "is essential for building public confidence in the electoral process. Where the public has doubts about the independence of the [ECN], it is more likely to have less confidence in the electoral process thereby undermining democracy".[48] This, as is the case with the judiciary as an institution, implies that the ECN must not only be independent but also be seen to be independent.[49]

A transparent ECN

Although transparency has become a catch-word in domestic and international socio-political arenas, leading some commentators to lament its overuse and misuse,[50] Article 94B introduces the first explicit reference to transparency in the Constitution's text. The term 'transparency' relates to decision-making and enforcement in a manner that follows set rules and regulations.[51] This implies openness in the processes of decision-making and implementation. Transparency facilitates a 'level playing field' where all stakeholders in an election—in particular political parties and candidates for election—are consulted frequently by the ECN and are active participants in or observing the major election preparatory processes and procedures.[52] However, transparency has a much wider role which is to enable the public at large to be kept informed timeously on electoral matters and to

[46] Article 94B prescribe a maximum of five years a term with the possibility of a second term which is the limit. There is no minimum number of years.
[47] Balule (n 36 above) 113.
[48] Citing the Batswana experience, Balule states that: "The failure to guarantee expressly the institutional independence of the [Independent Electoral Commission] in the Constitution has resulted in a perception by opposition parties that the institution is just another government department which lacks independence from government and is therefore not competent to manage credible democratic elections. This perception is perhaps given further credence by the fact that the IEC is placed under the Ministry of Presidential Affairs and Public Administration in the Office of the President." Balule (n 36 above) 113.
[49] *Rex v Sussex Justices, Ex Parte Mccarthy* 1923 All ER Rep 233 where it was stated that "[I]t is […] of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".
[50] Forssbæck J & Oxelheim L, 2014. "The Multifaceted Concept of Transparency", in Forssbæck, J and Oxelheim, J (Eds). *The Oxford Handbook of Economic and Institutional Transparency*, Oxford University Press, p. 1.
[51] Debrah (n 12 above) 27.
[52] Dundas, CW. 1994. "Transparency in Organizing Elections" *Round Table*, Vol. 83(329) pp. 61-75 at p. 65.

ensure that there is confidence in those entrusted to be electoral administrators.[53] Like independence, transparency positively enhances the public perception of the electoral process which in turn strengthens the integrity of the process.[54] This is made possible where information is freely available and directly accessible to those who will be affected by the decisions and their enforcement.[55] Therefore, transparency's value can be regarded as both functional and instrumental; a means to an aim of delivering trust, ensuring accountability, promoting substantive fairness, and entrenching legitimacy in process and outcome.[56]

Transparency's constitutionalisation in Article 94B transforms it into a norm of higher imperative status. To this extent, transparency's utility and instrumentalism facilitates Jeremey Bentham's principle for good governance: the more strictly we are watched, the better we behave.[57] In the context of political contestations, transparency allows the demos (the people) to watch decision makers, the ECN, at work.[58] Experience from far and near reveal that elections provide fertile ground for those jostling for political power to succumb to the lure of nefarious conduct, corruption and resort to fraud. Transparency mitigates, but does not eradicate, this risk by allowing for corrupt and fraudulent relationships to be exposed through removing the opacity that those who engage in such conduct rely on.[59] Through measures of transparency, the informational asymmetry that hinders accountability is narrowed.[60]

Sweeney[61] provides a useful typology for transparency arguing that it entails (i) visibility that allows for the demos to watch decision makers at work; (ii) documentation that requires a fairly comprehensive and valid record of decision making; (iii) explicability that decision making meets some standard of reasonableness or intelligibility; and (iv) predictability where the constitutional outcomes are at least partially forecastable. The opacity that accompanies transparency helps prevent and tackle electoral corruption thereby mitigating opportunity for fraud during the electoral process.[62]

An impartial ECN

The third constitutional principle that must characterise the ECN is impartiality. In general terms, this means the absence of favour, bias and prejudice. Impartiality can be seen

[53] Dundas (n 52 above) 63.
[54] ibid.
[55] Finel, BI and Lord, KM. 1999. "The Surprising Logic of Transparency'. *International Studies Quarterly* vol. 43(3), pp. 15-39.
[56] Forssbæck, J and Oxelheim L, "The Multifaceted Concept of Transparency", in Forssbæck and Oxelheim (n 56 above) 10.
[57] Deberah (n 12 above) 27.
[58] Sweeney, R. "Constitutional Transparency", in Forssbæck and Oxelheim (n 56 above) 40.
[59] Cuervo-Cazurra, A. "Transparency and Corruption", In Forssbæck and Oxelheim (n 56 above) 323.
[60] ibid.
[61] Sweeney (n 56 above) 40.
[62] Cuervo-Cazurra (n 56 above) 323.

in limit of the natural justice principle that is expressed in the maxim nemo iudex in sua causa—no man should be judge in his own case. Its expression reflects the reality that the ECN acts as referee to contestations between various partisan actors. The ECN partiality, whether as body or any of its actors (Commissioners, officials or employees), in favour or against a party can taint not only the specific action but also the entire judicial system. This results in a diminishment, to varying degrees, of public confidence in the ECN. For purposes of this chapter, the succeeding sections will focus on aspects of independence and transparency vis-à-vis Commissioners' appointment, although their interaction with impartiality remains inextricably important.

Nomination, approval and appointment of ECN Commissioners

In light of the preceding discussion on the substantive meaning of the principles of independence and transparency, this section endeavours to apply these to assessing how they are (to be) realised in the nomination, approval and appointment of Commissioners. This is in the recognition that, as Balule aptly asserts, their express constitutional guarantee is alone insufficient.[63] In applying these principles, this section considers the case study of the five Commissioners who were sworn into office on October 4, 2016 in determining the constitutional compliance with Article 94B.[64]

The Constitution does not precisely prescribe the manner in which Commissioners are to be appointed. It only requires that the ECN consist of five Commissioners who are appointed by the President with the approval of the National Assembly.[65] The Act does, however, flesh the Article 94B(3) skeleton, in providing for selection of nominees for appointment as Commissioner either by a specially constituted Selection Committee or by the National Assembly Standing Committee on Privileges. Therefore, the process of becoming an ECN Commissioner is three staged. The process is purposefully designed to serve as institutional and procedural safeguards of the electoral process so as to ensure that the Commissioners who are ultimately appointed are ascertained to be persons of irreproachable competence, integrity, temperament, and fitness to serve. A failure to ensure that the process leading to the Commissioners' appointment complies with the triple standard principles would likely result in an ECN that is devoid of the constitutional legality and legitimacy to direct, supervise, manage, and control the conduct of elections. A well-designed, thoroughgoing and elaborate process for appointment thereby ensures that the President, who retains final appointment powers, reasonably exercises her or his powers and does not "recruit straw men and women" for Commissioner as they are thoroughly

[63] Balule (n 36 above) 110.
[64] The subject matter of this section was contained in a blog post published by this author. See: Ndjodi Ndeunyema, "Questioning the constitutionality of newly appointed Electoral Commissioners in Namibia"(OxHRH Blog, October 2016). Available form: http://ohrh.law.ox.ac.uk/questioning-the-constitutionality-of-newly-appointed-electoral-commissioners-in-namibia/ [21 October 2016].
[65] Article 94B(3) of the Constitution.

scrutinised by the National Assembly as the selection body.[66]

Seeing that it is the Act that sets out the mechanics of appointment, this section seeks to appraise the independence and transparency in the Commissioners' appointment processes so as to establish the extent to which these are realised by, and inculcated within, the Act. As mentioned above, the Act prescribes two alternative processes for selection of nominees for Commissioners which are either a) nomination by a Selection Committee or b) nomination by the Standing Committee on Privileges of the National Assembly. These processes are successively discussed in the context of the three principles below.

The Selection Committee's nomination process

For purposes of considering applicants and making nominations for Commissioners', section 5 of the Act requires that a Selection Committee be constituted. The members of this Committee are the Public Service Commission Chairperson (who is the statutory Chairperson of the Committee); the Law Society Chairperson; the Public Accountants and Auditors Board Chairman[67]; the Qualifications Authority Director; and the High Court Registrar. The Secretary of the Selection Committee is the Secretary of the National Assembly, but she or he is not a Committee member and does not have voting rights.[68] The variety and plurality of skillsets amassed on Selection Committee allows for nominees to be assessed across the multiplicity of expertise that are essential to manage and administer elections. The Committee must have regard to an applicant's societal standing, legal knowledge and experience, electoral matters knowledge, professionalism, management capacity, integrity, political impartiality and mediation capacity.[69] So as to maintain its ability to determine an applicant's qualities and to ensure that a quorum to convene a meeting always exists, the Act requires that a given substantive Committee member is unable to attend a Selection Committee meeting, their respective appointees, deputies or vices' is required to attend in their stead.[70]

The Electoral Act patently goes to great lengths in ensuring that the Selection Committee inculcates independence, transparency and impartiality in its processes by requiring, inter alia, that the Committees meetings and applicant interviews be open to both the public and media,[71] and that the rules and procedures to be followed in the meeting be tabled by the Chairperson for the Committee's approval.[72] Moreover, it is notable that powers to invite applications for Commissioner[73] and to convene the Selection Committee[74] lay

[66] Debrah (n 12 above) 31.
[67] Public Accountants' and Auditors' Act, 1951 (Act No. 51 of 1951) employs gendered terminology.
[68] Section 5(5) of the Act.
[69] Section 7(2) of the Act.
[70] Section 5(2) of the Act.
[71] Section 6(12) of the Act.
[72] Section 6(4) of the Act.
[73] Section 6(3) of the Act provides that: "At least four months prior to the date on which the terms of office of the members of the [ECN] expire, the Chief Electoral Officer must inform the Secretary of the National Assembly to invite by notice in the Gazette and in at least two daily newspapers circulating

exclusively with the Secretary of the National Assembly.

The Standing Committee on Privileges nomination process

The Act allows for the Selection Committee's power to recommend Commissioners to be supplanted by the Standing Committee on Privileges of the National Assembly in three circumstances. The first is where the Secretary of the National Assembly fails to carry out their functions to convene the Selection Committee or calling for applications in the prescribe manner.[75] The second is where the Selection Committee fails to make the required recommendations of suitable applicants to the President[76], while the third is where the Selection Committee meetings convened to decide on nominees does not take place or are not finalized, *for any reason*.[77] Although the National Assembly's Standing Committee on Privileges is alternative, the Act is rather scant in details as it does not prescribe the precise procedure that the Standing Committee on Privileges in selecting nominees.

By way of background, Article 59, read together with Article 74, of the Constitution empowers the National Assembly to establish Committees. The National Assembly Standing Committee of Privileges is such a Committee and is a creature of statute by virtue of section 7(a) of the Powers, Privileges and Immunities of Parliament Act, 1996.[78] It is statutorily constituted by six members of the National Assembly, who are appointed by the National Assembly's members. At the time of writing, and at the material time of recommendation of Commissioners' in 2016, the Standing Committee was composed of two members from the opposition benches with the remaining four from the governing party.[79]

The (Un)constitutionality of Commissioners

It is this veil of secrecy that engulfed the nomination process of Commissioners' in 2016. This was widely reported in the print media, a testament to its significance as a watchdog that is integral to ensuring constitutional survival, as influential Mohamed CJ has writ-

throughout Namibia any person who complies with the qualifications of and criteria for appointment as a member of the [ECN], to apply in writing for appointment as a member of the [ECN]."

[74] Section 6(5) of the Act which provides that: "The Secretary of the National Assembly must convene a meeting of the Selection Committee to be held on or at the date, time, and venue as the Secretary may determine, which meeting must be held not later than seven days after the closing date for the submission of applications."

[75] Section 6(23)(a) of the Act.

[76] Section 6(23)(b) of the Act.

[77] Section 6(23)(c) of the Act.

[78] Powers, Privileges and Immunities of Parliament Act, 1996 (Act No. 17 of 1996).

[79] Section 7(2) of the Powers, Privileges and Immunities of Parliament Act, 1996 (Act No. 17 of 1996). The Standing Committee of Privileges—as at September 2016—was composed of the three Members of the National Assembly from the governing party SWAPO Party of Namibia, and two members of the National Assembly from the Opposition benches. Members from SWAPO Party of Namibia were Peter Katjavivi (who is the Speaker), Evelyn !Nawases-Taeyele, Veikko Nekundi and Bernadette Jagger. The opposition Members of the National Assembly were McHenry Venaani of the DTA of Namibia and Stephanus Bezuidenhout of the Rally for Democracy and Progress.

ten.[80] The Speaker of the National Assembly is quoted stating that the Selection Committee was constituted but not in a sufficient timeous manner so as to complete nomination of Commissioners process. The precise reasons remain unclear, which is further evidence of the absence of transparency in the nominations.[81] This resulted in the invocation of section 6(23) of the Act so as to allow the Privileges Committee to take on the mantle of recommendation. In addition to the already mentioned questions of actual and perceived independence of the Privileges Committee, it has factually been ascertained that the meetings of the Privileges Committee were neither open to the public nor were the candidates subject to an interview process. It is reported that the curriculum vitae of candidates were considered upon which the recommendations for appointment were made to the President and National Assembly.[82]

Three issues relating to the constitutionality of Commissioner appointment procedures thus arise. First, the Act vests the National Assembly Secretary with the exclusive power to constitute the Selection Committee but fails to incorporate measures of accountability and oversight that are aimed at ensuring fulfilment of their mandate and adequately preserve the ECN's independence at the selection stage. The Act expressly permits the acceptance of "any reason" provided (or not provided) by the National Assembly Secretary as warranting recourse to the Privileges Committee process. This is unfortunate as the primary Selection Committee process is patently designed to preserve the trilogy of independence, impartiality and transparency during the critical stage of nominations. The Act's silence and vagueness in some respects has allowed for technicalities of time to be acceptable in justifying recourse to the less robust Privileges Committee process.

The Privileges Committee's nomination process is further constitutionally questionable on two grounds. First, compliance with the ECN independence requirement is wanting as the recommendations for Commissioners are decided upon by six members of the National Assembly who are, by definition, politically partisan due to them being—in the language of section 7(1)(b)(ii) of the Act—office-bearers of a political party, active politicians or having high party political profiles.[83] The Standing Committee's *actual* and *per-*

[80] Naldi, G. 1995. *Constitutional Rights in Namibia: A Comparative Perspective with International Human Rights Instruments.* Kenwyn: Juta & Co.

[81] *New Era Newspaper*, "Katjavivi clarifies ECN appointment." (12 August 2016). Available at https://www.newera.com.na/2016/08/12/katjavivi-clarifies-ecn-appointment/ [accessed 22 October 2016]. Although newspaper reports of this nature would constitute hearsay and be inadmissible under Namibian evidence law, this auxiliary source is had recourse to due to the very issue that this Chapter impugns – the absence of transparency in Commissioner nomination.

[82] ibid.

[83] It may be said that the argument holds true for the President. Although Article 94B allows for commissioners to be appointed by the President it is this author's view that because Commissioners are appointed by the President – who is inherently politically partisan and is almost invariably a leader or senior figure in a political party - does not, in and of itself, result in the independence of Commissioners and the ECN as a body being compromised. The Acts prescriptions of who the President is able to nominate is therefore significant and defining. See: *Mabere Nyaucho Marando and Edwin Mtei v The Attorney General*, High Court of Tanzania at Dar es Salaam, Civil Case No. 168 of 1993. Notably, Tötemeyer, finds

ceived independence and impartiality is called into question as the public could reasonably have an apprehension of bias on the part of Privileges Committee members. Perceptions that they lack the requisite measure of independence could have been mitigated at the very least by ensuring that the process is carried out in a transparent manner, under the watchful eye of the public, but there were no public processes. This is very important as it instils not only a sense of ownership of an EMB by all stakeholders but also their trust in its integrity.[84]

Secondly, the Privileges Committee is not under the explicit obligation of transparency in the conduct of its nomination affairs such as when interviewing applicants as is the case with the Selection Committee process.[85] It can be said - and it is so submitted - that transparency in the conduct of its affairs is an implied duty. An interpretation to the contrary would be manifestly absurd. It has been factually established that in the fulfilment of its other functions, the Privileges Committee traditionally sits behind closed doors with no records of its meetings being made public. Moreover, the names of those recommended for Commissioner to the President are not made public. The Act's muteness can result in a continued opacity of the Privileges Committee's functions even in the case of nomination of Commissioners processes. Indeed, this is what materialised in the 2016 process of nomination of Commissioners as shall be expounded upon below.

An unconstitutional ECN and the erosion of constitutionalism

The preceding section has established evidence pointing to unconstitutionality in the nominating process of Commissioners. It follows, in this authors view, that their appointment is unconstitutional. However, in a positivist fidelity to the presumption of regularity[86] these appointments are for all intents and purposes lawful, unless and until they are declared otherwise by a competent Court, in this case the Electoral Court.[87] That the issue of Commissioners appointment has not been brought before the Electoral Court indicates that the administration of elections continues to be viewed and treated as a variable of negligible relevance during the electoral cycle.

The issue of legal standing to bring a dispute before a Namibian court is not reasonably at issue here as the Act provides that the Electoral Court—which has jurisdiction over these matters—must seek to avoid formality in proceedings.[88] Vigilance and proactivity in safeguarding the right to vote must span the entire electoral process, including during the

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that the National Assembly Speaker has been perceived as more neutral. See Tötemeyer (Tötemeyer, G. 2010. "Namibia's Constitution, democracy and the electoral process" In Horn, N. and Bösl, A. *The Independence of the Judiciary in Namibia*. Windhoek. Macmillan Education Namibia, 292.

[84] Makulilo A. 2009. "Independent Electoral Commission in Tanzania: A False Debate?" *Representation* Vol 45(4), 435-453, at 437.

[85] Section 13(a) of the Act.

[86] *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC), para. 46.

[87] Section 167 read together with section 168 of the Act.

[88] Section 169(2) of the Act.

ECN's incipience, and throughout the pre-electoral and post electoral stages. Namibians ought to embrace a culture of immediacy in challenging irregular decision-making and legal processes should be inculcated, as opposed to the settled practice or tradition over the last 26 years of bringing grievances that span the entire electoral cycle only close to or after the election outcome is determined.

Notwithstanding the presumption of regularity above, the constitutional deficiencies in the appointment process of Commissioners can and has compromised the public's confidence and institutional integrity of the ECN it is argued. The officially declared election outcomes aside, elections can be won or lost by perceptions of their credibility, particularly where Commissioners are deemed as beholden to a certain political sect as the relevant political actors and voting public will be unable to satisfy themselves as to their suitability. In concurrence with Pastor "the fair and effective administration of the rules is often as important as the rules themselves". If the public has no confidence in Commissioners due to shortfalls in their appointment processes, this may undermine the electoral process itself through voter apathy, either at the point of registration or during the actual elections, an issue that is particularly acute in Namibia's past regional and local government elections.[89] An even graver consequence is that electoral disputes may trigger conflict and precipitate violence as the public may not regard an elections processes and outcomes as reflective of the true will of the people prevailing to allow for all power to vest in the Namibian people.[90] Elections being the soul of the constitutional democracy, an ECN that is headed by unconstitutionally appointed Commissioners, their individual qualities notwithstanding, would pierce the soul of our constitutional democracy. Pastor,[91] notes that "[m]any elections fail because one party interprets a 'technical irregularity' as politically-inspired by its opponents, whereas it might be due to administrative failures." If we are to allow for laxity and nonchalance in the application of constitutional principles and legislative prescribes is to invite the gradual erosion of our democracy.

Conclusion

This chapter has sought to give both meaning and substance to the triple principles of a constitutionalised ECN—independence, transparency and impartiality. From a consolidation of constitutional democracy in Namibia viewpoint, Article 94B's introduction through the Third Amendment to the Constitution is a laudable one. The constitutional entrenchment of the ECN was long overdue and can serve to fortify it. Nevertheless, this alone is not a panacea to the challenges inherent in the contestation for political power

[89] During the 2015 regional and local council elections, the ECN reported that voter turnout was relatively low at 39.8% and 36.6%, respectively. Electoral Commission of Namibia. 2015. *Performance Assessment and Post-Election Report 2015 Regional Councils and Local Authority Councils Elections Held On 27th November 2015*, p. 14. Available from: http://www.ecn.na/documents/27857/193258/ECN+Elections+Report.pdf/be9c1c04-7e37-4bf9-9cb8-c6d1a29ec988 [Last accessed 29 October 2016]. See also: *Election Watch Namibia*. "1,158,925 register to vote" http://www.electionwatch.org.na/?q=node/488 [accessed 29 October 2016].

[90] Article 1(2) of the Constitution.

[91] Pastor (n 11 above) 27.

and the ECN as an institution at the frontline of organising, conducting and supervising of elections. It serves to augment democracy and demonstrates that constitutionalism in Namibia was but a seed planted in 1990 and that must avoid erosion for it to grow and reach its fullest blossom. The Third Constitutional Amendment is a significant measure in nurturing democracy, but if this is not coupled with the building of strong institutions and fidelity to the letter and spirit of the law, then the process of constitutional amendment would be nugatory. Africa's post-independence history alone is replete with lessons that elections are highly combustible with disputes being fuelled by a perceived absence of independence, transparency and impartiality on the part of EMBs. Namibia should actively work towards avoiding this so as to ensure that the right to vote—one that has been arduously achieved through the sacrifices of many of her gallants—must be vigilantly safeguarded by all the people.

Constitutional Democracy in Namibia: 25 years on

Dennis U. Zaire

Introduction

> Our (Ghana's) independence is meaningless unless it is linked up with the total liberation of the African continent![1]

The attainment of independence[2] by Namibia on 21 March 1990, closed a sad chapter of colonialism and marked the end of apartheid, a primitive system of separation, in- equality, racial discrimination, racism, ethnicism and complete lunacy. The midnight of 21 March 1990 marked the beginning of a new era, a new chapter in the fascinating history of Namibia. Independence brought happiness and put the smile on the faces of many people, falling mainly in three groups. First, the local Namibians who remained behind in the country and supported those who went into exile. Second, those who went in exile and returned to the country, before and soon after independence, many for the first time. Finally, the international community who lobbied and supported the freedom of Namibia for many years. Namibia, as a nation, remains forever indebted to them for their sacrifices and solidarity. Independence, therefore, represented a collection of many hopes, emotions, aspirations and dreams, all keen to secure a better live and future for themselves under the new dispensation. Namibia, a new country, was born and with it, a new chapter was opened.

Since the birth of a new nation, 25 years have passed. At this juncture, it is fitting to pause and reflect on the experiences encountered, past challenges, present trends and future prospects. How did Namibia, as a constitutional democracy, fare over the last 25 years? This paper constitutes a small attempt to reflect on that. First, the paper departs by looking at the Constitution and the Amendments. Second, it considers the economy before looking at politics with special focus on elections in Namibia. Fourth, it briefly interrogates the role of the Civil Society, Churches and the Media. The New Government and new way of doing things will be tackled next. Finally, the paper makes an analysis before concluding.

[1]Kwame Nkrumah, Ghana's first President: independence speech, 5 March 1957.

[2] Namibia became independent under the framework of the United Nations Resolution 435 of 29 September 1978, which was implemented on 1 April 1989 and paved the way for independence. Namibia's first democratic elections took place on 7-11 November 1989, under the supervision of the United Nations Transitional Assistance Group (UNTAG).

The Constitution[3] – difficult balancing act but a source of unity

> *"*The constitution of a country is not simply a statue which mechanically defines the structure of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of ideals and aspiration of the nation, the articulation of the values bonding its people and disciplining its government.*"*[4]

Crafting the Constitution[5] for a nation that has been to war for many years was never an easy task. Let alone for parties that were sworn enemies and fought on different sides of the war, and who up until then did not recognize the existence of one another as legitimate. Back in 1989, the complexities surrounding the fight for independence and the resistance to the demands for freedom were fresh in the minds of all drafting parties. Hence, an atmosphere of distrust prevailed. Some victors may have wanted revenge while the losers hoped for mercy, but the collective dream for a better and peaceful nation unified the desire to reach compromises on complex and difficult issues. This helped all parties to bring their part in reaching difficult decisions and add values to the debates on key matters and principles to be included in the Constitution. The process involved significant compromises based on different ideological and political understandings as well as various internal and external influences and/or factors. Hence, the choices made by parties who participated in the drafting of the Namibian Constitution was fundamental, cemented and shaped the future of the country for better in many ways. The Preamble of the Constitution bears reference to this fact. It emphasized the wishes and desires of all parties to build a nation that recognizes and value the importance of a human or personhood as a center of all principles. To that effect, the first sentence in the Preamble reads:

> *"*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;
> Further, it reads, whereas we the people of Namibia: desire to promote amongst all of us the dignity of the individual …, will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state."

[3] Drafted by 72 elected Members of the Constituent Assembly (which became the National Assembly) in 80 days. The Constituent Assembly met for the first time on 21 November 1989. The drafting Committee comprised 21 Members and was chaired by Dr. Hage G. Geingob, who became Namibia's third President on 21 March 2015. The Constitution was adopted on 9 February 1990 and became law on 21 March 1990.

[4] This dictum was approved by the Supreme Court in the case of *Defence v Mwandinghi. State v Archeson (1989) (4) SA 63 (SWA).*

[5] The Namibian Constitution is in many ways a product of international processes and developments. It is based on the 1982 Constitutional Principles and the SWAPO draft Constitution. Hence, the notion that the final Constitution of Namibia reflects compromises achieved and borrows widely from international instruments and conventions.

The recognition of a human and reference to the individual as well as the human family is against the realization that, everything we do as humans, are underpinned by interrelationships, interconnectedness and reliance on each other. As humans we are interdependent. The rational was that we are all, as Namibians, in the same boat and therefore need each other to succeed or fail, together, as a country. This recognition is closely linked to the African concept of Ubuntu which has as its basis the essence of being human.[6] The realisation that, as humans, we are who we are, because of others. Hence, the need to include others in the project of Namibia was overwhelming. Thus, crafting the Constitution around the concept of Ubuntu allowed Namibia a rare chance to succeed in building relations between former warring parties, the various ethnic groups as well as ensure peace and stability.

Under Article 10 (1), all persons are equal before the law. Article 10 (2) further states that no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. Article 16 protects private property and under Article 17, all citizens are guaranteed the right to participate in peaceful political activity intended to influence composition and policies of government. Moreover, in Chapter three which contains 21 Articles, the Constitution guarantees fundamental human rights and freedoms. Importantly under Article 25,

> "Parliament or any subordi- nate 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"[7]…

Under article 95, the Constitution provides that the 'State shall actively promote and maintain the welfare of the people…'

Further, throughout the Constitution, reference is made to 'all persons' and 'all citizens' without any single discrimination to any person(s) and/or group(s). These and many other provisions, such as the reference to national reconciliation in the Preamble, the Constitution played significant role in building confidence in the people of Namibia

[6] The author acknowledges the various interpretations of the concept *'Ubuntu'* and what it really means. Munlani Z. Umajozi tried without success to interrogate the concept. However, his article did not go deep enough and only scratches the surface. See, http://www.news24.com/ MyNews24/What-is-Ubuntu-20150714 last visited on 14 July 2015 at 15:11.

[7] The rights and freedoms are further protected by Article 5, which states: 'The fundamental rights and freedoms enshrined in this Chapter (3) 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…' Article 131 is a further wall of defense for fundamental rights and freedoms. It state, 'No repeals 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'.

soon after independence and beyond. Over time, people got to appreciate the fact that the country belongs to all of them and they have a permanent home and a role to play to contribute to peace, political stability as well as economic growth and job creation.

Hence, the Constitution after independence, symbolized a first step towards self-rule and full emancipation. Moreover, as the supreme law of the country[8], it was, soon after independence, a source of strength and unifying factor in that people could look up to it with confidence. Even years down the line, it still continues to fulfill that role successfully, so far. As a final document, it shows strong commitment to the rule of law, contains provisions for checks and balances, and of course, the inclusion of the bill of rights and generally follows liberal democratic model.[9] "The Constitution can't really solve all the problems but it can provide the basics".[10]

The Amendments

To date the Namibian Constitution has been amended three times. The first amendment allowed the first President of Namibia Sam S. Nujoma to serve a third term in office. This amendment was done under the Namibian Constitution First Amendment Act.[11] The second amendments catered for among others:

- Extension of the period required for acquisition of Namibian citizenship by spouses of Namibians and for naturalization;
- Alignment of the period of tenure of member of the National Council with those of Members of the National Assembly;
- Establishment of the Anti-Corruption Commission as an institute of the state;
- Subjecting the appointment of foreign judges to a fixed-term contract;
- Decreasing the term of office of the members of the Management Committees of the Regional Councils to two years and six months;
- Elevation of the Head of Prison Services to the rank of Commissioner General of Correctional Services;
- Redefinition of Prison Services as Correctional Services;
- Removal of the function of investigating corruption from the Ombudsman's powers and functions; and
- Provision for incidental matters relating to the amendments.

[8] Article 1 (6) states, 'This Constitution shall be the Supreme Law of Namibia'. The Constitution remains the supreme law of Namibia from which all laws flows and against which all laws can be tested, *(By former Chief Justice of the Supreme Court of Namibia, Justice Strydom addressing judicial officers at the first retreat of the Office of the Attorney-General at Swakopmund on 20-22 November 2002).* For discussion on constitutional supremacy refers to *Kafota v Administrator General for South West Africa).*

[9] Hence the praises and reference that it is one of the best in the world.

[10] Nahas Angula, in "The Constitution in the 21st Century, Perspectives on the context and future of Namibia's Supreme Law", 2011 at page 7.

[11] No. 34 of 1998.

These amendments were done under the Namibian Constitution Second Amendment Act.[12] The third and final amendments to date have been done under the Namibian Constitution Third Amendments Act.[13] The Third Amendments provided for, among others[14]:

- To provide for the Presidency;
- Provide run offs for Presidential elections;
- Create a Vice-President to be appointed by the President to deputise the President;
- To provide for the appointment by the President of the Head of Intelligence Service;
- Provide for the judiciary as a financial and administrative independent organ of the state;
- Provide for a Deputy-Chief Justice, and Deputy Judges-President;
- Provide for an increase in the number of Presidential appointees to the National Assembly, and
- Increase the size of the National Council.

The first and third amendments to the Constitution raised significant amount of controversy and unhappiness among many parts of the country. The controversies were witnessed during the heated discussions in the National Assembly as well as the public realm. The recent and Third Amendment of 2014, had the Non-Governmental Organizations (NGO's) joining hands to oppose the amendments. However, the NGO's last minute attempt to block the amendments though lobby and organizing public demonstrations was unsuccessful and the Third Amendments to the Constitution was successfully implemented.

Proponents of the third amendments noted that it was necessary to amend the constitution and provide for the necessary changes to the supreme law. Mr. Sacky Shanghala who spearheaded the Third Amendments as the Chairman of the Law Reform and Development Commission at the time[15], posited[16], that Constitutional amendments are provided for in the Constitution under Chapter 19. He argued that "India, the world's largest democracy, has amended its Constitution 94 times; and the United States of America, the oldest democracy, have amended 27 times" respectively. Given that Namibia is only 20 years[17], since its independence, more amendments can be made in the future, he said. Further, he indicated that the Supreme Court reaffirmed his contention. It noted that[18],

[12] No.7 of 2010.
[13] No. 8 of 2014.
[14] For more, see http://www.lac.org.na/laws/2014/5589.pdf last visited on 21 May 2015 at 15: 53.
[15] Now Attorney General
[16] In his article, Amendments to the Namibian Constitution: Objectives, Motivations and Implications, available at http://www.kas.de/upload/auslandshomepages/namibia/ constitution_2010/shanghala.pdf last visited on 21 May 2015 at 16:07.
[17] At the time the article was published, in 2010; Namibia was only 20 years.
[18] *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State 1991 (3) 76 (NmSC) at 86.*

> "…contemporary norms, aspirations, exceptions, and sensitivities of the Namibian people as expressed in its national institutions and its Constitution...it is a continually evolving dynamic."

In the end, despite controversy and varying opinions on the issue, all three Constitutional amendments went through Parliament, received the President signature, was gazette and effectively became law. Constitutional reforms and amendments[19] may arise but they have to be done within the confines of the law of the land.[20] This includes taking the public and ordinary men and women on the streets along through informed and well-orchestrated broad based public consultations countrywide.

Despite the reasons offered by critics and proponents for Constitutional Amendments over the years, it is certainly important for the nation to pause, take a reflection and ask itself touch questions. Did the amendments positively and/or otherwise contributed to a strong democratic dispensation in the country, now and in the future? Did they result in the strengthening of institutions and agencies to ensure accountability; transparency and improved service deliver to the Namibian population? Or did they simply reflect the narrow wishes of the few well offs who want to further increase and concentrate political and economic powers for personal gain? These are necessary questions that should be directly confronted and not escaped for political expediency. The answers to these questions are fundamentally important to the spirit and wishes of the founding reasons for the Constitution of Namibia. They are equally important to the future of the country as they could define the kind of society and dispensation that Namibia could become, many years from now. Hence, it is, and remains, imperative that the Amendments to the Constitution defines, reflects and incorporate the wishes and aspirations of the entire Namibian society, collectively. This will ensure that people retains confidence and respect for the Constitution. With the reassurance and public confidence, the Constitution will, thus, continue to play its pivotal role of guiding and serving as a point of reference and the supreme law for the country, still with legitimacy. This is what Namibia needs, and is what the future generations expect from us all. "It is absolutely necessary that we continue to uphold the ideals of our Constitution and that we jealously guard it".[21]

[19] President Hage Geingob, then Prime Minister at the time of the Third ConstitutionalAmendments was a fierce defender of the Third Amendments which raised wide concerns from the public, NGO's and opposition parties alike that they were not consulted on the amendments. He said "those Germans and other foreigner's only want to come here and influence the progress of democracy in this country by marching", the Namibian, front page, Friday, 15 August 2014.

[20] Prof Peter Katjavivi, Speaker of Parliament of Namibia, speech delivered on the Constitution Day, 09 February 2016, New Era, 09 February 2016, at page 9.

[21] *Ibid.*

The Economy

> "The first democratic government in a free Namibia came to power through a peaceful settlement with no losers and no winners, and thereby inherited the extremely skewed economy and the state possessed very little power to alter things drastically or immediately"[22]

It is fair to acknowledge that, many years under Apartheid and colonialism, left Namibia with significant problems in many areas. Access to education was limited, health care system was broken and limited to few, access to housing and water was inadequate for the majority, the economy was controlled by few white minority while the majority blacks lived in absolute poverty right across the country, unequal distribution of wealth and lack of access to resources and land for many, but to mention a few. These issues represented challenges for the new government. The list of problems and challenges was, as could be expected, long and all competed for attention and priority. Analysis and assessment of progress, or lack thereof, made since independence should be viewed with this background in mind.

In simple terms, Namibia is a country producing what it does not consume and consuming what it does not produce.[23] South Africa, Namibia's former colonizer for 75 years (1915-1990), continues to dominate the economic interests in its former colony. It controls the financial and insurance institutions, as well as, the retail and wholesale sectors. Big South African brands such as Pick n Pay and Shoprite have presence in almost every city or town in Namibia. South African economic interests in Namibia are also prevalent in many other sectors and Namibia continues to rely on South Africa for most of its import.[24] The Namibia dollars is still pegged one-to-one to the South African rand. In fact, from an economic perspective, Namibia is heavily reliant on South Africa than the other way around. This has been the trend since independence. In that respect, Namibia has done little, in the last 25 years, to reduce the 'risky and unhealthy' economic reliance on South Africa, the regional economic and military hegemon.

Despite the heavy presence of South African interests and influence, in recent years the country recorded positive economic growth of between 4 and 5 percent respectively.[25]

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[22] Prof Joseph Diescho, 'The meaning and role of SOEs in Namibia', New Era, Friday – 26 June 2015 at page 9.

[23] Namibia relies heavily on the extraction and processing of minerals for export.

[24] South Africa represents 27% of Namibia's total export and 66% of Namibia's total imports. http://www.tradingeconomics.com/namibia/balance-of-trade.

[25] According to the figures released by Minister of Economic Planning in the presidency and Director General of the National Planning Commission, Tom Alweendo, the Namibian economy grew by 5.1% in 2013 and 4.5% in 2014, and the forecast for 2015 is 4.9% respectively. See The Namibian, Monday 22 June 2015, at page 11. 30%-40% of Namibia's revenue comes from the Southern African Customs Union (SACU). Reliance on SACU come with risks as vitality in the size of Namibia's annual SACU allotment complicates budget planning. The Minister of Finance Calle Schlettwein recently shared his concern that "reduction in SACU allotment will impact the budget and reserves going forward and thus appropriate measures are required". See, The Namibian, Tuesday, 14 July 2015 at page 12.

This is despite the persistent global economic turbulence resulting mainly from the 2009 financial crisis. The country is classified as an upper middle income country[26] and has a positive history of macroeconomic management.[27] Namibia inherited and continues to maintain good public infrastructures, has good road networks, information and telecommunications services is well established, the banking and financial institutions[28] are equally well set up and maintains good civil aviation facilities. Despite the various economic challenges and external economic influences, Namibia recorded good investment growth and has been rated[29] favourably by international rating agencies as a result.

> "Economic growth is necessarily an internal matter; it is also driven by external factors"[30]

Overall, the wider challenges for the Namibian economy[31] include reliable energy sup-

[26] Namibia remains one of the most unequal societies in the world with a GINI coefficient of 59.7, www.indexmundi.com/namibia/economy_profile.html last visited on 19 June 2015 at 07:47. According to the Poverty Mapping Report launched by the National Planning Commission (NPC) in April 2015, over 500 000 Namibians live on less than N$12 a day. In 2015, the new Government has set up a Ministry of Poverty Eradication and Social Welfare to help tackle poverty and address inequality in the country. The new Ministry has set up a food bank to cater for the needs of impoverished Namibians, who have been collecting expired and disposed food items from dumpsites. See, Namibian Sun, Wednesday-24 June 2015 at page 9. President Hage Geingob is on record for disputing Namibia's upper middle income ranking by the World Bank according to the formula of calculating per capita GDP by dividing it into population and deriving a high per capita income, as being flawed and misleading and not reflective of the reality on the ground.

[27] Namibia is ranked in the top ten in Sub Saharan Africa for competitiveness at 88th position out of 144 countries worldwide. See, the Global competitive index 2014-15, http://www3. weforum.org/docs/img/WEF_GCR2014-15_SubSahara_Image.png. The country's economy grew from N$8.3 billion in 1990 to N$126.6 billion in 2013 and seen an increase in its per capita income from N$5, 500 to N$58,300. Taken from a statement by President Hage Geingob, at the opening ceremony of Cabinet Ministers induction seminar, 9 April 2015 at Windhoek Country Club Hotel and Casino, at page 3.

[28] Ranked 25th in the world by the World Economic Forum during 2014.

[29] In December 2013, Fitch – the London based agency rated Namibia's long term foreign and short term local currency Issuer Default Rating (IDR) at 'BBB' and 'BBB' respectively. See, The Economist of Friday, 06 December 2013, http://www.economist.com.na/headlines/4506- fitch-affirms-namibia-s-credit-rating last visited 17 June 2015 at 16:20. In September 2011, Moody rated Namibia's long tern foreign currency at Baaa3 (stable) and long term local currency at Baaa. See http://countryeconomy.com/ratings/namibia last visited 17 June 2015 at 16:25. In December 2014 Fitch repeated same ratings for the country long term foreign and local currency Issuer Default Ratings at 'BBB'(stable) and 'BBB' respectively. See, http:// www.economist.com.na/markets/6715-fitch-affirms-namibia-s-ratings last visited on 17 June 2015 at 16:29.

[30] Tom Alweendo, Minister of Economic Planning in the presidency and Director General of the National Planning Commission, The Namibian, Monday 22 June 2015, at page 11.

ply,[32] infrastructure, skills deficit, financing, diversification of sectors, and access to international markets and value chain additions to existing sectors. Heavy reliance on mining[33] (extraction)[34] activities and lack of diversification[35] also remain a concern.

Hence, Namibia needs to explore alternative opportunities in the logistics and transportation, as well as other sectors to increase diversification of the economy. National policies and programs should support and reflect this dream. Policies and programmes should be implemented and effectively monitored to ensure compliance.

The expansion in the economy and increased business opportunities meant that the previously disadvantage majority Namibians are now able to participate actively in the economy. This participation is limited though. The private sector is still largely controlled by the few white minorities who operate as a cartel making it hard for the black majority to penetrate[36], even 25 years after independence. In that respect the government policy of affirmative action[37] has been ineffective in opening up opportunities for blacks

[31] The visit by the International Monetary Fund (IMF) in June 24 to July 7 2015 identified three policy challenges to the economy namely, high housing prices, low levels of reserves and a decline in SACU revenue. The IMF delegation was led by Jiro Honda. The visit was to conduct 2015 article IV consultation with Namibia.

[32] Security of electricity supplies both nationally and regionally, are not guaranteed, demand is outstripping supply faster than replacements can be brought on line. At page 11, Namibia's Energy Future: A case for Renewables, published by Konrad Adenauer Foundation, 2012. South Africa's Eskom constitute the single largest contributor to Namibia's electricity supply, with a contribution of between 38% and almost 53%, over the last decade, at page 25. The rest of supplies comes from Zimbabwe Electricity Supply Authority (ZESA) with 150 MW up to 2014, Mozambique's Electridade de Mocambigue (EDM) with a contract on 30 MW, Zambia Electricity Supply Corporation Limited (ZESCO) with a 50MW contract, at page 26.

[33] According to Saara Kungongelwa, former Finance Minister and now Prime Minister, announced in her 2013/2014 budget motivation that heavy taxes to the mining companies are envisaged and includes, export tax on natural resources, revised corporate income taxes for non-diamond mining entities and environmental levy for environmentally harmful materials.

[34] Namibia mostly exports diamonds which represent 25% of total export.

[35] The depletion of the diamond reserves in the onshore mines motivated the government to diversify with Uranium now dominating the extraction sector. Heavy investment and expansion in the mining sector continues unabated but is however, threatened by high demand for power and constraint as well as unreliable supply of power by Eskom and other suppliers.

[36] According to a report by the Employment Equity Commission, white Namibians continue to dominate top positions in key sectors of the economy by occupying 61% executive directorship posts. This is an increase from 59% reported in the 2010 report. The report also criticized some employers who continued to violate affirmative action laws by failing to submit reports by deadline and failure to advertise vacant positions in order to allow qualified Namibians to apply. The report named and criticized Metje and Ziegler (M&Z) and Bank Windhoek as some of the companies that employed a workforce that was skewed in favour of whites over blacks. See *The Namibian*, Monday, 3 August 2015, front page.

[37] Article 23 (2) and (3), of the Namibian Constitution commits the government to an Affirmative Action Policy for women and formerly disadvantaged persons by past discriminative laws or practices. Additional policy measures such as the Black Economic Empowerment meant to redress past imbalance and avail opportunities for the previously disadvantage blacks, has dismally failed to avail

in the private sector. The few blacks who are employed in the private sector are mostly occupying middle managerial positions and below.[38]

In contrast, the black majority has been mainly successful in the public sector where they occupy high positions comparing to the private sector. Of course, this is not surprising given that in this sector the government is the main employer. Sadly, many of the semi-governmental institutions, known as State Owned Enterprises (SOE)[39] have been performing poorly[40] in recent years for a number of reasons, that may include, but not limited to, political appointments, lack of sophistication, poor training, lack of accountability and transparency, and of course political correctness. Only few of these institutions stand out. Most of them do not have proper expenditure support documents, revenue documents and do not submit reports and other financial compliance documents to the office of the Auditor General.[41] Those that do submit, they are usually late – or submit after the deadline has passed. This points to the lack of accountability and transparency as alluded to earlier.

Generally, the public sector has been dodged by many problems since independence. Apart from being bloated with more than 80 000 people, in addition to problems alluded to above, corruption took serious hold[42], poor service delivery[43] has become common,

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such opportunities to the targeted category of people on a wider scale. Instead, it has resulted in very few people who are well connected to the center of power getting extremely wealthy as a result of public projects such as TEEPEG and others, and through securing public tenders.

[38] Black employees occupy 63% of managerial positions even though they account for 91% of total employees researched. Ibid.

[39] SOE's are 100% owned by the State and can be classified as regulatory, service-rendering, economic and productive and general enterprises, see State-owned Enterprises Governance Act, 2006 (No.2 of 2006). At the moment there are 84 SOEs.

[40] Poor performers include but not limited to Transnamib, Air Namibia and Namibia Broadcasting Corporation (NBC). The poor performance also extends to most of the Ministries in government. The Ministry of Home Affairs has over the years received bad publicity in the news due to a bad performance and lack of accountability. Since, it introduced a turnaround strategy in 2012, things are now slowly improving. The Ministry of International Relations and Cooperation in a 2014 report (signed by the AG in May 2015) by the Auditor General, criticized the ministry for widespread absence of proper controls and accountability measures. The report indicated the 'lack of supervisory checks, especially of the cash book and other revenue related records'. It went on to say that, 'no counter books are in place to account for E-class items (consumables), salary files of local staff were found not updated with increments and other related information. The report recommended that 'accounting officer should put measures in place and implement controls to ensure that staffs that perform administrative duties adhere to the procedures as stated in various regulations'. See, The Namibian, Wednesday, 24 June 2015 at page 3.

[41] It was reported in 2013 that out of 72 State Owned Enterprises , 43 failed to submit any documentation on their operations for audit purpose, taken from Dennis U. Zaire, Accountability (or the absence thereof) in the Namibian public sector, Namibia Law Journal, Vol. 06 – Issue 01, August 2014 at page 54.

[42] Widely present in Namibia. Namibia has ratified the United Nations Conventions against Corruption in 2003. Dr. Elijah Ngurare argues that corruption in government is tribalised. He said "the real problem and the catalyst for tribalism, is the black elite having in mind the 'the Members of Parliament, Ministers, Governors, Permanent Secretaries, Chief Executive Officers, Editors and so forth', See the Namibian 23 March 2012, taken from *Obstacles to Reconciliation and Stability in*

nepotism is common knowledge and widely practiced to the extent that if you apply for a job, your application is not necessarily considered or judged purely on merits, but sadly, in fact you need to know someone from inside the particular institution, and/or you need to have the right surname, and/or have good political connections, or simply pay someone to secure the job. [44]This is how corruption took hold and unfortunately, has become imbedded.[45] According to latest statistics released[46] by the Inspector General of the Namibian Police, Sebastian Ndeitunga, between 2012 and 2014 the police has charged 84 members of the force with corruption, e.g. complicity in crimes that involved dishonesty. He said 'the force is not immune to acts of corruption.' Further he said 'the responsibility to fight corruption is not that of the law enforcement agencies alone, but is a joint responsibility.'[47] Corruption is not only bad for economic growth and companies, but is also bad for ordinary citizens, especially the poor and the vulnerable'.[48]

In fact, in Namibia only few people lose their jobs in government. Hence, in local circles, the government is known as an institution that guarantees employment for life despite issues and concerns of poor performance and lack of accountability on the part of

the Namibian State and Society, by Gerhard Totemeyer, 2013 at page 32. Published by Namibia Institute for Democracy. On this point, another Namibian academic and a former columnist for the Namibian Newspaper, Dr. Tjiurimo Hengari argues that corruption "has entrenched itself in all aspects of life through a gulping elite with an exclusive passion for the short-term. As a result our moral instinct have shifted and we don't have a critical mass of men and woman to influence a sense dignity in the life of our state." He warned that "when corruption is not dealt with, it breeds powerful and untouchable men and women who negotiate their interest on equal terms with politicians, the executives and other institution of democratic governance," The Namibian, 20 April 2012, in Totemeyer at page 33, *Ibid*. Under the Nujoma government a total of 14 Presidential Commissions were appointed to investigate incidences of corruption but none of them released their result. Thanks to political interference and influence.

[43] In Katima Mulilo, hundreds of youth occupied land and took the law into their own hands. They stormed into Katima Mulilo Town Council offices and stone the office of the CEO, Charles Nawa, who they accuse of failing to address their plight for residential land. See *New Era, Tuesday, 16 June 2015, front page, (ww.newera.com.na)* In 2014, several youth occupied a piece of land in Windhoek's luxurious suburb, Kleine Kuppe and resulted in the formation of the Affirmative Repositioning Movement, which is, basically, demanding land to be allocated to the poor and the landless in cities and towns around the country.

[44] In most cases jobs are advertised as a formality and interviews are conducted as a smokescreen to cover for lack of transparency in the processes of recruitments mainly in the public sector, but this could also be observed in the private sector increasingly.

[45] Minister for Economic Development and Director General of the National Planning Commission, Tom Alweendo, recently said; "The Namibian Government acknowledge that corruption can have a negative effect on national development. It is therefore vital that all Namibians should get involved to fight corruption." Delivered at the conference organized by the Anti-Corruption Commission to 'reflect and discuss pertinent issues relating to plans of activities that enhance a transparent and accountable systems in all sectors of society', on 22-24 June 2015, Safari Hotel- Windhoek.

[46] In a speech at the Anti-Corruption Conference that took place in Windhoek, 22-24 June 2015, Safari Hotel, Windhoek. The conference took place under the theme *"Building an honest Namibia together: People, Integrity and Action".*

[47] New Era, front page, Thursday, 25 June 2015.

[48] Minister for Economic Planning and Director General of National Planning Commission, Tom Alweendo, New Era, Thursday, 25 June 2015 at page 12.

civil servants. Under Section 24 (4) (e) and (f) of the Public Service Act[49], any staff member maybe discharged from the Public Service of Namibia on account of misconduct or inefficiency. In fact, the Namibian Constitution under Article 18 clearly states, "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation…" The law and policies exists and are in place and makes provision for discharging people from their public duties under certain circumstance, but in practice this rarely happen.[50]

Moreover, State Owned Enterprises are constantly in the press for the wrong reasons, mainly, governance issues, the infighting between members of the board of directors and the management, or the differences between the board chairperson and the management. In some instances, the board chairperson is accused of taking decisions unilaterally or without the blessing of the board. A recent example is the appointment of Tamer El-Kallawi by Namibia Airports Company (NAC) as its Chief Executive Officer, after acting in that capacity for two years. In this case, the board chairperson Ndeuhala Katonyala,[51] issued a media statement announcing the board decision to appointed El-Kallawi, only to be disputed by some members of the board of directors that no such decision was taken by the board, and in fact, went as far as calling the appointment illegal. [52]Another example is Transnamib that is notorious for infightings between board members and suffers serious governance deficit and, as a result, the company is one of the poor performers among the SOE's[53]The short lived resignation of one of the board members of Transnamib, Mr. Sacky Kadhila Amoomo, brought to light the governance mess the

[49] 1995 (No. 13 of 1995), amended by the Public Service Amendments Act, 2012 (No. 6 of 2012).

[50] In recent years the dismissal of Titus Haimbili, former Chief Executive Officer of Transnamib, and Charles Funda, its Chief Operating Officer, in April 2012, is a rare example. For more on issues of accountability in the Namibia Public Service, refer to; Dennis U. Zaire, Accountability (or the absence thereof) in the Namibian Public Sector, Namibia Law Journal, Vol. 06 – Issue 01, August 2014.

[51] Has always been a controversial figure. The issue of CCTV installations at the country's airport raised eyebrows about Katonyala's relationship with Syntex owner Linus Amulungu. Again Brian Nalissa was awarded N$7.7 million for only five month consultancy work by the same company under Katonyala's chairmanship. This example further demonstrate a significant problem that has become imbedded within the public sector, the fact that certain personalities has become extremely powerful and influential to the detriment of the institutions they are supposed to serve and guard for the benefit of the wider public.

[52] The Namibian, 01 June 2015, http://www.namibian.com.na/indexx.php?id=27263&page_type=story_detail.

[53] The company is often at loggerheads with union over retrenchments as it seeks to relieve its loss making operations. Recently, early 2015 the company planned to retrench over 1000 workers but bowed down to pressure from unions and Swapo Youth League. In June again, the company reneged on its agreement not to retrench and is against at loggerheads with unions. The bad publicity for the company continues. See, Front page-New Era, Tuesday, 23 June 2015. Transnamib has a strong record of receiving government bailout. In July 2015, the Public Enterprises Minister, Leon Jooste confirmed that Cabinet is injecting N$400 million in the parastatal. See, The Namibian, Wednesday, July 15, 2015, front page.

company is engulfed in[54] further, most of the SOE's have suspended their Chief Executive Officers and/or other executives.[55] This often results in lengthy and costly[56] legal battles and often divides board and management members due to loyalty or lack thereof, and compromises such entities. The new Minister of Public Enterprises, Leon Jooste, condemned the practice of suspending CEO's or Managing Directors (MD's) for very long while also paying the acting CEO's or MD's as "rather unacceptable"[57]. As a result changes are expected to be effected soon. Under the new changes, the Minister said,"Public Enterprises boards would have to seek approval from line Ministries before they can suspend or fire the executive heads of State-owned enterprises because such suspensions are burden to taxpayers. We will only approve the suspension of these CEOs and MDs under exceptional circumstances and only for a limited period of time. If agreed, it will have to be for a maximum of three months and the boards will have to resolve the issues within this time-frame otherwise they have to reinstate the person"[58]. One hopes that the Minister and his Ministry will play a key role in reducing the many endless problems and fighting that has dodged this sector.

[54] The Minister of Transport, Alfeus !Naruseb, convinced Mr. Amoomo to stay on as a board member. In his resignation letter to the Minister, Amoomo raised three points he said was wrong at Transnamib; the position that resulted in the three years appointment of Johan Piet as an Executive Project Manager for turnaround strategy was not advertised, the suspension of the Chief Executive Officer, Saara Naanda, and the vote of no confidence in him by the board. See, front page- The Namibian, Wednesday, 10 June 2015.

[55] In October 2014, Transnamib board suspended its CEO, Saara Naanda; on 11 February 2013, the Namibia Training Authority suspended its CEO, Maria Nangolo-Rukoro with full pay and she is still (June 2015) to be charged; on 30 September 2013, the National Disability Council suspended its CEO, Martin Limbo for subordination and being a bully; and Air Namibia suspended CEO Theo Namases in June 2014 is another example. Over the years, suspensions and infighting has been the trend among the SOE's. on 29 June 2015, Air Namibia announced that it has 'amicably' parted ways with managing director Theo Namases in a confidential agreement after an investigation revealed corrupt deal in which she is accused of receiving N$3millions, tarnishing the image of the company and other irregularities. See, The Namibian, front page, Wednesday, 1 July 2015.

[56] The suspension of National Training Authority CEO Maria Nangolo-Rukoro in February 2013 has by June 2015 cost the taxpayers N$ 3.5 million in legal fees excluding money paid to Engelbrecht (lawyer) which is N$22 000 per day for seventy days! See, http://observer24.com. na/national/4526-suspended-ceo-threatens-to-sue-nta last visited 14 July 2015 at 10:55. The fight between the board of the Social Security Commission headed by Rick Kukuri and the Chief Executive Officer, Mr. Kenandei Tjivikua which resulted in his suspension for a year ended up costing the company over N$3 million. This fight started when the CEO Tjivikua refused to spoil the board members with Apple iPads which would have cost the company heavily.

[57] Namibian Sun on Fri, 10 April 2015, http://m.sun.com.na/government/unresolved- parastatal-suspensions-unacceptable-jooste last visited on 14 July 2015 at 10:00.

[58] See the Windhoek Observer, Friday 10-16 July 2015 at page 6, www.observer.com.na last visited on15 July 2015 at 13:40.

The Politics

Elections

Apart from the Transitional elections of November 1989, Namibia has witnessed five National Assembly and Presidential Elections. During the 1989 Transitional elections, SWAPO secured 57% against the second party DTA's 28%. This translated into 41 and 21 seats for the two parties respectively. One interesting fact about this election is that 97% of registered voters[59] took part in the voting. This high percentage of voter's turn-out has not been achieved again for the last 25 years since gaining independence.

During the first National Assembly and Presidential elections in 1994 SWAPO secured 74% and DTA only 21 % with the remaining six parties sharing the rest of the votes. The winning trend for SWAPO continued undisturbed for the other five National Assembly and Presidential elections to date, in 1999, 2004, 2009 and 2014. In 1999, the party got 76.15%; in 2004 it secured 75.83%; in 2009 it got 75.27% and the recent 2014 elections, it managed an overwhelming 80.01%.[60] During the 1989, 1994, 1999 and 2004 elec- tions victories SWAPO was under the presidency of Sam Nujoma, Namibia's founding President.[61] During the 2009 and 2014 election victories it was under the leadership of Hifikepunye Pohamba. Both previous party presidents campaigned for the incumbent president Hage Geingob during the recent 2014 elections, under the banner of "The Legacy Continues".

The figures above show that SWAPO have accumulated massive support countrywide and succeeded in maintaining its two third majority in Parliament. Thus, consolidating its political dominance in Namibia. A number of reasons could be advanced why SWAPO has continued to enjoy the massive support to date:

- The party still enjoys the 'liberator' status mainly among the old liberation generation that is now ageing;
- The party support base is strong in the rural uneducated population, mainly in the so called four "O" regions, namely Oshikoto, Oshana, Ohangwena and Omusati;
- The huge influence of the party liberation leader, Sam Nujoma is still significant;
- The party has managed to create significant wealth over the years through investments, pledges and party funding[62] allocated to parties that have seat in Parliament

[59] 701 483 people registered to vote.

[60] Statistics are available from the Electoral Commission of Namibia (ECN), www.ecn.na, last accessed on 25 June 2015 at 14:51. See also, Celebrating 25 years of Democratic Elections in Namibia, 1989-2014 , published, published and distributed as a free supplement in, Die Republikein, Namibian Sun, and Allgemeine Zeitung in 2015. The book was launched on5 February 2015.

[61] Conferment of the status of the Founding Father of the Namibia Nation Act, 2005 (Act 16 of 2005).

[62] In 2014, party funding was N$28 million; in 2015 it has ballooned to N$116 million. The money are allocated per seat in Parliament. Under the new formula, a seat is worth closed to N$1 million. SWAPO will receive N$97millions for their 101 seats in Parliament. The official opposition DTA will

of Namibia:

- SWAPO has created loyal support among the new breed of wealthy black Namibians who acquired wealth mainly thorough securing public tenders and/or public projects;
- Resources allows the party an advantage over other parties to reach the entire country when campaigning before, during, after and in-between elections;
- The significance of Hifikepunye Pohamba, who many in the party saw as a unifier and peacemaker,
- The "Hage" effect, the first non-Oshiwambo president for the country;
- In the 2014 elections, the support received from traditionally smaller parties supporters due to the "Hage" effect;
- The loyalty to the party rather than issues based voting pattern;
- The lack of serious political agenda on the part of the smaller parties or opposition rather;
- The ethnic based voting pattern;
- As well as many other 'known' factors that has played in favour of SWAPO over the years.

The SWAPO winning trend created a notion of one dominant party system. This comes with its challenges. First, poor quality legislation goes through Parliament and becomes law. The *Stock Theft Act*[63] is one example. The Prevention and Combating of Terrorist Activities Act is another.[64] There are many similar others. This trend of making bad laws creates significant problems for the system as such laws have to be amended soon after coming into effect or are stroked down by the courts and have to be revisited again and again, leading to waste of public resources both human and capital. This could be avoided if laws are properly debated and passed through Parliament on the basis of merits and not because of reliance of the majority presence of the ruling party in Parliament. Second, the level and quality of debates in Parliament is low and not interrogative and constructive enough. As just alluded to, this negatively affects the legislations coming out of the August house.

receive N$5.7million for its six seats. See, The Namibian, 29 April 2015, http://www.namibian.com.na/indexx.php?archive_id=archive_story_detail&page=1 Former United Democratic Front (UDF) President and Paramount Chief of the Damara community, Chief Justus Garoeb urged all his supporters to vote for Hage Geingob during November 2014 elections. Henk Mudge, President of the Republican Party also urged his supporters to vote for Hage Geingob as a candidate.

[63] 12 of 1990. This Act imposed heavy mandatory sentences of up to 30 years imprisonment to stock theft worth more than N$500. Over the years it has been held by courts in various cases that the mandatory sentences are unconstitutional. One such case is *Kulandwa v The State (CA 29/2014) [2014] NAHCMD 220 (21 July 2014).* Note the 1990 Act was amended several times with the latest amendment being the Stock Theft Amendment Act, 2004 (No: 19 of 2004). See Government Gazette No. 3351 of 20 December 2004.

[64] Act no. 12 of 2012.

Reasons could also be advanced why the opposition has been performing badly over the last 25 years:

- Lack of clear political agenda;
- Leadership incompetency and lack of vision;
- Lack of resources, means and will to pursue strong political agenda;
- Ethnic base focus and narrow vision advanced mostly during elections;
- Leadership opportunistic tendencies of staying long in power –basically killing the party due to lack of vision to pursue new ideas and policies;
- High level of ignorance on the leadership to pursue bread and butter issues for the voters;
- Lack of consensus to unite and form a common front between smaller parties to contest elections – where they stand a better chance to gain more votes;
- Absence of clear party policies on key issues and weak party manifestos;
- The comfort to remain opposition as long as a seat is secured in Parliament "politics of the belly"
- Leadership inability to sell their party manifestos to the voters effectively; Inability to convince the voters on key issues;
- General infighting in the party leadership – hence reducing voters confidence in the party as a serious and credible force;
- Absence of leadership that cares deeply about the project "Namibia".

Elections – the controversy

> "The right accorded to people on the basis of equal and universal adult suffrage to freely assert their political will in elections regularly held and fairly conducted is a fundamental and immutable premise for the legitimacy of government in any representative democracy[65]. It is by secret ballot in elections otherwise transparently and accountably conducted that the socio-political will of individuals and, ultimately, that of all enfranchised citizens as a political collective, is transformed into representative government: a "government of the people, by the people, for the people".[66]

Generally, elections in Namibia are conducted under a climate of peace and political stability. However, from time to time reports about irregularities such as violence, intimidation, threats as well as other forms of irregularities do appear, although on a small scale and limited to certain areas, especially, the so called 'no go' areas where certain parties have dominant support. In 2004, opposition parties led by Congress of Democrats (COD) challenged the election results and approached the High Court to have

[65] As Roux pointedly remarks in his contribution to *Constitutional Law of South Africa* (Woolman *et al.*, 2nd ed., Vol.1, p.10-1, Original Service) before discussing and analysing the current descriptive and normative lexicon being used in theorising on the subject: *"Democracy is a noun permanently in search of a qualifying adjective."*

[66] Supreme Court of Namibia, judgment in the case of *Rally for Democracy and Progress v Electoral Commission of Namibia (SA-6-2010) [2010]* (6-September 2010), at page 3.

the votes recounted.[67] The recount produced the same result as before. However, during the 2009 elections coalition of opposition parties approached the Supreme Court with an appeal contesting the legality of the process, urging it to be nullified, and its results be set aside and/or order for a recount.[68] After years of legal wrangling and going between the courts, the attempt by the parties to put the November 2009 elections aside for Members of the National Assembly was dismissed.[69]

The court outcome of both cases was accepted by the losing parties and moved on as lessons to be learned in future. Importantly, the Supreme Court criticized the elections administrators heavily. The court said,

> "It will be unfortunate if the people responsible for the lapses are allowed to participate in the conduct of elections and to unnecessarily put the country through the same controversy and suspicion that had characterized the aftermath of the 2009 (National Assembly) elections. It will be a sad day indeed for this fledgling democracy if, after this verdict, those who manage elections think that they have been completely vindicated, and therefore to continue with business as usual."[70]

The two cases and the outcome also provoked discussions in the public domain as well as party levels about elections in the country. Public lectures, panel discussions, radio and televisions shows were held over the years to discuss the elections cases and the court's rulings and what they meant for Namibia and SADC as a whole. The acceptance of the decisions of the courts by the losing political parties and the wider discussion in the public points to a crucial fact, that the people of Namibia chose sanity and decided to solve the difficult electoral problems through the courts of law, and have, fortunately, not resorted to the streets and opted for violence. This shows that democracy have over years slowly become imbedded in our people and is maturing.

Elections and the acceptance of their outcome, is a phenomena that defines the future of every country. In Africa mostly, it happens that none acceptance of elections results, especially by the incumbent politicians against their opponents in order to remain in power, results in destabilizing violence[71] in the country.[72] Such violence takes different stages

[67] *Republican Party of Namibia & Another v Electoral Commission of Namibia & 7 Others*, unreported judgment in *Case No. A387/2005* delivered on 26 Aril 2005. See also *DTA of Namibia & Another v Swapo Party of Namibia & Others, 2005 NR 1 (HC).*

[68] *RDP v EC, Supreme Court of Namibia. Case No. SA 6/2010*, heard on 31 May 2010, judgment delivered on 6 September 2010.

[69] *Rally for Democracy and Progress v Electoral Commission of Namibia (SA12-2011)[2012](25 October 2012.*

[70] Ibid, at page 96.

[71] Mostly perpetuated by factors such as poverty, weak governance, corruption and culture of impunity widely visible in Africa. Other factors can also be at play depending on circumstance of each political system in each country.

either before, during or after elections and present serious threat to security, peace and development. In most cases, parties do not even allow the law to take its course and put faith in the judiciary to help in solving such crises but instead resort to violence. On that score, one praises the democratic nature and believes in Namibia's judiciary by the political parties to solve elections disputes peacefully through the legal mechanisms provided by our supreme law. This boded well for democracy in the country and has help define the future of elections management in Namibia for years to come. Certainly, Namibia has avoided falling in the pothole that has caught many countries in Africa and beyond. The challenges for the Electoral Commission of Namibian,[73] as an institution tasked with man aging elections, and Namibia as a country, remains on how to strengthen systems to hold credible elections in confidence, peace, stability and security. This is certainly no easy task but one worth pursuing.

Civil Society, Churches and the Media

The dawn of independence has not been good to civil society in Namibia. Civil society plays a vital role in a democratic state, that of being an independent voice and also holding government to account. Before independence, civil society was active, vocal and played its role in mobilizing support against Apartheid. Sadly, this role has dwindle and the lack of financial means has further dealt a serious blow to this important sector. Many Non-Governmental Organizations (NGO's) relied and still relies on donor funding for their financial support. Three factors affected the operations of the civil society in Namibia. First, the lack of a common goal that unified responses of the civil society the same way Apartheid did before independence, many organizations started disappearing and becoming dormant. Second, the classification of Namibia as an upper middle income country meant that donors started looking elsewhere to put their money on, this was a final nail in the coffin for many NGO's. Third, experienced NGO's staff left for greener pastures. Despite the predicament that confront the civil society in Namibia, one should acknowledge that despite the challenges, there are still few NGO's that are vocal and continue to contribute to democracy in Namibia through various means, such as, research and publications, e.g. Institute for Public Policy Research (IPPR) and Labour Resource and Research and Institute (LaRRI); human rights advocacy e.g. Namrights, legal representation on a pro-bono basis e.g. Legal Assistance Centre, community lobby and empowerment e.g.

[72] Election violence in Kenya in 2013 is one of many examples. For election disputes in Kenya refer to a paper by Justice J.B. Ojwang, available at http://kenyalaw.org/kenyalawblog/election- disputes-and-the-judicial-process-emerging-lessons/ last accessed on 25 June 2015 at 08:59.

[73] Need to clean its name, reputation and image as a credible institution tasked with an important duty of managing elections. In view of this, the dust has not really settled completely on two things. One, the criticisms levelled against the institution in the two court cases have not been entirely and satisfactorily dealt with by the ECN. Two, the dust refuse to settle regarding the credibility of the 2014 elections results, with critics pointing to significant number of irregularities, e.g. lack of paper trails. Although, no new election challenge was launched by the parties with the courts but instead accepted the results with reservations, the ECN image was left with a stain, one that did more harm than good to the image of the institution.

Women's Action for Development (WAD) but to mention a few.[74] Totemeyer summarized the role of civil society well. He said, "Civic Society Organizations should play a much more engaged, supportive and initiating role in re-organizing and rebuilding the Namibian society in many respects. But should not be seen by the government as endangering or questioning its authority and as a threat to its governance".[75] The role played by the churches before independence in mobilizing support for the independence of Namibia is well recorded in the history books. Before independence churches were active, vocal and most importantly, independent. They could criticize the Apartheid regime and took their civil duties serious. Many people were cared for by churches before independence and could look up to churches spiritually, moral support, for food and shelter as well as guidance. Importantly, churches and their leaders where fearless in speaking out against Apartheid and the government. Sadly, with independence, this role has suffered serious stroke and has not received treatment.

After independence, the churches have become quieter and do not speak out against many ills in society, such as, the danger of high alcohol consumption, high number of suicide, teenage pregnancy, corruption and Gender based violence, but to mention a few. This may even extend to speaking out against the government and its leaders on matters that affect the wider society like inequality and poverty. This is against the fact that churches, as institutions, that have wider influence in society, should defend society as a critical component of any country. Reasons for hesitancy to speak out or remind the leaders about their role in/and to society, may include the following:

- The government has succeeded to invite many church leaders to eat at the big table – hence, the silence;
- Some church leader have prioritized political alliance above societal wellbeing;
- Lack of support structure to encourage churches to continue to be relevant and vocal on issues that touch on and affect society;
- Fear to be singled-out and labelled as an agent of imperialism and Western governments;
- Fear to criticize or be seen to criticize the government as it is the biggest employer in the country and the church may lose members who support the ruling party or are loyal to it;
- Lack of vision and focus on the part of the church leaders and churches as institutions in society;

These are only some, but not all, reasons. Other exists.

Instead, what the country has witnessed is the mushrooming[76] of churches all over the

[74] Naming these few organizations is not to say they are the only ones doing advocacy or that they are doing a better job than others. This is due to space limitations only. The author acknowledges that there are many other similar organizations doing a great job and hence contribute to the role of the civil society in the country.

[75] Gerhard Totemeyer, *Ibid*, at page 38.

[76] Due to poor regulations, influx of people from other countries who saw and operate churches as a business and money making scheme rather than its intended purpose and of course, the high level of

country and are instead, deceiving and corrupting society, as reported and covered in daily papers.[77] The fact that church leaders are in the employment of the government and are, in certain instances, members of the ruling party Swapo does not help the course at all. As an example, the Secretary General of the Council of Churches in Namibia, Maria Kapere is a Swapo member. Her husband, Asser Kapere was the Chairperson of the National Council for many years now. Hence. Maria Kapere could not be expected to lead a stronger and vocal umbrella body, (the Council of Churches in Namibia –CCN) for the churches in Namibia as her loyalty to Swapo would be questioned. This is partly one of many reasons why this umbrella body is and has not been active enough for many years now. CCN needs to clarify its role and be heard on many pertinent issues. It is therefore important that the churches in Namibia interrogate the following key questions:

- Why has the church, as an institution, lost its influence and role in society?
- What is the role of the church in a modern society and in keeping it (society) together?
- What could be done to enhance the role of the church in Namibia?[78]
- Have the phase of change in society been so rapid that the church is left behind?

Hence, the churches needs to regroup and fight for its place in society and make its voice heard.[79] It is critical that changes incorporate and equip the youth to be involved and go along with the changes and place in society. The role of the church in society should not

poverty as people turn to faith and religion to quench their thirst for why they are poor or not doing well in life.

[77] As one example out of many, it was reported that a women emptied her house of everything to exorcise demons. According to her husband problems started when she started attending the Pentecostal Church. The women said 'she felt the church was helping her but she started developing problems'. Head of Chaplain Namibian Police in Khomas region Warrant Officer Hafeni Mwaningange who is dealing with such matters had the following to say, 'I don't have a problem with Namibia secular state or freedom of religion, but I have a problem how it is regulated. There should be control and requirements (on churches and pastors) just like with other professions." See Namibian Sun, Monday, 6 July 2015.

[78] This debate could touch on issues such as the role of the family as a unit and also that of the teachers in the community. What values, for instance, do we instill in our close ones such as children? What do we teach them after they leave home? Does society accept or reject such values?

[79] On 24 July 2015, four clergymen namely, Pastor Lukas Kaluwapa Katenda & Joseph Nghifikepunye Hanghome of the Anglican Diocese of Namibia, Laban Shitundeni Mwashekele o fthe Evangelical Baptist Church in Namibia, and Likius Nambili Namutenya o fthe Evangelical Lutheran Church in Namibia in unison wrote an open letter to H.E President Hage Geingob, Mr. Job S. Amupanda, Mr. Dimbulukweni H. Nauyoma and Mr. George H. Kambala, land activists, Affirmative Repositioning and Lt Gen. Sebastian H. Ndeitunga, Inspector general of the Namibian Police pleading under the heading 'Let there be no bloodshed' and asking for all parties to resolve the land issue peacefully before the 31 July 2015 deadline set by the Affirmative Repositioning to occupy land illegally if the government do nothing to reduce the high prices of land in Windhoek and increases the accessibility to land for the landless countrywide. This letter demonstrates a positive influence and how churches and their leaders can have influence in important matters that confront society.

diminish but become prominent again in future.[80]

One could also not overlook the critical role performed by the media, especially, those that continue to be vocal, independent and dare report facts as they are. The Namibian newspaper is a case in point. Its record before independence is one that present a picture of fearless reporting against the Apartheid government, and has played its part in contributing to the independence of Namibia. After independence, it stood by its principles of reporting facts as they are and criticizing the government if and when necessary and praising it when needed. This did not always go down well with the government. As a result, in 2001 the government decided to burn all government agencies from advertising in the paper or even buying it due to its "anti-government stance," at least officially. Eleven years down the line the ban was perceived as being excessive and senior government ministers started questing its relevance. Finally, in 2011 the ban was lifted, with the paper still intact.

Generally, the role of the media in Namibia continues to be critical in informing society. The country received recognition as a media friendly country[81] as there is absence of violence and detention of journalists by the authorities and no media has been taken off air[82] as well. Despite this fact, the media face various challenges[83] in Namibia. None cooperation from the authorities when gathering news and information is but one example as journalists are, at times, send from pillars to post when seeking information or to verify facts. Intimidation of journalists with sarcastic comments such as, 'I don't report to you', or 'I won't do your job for you' is another example. This could be attributed to the fact that Namibia still does not have access to information legislation. Despite few instances of intimidation and harassment, one is bound to conclude that Namibia[84] is not a media unfriendly country. In fact, Namibia allows the media the critical space to operate and do their jobs. However, the absence of access to information legislation is an indication that

[80] The shelter called 'Friendly Haven' set up by the Ecumenical Social Diaconate Action (ESDA) in 2002 to help battered women and children to seek help from all sorts of abuse is one good example of how churches can regain their place in society. Between 2002 and 2014, 1750 people were taken in at the shelter of whom 980 were children and 770 women.

[81] In February 2015, Namibia was ranked 17th in the world for press freedom by Reporters without borders. See, https://www.namibiansun.com/local-news/namibia-ranked-17th-globally-for- press-freedom.76571.

[82] The popular call-in programme on the Oshiwanbo radio service was banned for few years until July 2015, when it was brought back on air. The government saw this programme as giving those critical of the government a voice and opportunity to criticize it.

[83] According to the director of Media Institute for Southern Africa (MISA), Natasha Tibinyane, 'in 2014 three journalists were attacked. One was attacked by a politician while on air and another while covering elections'.

[84] Host the Head Quarters of the Media Institute for Southern Africa (MISA) set up in 1992 in Windhoek to advocate for free press in Southern Africa and monitor media freedom violations. The country also hosted the 1991 UNESCO sponsored seminar to promote a free, independent and pluralistic African Press. The seminar concluded with the adoption of the Windhoek Declaration on a free, independent and pluralistic press in Africa.

the country still need to do more.[85]

New Government. New way of doing things?

> "No Namibian must feel left out. Namibia is a child of international solidarity; a friend to all and an enemy to none. We are however aware that people don't eat constitutions, peace or democracy. People eat decent food, live under decent shelter and enjoy decent employment, Therefore, our first priority will be to declare all-out war on poverty and concomitant inequality. Our focal point will be to address inequality, poverty and hunger and that will involve looking at a range of policies and interventionist strategies to tackle this issue."[86]

President Geingob uttered these words to loud applause from the crown of around 20 000 in attendance as witnesses. The president statement above and the promises in it instilled a sense of hope and expectations among the Namibian nation. In fact, the President declared an all-out war on poverty[87] and made accountability and efficiency his priority. Ministers received their terms of references outlining key performance indicators on which their performance will be gauged. Ministers are also expected to have a clear 5 year work plan. Geingob urged the civil service to be 100% committed and forget about the 'thank God it's Friday' notion but to be committed to fulfilling the objectives of government. Travel ban to ministers and high profile civil servants were introduced except for the Deputy Prime Minister and Minister of International Relations soon after Geingob took office, although this did not last long.

In his first 100 days[88] in office, the president showed that he meant business as he publicly declared his wealth and that of the first lady. He challenged his cabinet colleagues to do the same, but they reacted slowly indicating reluctance to comply or respond to this call. On his 100th day, the president announced his so called A-Team consisting of eight members.[89] Some of these appointments raised concerns about duplication of roles and

[85] For more background and analysis of the Media in Namibia, consult a recent article by Gwen Lister. *The State of Media in Namibia* by Gwen Lister, in Working for Social Democracy in Namibia – 25 years of Friedrich Ebert Stiftung in Namibia, 2014. Printed by John Meinert Printers (Pty) Windhoek.

[86] Pres. Hage G. Geingob, in his acceptance speech as Third President of the Republic of Namibia, 21 March 2015.

[87] "This is a major war. And it is a long term war which will require soul searching, meticulous planning and innovative approaches, so that while we continue fighting for economic emancipation, we can achieve a number of short-term successes along the way-as well as – to boost the morale of the populous." President Geingob, at the ceremony of Cabinet Ministers Induction Seminar, 9 April 2015 at Windhoek Country Club Resort and Casino.

[88] On Sunday, 28 June 2015.

[89] It consist of Albertus Aochamub as Government Spokesperson, John Steytler as Economic Advisor, Etienne Marits as Executive Secretary in the Office of the President, Daisry Mathias as Advisor on Youth Matters, Inge Zaamwani-Kamwi as Constitutional and Public Sector Advisor, Penny Akwenye as Policy Advisor on Implementation and Monitoring, Philemon Malima as Director-General of the Namibia Central Intelligence Service (NCIS) respectively.

functions at the government level. For instance, why appoint a government spokesperson while there is a Minister of Information Technology and Communications who by law is the official government spokesperson? The same could be said about the position of Advisor for Youth Engagements while there is also a Ministry for Youth and Sport. Moreover, what is fascinating is whether the A-Team is senior or more influential than ministers by virtue of proximity to the president and their technical advice to him. The A-Team also consists of highly educated technocrats who will be sharing corridors and meetings with ministers who are political appointees. How will the president manage the egos and potential differences of opinions?

Before appointing his cabinet and following his election victory in November 2014, then as Prime Minister and President elect, Hage Geingob asked that all 77 candidates on the party list to submit their CV's.[90] He named and shamed those that did not respond to his call on the deadline and asked them to submit without delay.[91] The same process of naming and shaming has also been done for the assets declaration. One wonders if this strategy of naming and shaming could not backfire instead of being perceived as taking ministers and his team to tasks. More observations about the first 100 days include:

- The nation has witnessed a different presidential style marked by openness and engagement on social media and regular press conferences. Will the president keep the momentum?
- Expensive presidential democracy since independence due to a bloated[92] executive and extra appointments e.g. the A -Team,
- Overlapping and duplicating of functions between Ministries,
- Increase in pension and child care grant – positive development,
- Frequent use of the "I" instead of the "we", does this imply his cabinet is not behind him?
- Stopping the mass housing project – welcome due to significant irregularities discovered in the project,
- Too big bureaucracy which may hinder or slow down progress,
- Missed opportunity to speak at the AU Summit in June 2015 in Johannesburg, lost

[90] "The historic mandate given to the SWAPO Party by the people is indicative of the fact that now, more than ever, there is an unprecedented level of expectation for the incoming President and the members of his Cabinet to perform at a high level and take the nation towards economic prosperity. It is for this reason that I requested for the members' CVs in order for me to gauge their respective qualifications, competencies, skills and aptitudes so that they may be deployed in a manner which will make full use of their individual talents," reads the statement. "Laxity of officials has, and will continue, to be the Achilles heel of many administrations, which cannot be tolerated," said Geingob, See, http://www.namibian.com.na/indexx.php?archive_=133718&page_type=archive_story_detail&page=1

[91] They included Bernhardt Esau, Alpheus !Naruseb, Anna Shiweda, Peter Katjavivi, Saara Kuugongelwa-Amadhila, Erkki Nghimtina, Anna Hipondoka, Sophia Swartz, Faustina Caley, Marina Kandume.

[92] Currently there are 28 Ministries (28 members Cabinet) that consists of Ministers, Deputy Ministers (34 in total) some with two deputies, Permanent Secretaries and their deputies as well as 10 advisors

chance to speak on Namibia's foreign policy to align with his new notion of a 'new Africa',
- Not vocal on corruption and civil servants allowed to do business with government – blow to tackling corruption, inefficiency and accountability in the civil service,
- To be seen if 'no one should feel left out' and notion of 'inclusivity' will be realized,
- From end of June 2015, all civil servants occupying a rank lower than a permanent secretary will need permission from the same ministry to engage in remunerative work beyond the scope of their work, this is a positive development,
- All civil servants including Permanent Secretaries had until 30 June 2015 to declare their assets,[93]
- Generally, the president has set his vision for the country and now it is only to be match by action.

The old adage acknowledges that, *Rome was not build in a day*, and the business of running a country is certainly no laughing matter. President Geingob surely made good noises and promises thus far, in his first 100 days. It is equally important to acknowledge that 100 days are too early to judge the president and his achievements, but nevertheless present an able opportunity as the president during this time, is still popular and has a lot of support behind him. What remains is to ensure that rhetoric is matched by actions and implementation of decisions and policies happens on the ground. That the new sense of purpose, optimism and rejuvenation the president created is realized. He has the full support of the public.

Analysis

The economy

If one looks at the different figures and numbers of the Namibian economy, of course, certainly one would be impressed. Significant growth rate of about 5 percent, low deficit of about 5 percent accompanied by low debt stock of about 30 per cent plus an increase in per capita income over the years, this is certainly something to be proud of thanks to good macroeconomic management and good monetary policy in place, as well as other enabling factors in the country.

However, beyond the figures one can find a different picture, one that raises serious concerns. Namibia's dependence on foreign imports are unsustainable, its reliance on South Africa is seriously a matter of concern and is unhealthy, the growing poverty and

[93] The Prime Minister said "the purpose of this (compulsory declaration of interests and remunerative work outside public service employment) policy is to regulate this matter in an open and transparent manner in order to protect the interests of the public service by ensuring that staff members and members of the services places the whole time at the disposal of government. It is also aimed at preventing unfair competition between staff members and the person in the private sector". See, New Era, Wednesday, 1 July 2015, front page.

inequality in the country, is concerning, although promises are there that something will be done about it – it remains to be seen if this materialize any time soon.

It is important that ways are found to macro manage the economy profitably for the benefit of all Namibians in the long run. Reducing reliance on South Africa while sharing institutional relationship, diversifying investment options, investing in value additions to our products and services before exporting, as well as, looking at other viable options beneficial to Namibia is a necessity. Namibia's long term economic interests can, unfortunately, not be protected by reliance on South Africa and SACU. South Africa's vision and aspiration does not carry Namibia's economic interests as one of its priorities.

The biggest challenge for Namibia, a small country in GDP terms, placed between two regional economic giants, Angola on the North, and of course, South Africa on the South, will be to search and try to find ways to be self-sustainable. Unfortunately, regional political dynamics and security issues, being it human, political or otherwise, require self-sustainable economic solutions tailored for the best interests and needs of Namibia. This has, however, not been achieved over the last 25 years of independence in Namibia. Is that an impossible phenomenon to achieve?[94]

Corruption

It is certainly true that corruption affect every facet of life in Namibia and Africa in general. Hence, it is important that the government is seen to be doing something about it. The institution set up for that purpose (Anti-Corruption Commission) should be adequately capacitated and strengthened in terms of funding and human resources. Corrupt public officials should be prosecuted and action must be taken against those found to be corrupt. The culture of impunity must be addressed and the 'untouchables' should be confronted. Other institutions such as the police force, governmental structures and institutions, churches, schools, the family as a unit, and the wider society should joint efforts in fighting corruption fiercely so that Namibia could be rescued before it sank even deeper into it. So far the government under the new administration has not been vocal enough on this subject. One hope this changes soon.

The Politics

Politics in Namibia has been characterized by the same trend of one party, Swapo dominating and winning election by big margins. It is equally true that opposition parties have

[94] Experts are already predicting the next financial crises. According to Prof David Taylor from the Institute of Financial Markets and Risk Management (AIFMRM) at the University of Cape Town (UCT), the world is not ready for the next financial crisis, which could hit sooner than people realizes. He said "It is not a question of whether there will be another financial crisis like we saw in 2008 following the US sub-prime mortgage debacle. The question is when and where? He asked. See, *http://www.fin24.com/Economy/The-next-financial-crisis-is-on-its-way- warn-experts-20150703* , last visited Friday, 3 July 2015 at 07:56.

been getting weaker over the years and so far, there is no evidence of this stopping soon. Democracy needs stronger institutions and parties to keep the government in check and make it function better. With the ever weakening opposition, weaker institutions and ever stronger ruling party, one wonders if development could not be affected, as development and democracy are two sides of the same coin. One needs the other to succeed and one cannot function without the other. Only time will tell.

Constitution

The Constitution of Namibia is a fundamental bed rock for this country in the same way that elections are the bedrock of democracy in Namibia or elsewhere. It is the only document, apart from the bible, that unites, and in addition, legally binds so many people in Namibia. It is, also, the only document that has the ultimate authority and is a source of reference for law in the country, for all people. It carries the wishes and aspirations of all people in Namibia, either as citizens or those that happens to be here by birth, descent and/or otherwise and called themselves Namibians. It is a document that represents all people, be they rich, poor, influential, politically well connected; be in power as Legislators, Judiciary, Executive, the blind, disable, homeless, and all kind of classes that one could think of. Therefore, all these people have interest and by law are entitled to know what happens to the supreme law as, any changes to it, directly or indirectly affect them. Amendments are of broader public importance. Yes, it is. It affects the broader public. It is, thus, imperative that the people be involved and consulted so that they could express their opinions on any of the proposed changes. Anything that falls short of this is not acceptable and could not be condoned. Namibia, is ours and we should defend it during the good and the bad times, and that involve defending the ideals, values and principles that underpin our supreme law.

Public Service

Governance issues in the public sector must be confronted head on and those tasked with responsibilities should be held accountable for their decisions and actions or lack thereof. Problems that confront the public service such as corruption, nepotism, lack of accountability, poor service delivery, and lack of efficiency, bureaucracy and other forms of red tap cannot be swept under the carpet any longer. The time for jobs for comrade is long gone. Namibia needs people in positions who are able to add value to the system and governance in the country. People who are appointed into positions mainly because of merits and not due to political alliance or because they have the right surname, or any other illegitimate consideration for that matter.

The constant infighting between the different members of the board of directors of State Owned Enterprises must be addressed urgently; the difference between the role of the board of directors and the management of the SOE should be clearly spelled out to avoid unnecessary misunderstanding. In fact, this is why the idea for the establishment of the

Namibia Institute for Public Management and Administration (NIPAM)[95] was born. To train and add value to the administrators in the public service, among others. Perhaps, one could ask, why are clear governance issues ignored in the public service? For instance, the role and responsibilities of the board of directors, the chairperson of the board and that of the management of a SOE are very clear, but ignored by the same people who are supposed to implement and obey such rules. Why? What is the State Owned Enterprises Governance Council (SOEGC)[96] doing about these and many other governance issues in the public service?

It is time that political interference in the management and affairs of the SOE is reviewed with a view to adding value and reducing conflicts, bureaucracy and inefficiency. No one can dispute that SOE are government institution and also no one can prevent political interference, if the government allows it and want so. However, in the last 25 years since independence, political interference in the running and management of SOE has done irreparable damage than any good.

It is extremely necessary to address the issue of personalities in the public service. Those are the people who think, act and behave as if they own the institution they work for. The behavior of such individuals is counterproductive and disruptive to the work of the SOE. Most SOE in Namibia are inhibited by such individuals. They often behave like they are not accountable to anyone, that they can start work and leave work any time, that they don't need to work for the government and they use work hours to attend to personal business. Their behavior are mostly influenced by the fact that they have long years of service for the institution, that they are well connected politically, that they are senior either in age and/or experience, that they belong to the right ethnic group, that they are influential, and of course, simply because of ignorance. These individuals are simply standing in the way of progress, transformation and are simply a betrayal to the pledge they made to the Namibia people upon taking their offices, either through the contract they signed or through other legal appointment methods, such as, by the Head of State and or otherwise, as the case may be. The public service cannot deliver efficiently and transform into one that has the aspirations and wishes of the people of Namibia at heart. One that can deliver good services to the poor and the vulnerable, the so called 'no bodies'. The status quo has certainly not worked, hence the need for review and change of direction. Thus such personalities should either shape up or ship out.

[95] Created by an Act of Parliament, Namibia Institute of Public Administration and Management Act, 2010 (N0. 10 of 2010), with the mandate to provide administration and management training to instill a culture of service in the Public service of Namibia, as well as for coordination, partnership-building, operational research and capacity evaluation. For more consult an article by this author, *Ibid*, at page 62.

[96] Created by State-owned Enterprises Governance Act, 2006 (No. 2 of 2006). This Act makes provision for the efficient governance of SOE and the monitoring of their performance. SOEGC, created under section 2 (1) of the Act with the aim to regulates, monitor and report on the work of the SOE.

New Government- new way of doing things!

No doubt that the Hage administration brought sweeping changes to the government and governance in the country with the complete overhaul of the public service. For the first time, Permanent Secretaries and all civil servants have to declare their assets, Permanent Secretaries has been realigned and new ones appointed, the A-team is in place, new rules and guidelines are brought in to beef up the existing once, and contract based performance managements system is revised. These are, but only, some of the changes. The new appointments and the A-Team are adding to the costs of running the government and, for sure, the Hage administration is one of the biggest and most expensive since independence.[97] One wonders if the size and cost of the administration will succeed to reduce the high level of poverty in the country, one of President Geingob's main objectives. No doubt that Namibia is witnessing changes that never happened before, and one hope that they will translate into practical realities to change the lives of many and fulfill the expectations not realized before. These are indeed fascinating times for Namibia.

Conclusion

The last 25 years of Namibia's independence could be taken as a learning curve that was marked by both achievements and challenges. It is important to remember that the proper function of Namibia as a modern state could be seriously compromised if nothing is done to reverse the status quo, as far as key challenges such as access to resources and re-distribution of land[98], poverty, inequality, proper shelter and sanitation are concerned. To that effect, Namibia need to transform its economy for the benefit of all Namibians collectively. This is one way to take this country forward. This is a challenge the new government under President Geingob can capitalize on to find credible solutions for the country. The people are waiting for changes, but their patience is warring thin. Only action, delivery and implementation can restore both. For Namibia, the future is still bright and full of hope.

[97] The President pleaded to be given time to govern and implement his ideas. He was quoted as saying, *"one only worries about the expenses if the resources are being wasted without any delivery. It is therefore fair to give the Team Hage a chance and if it fails to deliver then you can pass a verdict."* The President further said, he has high expectations on the performance of his team, and will be the first person to take them to task if they do not perform. See, The Namibian, Friday – 3 July 2015 at page 3.

[98] Government attempts to address land is dating back as far as the 1991 land conference followed by various policies and other interventions like the resettlement programme. Sadly, some of the interventions had negative implications, e.g. resettlement pushed up the prices of farms and land generally in the country, resettlement was dodged my corruption as it mostly resulted in the well connected individuals and those in high positions in government allocating themselves resettlement farms. One could conclude that the government has failed dismally on this issue. In 2014, the formation of Affirmative Repositioning by three land activists brought pressure on government again on the land issue. Recently, (Friday-10 July 2015) the government published the Cabinet Report on measures taken to address the land question. See New Era, Monday, 15 July 2015 at page 7.

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Namibia's Constitution in the context of environmental protection and combatting climate change

Oliver C. Ruppel & Katharina Ruppel-Schlichting

Introduction

Colonialism, apartheid and the unequal distribution of resources have curbed human rights and challenged progress in Namibia for a long time. Today, more than 25 years after Independence[1] and the promulgation of the Constitution of the Republic of Namibia[2], the country still faces challenges that impede, *inter alia*, the explicit recognition and effective implementation 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 to which the Namibian Government is subordinate and it also established a new regime relating to natural resources and foundation for environmental protection in the country. This chapter intends to show, how environmental concerns are anchored in Namibia's Constitution in general, and exemplarily, how the Constitution serves as a legal foundation to respond to current environmental challenges such as climate change.[3]

Environmental protection and the law

During the past decades, environmental concerns have been high on the legal agenda, with good reason. Mankind is part of nature and life depends on the uninterrupted functioning of natural systems as this ensures the supply of energy and nutrients. Humans are directly dependent on the ecosystems and natural resources. The dependence of people on ecosystems is often more apparent in rural communities where lives are directly affected by the availability of resources such as water, food, medicinal plants and fire wood. Further, ecosystems provide cultural, aesthetic, spiritual and intellectual stimulation. Every form of life is unique and merits respect, regardless of its worth to man. Humans can, however, alter nature and exhaust natural resources by action or its consequences and must therefore fully recognise the urgency of maintaining the stability and quality of nature and of conserving natural resources. Thus, environmental concerns have become subject to multiple law-making processes.

[1] Namibia became independent on 21 March 1990.
[2] No. 1 of 1990.
[3] This chapter is partially based on Ruppel, OC & KG Ruppel-Schlichting (Eds). 2016. *Environmental law and policy in Namibia – towards making Africa the tree of life*. Windhoek: Hanns-Seidel- Foundation. The publication can be downloaded at http://enviro-awareness.org.na/common-files/files/ELP3%20FINAL_WEB.pdf for further detailed information.

The term environment denotes the entire range of living and non-living factors that influence life on earth, and their interactions.[4] Everything living, humans, animals, plants and microorganisms are thus part of our environment, as well as non-living resources such as air, water, land, in addition to historical, cultural, social and aesthetic components; this includes the built environment. Given that all human activities, as well as all natural events have a direct or indirect impact on the environment, environmental protection virtually forms part and should be integrated into all areas of law and policy. An interdisciplinary and holistic approach is needed in order to adequately address environmental threats and concerns from a legal perspective. Disciplines that are relevant for the area of environmental law include the natural, physical and social sciences, history, ethics, and economics. Thus, environmental law cannot be seen as a distinct domain of law but rather as an assortment of legal norms, contained in a number of conventional fields of law.

In more detail, environmental law can thus be defined as the group of norms, rules, procedures and institutional arrangements found in civil and common law, statutes and implementing regulations, case law, treaties and soft law instruments, which deal with or relate to protection, management and utilisation of the environment and natural resources for sustainable development and/or intergenerational equity.[5]

But why is law needed to conserve our environment? Given that environmental degradation is largely caused by human intervention, the public authority responsible for preventing such negative effects will act by developing legal rules in order to have at hand binding norms. The obligatory character of environmental law and enforcement mechanisms are designed to prevent acts detrimental to the environment. Not only does environmental law establish rules and regulations, it also provides for other forms of intervention such as management tools, incentives and disincentives. However, binding rules are not the only element in environmental law; other, non-binding principles such as declarations or plans might just as well be appropriate to enhance environmental protection. Thus, environmental law is an essential remedy to pollution and to the depletion of the world's natural resources. International law is needed because most environmental challenges cross boundaries in their scope.[6] From a legal perspective, environmental protection can be achieved by international treaties and declarations, through national constitutions, and environmental policies determining the objectives and strategies

[4] The Namibian Environmental Management Act No. 7 of 2007 in Section 1 defines environment as: "the complex of natural and anthropogenic factors and elements that are mutually interrelated and affect the ecological equilibrium and the quality of life, including –

(a) the natural environment that is the land, water and air, all organic and inorganic material and all living organisms; and

(b) the human environment that is the landscape and natural, cultural, historical, aesthetic, economic and social heritage and values."

[5] See also Sands, P & J Peel. 2012. *Principles of international environmental law*. Cambridge: Cambridge University Press, p 13.

[6] Kiss, A & D Shelton. 2004. *International environmental law*. New York: Transnational Publishers, Inc, p 3.

which should be used in order to ensure the respect of environmental values, and further, through statutory legal instruments to reach the objectives fixed by the environmental policy.

The main function of environmental law is the use to safeguard and protect non-renewable resources for future generations. Further to this, renewable resources have to be managed in such a way that continuous supply is ensured and resource depletion is avoided, e.g. deforestation, which can also trigger climate change and desertification. Habitats upon which various species of animal life depend for survival have to be protected in order to retain the food chain. Also the essential character of natural treasures has to be preserved for future generations[7].

Namibian environmental law is a complex and interlocking system of statutes, policies, treaties, common, customary and case law with the Constitution as the supreme law of the land and therefore the ultimate source of law in Namibia.

Background and environmental concerns in Namibia

Namibia's surface area is 824,268 km^2 with three major categories of land tenure: the so-called commercial farmland with freehold tenure (approximately 44% of the country situated predominantly in the south and centre of Namibia), communal areas which are situated mainly in contiguous blocks in the northern Namibia (approximately 41% of the country), and the state land including conservation areas (approximately 15% of the country).

Namibia has common borders with Angola, Zambia, Zimbabwe, Botswana and South Africa and a coastline of 1,572 km at the Atlantic Ocean to its west. The Ocean with its cold, nutrient rich Benguela Current has a significant influence on Namibia's climate, vegetation and marine life. Main geographical areas in Namibia include two of the largest and most important great deserts, namely the Kalahari Desert in the east, which is dominated by stabilised dunes an the Namib Desert in the west, which comprises a wide range of landscape types. The Central Plateau with its Great Escarpment lying in the inland of the Namib plains and rising up above them is the third great landscape unit in Namibia.[8]

Namibia is one of the driest countries in sub-Saharan Africa with a mean annual rainfall of approximately 270mm with wide regional and seasonal variation. This is reflected in the country's rivers. Most of the rivers that rise in Namibia such as the Kuiseb are dry for most of the year, they are ephemeral and seasonal. The perennial rivers in Namibia

[7] Sands, P. 2003. *Principles of international environmental law*. 2nd edition. Cambridge: Cambridge University Press, p 252; Kidd, M. 2008. Environmental law. Cape Town: Juta, p 13.

[8] Goudie, A & H Viles. 2015. *Landscapes and landforms of Namibia*. Dordrecht: Springer, p 3; See also Mendelsohn, J, A Jarvis, C Roberts & T Robertson. 2009. *Atlas of Namibia: A portrait of the land and its People*. 3rd edition. Cape Town: Sunbird Publishers.

are located on the northern and southern borders and gain their flow in Zambia and Angola and in South Africa respectively. Only three perennial rivers reach the sea, namely the Orange, the Zambezi and the Kunene rivers, while the Okavango and the Kwanda flow into the the Okavango Delta and the Linyanti Swamps in the North of Botswana.

Major parts of Namibia are thus predominantly dependent upon ephemeral rivers and groundwater. [9]According to figures from the World Bank and based on the definition on arable land by the Food and Agriculture Organization (FAO)[10] only 1% of Namibia's land surface was arable in 2012.

Against the backdrop of variation in climate and aridity in the country, it is explainable that the vegetation cover in Namibia is generally low. The main groups of soils in the country are unconsolidated sand and shallow and weakly developed soils on bedrock[11]. Owing to very low contents of clay in the soil, the water holding capacity is generally very low. Nonetheless, Namibia has a broad variety of vegetation types including deserts, savannahs and dry woodlands. Moreover, Namibia has an abundant dense and diverse mammalian fauna.

To quite some extent, Namibia faces environmental problems that are similar to those experienced in many parts of Africa, including climate change, water stress, land degradation and soil erosion, deforestation, overexploitation (overhunting, overfishing and over-harvesting) and the introduction of invasive species and pollution. The root causes for environmental degradation as experienced worldwide also apply to Namibia. Environmental degradation is closely related to human actions, economies and policies. The direct causes for environmental degradation include overexploitation, over-consumption, pollution and a wide range of activities that have a direct impact on the environment. The major threats to the Namibian environment include unsustainable harvesting of wild plants and wildlife, soil erosion and water pollution, climate change but also alien invasive organisms that threaten the survival of indigenous species.

The environment in constitutional context

Many national constitutions cover environmental protection. While some constitutions establish environmental protection as a constitutional objective[12], others acknowledge a

[9] Goudie & Viles (2015:12); Sweet, J & A Burke. 2006. *Country pasture / forage resource profiles – Namibia*. Rome: FAO; available at http://www.fao.org/ag/agp/agpc/doc/counprof/PDF%20files/Namibia-English.pdf, last accessed 28 August 2015.

[10] According to which arable land includes land defined by the FAO as land under temporary crops (double-cropped areas are counted once), temporary meadows for mowing or for pasture, land under market or kitchen gardens, and land temporarily fallow (land abandoned as a result of shifting cultivation is excluded).

[11] Sweet & Burke (2006).

[12] E.g. the constitutions of Austria, Finland, France, Germany, Greece, the Netherlands, Sweden and Switzerland.

fundamental individual right to environmental protection.[13] 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[14], others include environmental concerns in the principles of state policy[15] rather than formulating a human right to environment as a fundamental human right.

When the Namibian Constitution came into force, it was lauded as a model for Africa because of 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.[16] 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.[17]

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.[18] Namibia has not totally relinquished its South African legal legacy and 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 Namibia has a considerable amount of pre-Independence legislation, of which some certainly needs renewal.

Since the Namibian Constitution does not provide explicitly for entrenched and enforceable environmental human rights, it has to be determined whether (and to what

[13] E.g. the constitutions of Belgium, Hungary, Norway, Poland, Portugal, Slovakia, Slovenia, Spain and Turkey.

[14] 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; just recently, a new Constitution of 2016 has been promulgated in the Ivory Coast, of which Article 27 entails a provision relating to environmental protection. The 2016 Constitution of the Ivory Coast is available at http://www. constitution-net.org/sites/default/files/2016-11/Draft%20Constitution%20of%20Ivory%20Coast_October%202016.pdf, last accessed 10 November 2016.

[15] 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".

[16] Article 130.

[17] Bukurura, SH. 2002. *Administration of justice in Namibia. Essays on constitutionalism and administration of justice in Namibia 1990-2002*. Windhoek: Out of Africa Publishers, p 57.

[18] Watz, FL. 2004. *Die Grundrechte in der Verfassung der Republik Namibia vom 21. März 1990*. Göttingen / Windhoek: Klaus Hess Publishers, p 21.

extent) these rights are covered by the Constitution's fundamental rights and freedoms, or whether the respective rights form part of it in other provisions, e.g. as principles of state policy. Arguable, the fundamental rights and freedoms – to life, human dignity and equality – reinforce claims that people may have to an environment of a certain quality, even if positive obligations on the part of the state are not imposed *per se*.

Constitutional provisions explicitly relevant for environmental protection

According to Article 1(6) of the Namibian Constitution, the latter is the law above all laws. Therefore, all legislation ought to be consistent with the provisions of the Constitution. The Constitution lays the foundation for all policies and legislation in Namibia and contains three key environmental clauses relevant to sustainable use of natural resources.

Article 95(l) of the Constitution

Environmental policy determines the objectives guiding, and the strategies to be used in order to strengthen the respect for environmental values, taking into account the existing social, cultural and economic situation. Article 101 states 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. [19]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. [20]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 foundation for the Namibian environmental policy framework is Article 95(l) of the Constitution, which stipulates that the state shall actively promote and maintain the welfare of the people by adopting policies, which include

> "the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory (…)".

Namibia's obligation to protect its environment and to promote a sustainable use of its

[19] (ibid.:186).

[20] Du Plessis, A. 2008. *Fulfilment of South Africa's constitutional environmental right in the local government sphere*. Nijmegen: Wolf Legal Publishers, p 177.

natural resources as spelled out in Article 95(l) has resulted in a wide variety of policies, which have a direct or at least an indirect impact on the environment. Those considered to be most relevant are listed in the table below:

Environment and Wildlife

Namibia's Environmental Assessment Policy

Policy for Prospecting and Mining in Protected Areas and National Monuments

National Policy on Human Wildlife Conflict Management

Water and Fisheries

Water Supply and Sanitation Policy

The National Water Policy Namibia's Draft Wetland Policy

Namibia's Aquaculture Policy – towards responsible development of aquaculture

Agriculture

The National Agricultural Policy

The National Drought Policy and Strategy

The Regional Planning and Development Policy

The National Seed Policy

Biotechnology

Enabling the Safe Use of Biotechnology Policy

Land

Land-use Planning: Towards Sustainable Development

The National Land Use Planning Policy

The National Land Policy

The National Resettlement Policy

The National Land Tenure Policy

Climate Change

Namibia's Climate Change Policy

Forestry

Namibia Forestry Strategic Plan Development Forestry Policy

Tourism

The Tourism White Paper

The Draft National Tourism Policy

The Community-Based Tourism Policy

Revised Draft Tourism Policy

Article 91 of the Constitution

In order to protect and maintain the respect of the state for the rights of the individual citizen, to promote the rule of law, and to promote and advance democracy and good governance, the Office of the Ombudsman has been established. The relevant legal provisions with regard to the Ombudsman are to be found in Chapter 10 of the Namibian Constitution as well as in the Ombudsman Act.[21] The mandate of the Ombudsman relates

[21] No. 7 of 1990.

to three widely-defined categories[22]: human rights, administrative practices, and the environment. Moreover, the Ombudsman contributes proactively towards education and development.[23]

Complaints, which are related to the mandate of the Ombudsman, may be submitted by any person, free of charge and without specific formal requirements. To ensure that citizens have an avenue, open to report complaints free of red tape, and free of political interference, the Ombudsman is politically independent, impartial, fair, and acting confidential in terms of the investigation process. Negotiation and compromise between the parties concerned are the main objective when handling complaints[24].

Article 91(c) stipulates that one of the functions of the Ombudsman is "the duty to investigate complaints concerning the over utilisation 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."

Beside the mandates on human rights and maladministration, the environmental mandate is of specific importance with regard to the legal implications of environmental concerns in Namibia. The power to investigate complaints concerning environmental issues contains unique provisions, which go beyond the traditional powers and functions of an Ombudsman institution. The environmental mandate of the Ombudsman is a progressive and innovative step towards environmental protection, which may have model rule character. However, the provision could be given a more vital role within the Ombudsman's activities.

Although the categories of maladministration and violation of human rights play the most vital role in the work of the Office of the Ombudsman[25], environmental concerns deserve equal attention. The imbalance as to complaints by specific mandates can be clearly seen when consulting relevant data of the recent years.[26]

[22] For more details on the mandates of the Ombudsman see Ruppel-Schlichting, K. 2010. "The Ombudsman and the environment". In Ruppel, OC & K Ruppel-Schlichting (Eds). *Environmental law and policy in Namibia – towards making Africa the tree of life*. Windhoek: Hanns-Seidel-Foundation, p 510.

[23] Walters, J. 2008. "The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsman". In N Horn & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education, p 122.

[24] Article 91(e) of the Constitution and Section 5(1) of the Act.

[25] Walters (2008:121).

[26] See the annual reports by the Office of the Ombudsman (2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015); available at https://www.ombudsman.org.na/reports/; last accessed 4 November 2016.

	2008	2009	2010	2011	2012	2013	2014	2015
Maladministration	872	1064	1,397	1,656	978	1,288	1,332	2,018
Human rights violations	138	165	236	221	189	236	199	341
Corruption	35	30	14	10	6	8	12	5
Environment	3	6	4	5	6	6	5	4
Miscellaneous	494	343	475	659	746	805	886	1,584
Total number of complaints	1,542	1,608	2,126	2,551	1,925	2,343	2,434	3,952

Two major points may by listed for the fact that the Office of the Ombudsman to date are not dealing with many complaints under the environmental mandate; on the one hand, the imbalance can be traced back to the nature of topics/complaints, with some occurring more frequently than others; on the other hand, despite the fact, that the Office of the Ombudsman endeavours to raise publicity for the institution and to take the office to the grassroots level[27], the awareness of the potential of the Ombudsman in environmental matters is very low. Many people are still unaware of the availability of the institution in environmental matters and thus, many cases of environmental concern do, regrettably, still not find their way to the Ombudsman office. The lack of sufficient specifically trained staff[28] and financial resources as well as the heavy workload are further challenges for the Ombudsman's activities in environmental matters. Nevertheless, the Ombudsman's environmental mandate is a progressive step towards environmental protection in Namibia and it is hoped that because of the multi-functionality of the Office this mandate can be invested with the much-deserved and needed importance in future.

Article 100 of the Constitution

Article 100 of the Constitution vests all natural resources in the state, unless otherwise legally owned. Thus, unless legal ownership of natural resources in a specific locality is proven, such natural resources are owned by the state; the provision also implies that natural resources can be legally owned as private property. Article 100 enshrines the principle of state sovereignty over natural resources providing the sovereign right of the state to exploit and utilise natural resources according to its own national policies. Under the public trust doctrine emanating from Article 100 read together with schedule 5 of

[27] Tours all over the country are recurrently undertaken by the Office of the Ombudsman to expose the office to the population and to enhance publicity; alongside the main Office of the Ombudsman in Windhoek, the institution maintains branches in Keetmanshoop and Oshakati.

[28] However, several training measures on environmental issues, such as workshops on environmental law in Namibia, have been performed recently in order to train staff of the Office of the Ombudsman in environmental matters. Further projects of this kind are on the Ombudsman's agenda in the near future.

the Constitution all water is controlled by the state and can be regarded as a common resource. Since the exploitation of natural resources is also deemed to have destructive effects to ecosystems and habitats that support essential living resources, exploitation activities such as mining activities therefore need to be monitored with regard to their impacts on human and environmental rights.

With 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. This is particularly true in the light of the global economy's growing dependence on natural and exhaustible resources extracted in Africa.

The legal perception of Article 100 is not uncontested, which becomes evident in the case of water resources. It has been argued that the state's water ownership is in contradiction to the customary law of at least some ethnic group.[29] The Water Act No. 54 of 1956[30] distinguishes between private and public water. Private water is that which flows, naturally rises, falls or generally drains or is directed into land but is not available for common use.[31] Public water includes any water flowing or found in or derived from the bed of a public stream, whether visible or not.[32] There is no private property right to public water[33], and the sole and exclusive use and enjoyment of private water is vested in the owner of the land on which such water is found.[34] The Act thus gives preferential abstraction rights to the landowners on whose land such water is found.[35] This private-public water dichotomy might be unconstitutional in the current constitutional dispensation. While the Act provides for private and public water, the Constitution regards natural resources as common resources thus they constitutionally belong to the state unless otherwise lawfully owned.

[29] Mapaure, C. 2010. *'Water wars': Legal pluralism and hydropolitics in Namibian water law.* Unpublished thesis submitted in partial fulfilment of the degree of Master of Laws (LLM), University of Namibia.

[30] Although the new Water Resources Management Act No. 11 of 2013 has been passed by Parliament, signed by the President and published in terms of the Namibian Constitution, it has not yet come into operation as the Minister has not yet determined a date for the Act to come into operation as required by Section 134 of the Act. Regulations to implement the Act are currently under preparation. Once in operation, the Act repeals both, the Water Resources Management Act No. 24 of 2004 (which had de facto never come into force) and the Water Act No. 54 of 1956 as a whole.

[31] Section 1.

[32] Section 1.

[33] Section 6.

[34] Section 5.

[35] Land-based entitlement: Rights to abstract and use public and private water is based on the riparian principle which means that the right to water usage is determined by the location of the water resources in relation to the land.

Other constitutional provisions relevant for environmental protection

The Constitution explicitly states that Namibia is established as "a democratic and unitary state founded on the principles of democracy, the rule of law and justice for all." Although not particularly designed to enhance environmental protection, several provisions of the Constitution are implicitly relevant when it comes to environmental concerns.

Fundamental Rights and Freedoms (Chapter 3 of the Constitution)

Chapter 3 of the Namibian Constitution outlines 16 fundamental rights and freedoms, reflecting the values and spirit of the independent Namibian nation. The Constitution excels in being a document that guarantees human rights by comprehensive coverage and provisions set out in clear language. Human rights are justiciable as their protection can be secured through the courts.[36] 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 are to be respected and upheld by the Executive, the Legislative and the Judiciary, all organs of Government, its agencies, and, where applicable, by all natural and legal persons in Namibia.[37] As mentioned above, the Namibian Constitution does not include environmental concerns explicitely in its catalogue of fundamental rights and freedoms. However, some Articles in the Namibian Constitution are in one way or another related to promoting the protection of environmental human rights and justice.

Article 6 regulates, amongst others, 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. As such, the right to life is one that should be interpreted narrowly and this arguably requires the state to adopt positive measures. Presenting compelling facts, however, is critical for an individual to successfully present a case. Obviously, the most compelling cases involve environmental harm that is likely to cause death in the short term.[38]

Article 8 of the Namibian Constitution states that "[t]he dignity of all persons shall be inviolable." This 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 human rights, as a person's health, well-being and respect-worthiness are subject to environmental human rights, as e.g. access to clean and sufficient water, sanitation services, and waste disposal are

[36] Bukurura (2002:21).
[37] Article 5.
[38] Herz, R. 2008. "Litigating environmental abuses under the alien tort claims act: a practical assessment". *Yearbook of Human Rights and Environment.* 173-281.

aspects relevant to human dignity.[39]

The Constitution deals with administrative justice in 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. This article obviously plays an eminent role in the proper implementation of administrative measures, being a means of achieving compliance with environmental laws and, thus promoting environmental human rights in Namibia. Article 5 contains the fundamental obligation enshrined in modern constitutionalism according to which the three organs of the state – 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 invested with real constitutional and legal weight.[40]

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 International Covenant on Economic, Social and Cultural Rights (ICESCR). In terms of these two legal obligations, Government is required to take legislative and administrative action to ensure the fulfilment of these rights. Although Chapter 3 is not primarily aimed at protecting economic, cultural and social rights (such as those of Article 19), it is important to remember that Article 5 makes those listed within Chapter 3 legally enforceable. From this arose the right to profess, maintain and promote a language in the case of *Government of the Republic of Namibia v Cultura 2000.*[41] Cultural diversity is also closely linked to ecological biodiversity.[42] The collective knowledge of biodiversity, its use and its management rests in *cultural diversity*, and can, therefore, also be regarded as an (indigenous) environmental human right.[43] 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[44] comprising Namibia's society are protected.

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[39] The World Health Organisation. 2003. *The right to water.* WHO Health and Human Rights Publication Series, 3; available at http://www.who.int/docstore/water_sanitation_health/ Documents/righttowater/righttowater.htm, last accessed 11 November 2016, p. 18.

[40] Hinz, MO. 2009. "More administrative justice in Namibia? A comment on the initiative to reform administrative law by statutory enactment". 1 *Namibia Law Journal:* 81-89.

[41] 1994 (1) SA 407 (NmS).

[42] See in detail Hinz, MO & OC Ruppel. 2008. "Legal protection of biodiversity in Namibia". In MO Hinz & OC Ruppel (Eds). 2008. *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society, pp 3-62.

[43] (ibid.:57).

[44] Indigenous groups can be defined as "originating in and characteristic of a particular region or country; native; … e.g. the indigenous peoples of southern Africa." See http://dictionary. reference.com/browse/indigenous; last accessed 19 December 2015.

Article 44 Legislative Power

According to Article 44 of the Constitution, the National Assembly has the power to pass laws with the assent of the President as provided in the Constitution. Since Independence, the National Assembly has passed a wide number of enactments, also pertinent – directly or indirectly – to environmental issues. Environmental framework legislation of cross-sectoral nature such as the Environmental Management Act[45] or the Nature Conservation Ordinance[46] are rather broad in scope, while sectoral legislation such as the Forest Act[47] cover specific environmental issues. The following list, which raises no claim to completeness, shows the rich body of environmental legislation in Namibia. The substantial number of enactments emphasises the relevance of environmental concerns in Namibia on the one hand, on the other, it reflects the fragmentation of environmental law, which is one of the major challenges of environmental law with a view to administration and enforcement.

Article 66 of the Constitution: customary and common law

Article 66 of the Namibian Constitution lays the foundation for the constitutional recognition of customary law. It states that both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent that such customary or common law does not conflict with the Constitution or any other statutory law.

Customary law

Before the arrival of colonists, indigenous populations have lived for generations according to their own distinctive laws and despite the legal influence of the ex-colonial powers, a large number of Namibians still live under indigenous customary law. Most of the customary rules have been transmitted orally from generation to generation, the process of ascertaining customary law in Namibia is ongoing.[48]

[45] No. 7 of 2007.
[46] No. 4 of 1975.
[47] No. 12 of 2001.
[48] The ascertainment of customary law project under the responsibility of the Human Rights and Documentation Centre of the Faculty of Law of the University of Namibia and undertaken in co-operation with the Ministry of Regional and Local Government, Housing and Rural Development and the Ministry of Justice, Law Reform and Development Directorate has the ultimate goal to ascertain and publish all the individual customary laws of Namibia. Namibian customary laws are subject to a three-volume series. Volume 1 contains the customary laws of the Owambo, Kavango and Caprivi communities; Volume 2 the customary laws of the Bakgalagari, the Batswana ba Namibia and the Damara communities and Volume 3 the customary laws of the Nama, Ovaherero and Ovambanderu and San communities. The customary laws are published in two languages: English, the official language in Namibia, and the vernacular language of the individual communities. See Hinz, MO (Ed.) assisted by NE Namwoonde. 2010. *Customary law ascertained. Volume 1: the customary law of the Owambo, Kavango and Caprivi communities of Namibia*. Windhoek: Namibia Scientific Society; Hinz, MO. (Ed.) assisted by A Gairiseb 2013. *Customary law ascertained. Vol. 2. The customary law of the Batswana ba Namibia, Bagkala-*

Section 3 of the Traditional Authorities Act[49] gives certain powers, duties and functions to traditional authorities and members thereof. It is the overall responsibility of traditional authorities to supervise and ensure the observance of the customary law of that community by its members. As to nature conservation it is one of the duties of a traditional authority to ensure that members of the traditional community use the natural resources at their disposal on a sustainable basis and in a manner that keeps the environment and maintains the ecosystem for the benefit of all Namibians. Customary law plays an important role in the sustainable development of natural resources and the protection of biological diversity as it incorporates a broad knowledge of ecosystems relationships.[50]

For the protection and management of forest resources for example,[51] many of the customary laws contain specific provisions for the protection of plants, trees and forests. One example[52] is Section 12 of the Laws of Ombalantu on the protection of forests, providing that "forests shall be protected and shall not be cut down, because this can lead to deforestation (…). No one shall cut down a tree, which bears fruit. The fine for this is a payment of two head of cattle".

Common law

Common law[53] refers to law and the corresponding legal system developed through court decisions and similar tribunals, rather than through statutory enactment. Common law is created and refined by judges: a decision in the case currently pending depends on decisions in previous cases and affects the law to be applied in future cases. When there is no authoritative statement of the law, judges have the authority and duty to make law by creating precedent.

Several common law doctrines are relevant in terms of environmental protection. For example, the common law rule of delict can be applied with regards to wrongful acts

gari, Damara, Otjiherero-speaking and San communities. Windhoek: UNAM Press. Hinz, MO (Ed.) assisted by A Gairiseb. 2015. *Customary law ascertained. Vol. 3. The customary law of the Nama, Ovaherero, Ovambanderu and San communities*. Windhoek: UNAM Press.

[49] No. 25 of 2000.

[50] Hinz & Ruppel (2008:57).

[51] Muhongo, M. 2008. "Forest conservation and the role of traditional leaders: a case study of the bukalo community forest". In MO Hinz & OC Ruppel. *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society, pp 197-208; Mapaure, C. 2012. "who legally owns water in Namibia's communal areas? a critical analysis of observations from empirical experience". In MO Hinz, OC Ruppel & C Mapaure (Eds). *Knowledge lives in the lake. case studies in environmental and customary law from southern Africa*. Windhoek: Namibia Scientific Society, pp 207-232.

[52] Further relevant customary law provisions are contained for example in Section 5.2 of the Laws of Ombadja, Section 16 of the Laws of Ongandjera; Section 8.1 of the Laws of Uukwaluudhi; Section 16.1 of the Laws of Uukwambi; the Sections on Deforestation and Gathering of Firewood of the Laws of the Mashi; or Section 10.3 of the Laws of the Mayeyi.

[53] For further details on the common law in Namibia see Amoo, SK. 2008. *An introduction to Namibian law*. Windhoek: Macmillan Education, p 62.

or omission; fault, either intended or through negligence; or harm to person or property (patrimonial loss).[54] The law of nuisance, including public and private nuisance is equally applied in cases with environmental impact and the neighbour legal principle of *sic utere tuo ut alienum non laedas* (use your property in a way which does not harm another) is considered to be one of the roots of environmental protection. The remedies available under the common law are self-help, an abatement order, action for damages and an interdict. The principal remedies for preventing or restraining an environmental nuisance or delictual conduct are an interdict and, where harm has already been caused, a claim for damages in terms of Aquilian action.[55]

Especially from a common law perspective, environmental litigation is an important facet for the vital development of environmental law. Judicial intervention related to environment-related issues arises when persons resort to court action to seek redress for a grievance. Court action can be either of civil or of criminal nature. While civil action is typically resorted to by private parties, criminal action is generally the preserve of public authorities. Judicial decisions in environment-related decisions are scarce in Namibia, which is no surprise given the novelty of environmental law and Namibia's tender age.[56] However, being a plural legal system with substantive common law elements, Namibia can greatly benefit from the experience with environment related cases in other countries.[57]

Over all, it can be concluded, that the common law rules complement environmental statutory enactments; this is also true, when it comes to their application and interpretation. It is this gradual convergence of conventionally disparate legal families that leads towards a system that recognises the complementary roles of legislation and judicial precedents as sources of law. In this context, the role of judges in the development of the common law and – at the same time – the judicial interpretation of statutes should not be underestimated. However, where pollution is, for example, expressly prohibited by means of legislation, it is usually the state that has the responsibility "to take the necessary steps to put a stop to the action or to prosecute the offender", whereas under com-

[54] Kidd, M. 2008. *Environmental law*. Cape Town: Juta, p 133.

[55] For further literature and South African case law references on the common law and other remedies in environmental law, cf. A Paterson & LJ Kotzé (Eds). 2009. *Environmental compliance and enforcement in South Africa: legal perspectives*. Kenwyn: Juta.

[56] Environment-related cases in Namibia are mostly of criminal nature and fall under the scope of the Nature Conservation Ordinance No. 4 of 1975. The cases include but are not limited to the following: *S v Ngombe* 1990 NR 165 (HC); *S v Machinga* 1990 NR 157 (HC); *Skeleton Coast Safaris v Namibia Tender Board and Others* 1993 NR 288 (HC); *S v Makwele* 1994 NR 53 (HC); *S v Koortzen* 1994 NR 356 (HC); *S v Kau and Others* 1995 NR 1 (SC); *S v Vorster* 1996 NR 177 (HC); *S v Seibeb and Another; S v Eixab* 1997 NR 254 (HC); *S v Maritz* 2004 NR 22 (HC); *S v Aukemeb* 2009 (1) NR 19 (HC); *Van Rensburg and Another v Government of the Republic of Namibia* 2009 (2) NR 431 (HC); *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others* 2009 (2) NR 670 (HC).

[57] For a collection of environmental decisions see United Nations Environment Programme. 2005. *Compendium of summaries of judicial decisions in environment-related cases.* Nairobi: UNEP Environmental Law Branch.

mon law the plaintiff needs to take up the matter and therefore has to carry the "burden of expense, time and other pressures"[58].

Article 144: International Law

Further to the above sketched constitutional provisions, Article 144 must be pointed out as the constitutional link to international environmental law applicable in Namibia.[59]

Namibia, since Independence, has put a strong emphasis on integrating environmental concerns into the post-colonial legal framework. Many legislative steps have been taken, in order to comply with its obligations under international law and to ensure the conservation of natural resources by legislative means.

Article 144 of the Namibian Constitution incorporates international law explicitly as law of the land and it needs no legislative act to become so.[60]International law is thus integrated into domestic law. National authorities and the judiciary in particular can, therefore, apply international law directly on the national level, before cases are taken to regional or international judicial or quasi-judicial bodies. However, international law has to conform to the Constitution in order to apply domestically. Whenever a treaty provision or other rule of international law is inconsistent with the Namibian Constitution, the latter will prevail.[61] Further to Article 144, Article 96 of the Constitution promotes international cooperation, peace and security. It also exhorts respect for international law and treaty obligations as a principle of state policy. Article 144 mentions two sources of international law that apply in Namibia: general rules of public international law and international agreements binding upon Namibia. General rules of public international law include rules of customary international law, supported and accepted by a representatively large number of states.
Two criteria have, crystallised with regard to the requirements for a rule to become international customary law.[62] The prerequisite for the first criterion, namely that of settled practice (*usus*), is a constant and uniform usage or widespread acceptance of a rule. The acceptance of an obligation to be bound (*opinio juris sive necessitatis*) is the second criterion.[63]

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[58] Kidd (2008:134).

[59] Article 144 reads as follows: "Unless 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."

[60] Erasmus, G. 1991. "The Namibian constitution and the application of international law in Namibia". In D van Wyk et al. (Eds). *Namibia – Constitutional and international law issues.* Pretoria: VerLoren van Themaat Centre for Public Law Studies: 81-110.

[61] (ibid.:94).

[62] These criteria, which are being applied by national courts as well, have been developed by international jurisprudence inter alia in the following cases: *Asylum case* 1950 ICJ Reports 266; *North Sea Continental Shelf Case (West Germany v The Netherlands and Denmark)* 1969 ICJ Reports 3; *Nicaragua Case (Nicaragua v US)* 1986 ICJ Reports 14.

[63] For a detailed discussion see Sands (2003:143).

Many international customary law rules relevant for the field of environmental law have been developed.[64] The principle that no state may use or permit to use its territory in such a manner as to cause injury to the territory of another state has for example become a principle of international customary law. This principle goes back to the Trail Smelter Arbitration in 1941[65] and was taken up by the Stockholm Declaration, repeated in the Rio Declaration and reaffirmed in the Nuclear Weapons Case.[66]

The duty to warn other states promptly about emergencies of an environmental nature and environmental damages to which another state or states may be exposed is contained in the 1978 Principles Concerning Shared Resources, drafted by UNEP, and also contained in Article 192 of the 1982 UN Convention on the Law of the Sea. This duty was neglected by the Government of the Soviet Union in the case of the Chernobyl disaster in 1986. As a consequence, the 1986 Convention on Early Notification of a Nuclear Accident was adopted, which in Article 2 explicitly imposes a duty upon states to notify those states which are or may be physically affected of a nuclear accident.

The notion of 'international agreement' primarily refers to 'treaty' in the traditional sense, i.e. international agreements concluded between states in written form and governed by international law, [67]but it also includes conventions, protocols, covenants, charters, statutes, acts, declarations, concords, exchanges of notes, agreed minutes, memoranda of understanding, and agreements[68]. Notably, not only agreements between states, but also those with the participation of other subjects of international law, e.g. international organisations, are covered by the term 'international agreement'. In general, international agreements are binding upon states if the consent to be party to a treaty is expressed by a signature followed by ratification; or by accession, where the state is not a signatory to a treaty; or by declaration of succession to a treaty concluded before such a state existed.

As mentioned above, international agreements, will become Namibian law when they come into force for Namibia. The conclusion of or accession to an international agreement is governed by Articles 32(3)(e), 40(i) and 63(2)(e) of the Namibian Constitution. The Executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required by the Constitution that the National Assembly agrees to the ratification of or accession to an international agreement. However, the Constitution does not require the

[64] For further reference see Sands (2003:147) and Kiss (2004:49).
[65] *Trail Smelter Arbitration* (1938/1941) 3 RIAA 1905 Arbitral Tribunal: US and Canada.
[66] Advisory Opinion, ICJ Rep. 1996, 226 at para 64 ff.
[67] Definition in Article 1 of the Vienna Convention on the Law of Treaties of 1969, which entered into force in 1980.
[68] Cf. the definition of 'treaty' proposed by the International Law Commission; Article 2(a) of the Draft Articles on the Law of Treaties, with commentary, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf; last accessed 15 September 2015.

promulgation of an international agreement in order for it to become part of the law of the land.[69]

Namibia is a state party to a large number of Multilateral Environmental Agreements (MEAs). This emphasises Namibia's strong environmental commitment. Every membership of a MEA brings about benefits as well as obligations for Namibia. The relevance of international relations and cooperation has been highlighted in the recently launched Government's action plan towards prosperity for all titled Harambee Prosperity Plan 2016/17 – 2019/20[70] in which climate change and biodiversity conservation are explicitly mentioned as areas for envisaged actions and strategies within international cooperation.

Aside from the immediate benefits of advanced environmental protection, there are also long-term effects. For instance environment-related public health problems with a bearing on development are dealt with proactively and internationally[71]. Many MEAs improve environmental governance and generally promote transparency, participatory decision-making, accountability, conflict resolution, and have an indirect positive influ- ence in terms of democratisation processes in any given developing country context. In some cases, it is beneficial to become a party to a MEA in order to obtain financial as- sistance for addressing environmental problems, and, more importantly, MEAs may also facilitate technical assistance, for example through knowledge and technology transfer.

As a member of the United Nations (UN), the African Union (AU) and the Southern African Development Community (SADC), Namibia has signed many international agreements relevant for environmental protection and environmental covenants, treaties, conventions and protocols and is, therefore, obliged to conform to their objectives and obligations.

Climate change from a constitutional perspective

Introduction to climate change law

Niels Bohr's aphorism that "prediction is difficult, especially about the future" becomes less and less viable in the context of climate change. In 2014, the Intergovernmental Panel on Climate Change (IPCC) released its 5th Assessment Report on Climate Change (AR5), which highlights the risks climate change poses to human and natural systems. Although the report provides thorough evidence that climate change is a pressing and present reality, the IPCC has so far avoided making normative statements encapsulating its general findings. Yet, normative claims are inevitable to give societal meaning to the scientific and empirical findings, generated by the IPCC reports. Therefore, science and

[69] Hinz & Ruppel (2008: 8).
[70] The Harambee Prosperity Plan is available at http://www.gov.na/documents/10181/264466/HPP+page+70-71.pdf/bc958f46-8f06-4c48-9307-773f242c9338, last accessed 15 November 2016.
[71] United Nations Environment Programme. 2006. *Manual on compliance with and enforcement of multilateral environmental agreements.* Nairobi: UNEP Division of Environmental Conventions, p 44.

law need to be brought together to make a significant and timely difference to humanity in the face of climate change, especially to those most severely affected.

AR5 presents strong evidence that the impacts[72] of climate change in Africa are already being felt across various sectors. Climate change poses challenges to economic growth and sustainable development and to the various facets of human security. Although detection of and attribution to climate change are often difficult given the role of drivers other than climate change, there are substantially more impacts in recent decades now attributed to climate change[73]. Various examples show, however, that climate change exerts extensive pressure on different ecosystems such as terrestrial, freshwater, and coastal/ocean ecosystems[74]. The health, livelihoods and food security of people in Africa are all affected by climate change. And as "Africa as a whole is one of the most vulnerable continents due to its high exposure and low adaptive capacity", [75]innovation and technology, smart policy making, high levels of Government attention, effective diplomacy, and international cooperation are required in order to effectively address the current and future challenges related to climate change.

[72] Impacts of climate change are the "effects on natural and human systems of extreme weather and climate events and of climate change. Impacts generally refer to effects on lives, livelihoods, health, ecosystems, economies, societies, cultures, services, and infrastructure due to the interaction of climate changes or hazardous climate events occurring within a specific time period and the vulnerability of an exposed society or system. Impacts are also referred to as consequences and outcomes. The impacts of climate change on geophysical systems, including floods, droughts, and sea level rise, are a subset of impacts called physical impacts." Intergovernmental Panel on Climate Change. 2014. "Summary for Policy Makers". In CB Field, VR Barros, DJ Dokken, KJ Mach, MD Mastrandrea, TE Bilir, M Chatterjee, KL Ebi, YO Estrada, RC Genova, B Girma, ES Kissel, AN Levy, S MacCracken, PR Mastrandrea & LL White (Eds). *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*. Cambridge: Cambridge University Press, p 5.

[73] Intergovernmental Panel on Climate Change. 2014. *Climate change 2014: Synthesis report. Contribution of working groups I, II and III to the fifth assessment report of the Intergovernmental Panel on Climate Change*. Geneva: IPCC; available at http://www.ipcc.ch/pdf/assessment- report/ar5/syr/SYR_AR5_FINAL_full.pdf, last accessed 15 October 2015, p 7.

[74] See Niang, I & OC Ruppel. 2014. "Africa". In CB Field, VR Barros, DJ Dokken, KJ Mach, MD Mastrandrea, TE Bilir, M Chatterjee, KL Ebi, YO Estrada, RC Genova, B Girma, ES Kissel, AN Levy, S MacCracken, PR Mastrandrea & LL White (Eds). *Climate change 2014: Impacts, adaptation, and vulnerability. Contribution of working group II to the fifth assessment report of the Intergovernmental Panel on Climate Change*. Cambridge: Cambridge University Press, p 1214.

[75] (ibid.:1205).

Changes in climate are most often analysed in terms of their impacts and adaptation and mitigation strategies. Relatively undiscussed are the general questions of how climate change may affect current law-giving and its implementation. For instance, human-induced (that is human-made) climate change raises the question whether and to what extent previously termed 'Acts of God', may be used as an actual or implied defence in a legal process. If an 'Act of God' is defined as an unforeseeable natural phenomenon, due to natural causes and which could not have been prevented via human planning and foresight, then it would seem that climate change falls foul of all these conditions.

The fact is, (1) climate change is increasingly foreseeable, (2) it is only partly a natural phenomenon and (3) it can be prevented, at least partially, by appropriate action or actions via mitigation. Where climatic changes become increasingly foreseeable, courts will need to determine the delimitations of the 'Act of God' defence justification. And in order to avoid negligence politicians should start getting ready to apply due diligence and reasonable precautionary measures in good time.

Climate change permeates the law in many ways[76], creating intersections of law in its diverse fields. Climate change law, an emerging legal discipline, is both international and domestic in nature and includes, at least, two complementary dimensions: a *procedural* and *substantive one*. The *procedural* dimension refers to the right to climate information, the right to participate in climate related decision-making, and the right of access to climate justice. Climate change opens a multitude of procedural challenges with the requirement of legal standing leading the way.

Climate change law consists of the sum of legal provisions protecting the climate itself and those that need protection from the negative effects of climate change. The *substantive* dimension of climate change law is far reaching and can embody *inter alia* constitutional law; administrative law; environmental law; maritime law; water law and the law of the sea; coastal law; biodiversity law; agricultural law; building and planning law; human rights law; humanitarian law; criminal law; the law of nuisance; the law of tort; liability law including the 'Act of God' doctrine mentioned above; insurance law; trade and investment law; and even tax law.

In a horizontal sense, climate change law intersects at different levels of international and national law. The horizontal level would entail international law with multilateral agreements on the global, regional and sub-regional level, bilateral and unilateral agreements, general principles of law, customary international law, case law, and other instruments such as the United Nations Framework Convention on Climate Change (UNFCCC). National laws that may be affected or contribute to tackle existing climate challenges consist of constitutional law, such as fundamental human rights such as the right to

[76] For deeper insights into climate change and the law see Ruppel, OC, C Roschmann & K Ruppel-Schlichting (Eds). 2014. *Climate change: International law and global governance. Volume I: Legal responses and global responsibility; Volume II: Policy, diplomacy and governance in a changing environment.* Baden-Baden: Nomos Verlag.

food, health or environment enshrined in a national constitution, statutory law, such as legislation on energy and policies where many countries have developed specific climate change policies, strategies and action plans, common law, including public and private nuisance and tort claims, case law and other relevant instruments.

Intersections of law not only occur with regard to the question whether it is national or international law that applies, or both, but also within the categories of national or international law themselves. Disasters, for instance, are not constrained by administrative boundaries and require trans-boundary policies.

Climate law (national, regional and international) should also form part of a social protection system for food security and resilience building and climate change. The demarcation between 'hard' and 'soft' law can create complications, however. Some of the sources of national and international law are obligatory; others are of a non-binding nature. In the climate change context, the lack of globally applicable enforceable legal obligations is without doubt one of the major deficiencies. The intersections of international climate change law and multiple overlapping regulatory bodies reflect the fragmentation of global climate change governance in the absence of a universal climate change regime. This makes international climate change law extremely complex and global climate governance unorchestrated. In face of the above and despite the fact that climate change action goes beyond the capacity of national governments, it seems most likely that challenges at the national level will be the preferred to deal with climate change inaction.

Climate change law has the potential to shake the foundations of previously held ideas of the grounds for litigation by groups, regions or governments given environmental damage caused by climate change. It intersects with and will colour the development of many aspects of current international law and will have to deal with completely new categories of legal issues, such as the status of 'climate refugees', who will move as their adaptive response to climate change.

Comparative constitutional aspects of climate change

Climate change and environmental regulation are not expressly covered by the Constitution. Nevertheless, there are now some basic understandings that constitutions can explicitly address climate change or at least be interpreted in a way that accommodates major concerns related to climate change.

Only very few Constitutions in the world so far explicitly cover climate change. Just recently, Tunisia's parliament celebrated the signing into law of its new Constitution[77]. The Constitution among others contains provisions on health care, women's rights and - most notably – on climate change. In fact, by embedding climate protection in its text,

[77] The Constitution is available at https://www.constituteproject.org/constitution/Tunisia_2014. pdf, last accessed 10 November 2016.

Tunisia has joined a small group of countries to do so. The opening preamble of the new Constitution notes "the necessity of contributing to a secure climate and the protection of the environment." And the new climate clause under Article 45 reads as follows:

> "The state guarantees the right to a healthy and balanced environment and the right to participate in the protection of the climate. The state shall provide the necessary means to eradicate pollution of the environment."

Section seven of Ecuador's Constitution of 2008[78] on Biosphere, urban ecology, and alternative sources of energy provides that:

> Article 413. The State shall promote energy efficiency, the development and use of environmentally clean and healthy practices and technologies, as well as diversified and low-impact renewable sources of energy that do not jeopardize food sovereignty, the ecological balance of the ecosystems or the right to water.
>
> Article 414. The State shall adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk.
>
> Article 415. The central State and decentralized autonomous governments shall adopt integral and participatory policies for urban development and land use planning that make it possible to regulate urban growth, manage urban fauna, and promote the establishment of green areas. Decentralized autonomous governments shall develop programs for the rational use of water, the reduction of recycling and the adequate treatment of solid and fluid waste. Non-motorized overland transportation shall be promoted and facilitated, especially with establishment of bike lanes.

And Article 194 of the Constitution of the Dominican's Republic of 2010 which deals with the plan of territorial ordering reads as follows:

> "The formulation and execution, through the law, of a plan of territorial ordering that assures the efficient and sustainable use of the natural resources of the Nation, in accordance with the need of adaptation to climate change, is a priority of the State."

The examples above show, that climate change is becoming more and more relevant, also from a constitutional perspective. National governments take the issue of climate change seriously and incorporate it in their supreme laws, which shows a laudable and progressive approach. What will remain a major challenge however, is the interpretation and effective implementation of such provisions.

[78] The Constitution is available at http://pdba.georgetown.edu/Constitutions/Ecuador/english08. html, last accessed 10 November 2016.

Climate change in the context of Namibia's Constitution

As mentioned above, climate change is not explicitly enshrined in Namibia's Constitution. However, as climate change is and will continue to be one of the major environmental challenges for Namibia, the Constitution needs to be interpreted and applied in a manner that meets the requirements of effective mitigation and adaptation. And, in fact, the Constitution offers various mechanisms to do so as will be shown in the following.

Namibia is considered to be one of the driest countries in southern Africa. The cold Benguela current along the west coast and Namibia's location traversing the subtropical high-pressure belt greatly influences the main features of the climate. The climate of Namibia is characterised by high variability. This in part, contributes to making Namibia vulnerable to the impact of climate change.

Namibia is very vulnerable to the effects of climate change due to the arid nature of the country, limited capacity to deal with the effects and inadequate technical and financial capacity for adaptation, given that there is a myriad of other challenges (e.g. poverty, HIV and AIDS, unemployment) that need to be dealt with in addition to climate change. The evidence for impacts of climate change are very clear, manifested by more intense flooding, shortening of the growing season, more frequent droughts, rising average summer and winter temperatures, frequent heat waves, among many other effects. This conforms to predictions that paint a gloomy picture of rising temperatures and declining rainfall in most areas. There will be an accelerated decrease in biodiversity, increasing evaporation leading to water scarcity, low crop yields leading to food shortages and insecurity, declining marine productivity, flooding of coastal areas and changes in the distribution of disease patterns and their vectors. The economic sectors of Namibia that will be affected most are agriculture, biodiversity and ecosystems, coastal areas, energy, health, marine resources and water.

Climate change in Namibia has an impact on access to water and sanitation, health, agriculture, fisheries and marine ecosystems, forestry, energy, and human settlements.[79] A growing body of evidence has demonstrated that poor and other disenfranchised groups are the greatest victims of environmental degradation. In Namibia, the majority of the population lives in rural areas, where poverty is a sad reality and remains one of the great- est challenges in the southern African region. The combined impact of climate change is expected to reduce livelihood opportunities even further, to reduce biodiversity and food security; the prevalence of drought and flooding will increase. Predicted impacts associated with temperature increases include a further rise in sea levels, changes in precipitation patterns, and the resultant threat to food security and sustainable develop- ment in general, with more people being caught up in the poverty trap. Limited adaptive management puts Namibia's population and its natural resources at risk.

[79] Karuaihe, S, JK Mfune, O Kakujaha-Matundu & E Naimwhaka. 2007. *MDG7 and climate change: challenges and opportunities: Namibia country study*. Prepared for the Ministry of Environment and Tourism. Windhoek: UNDP, p 34.

Thus, integrat- ing adaption and mitigation strategies into the legal framework is essential. Additionally, access to information, public participation and the development of an educational approach is called for. Finally, interdisciplinary research into the effects of climate change needs to be consolidated.

Implementing Article 144 of the Constitution: Namibia and the UNFCCC

International law and its application through Article 144 of the Constitution play a significant role with regard to climate change. As a party to the United Nations Convention on Climate Change (UNFCCC) and other international instruments, Namibia is taking steps to minimise the impacts of climate change on the people and the economy by putting in place relevant policies, structures and institutions for dealing with climate change and enhancing adaptive and mitigation capacity. Namibia's greenhouse gas emissions are insignificant. In fact, Namibia is a net sink for CO^2 as indicated by the two GHG inventories done so far. Hence, efforts should be less on cutting down emissions but more on adaptation, coping strategies, and disaster management.

Namibia is a Non-Annex I Party (group of Parties mostly developing countries) to the UNFCCC. To date, Namibia has submitted two national communications under the UNFCCC, in 2002[80] and in 2011[81] respectively. In Namibia's initial communication to the United Nations Framework Convention on Climate Change (UNFCCC) in 2002[82], it is stated that trends in climate change predict that temperature will increase, specifically in central inland areas, rainfall will be variable and the rainy season is predicted to be shorter. Furthermore, an increase of potential evaporation at a rate about 5% per degree of warming and a sea level rise of up to 30cm was predicted. Namibia's second national communication to the UNFCCC dated 2011 reveals that:

The projected temperature increases will result in evaporation and evapotranspiration increases in the range of 5-15%, further reducing water resource availability and dam yields. It is predicted that, even without the additional stresses of climate change on the water resources, demand will have surpassed the installed abstraction capacity by 2015[83]. Namibia's first Nationally Appropriate Mitigation Action (NAMA) and National Adaptation Plan (NAP) are in the process of being developed with the objective to "better

[80] Government of the Republic of Namibia. 2002. *Initial national communication to the United Nations Framework Convention on Climate Change.* Windhoek: Ministry of Environment and Tourism; available at http://unfccc.int/resource/docs/natc/namnc1.pdf, last accessed 16 May 2012.

[81] Government of the Republic of Namibia. 2011. *Namibia second national communication to the United Nations Framework Convention on Climate Change*. Windhoek: Ministry of Environment and Tourism.

[82] Government of the Republic of Namibia (2002).

[83] Government of the Republic of Namibia (2011:6).

guide the country on its way to mitigate and adapt to climate change."[84] Furthermore, Namibia has submitted its Intended Nationally Determined Contribution (NDC) in September 2015[85]. Within the NDC, Namibia has stated that it "aims at a reduction of about 89% of its GHG emissions at the 2030 time horizon compared to the BAU scenario."[86] The NDC covers four sectors, namely energy; industrial production and product use; agriculture forestry and other land use (AFOLU) changes; and waste. Identified measures contributing to climate change mitigation with the highest amount of GHG include: to reduce the deforestation rate by 75 %; to reforest 20,000 ha per year; to restore 15 M ha of grassland; and to increase the share of renewables in electricity production from 33% to 70%.

Namibia's NDC is "fair, equitable, ambitious and adequate", given Namibia's development status and national circumstances[87]. Namibia has committed itself in the NDC to ensure political stability, good governance, an independent efficient judicial system, appropriate legislation, provision of incentives, and implementation of robust awareness campaigns as prerequisites for a successful and quick implementation of the NDC.

Implementing Article 44 of the Constitution: legislation relevant for climate change

It can be argued that although Namibian environmental legislation does not explicitly address climate change, many relevant general concepts and principles applicable to climate change are contained in the legal environmental framework. This is true for framework legislation such as the Environmental Management Act No. 7 of 2007, which promotes the sustainable management of the environment and the use of natural resources by establishing principles for decision-making on matters affecting the environment. One of these principles, which is relevant for climate change is that "renewable resources must be used on a sustainable basis for the benefit of present and future generations".[88] A further example is the principle that "damage to the environment must be prevented and activities which cause such damage must be reduced, limited or controlled".[89] Climate change can thus be considered in various ways in decision-making processes. But also sectoral legislation can be applicable to climate change. The Forest Act No. 12 of 2001, which provides for the protection of the environment and the control and management of forest fires, and the Disaster Risk Management Act No. 10 of 2012, which provides "for an integrated and coordinated disaster management approach that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery" are

[84] Government of the Republic of Namibia. 2015. *Intended nationally determined contributions (INDC) of the Republic of Namibia to the United Nations Framework Convention on Climate Change*. Windhoek: Ministry of Environment and Tourism, p 5.
[85] (ibid.).
[86] See Government of the Republic of Namibia (2015:2); BAU is the abbreviation for business as usual.
[87] See Government of the Republic of Namibia (2015:4).
[88] See Section 3(2)(a).
[89] See Section 3(2)(l).

prominent examples of national legislation pertinent to climate change. However, Government has also recognised that "there is an urgency to review existing legislation, regulations and norms to frame these in accordance with climate change concerns."[90] Several topics have been identified as priority areas of law and/or regulation to be subject to review and update:[91]

- Feed-in tariffs for the general public and other organisations to supply the grid with electricity;
- Finalize Power Purchase Agreements rapidly following the delivery and signature of IPP licences;
- Implement regulations on energy efficiency, particularly energy audits in the industrial sector that are heavy consumers of energy;
- Implement the DSM strategy and set regulations to ensure import of energy efficient appliances;
- Review the taxation policy and legislation to promote the update of cleaner technologies and promote energy savings;
- Strengthen the enforcement of legislation and regulations;
- Review the legislations regulating forest exploitation to fit them to the new agenda; and
- Implement land policy reforms to promote reforestation and afforestation by the different land owner groups.
- Implementing Article 95(l) of the Constitution: Namibia's Climate Change Policy

Implementing Article 95(l) of the Constitution: Namibia's Climate Change Policy

The State's mandate to promote the welfare of the people by adopting policies aimed to maintain ecosystems, essential ecological processes and biological diversity of Namibia and to utilise living natural resources on a sustainable basis for the benefit of all Namibians, both present and future as enshrined in Article of the Constitution is the principle foundation for Namibia's commitment to address the challenges related to climate change. To this end, Namibia's National Policy on Climate Change has been prepared and officially launched by the Ministry of Environment and Tourism in October 2011. The general aim of the Policy is to contribute to the attainment of sustainable development in line with Namibia's Vision 2030 through strengthening of national capacities to reduce climate change risk and build resilience for any climate change shocks.

[90] See Government of the Republic of Namibia (2015:17).
[91] (ibid.).

The following has been formulated as underlying rationale of the policy[92]:

> The policy seeks to outline a coherent, transparent and inclusive framework on climate risk management in accordance with Namibia's national development agenda, legal framework, and in recognition of environmental constraints and vulnerability. Similarly, the policy takes cognizance of Namibia comparative advantages with regard to the abundant potential for renewable energy exploitation.
>
> The goal of the National Policy on Climate Change is to contribute to the attainment of sustainable development in line with Namibia's Vision 2030 through strengthening of national capacities to reduce climate change risk and build resilience for any climate change shocks.
>
> The policy also serves to guide "Government on the development and enactment of climate-specific legislation to establish appropriate legal mechanisms for policy implementation."[93] To date, no such climate-change specific legislation is on the radar.

Recognising that sustainable development and ensuring environmental sustainability can contribute significantly to climate change adaptation and mitigation, the policy outlines the roles and responsibilities of stakeholders including the general public; the private sector; NGOs and faith and community based organisations; training and research institutions; the media; and international development partners.

The policy identifies five objectives, sets out a set of guiding principles and proposes a framework for sectoral strategies to address the impacts of climate change:

- to develop and implement appropriate adaptation strategies and actions that will lower the vulnerability of Namibians and various sectors to the impacts of climate change;
- to develop action and strategies for climate change mitigation;
- to integrate climate change effectively into policies, institutional and devel-opment frameworks in recognition of the cross-cutting nature of climate change;
- to enhance capacities and synergies at local, regional and national levels and at individual, institutional and systemic levels to ensure successful implementation of climate change response activities; and
- to provide secure and adequate funding resources for effective adaptation and mitigation investments on climate change and associated activities.

Although the Policy has been criticised for being "in conflict with existing sectoral poli-

[92] Government of the Republic of Namibia. 2011. *National policy on climate change for Namibia*. Windhoek: Ministry of Environment and Tourism, p iii.
[93] (ibid.:iv).

cy instruments and even sectoral national development aspirations"[94] – it is an important instrument to further Namibia's commitment to addressing the multi-faceted challenges related to climate change. It is founded in the multidisciplinary nature of climate change that conflicts or overlaps with other policy instruments and strategies arise.

This also applies to the question of institutional responsibility for issued related to climate change. Although it could be argued that virtually every ministry is somehow concerned with issues related to climate change, the Ministry of Environment and Tourism is the key responsible line ministry for climate change[95].

To implement the Climate Change Policy, a Climate Change Strategy and Action Plan (NCCSAP) for the period 2013 to 2020 has been developed and approved by Parliament in 2014. The NCCSAP contains guiding principles relating to climate change, identifies priority action areas for adaptation and mitigation and pinpoints various funding mechanisms.

Forests in the focus of Namibia's mitigation strategies

Forests play a very important role in the context of climate change as forests are one of the biggest reservoirs of carbon, so they are key in keeping the carbon cycle and other natural processes working and help to reduce climate change. Forest resources in Namibia are of essential importance as woodlands stabilise fragile soils. Moreover, forest areas are the home of parts of Namibia's rich biological diversity. And forests also play a vital role from a socio-economic perspective, especially in the rural areas of Namibia, as many are directly or indirectly dependent on the availability of forest resources for browsing, building material for homesteads, fuel wood for cooking, light and heating, and medicines amongst others. Forestry resources in Namibia are exploited for various uses, including charcoal production (primarily for export to the EU) and the production of fire blocks from crushed bush for energy production. Moreover, woodlands harbour fruit and nut bearing tree species (such as marula, bird plum, and monkey orange) are gaining commercial importance, just as medicinal plants such as devil's claw.[96]

[94] Zeidler, J, L Kandjinga, A David, J Turpie & D Malema. 2014. *climate governance and development case study: Namibia.* Cape Town: Heinrich Böll Stiftung; available at http://za.boell.org/sites/default/files/downloads/Namibia_long_doc_low_res.pdf, last accessed 20 November 2015, p 23.

[95] (ibid:22).

[96] Cf. World Trade Organization. 2015. *Understanding the WTO*. 5th edition. Geneva: WTO; available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf, last accessed 15 April 2015.

Based on the Namibian National Forest Inventory[97] the following rough estimates have been summarised in 2005[98]:

- Approximately 10% of all plant species in Namibia are trees (woody plants that usually grow to one metre or more in height.
- Less than 10% of the country is covered by trees with a canopy cover of more than 10% and higher than five metres.
- Around 50% of the country are areas of woodland and 40% are desert or shrub land.

Official estimates from Namibia's Directorate of Forestry reported to the FAO[99] reveal that in 2015, almost 7 million ha (down from 8.7 million ha in 1990) of Namibia (8.4% of the total land surface area) are covered by forests. More than 2% of the forest area has disappeared since 1990.

Major threats to forests in Namibia include the expansion of land for agriculture; the cutting of wood for fuel and for domestic use; clearing for infrastructure development; uncontrolled wild fires; selective logging through timber concessions and unlicensed curio carving; and habitat destruction by elephants.[100] The increase of population unfortunately goes hand in hand with an increase in an unsustainable use of timber for fuel, housing, fencing, fire, and poses a severe strain on the environment as deforestation not only leads to the loss of resources used for human activities, it also results in desertification and severe degradation of land.[101] A Forest Research Strategy for Namibia (2011–15) addresses issues associated with sustainable forest management and the issue of value addition to forest products. The strategy identifies forest research areas, including a vegetation (forest and rangeland) monitoring programme; forest products (value added) research; ecological studies; growth and yield studies; silvicultural research; economic, policy and sociological research; and management of information.

A sound legal framework protecting Namibia's forests is thus of utmost importance. And again, the Constitution provides the legal foundation for all forest related law and policy. Namibia has a relatively young history of forest management under the Forest Act No.

[97] The Forest Act in its Section 11 provides that the Director of Forestry has the duty to compile and maintain a national forest inventory. The compilation of such inventory has started in 1999 and resulted in a collection of datasets, maps and reports managed by the Directorate of Forestry in Windhoek, Namibia. The National Forest Inventory organised by regions is an ongoing collection of information about forests countrywide. For more information and selected inventory reports see http://www.mawf.gov.na/de/inventory-reports, last accessed 16 December 2015.

[98] See Mendelsohn, J & el Obeid, S. 2005. *Forests and woodlands of Namibia*. Windhoek: Ministry of Agriculture, Water and Forestry, p 21.

[99] Cf. Ministry of Agriculture, Water and Forestry. 2014. Global forest resources assessment 2015– country report Namibia. Windhoek: Ministry of Agriculture, Water and Forestry, p 10.

[100] See Food and Agriculture Organisation. 2005. Global forests resources assessment 2005; available at http://www.fao.org/docrep/008/a0400e/a0400e00.htm, last accessed 3 November 2016.

[101] Ministry of Environment and Tourism. 2006. *Vital signs of Namibia 2004. An integrated state of the environment report*. Windhoek: Directorate of Environmental Affairs, p 13.

12 of 2001 with its system of classified forests under which the first community forests have been gazetted in 2006 and 2013 respectively.

The main law and policy instruments pertinent to forests in Namibia include:

- the 2002 SADC Protocol on Forestry on the regional level;
- the Forest Policy of 1992
- the Development Forestry Policy for Namibia of 2001;
- the Forest Act No. 12 of 2001 as amended by the Forest Amendment Act No. 13 of 2005;
- the Community Forestry Guidelines of 2005;
- the 2015 Forest Regulations to the Forest Act; and
- the customary law of traditional communities;

Four different types of forests are classified under the Forest Act: state forest reserves (Section 13); regional forest reserves (Section 14); community forests (Section 15); and forest management areas (Section 16).

Community forests, the most dominant form of forests in Namibia, are forests where the local community plays a significant role in forest management and land use decision-making. Community forests can be declared on communal land, with the agreement of the Chief or Traditional Authority. An organisation representing the people who traditionally use the community forest is appointed as the forest management authority. The aforementioned authority has the legal rights to use the forest resources and graze animals there, or to rent out these rights to others. The management authority has to look after the forest according to a management plan; to ensure that all community members have equal access to the resources in their forest; and to reinvest enough of the money made from the forest to keep protecting the forest, and share what is left over between the community members. As of 2014, Namibia had 32 established and 27 emerging community forests. Thirteen community forests were gazetted in February 2006 and nineteen community forests were gazetted in March 2013 under section 15(3) of the Forest Act.[102]

With its ambitious aim laid down in the NDC[103] to achieve "a reduction of about 89% of its GHG emissions at the 2030 time horizon compared to the BAU [Business as Usual] scenario" forest related law and policy moves to the centre of Namibia's mitigation strategies as the ambitious aim is to be achieved by way of mitigation predominantly in the agriculture, forest and other land use (AFOLU) and the energy sectors. The reduction of the deforestation rate by 75%, reforestation and restoration of grassland will demand a progressive and effective implementation of existing forest related law and policy based on the pillars of Namibia's Constitution.

[102] See Government Gazette number 3590 of 2006 and number 5143 of 2013 respectively.

[103] Available at http://www4.unfccc.int/Submissions/INDC/Published%20Documents/Namibia/1/INDC%20of%20Namibia%20Final%20pdf.pdf, last accessed 10 November 2016.

Conclusion

The living tree doctrine developed in Canadian constitutional law in the late 1920s[104] rightly states that constitutional law is a moving framework that, "a living tree capable of growth and expansion within its natural limits," a document that is in a continuous process of evolution.

Namibia's Constitution provides a good example that by way of active application and continuous and progressive interpretation it can serve as the basic foundation to accommodate the topics of our times, even if these could not be foreseen by the drafters of the Constitution.

In Namibia, more than 25 years after Independence, a legal culture upholding environmental rights is in the process of being created. A broad variety of laws directed at environmental protection exists and there are many more to come; in principle, the existing legal framework provides for a variety of mechanisms to ensure compliance with and enforcement of environmental laws. Full implementation of these provisions remains a challenge though. The Executive and the Judiciary need to be strengthened in terms of manpower and know-how in order to ensure that the principles anchored within the broad field of Namibian environmental laws are implemented in due consideration of all aspects of good governance, including transparency, reliability, accountability, predictability and the rule of law.

The holistic fulfilment of the Constitution's environmental principles regarding state policy requires even more political will and public participation at different levels. There is also a need for the Namibian society as a whole, and individuals in particular, to pass on a healthy and viable environment to future generations.

[104] *Henrietta Muir Edwards and others v The Attorney General of Canada*[1929] UKPC 86 (18 October 1929); available at http://www.bailii.org/uk/cases/UKPC/1929/1929_86.html, last accessed 25 November 2016

Public Procurement - a Constitutional Perspective

Anne Schmidt

Introduction

The importance of public procurement is enormous from different points of view. Economically, public procurement makes up a percentage of between 10 and 70% of the states' GDP.[1] And, as "business process within a public system concerning national interests", public procurement has to be considered under the wider aspect of good governance and thus suffice the integrity, accountability and effectiveness standards inherent in the principle of good governance.[2]

When dealing with the regulation of public procurement, it should always be kept in mind that public procurement is a complex issue taking place at the interface of state and commercial interests, being influenced by and depending on the market of goods and services, and accommodating different stakeholders with partly diverging interests.[3] Additionally, the high amounts of money spent through public procurement makes not only government officials vulnerable to corruption but also other stakeholders such as companies which at all costs want to win government contracts.[4] Public procurement legislation and systems should follow certain principles in order to meet the requirements inherent in its nature. The widely accepted principles include transparency and accountability, integrity, fairness and equity, value for money, competition and effectiveness and efficiency.[5]

The Namibian Constitution does not explicitly refer to public procurement other than the South African Constitution which requires public procurement to be conducted in accordance with the principles of fairness, equity, transparency, competition and cost-efficiency.[6] Nevertheless, there are provisions in the Namibian Constitution that set up

[1] Development Assistance Committee. 2005. „Strengthening Procurement Capacities in Developing Countries – Harmonising Donor Practices for Effective Aid Delivery". Paris: OECD, p. 18.
[2] Ibid. See also Wittig, W.A. 1999. „Building Value through Public Procurement: A Focus on Africa". Conference Paper, 9th International Anti-Corruption Conference, Durban, South Africa, 10-15 October 1999. Available at http://9iacc.org/papers/day2/ws2/dnld/d2ws2_ wwittig.pdf (last accessed 8th November 2016), p.3.
[3] Schmidt, A. 2015. „Public Procurement Law and Reform in Developing Countries: International Best Practices and Lessons Learned. Namibia as a Case Study". PhD submitted at the University of Bremen in December 2015, p. 22.
[4] Cf. OECD. 2007. „Integrity in Public Procurement – Good Practice from A to Z". Paris: OECD, p. 10.
[5] See Trepte, P. 2004. „Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation". Oxford: Oxford University Press, p. 3f.
[6] Section 217(1) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

requirements for public procurement legislation and practice. These include especially the democratic mandate (Article 1), the state's duty to adhere to international law (Articles 144 and 96(d)), Article 94A on anti-corruption measures, and the provision on affirmative action (Article 23).

The Public Procurement Act of 2015[7] has been enacted after a lengthy reform process which took more than 10 years to lead to an outcome.[8] The prior applicable Tender Board Act[9] was subject to severe criticism and can be classified as outdated, insufficient piece of legislation which by far did not reflect the above mentioned principles.[10] The reform process was anything else than straightforward and transparent.[11] It is not clear whether all possibilities to design a public procurement law sufficing best practices were exhausted. There are several instruments by international organisations that can be used in reform processes to develop national public procurement legislation which is in line with best practices.[12] In Namibia, a focus should have been put on designing a piece of legislation and establishing a public procurement system in line with international best practices and addressing the problems that had been identified in the past. In particular worth mentioning are the lack of transparency and accountability, the related malady of corruption, the frequent use of exemptions and the failure to provide an effective and efficient review system for public procurement issues.[13] Whether the new Public Procurement Act responds to these issues and in how far it suffices the requirements in the Constitution will be outlined in the following.

Public Procurement in Namibia

The Public Procurement Act applies to the procurement of goods, works and services, the disposal of assets, the letting and hiring of anything and the granting of rights by the

[7] Act No. 15 of 2015.

[8] See Links, F.; Daniels, C. 2011. „The Tender Board – Need for Root and Branch Reform". Anti- Corruption Research Programme, Paper 3. Windhoek: Institute for Public Policy Research, p. 1. For a detailed description and analysis of the reform process see Schmidt (2015), p. 349f.

[9] Tender Board of Namibia Act, 1996 (Act No. 16 of 1996).

[10] Cf. Links; Daniels (2011). For a comprehensive discussion of the public procurement system under the Tender Board of Namibia Act, see Schmidt (2015), p. 24.

[11] Cf. Schmidt (2015), p. 379f.

[12] These include the Methodology for Assessing Procurement Systems by the OECD, the practical guide to transforming procurement systems, the Country Procurement Assessment Reports by the World Bank and last but not least the Model Law on Public Procurement by UNCITRAL as well as a comprehensive guide to the enactment of the model law. See OECD. 2009. „Methodology for Assessing Procurement Systems". Paris: OECD; Special Steering Committee of the OECD-DAC Task Force on Procurement. 2011. „A Practical Guide to Transforming Procurement Systems". Paris: OECD; UNCITRAL Model Law on Public Procurement, 2011 (adopted on 1 July 2011); UNCITRAL. 2012. Guide to Enactment of the UNCITRAL Model Law on Public Procurement. New York: United Nations.

[13] See Schmidt (2015), p. 317f.

Public Procurement Board or public entities.[14] Additionally, the contract management of goods, works and services procured by the Board or a public entity is subject to the application of the Act.[15] For security-related procurements by the Defence Force, Police Force, the Correctional Service and the Central Intelligence Service exemptions to certain provisions of the Act can be issued by the Minister of Finance if their application is considered impractical or inappropriate.[16] The Minister can furthermore grant special or general exemptions by way of a directive for specific types of procurement or disposal.[17] The public procurement institutional architecture is based on different institutions with various responsibilities. Public procurement below a certain prescribed threshold is conducted by specific committees and units within the public bodies.[18] The responsibility for those procurements bears the accounting officer; he or she is accountable for the full compliance with the rules and regulations on public procurement.[19] Procurements above the prescribed threshold are carried out by the Central Procurement Board.[20] The Procurement Policy Office is settled in the Ministry of Finance and has apart from the policy an oversight and review function.[21] The Minister of Finance has a special role with regard to public procurement being vested with decision-making power with respect to key issues in public procurement. These include the appointment of the members of the Central Procurement Board[22] and also the members of the independent review panel[23] the possible issuing of special or general exemptions from the application of the Act,[24] the granting and determination of principles for preferences[25] and the final decision on referring matters of alleged non-compliances to the police, the Anti-Corruption Commission or any other competent authority.[26] The review panel is no permanent institution, but one or, if necessary, more than one review panel can be constituted by the Minister to adjudicate on review applications, applications for the suspension, debarment and disqualification of bidders and suppliers or any other matter referred to the review panel by the Minister.[27]

The general public procurement method to be applied is open advertised bidding; meaning all eligible and qualified bidders should have access to the bidding process.[28] However, there are three basic reasons that justify the use of other methods outlined in the

[14] Section 3(1) of the Public Procurement Act.
[15] Section 3(1)(c) of the Act.
[16] Section 4(1) of the Act.
[17] Section 4(2) of the Act.
[18] Section 25(1)(a) of the Act.
[19] Sections 25(1) and 25(4) of the Act.
[20] Section 8 of the Act.
[21] Section 6 of the Act.
[22] Section 11(1)(c) of the Act.
[23] Section 58 of the Act.
[24] Section 4 of the Act.
[25] Sections 69 and 70 of the Act.
[26] Section 7(4)(b) of the Act.
[27] Sections 58(1) and 58(3)(b) of the Act.
[28] Section 27(2) of the Act.

Act: (1) open bidding does not support the empowerment and other policies of the government, (2) it is not efficient or practical in the procurement case at hand, or (3) it is too costly to apply, given the value of the procurement.[29] The alternative procurement methods are restricted bidding, request for sealed quotations, direct procurement, execution by public entities, emergency procurement, small value procurement, request for proposal and electronic reverse auctions.[30]

The Constitutional Perspective on Public Procurement

The Democratic Mandate of the State

A state's obligation to implement a law fostering an effective and efficient public procurement system can be derived from its democratic mandate to serve and pursue the welfare of the society.[31] In Namibia, the Constitution establishes the Republic of Namibia as a democratic state (Article 1(1)) and vests all power "in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State" (Article 1(2)). The state's task is further specified in Article 95 of the Constitution requiring it to "actively promote and maintain the welfare of the people". This also includes the obligation to spend the budget including the money gained from taxes paid by the citizens wisely.[32] Additionally, the welfare of the people is affected by the quality of goods and services procured by the state: "a well-functioning public procurement system is important for guaranteeing that goods and services are delivered in the proper quality and quantity, ensuring infrastructure development and stimulating trade and economy, which are in turn necessary preconditions for socio-economic development".[33] Very good examples are public health services and infrastructure. As the power vests in the people and state institutions are solely servants of the people, a democratic state is accountable to its citizens; also for the way public procurement is conducted.

International Obligations for Public Procurement

The Namibian Constitution emphasizes that Namibia is willing to live up to its obligations arising from being a member of the international community, contribute to the peaceful coexistence of nations, and endorse a positive approach to international law. Article 144 of the Constitution makes the general rules of public international law and international agreements that are binding upon Namibia directly applicable in Namibia. Article 96(d) requires the government to promote and maintain peaceful, cooperative, just and mutually beneficial relations with and among nations, and to foster "respect for international law and treaty obligations".[34] Furthermore, the preamble stresses that the

[29] Section 27(4) of the Act.
[30] Section 27(1)(a) of the Act.
[31] Cf. Schmidt (2015), p. 1.
[32] Ibid.
[33] Ibid., p. 8.
[34] Article 96(d) of the Constitution.

people of Namibia "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."

While Namibia has not been acceded the Government Procurement Agreement by the World Trade Organisation which is the only international agreement dealing particularly and in detail with public procurement, [35]Namibia is party to the United Nations Convention on Corruption (UNCAC)[36] which requires it members states to implement certain measures in their public procurement systems in order to prevent corruption.[37] Article 9(1) requires the establishment of "appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption". A non-conclusive list of aspects which should be addressed refers to

- the publishing of information relating to procurement procedures and contracts,
- the establishment and publication of conditions for participation at the beginning,
- the use of objective and predetermined criteria for public procurement decisions,
- an effective review system,
- and measures to regulate matters regarding public procurement staff.

Article 9(1) must be read together with Article 65 which emphasizes that state parties are obliged to take such measures, including legislation and administrative action, necessary to comply with the convention. The state parties are thus inevitable required to review and, if necessary, amend their public procurement legislation. As a matter of course, states reforming their public procurement systems should ensure that new legislation meets the requirements of Article 9(1). As those requirements are broad, the interpretation of what measures have to be taken in order to comply with Article 9(1) is left to the member states. However, there are several instruments that can and should be consulted when interpreting Article 9(1). First of all, the United Nations Office on Drugs and Crime (UNODC) which plays an important role in supporting the implementation

[35] WTO Agreement on Government Procurement, 1994 (signed in Marrakesh on 15 April 1994 and entered into force on 1 January 1996). In contrast to other (multilateral) WTO agreements such as GATT and GATS, this agreement is plurilateral meaning that the WTO members accede on a voluntary basis and are not automatically parties to the agreement. (Cf. Schmidt (2015), p. 65). It is not clear whether the Namibian government has ever considered accession. The number of parties is still low and most developed parties have not yet and might not become parties to the agreement in the near future. There are only 41 parties to the agreement so far. The reasons for the reluctance of developing countries are manifold; a particular point of criticism is though the prohibition of any kind of preferential treatment of local products, goods, companies, etc. See for more information Schmidt (2015), p. 65f. For a discussion on the reluctance of developing countries to accede to the agreement see Schmidt (2015), p. 101 f.

[36] The Convention entered into force on December 14, 2005.

[37] The Convention was signed by Namibia in December 9, 2003 and ratified by parliament on April 28, 2004.

of the agreement[38] has published a guidebook on anti-corruption measures necessary for compliance with Article 9.[39] Moreover, there are other documents of international and intergovernmental organisations which should be referred to. It can be observed that not only international, intergovernmental and non-governmental organisations but also other non-state actors have played an increasing role in the development and establishment of international standards and law. This phenomenon requires a re-thinking of the classical towards a less state-centred understanding of international law and the recognition of other than the conventional sources of international law.[40] The standards set by those institutions can be assigned the role of soft law.[41]

Apart from the UNODC guidebook, important documents outlining recommendations for the design of public procurement systems and legislation have e.g. been published by the Organisation for Economic Co-operation and Development (OECD)[42] and the United Nations Commission on International Trade Law (UNCITRAL).[43] Moreover the Government Procurement Agreement by the World Trade Organisation can serve as reference point. Having a closer look at these instruments, it is not difficult to make out commonalities and identify consequent best practices which can be used to interpret Article 9(1).[44]

In contrast to the Tender Board Act, the Public Procurement Act to a great extent suffices international best practices. However, there are still issues of concern.[45] First of all, the provision allowing the Minister to grant general and specific exemptions is contrary to best practices and can have severe effects for the achievement of transparency and accountability within public procurement.[46] The practice of granting exemptions was one of the main points of criticism under the Tender Board Act and undermined public procurement principles including transparency, accountability, fairness and competition.[47] There were times were the worth of tender exemptions by far exceeded the value of

[38] UNODC. 2009. „Technical Guide to the United Nations Convention against Corruption". New York: UNODC, p. xviii.
[39] UNODC. 2013. „Guidebook on anti-corruption in public procurement and the management of public finances – Good practices in ensuring compliance with Article 9 of the United Nations Convention against Corruption". Vienna: United Nations in collaboration with the International Anti-Corruption Academy.
[40] Cf. Boyle, A.; Chinkin, C. 2007. „The Making of International Law". Oxford: Oxford University Press, p. 41f.
[41] Ibid, p. 213.
[42] OECD (2007); OECD. 2009. „OECD Principles for Integrity in Public Procurement". Paris: OECD; OECD. 2015. „OECD Recommendation of the Council on Public Procurement". Paris: OECD.
[43] UNCITRAL (2012).
[44] A summary of the best practices can be found in Schmidt (2015), p. 225f. and Annex 3.
[45] See e.g. Links, F. 2015. „The Public Procurement Bill: A Lot of Good, Some Significantly Bad, But Certainly not Ugly". Democracy Report, Special Briefing Report No. 9. Windhoek: Institute for Public Policy Research. See also Schmidt (2015), p. 377f.
[46] Section 4 of the Public Procurement Act.
[47] Schmidt (2015), p. 253.

awarded tenders.[48] However, there was no opportunity to challenge the decisions of the Tender Board to grant exemptions, and there was no information on let alone justification for exemptions. Thus quite a huge part of public procurement was conducted in a legal limbo. For these procurements, the Tender Board could not be held accountable for their actions and decisions. According to best practices, the scope of public procurement should be as wide as possible; different procurement methods should be available to cater for all possible types of procurements.[49] If exemptions are granted it is of utmost importance to ensure that there are safeguards to prevent misuse and the abuse of such provision for personal gain. These safeguards include the requirement to justify and the approval by an oversight institution.[50] It should also be possible to challenge the decision to grant an exemption.[51] The exemption provision in the Public Procurement Act allows plenty of room for abuse and prevents all stakeholders of public procurement but also the wider public of the possibility to hold the decision-makers accountable. With view to the abuse of exemptions in the past and, as it is not apparent what kind of goods or services cannot be procured by using one of the methods outlined in the Act, the inclusion of the provision must be condemned.[52]

The review mechanism for public procurement challenges under the Public Procurement Act is problematic in several ways. Since Article 9 of UNCAC explicitly requires its member states to ensure that there is an effective domestic review mechanism in public procurement, state parties should pay particular attention to the requirements for a review mechanism satisfying Article 9(1). In Namibia, first of all, there is no internal review mechanism available which is not contrary to best practices but can be criticised because this is the most direct, less bureaucratic and often fastest way to resolve a public procurement dispute.[53] The establishment of an independent review panel has to be seen generally positive. However, basic procedural rights for the participants of challenge procedures are not mentioned. On the contrary, the exclusion of the public can be ordered for several reasons[54] which might contradict the right to request a hearing to be public that is also reinforced in Article 12 of the Constitution. Notwithstanding that there might be information that should be held confidential; the general exclusion of the public from the whole proceedings seems not to be appropriate in such cases. Moreover, making all information of challenge procedures strictly confidential and the disclosure of such information an offence[55] contradicts transparency and accountability and does

[48] In the financial year 2005/2006 tenders worth N$170.4 million exempted and tenders worth N$619 million were approved from tender procedures. In the following financial year tenders worth N$3.4 billion were exempted and thus by far exceeded the value of tenders awarded (N$624.4 million). See Links; Daniels (2011), p. 3.
[49] UNCITRAL (2015), p. 12f.; OECD(2015), p. 8; OECD (2009), p. 61f.; OECD (2007), p. 22.
[50] See e.g. OECD (2015), p. 8; and also Schmidt (2015), p. 230. The UNCITRAL Guide advises against the allowance of exemptions. (UNCITRAL (2012), p. 12f.).
[51] Cf. UNCITRAL (2012), p. 16; OECD (2006), p. 44 and also Schmidt (2015), p. 237.
[52] See Links (2015), p. 10.
[53] Cf. UNCTIRAL (2012), p. 310; OECD (2006), p. 44f.
[54] Section 61(2) of the Act.
[55] Section 61(1) of the Act.

not suffice the standards of the rule of law which is explicitly mentioned as one of the founding principles of the Namibian state in Article 1(1) of the Constitution. It can further be criticized as contradicting the requirements of Article 9(1) that only decisions and actions taken by the Board or a public entity for the award of a procurement contract are reviewable and not all other decisions or actions taken in the procurement proceedings such as the choice of the procurement method.[56]

It should be remarked that the possible consequences for breaching the convention are limited. While the parties concerned with drafting the convention could not agree upon conditions for a review mechanism[57], in 2009, the Conference of States Parties to the United Nations Convention against Corruption established a review mechanism as „intergovernmental process whose overall goal is to assist States parties in implementing the Convention".[58] The review is conducted in two phases with the implementation of Article 9 as part of Chapter II being assessed in Namibia in the second phase, running from 2016 to 2020.[59] Thus, in how far the requirements of Article 9(1) have been implemented by Namibia will only be announced no earlier than 2020.

Nevertheless, with view to the obligations existing under UNCAC, Namibia as a state party is not only accountable to the other state parties but also to its people. Indeed the public procurement provision of UNCAC is not directly applicable in their state parties' domestic legal systems, thus Article 144 of the Constitution of Namibia does not take effect. As 96(d) is not legally enforceable in courts but rather serves as guiding principle for the government, there is no direct breach of constitutional law. However, courts are entitled to refer to the principles in the chapter on state policies when interpreting any laws based on them.[60] The Namibian courts pursue a positive approach to international law by taking it as reference when interpreting national law, if it is appropriate.[61] It is thus not totally far-fetched to imagine the courts to criticise the government for a pos-

[56] It is recommended that all key decisions taking place along the procurement cycle are reviewable, including the choice of the procurement method and also the interpretation of contract clauses in the management of the contract. UNCITRAL (2012), p. 16 and 378; OECD (2006), p. 44 and also Schmidt (2015), p. 237.

[57] This reflects in Article 63(7) of UNCAC according to which „the Conference of the States Parties shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention.

[58] See UNODC. 2016. „Country Review Report of the Republic of Namibia. Review by Ethiopia and Canada of the implementation by Namibia of articles 15 – 42 of Chapter III. „Criminalization and law enforcement" and articles 44 – 509 of Chapter IV. „International cooperation" of the United Nations Convention against Corruption for the review cycle 2010 – 2015". Available at http://www.unodc.org/documents/treaties/UNCAC/ CountryVisitFinalReports/2016_01_29_Namibia_Final_Country_Report_.pdf, p. 2.

[59] Links, F. 2016. „Namibia and the United Nations Convention against Corruption (UNCAC)". Windhoek: Institute for Public Policy Research / Hanns Seidel Foundation.

[60] See Article 101 of the Constitution.

[61] The judicial approach to international law is analysed in detail in Hinz, M.; Schmidt, A. and Mapaure, C. 2016. „Namibia". In International Encyclopaedia of Laws: Constitutional Law, edited by André Alen, David Haljan. Alphen aan den Rijn, NL: Kluwer Law International, p. 85f.

sible failure to comply with its obligations deriving from UNCAC. And it is possible to argue that Namibia has acted contrary to its mandate stemming from Article 96(d), without being able to convincingly justify this failure.

Public Procurement and Anti-Corruption Measures

Corruption has been identified as a major problem for the effective and efficient functioning of public procurement systems in developed and developing countries alike[62]. In Namibia, there have been several allegations of corruption in public procurement in the past.[63] The instruments to disclose and counteract corruptive practices in public procurement have though been weak or non-existence. Most decisions along the procurement cycle were taken behind closed doors and not communicated to the tenderers let alone that the Tender Board had to justify and provide reasons for most of its decisions.[64] The Tender Board Act by far did not suffice transparency and accountability standards necessary to prevent corruption.[65] The lack of an effective review system for public procurement further attributed to the dissatisfying situation where nepotism, bribery and other forms of corruption could be practiced without having to fear consequences.[66]

With the third constitutional amendment in 2015 a provision on anti-corruption measures was added to the Constitution[67]Article 94A(1) requires the state to „put in place administrative and legislative measures necessary to prevent and combat corruption." The wording of Article 94A(1) is broad and can be interpreted to imply that the state is required to implement a public procurement law and put in place a public procurement system that do not allow or severely hinder any corruptive practices. In order to determine what substantial measures this requires, reference should be made to UNCAC and the best practices resulting from consulting the above mentioned soft law sources. Thus, Article 94A of the Constitution reinforces the governments' obligation arising from Article 96(d) by being a member state of UNCAC. It can be concluded that, according to Article 94A(1), the government has had the clear mandate to ensure that the new Public Procurement Act satisfies international best practices with regard to the objectives of transparency, accountability and integrity. Although the Public Procurement Act is an enormous improvement to the prior applicable Tender Board Act, there are still some matters of concern. Transparency and accountability are explicitly mentioned as objectives of public procurement[68], but this does not reflect throughout the whole Public Pro-

[62] Kostyo, K. 2006. „Handbook for Curbing Corruption in Public Procurement". Berlin: Transparency International, p. 13.
[63] Tjirera, E. 2011. Public Procurement in Namibia. The Role of Code of Conducts in Reducing Corruption". Anti-Corruption Research Programme, Paper 4. Windhoek: Institute for Public Policy Research, p. 2f.
[64] This is discussed in more detail in Schmidt (2015), p. 271f.
[65] See ibid.; see also Links; Daniels (2011).
[66] On the lack of an effective review mechanism see Schmidt (2015), p. 316.
[67] Namibian Constitution Third Amendment Act, 2014 (Act No. 8 of 2014),
[68] Section 2(a) of the Public Procurement Act.

curement Act. While most acts and decisions have to be recorded, access to information for the public still remains quite limited.[69] An example is the requirement that the ground for the choice of the procurement method has to be recorded but there is no provision for the publication of such information.[70] Considering that public procurement officers and staff members are strictly prohibited from divulging confidential information,[71] it seems that public scrutiny is prevented rather than supported. This also reflects with respect to the annual reports of the Central Procurement Board. It is not only that the content requirements are very broad and thus the Board is given a great margin in deciding what information the reports shall contain.[72] But there are no requirements or deadlines for the publication of the annual reports which leaves the public without any means to demand access to specific information. The problems with the exemption allowance and the review panel have been addressed above. Another shortcoming is that the possibilities of e-procurement have not been exhausted. It is e.g. required to publish tender invitations in newspapers of wide circulation, whereas it would be recommendable to require publication on a national procurement website in order to facilitate access to tender invitations and, thus, competition and fairness.[73] Furthermore, the provisions on disclosure of interests do not go far enough with view to prevent corruption.[74]

Public Procurement and Administrative Justice

The right to administrative justice has been of great importance under the prior applicable Tender Board Act. As the Act did not contain a review mechanism for unsatisfied tenderers, the only possibility to challenge decisions or actions by the Tender Board was by invoking Article 18 before the Namibian courts. The courts have developed several principles that are inherent in Article 18 and set out requirements for administrative justice in public procurement that have to be met in order for these acts to be fair and reasonable. These include adherence to the principle of legality, the right to be given reasons for decisions, fairness and reasonableness in the evaluation process and a certain degree of transparency in procurement proceeding.[75] There are several judgments dealing with public procurement; most of which disclose many of the shortcomings of the then applicable Tender Board Act.[76] The court proceedings and judgments however also led to the awareness that judicial proceedings as single review mechanism available to unsatisfied tenderers does not satisfy the nature of public procurement disputes.[77] While this has been changed by the provision for the establishment of an independent non-judicial ad hoc review panel in the Public Procurement Act,[78] the review to the courts by

[69] Cf. Links (2015), p. 13.
[70] See Section 27(5) of the Act.
[71] Cf. Sections 10(2), 13(2)(c), and 66(1)(d) of the Act.
[72] See Section 24(2) of the Act.
[73] See e.g. OECD (2015), p. 7 and 10.
[74] See Links (2015), p. 14f.
[75] See Schmidt (2015), p. 300f.
[76] For a discussion of case law dealing with public procurement matters, see Schmidt (2015), p. 298f.
[77] Schmidt (2015), p. 316f.
[78] Section 58 of the Act.

invoking Article 18 will still be open for unsatisfied tenderers. However, an application for judicial review is only possible if all available remedies under the Public Procurement Act have been exhausted.[79] As the Act does not provide a right to appeal against the decisions of the review panel, such appeals must be issued to the courts. With this in mind and with view to the limited scope of review, the failure to provide basic procedural rights and the confidentiality provisions in the Public Procurement Act, the courts will most probably still play an important role in dealing with challenges and improving transparency and accountability in public procurement.

Apart from the courts, the ombudsman which has been established under Article 89 of the Constitution and been vested with a wide range of powers[80] can investigate public procurement matters and thus be approached by unsatisfied tenderers seeking administrative justice.[81] Thus he or she theoretically could play a role in solving public procurement matters. The experience has however shown that in practice the ombudsman can hardly provide an alternative dispute resolution mechanism for public procurement issues for different reasons including that "the powers and functions of the Ombudsman are insufficient" with respect to the peculiarities of public procurement disputes and the "limited institutional capacity further constrains the Ombudsman's potential in this respect".[82]

Public Procurement and Affirmative Action

Another aspect in the Constitution relevant in public procurement in Namibia is affirmative action. Since independence Namibia has tried to use public procurement to promote not only domestic actors but also certain groups in society; meaning tenderers from Namibia or these groups benefited from preferential treatment. The preferential treatment of groups that have been discriminated in the past finds its constitutional legitimacy in Article 23(2) which allows the state to put into place affirmative action measures or legislation and thus deviate from the anti-discrimination provision in Article 10(2). Affirmative action aims at the advancement of persons who have been discriminated or disadvantaged in the past and address social, educational and economic imbalances existing due to past discriminatory laws or practices.[83]

It should be remarked that the application of preferential treatment in public procurement is very controversial and, in particular, from an economic point of view, it is likely that preferential treatment in the long-term has a detrimental effect.[84] Moreover, public procurement outcomes in particular with view to quality and price always suffer from

[79] Section 59(4) of the Act.
[80] See Articles 91 and 92 of the Constitution.
[81] See Article 25(2) of the Constitution which provides that „aggrieved persons who claim that a fundamental right or freedom […] has been infringed or threatened […] may approach the Ombudsman".
[82] Schmidt (2015), p. 296.
[83] See Article 23(2) of the Constitution.
[84] For a comprehensive decision of the economic effect of preferential treatment in public procurement see Schmidt (2015), p. 47f.

preferential treatment.[85] Nevertheless, in special circumstances the temporary application of preferential treatment might be appropriate. With view to the possible detrimental effect for the efficiency of public procurement certain safeguards should though be implemented. These include the labelling as temporary measure, the transparent application and the monitoring and constant review of the effect of preferential treatment provisions.[86]

In Namibia, the preferential treatment of certain groups of society also by public procurement is covered by the Constitution. Section 70(1) of the Public Procurement Act requires the Minister of Finance to issue codes of good practice on preferences. There is a list of non-mandatory content requirements including indicators to measure empowerment through preferential treatment, the setting of targets and the period within those targets must be achieved. These are important requirements which establishment should be mandatory and not left to the Minister's discretion. In case of national preferences, it is required that the preferences and weights given to the preferences must be clearly stated in the bidding documents, what is an important issue with view to the transparent manner of application. Considering the fact, the preferential treatment has been included in the Act rather than in secondary legislation and that there is no indication that preferential treatment is only to be applied as temporary measure, it seems that too much weight has been put on preferential treatment while losing sight of the primary objectives of public procurement.

Past experience has shown that preferential treatment in public procurement has not led to the envisaged but rather produced adverse effects. While the economic benefits for viable enterprises remain weak, the approach has "created nothing more than a 'rent-seeking' culture of front and middle-men who have no interest in building viable enterprises […] but are primarily interested in skimming the cream off the top of public procurement contracts and investing such in unproductive luxury consumption, which inevitably sees a lot of wealth flow out of the country."[87] Under the prevalent circumstances, the Institute for Public Policy Research opposes the inclusion of preferential treatment provisions in the Public Procurement Act as it "is a non-core issue in public procurement and burdens the legislative framework unnecessarily".[88] With this in mind and against the fact that preferential treatment always has a negative effect on procurement outcomes by affecting competition and, hence, the principle of value for money, the strong focus on preferential treatment in the Namibian public procurement system which is still in its infant state with respect to achieving primary objectives should be critically assessed.

It can be concluded that the approach to implement the preferential treatment provision in the Public Procurement Act is certainly legitimated under Article 23. However, as it threatens the achievement of other basic principles which are essential for the effective

[85] Cf. Trepte (2004), p. 257.
[86] Cf. OECD (2015), p. 9; UNCITRAL (2012), p. 6f.
[87] Links (2016), p. 16.
[88] Links (2016), p. 16.

and efficient functioning of a public procurement system, the approach should be reconsidered by focusing on the state's democratic mandate, the duty to pursue the welfare of the whole society and its anti-corruption strategy.

Conclusion

From the constitutional perspective the public procurement system and legislation must satisfy high requirements. Despite there is no direct reference to public procurement in the Constitution of Namibia, there are several provisions with implications for public procurement. First of all, public procurement as aspect of good governance has to be carried out effectively and efficiently following basic principles such as transparency, accountability, value for money, fairness and competition by the government simply because this is inherent in its democratic mandate to act in the interest of the people and pursue the welfare of society which reflects in Article 1(1) and has been reinforced in Article 95 of the Constitution.

It is disappointing that Namibia does not meet its international obligations under UNCAC, although the Constitution acknowledges the state's duty to play its part in the international community and emphasizes respect for international law. Moreover, the insertion of Article 94A into the Constitution has uplifted the state's duty to prevent and impede corruption to a constitutional level. To fight corruption in public procurement, high standards of transparency, integrity and accountability in public procurement are essential factors which should reflect in the public procurement legislation and system. Although the reform of the public procurement system constituted the opportunity to enact public procurement legislation in line with best practices, there are still some areas where the Public Procurement Act falls short of such practices. Matters of concern include the exemption provision, a lack of transparency and accountability, in particular an insufficient access to information as well as shortcomings in respect to the independent review mechanism.

The right to administrative justice as contemplated in Article 18 of the Constitution allowing the judicial review of public procurement acts and decisions has been the only way unsatisfied tenderers could challenge public procurement decisions in the past. Although the situation has changed by the enactment of the Public Procurement Act, the requirements inherent in Article 18, namely that public procurement acts and decision must be fair and reasonable, have by no means lost in importance and unsatisfied tenderers seeking judicial review can still invoke Article 18 when appealing against decisions by the review panel.

It can be concluded that, although the Public Procurement Act constitutes a great improvement to the prior applicable Tender Board Act, from a constitutional perspective there are still some matters of concern which should be addressed in order to satisfy the requirements that can be deducted from the Constitution. With regard to the meaning of public procurement for the relationship of the state to its citizens, good governance and

socio-economic development, it is more than appropriate to consider public procurement from the constitutional perspective.

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Lesbian and Gay Rights in Namibia

George Coleman

Introduction

> "If therefore a man and a woman can tacitly conclude such a partnership because of the aforesaid equality provision[1] in the Constitution and the provision against discrimination on the grounds of sex I have no hesitation in saying that the long-term relationship between applicants insofar as it is a universal relationship, is recognized by law."[2]

This statement by a High Court judge in a judgment delivered on 26 June 1999 opened the door to the recognition of same sex relationships in Namibian law.

The applicants referred to in this *dictum* are two women in a same sex relationship. The first applicant, Ms. Frank, is a German national who moved to Namibia in 1990 and attempted to obtain permanent residence here. Her partner with whom she was in a long-term relationship is a Namibian citizen. According to the report of the matter in the high court the stance of the Chairperson of the Namibian Immigration Selection Board was that the long-term relationship between the two women is not recognized in law and therefore it is irrelevant for purposes of Ms. Frank's permanent residence application. The judge overruled him and directed the Board to authorise a permanent residence permit for Ms. Frank.

However this door was shut abruptly on this issue when the matter went on appeal to the Supreme Court of Namibia.[3] In the judgment by Judge O'Linn[4] delivered on 10 October 2000 he states (at page 143G-H):

> "Although homosexual relationships must have been known to the representatives of the Namibian nation and their legal representatives when they agreed on the terms of the Namibian Constitution, no provision was made for the recognition of such relationship as equivalent to marriage or at all. It follows that it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual relationship."

And further (at page 144F-I of the judgment) in the context of Article 14 of the Namibian Constitution (the fundamental right to family) he concludes:

[1] Article 10 of the Namibian Constitution.
[2] Per Levy J, in *Frank and Another v Chairperson of the Immigration Selection Board* 1999, NR 257 (HC) at 268J-269B.
[3] Reported as: *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC).
[4] Teek AJA agreed. Strydom CJ wrote a separate judgment dismissing appellant's condonation application for the late filing of the appeal record and thus confirming the high court's conclusion.

> "The marriage is between men and women, not men and men and women and women."

and

> "The homosexual relationship, whether between men and men or women and women, clearly falls outside the scope and intent of art 14."

On page 145E of the judgment he comments:

> "It should be noted in passing that this Covenant[5] in its Articles dealing with the prohibition on discrimination, specifies 'sex' as one of the grounds on which discrimination is prohibited but not 'sexual orientation'."

Therefore it follows that according to the highest court of the land a same sex relationship is not recognized in the Namibian Constitution or protected as family on an equal basis with a heterosexual relationship. It appears relatively clear that the underlying conclusion of this judgment is that discrimination against lesbians and gays is not prohibited in Namibia.

On 30 June 2016 Namibia abstained from voting in respect of a United Nations Human Rights Council resolution to appoint an independent expert on protection against violence and discrimination based on sexual orientation and gender identity.[6]

On the face of it this resolution does not appear to be particularly invasive. It is designed to assist governments. The mandate of the independent expert in terms of the resolution is:[7]

(a) "To assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps;

(b) To raise awareness of violence and discrimination against persons on the basis of their sexual orientation or gender identity, and to identify and address the root causes of violence and discrimination;

(c) To engage in dialogue and to consult with States and other relevant stakeholders, including United Nations agencies, programmes and funds, regional human rights mechanisms, national human rights institutions, civil society organizations and academic institutions;

(d) To work in cooperation with States in order to foster the implementation of measures that contribute to the protection of all persons against violence and discrimination based on sexual orientation and gender identity;

[5] Referring to the *International Covenant on Civil and Political Rights*.
[6] http://www.namibian.com.na/152990/archive-read/Nam-abstains-from-UN-gay-rights-vote.
[7] Human Rights Council Resolution 32/2 of 30 June 2016. It was passed with 23 votes for, 18 against and 6 abstentions. For the resolution see: https://documentsddsny.un.org/doc/UNDOC/

(e) To address the multiple, intersecting and aggravated forms of violence and discrimination faced by persons on the basis of their sexual orientation and gender identity;

(f) To conduct, facilitate and support the provision of advisory services, technical assistance, capacity-building and international cooperation in support of national efforts to combat violence and discrimination against persons on the basis of their sexual orientation or gender identity;"

Based on Namibia's abstention and its stated rationale one is left with the impression that the Namibian Government is in agreement with the conclusion of the Namibian Supreme Court in the *Frank* matter that lesbians and gays do not enjoy the protection of the Namibian Constitution.

Namibia's international obligations

In its concluding observations on the second report of Namibia the UN Human Rights Committee observed on 22 April 2016 that it is concerned about, amongst others:

> "Discrimination, harassment and violence against lesbian, gay, bisexual and transgender persons, including cases of so-called "corrective rape" against lesbians."

As well as:

> "Discrimination on the basis of sexual orientation not being explicitly prohibited, exclusion of sexual orientation as a prohibited ground for discrimination from the Labour Act (Act No.11 of 2007), the maintenance of the common law crime of sodomy, the exclusion of same-sex partnerships from the Combating of Domestic Violence Act (Act No. 4 of 2003)."[8]

There is a general consensus that international law is now a crucial source for the protection of lesbian, gay, bisexual and transgender (LGBT) persons.[9] For example, the UN Human Rights Committee clarifi in 1994 that the concept 'sex' in Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) includes 'sexual orientation'.[10]

Article 2(1) of the ICCPR[11] records:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Cov-

[8] https://documentsddsny.un.org/doc/UNDOC/GEN/G16/084/97/PDF/G1608497.pdf?OpenElment

[9] Namibian Law on LGBT Issues, Gender Research and Advocacy Project, Namibian Legal Assistance Centre 2015.

[10] *Toonen v Australia* No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), at http://hrlibrary.umn.edu/undocs/html/vws488.htm.

[11] For the text of the ICCPR see: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. Namibia adopted the ICCPR and it became binding on Namibia on 28 February 1995.

> enant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Under Article 144 of the Namibian Constitution the general rules of public international and international agreements binding upon Namibia (of which the ICCPR is one) shall form part of the law of Namibia.[12] The Namibian Supreme Court confirmed this principle.[13] It also accepts the notion that international human rights norms are to be adopted to interpret the Namibian Constitution:[14]

> "It would not be generous and purposeful to ignore the special characteristics of a Constitution when rendering an interpretation to any of its provisions. 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 right norms."

Against this background Namibia's municipal laws on lesbians and gays should be looked at. It appears not to be in conformity with the applicable international principles.

Namibian municipal law

Sodomy is a crime in Namibia. Section 269 of the *Criminal Procedure Act*, 1977 (Act 51 of 1977) provides:

> "If the evidence on a charge of sodomy or attempted sodomy does not prove the offence of sodomy or, as the case may be, attempted sodomy, but the offence of indecent assault or common assault, the accused may be found guilty of the offence so proved."

This provision creates a competent verdict of indecent or common assault on a charge of sodomy. Consent is not a defence. In addition sodomy is a so-called Schedule 1[15] crime in Namibia, which means someone can in terms of section 40(1)(b) of the *Criminal Procedure Act*, 1977, be arrested by a peace officer[16] without a warrant merely on suspicion of having done the act of 'sodomy'.

Although in Namibia prosecutions for sodomy are rare it does happen[17] and can happen. In South Africa sodomy as a crime between consenting males in private was declared unconstitutional for (amongst other reasons) being an infringement of the right to human

[12] For a comprehensive discussion of the role of international law in Namibia see: Namibian Law on LGBT Issues *op cit* pages 46-62.
[13] *Government of the Republic of Namibia and others v Mwilima and others* 2002 NR 235 (SC).
[14] Per Mahomed AJA, in *Minister of Defence v Mwandinghi* 1992 (2) SA 355 (NmS) at page 362F-G.
[15] It is listed in Schedule 1 to the *Criminal Procedure Act*, 1977.
[16] Which includes a magistrate, police official and member of the prison services.
[17] See *Kennedy and others v Minister of Prisons and Correctional Services* 2008 (2) NR 631 (HC) at para [2] where it is reflected that an inmate was serving a 19 year imprisonment sentence for, amongst others, sodomy. See also Namibian Law on LGBT Issues *op cit* p 66-67.

dignity.[18] There is no reason why the Namibian courts should not follow suit when the opportunity arises.

Then there is the *Combating of Immoral Practices Act*, 1980 (Act 21 of 1980), a strange relic of Namibia's past. It is aimed at "…the combating of brothels, prostitution and other immoral practices and for matters connected therewith."

In section 1 this Act adopts the definition of "sexual act" in the *Combating of Rape Act*, 2000 (Act 8 of 2000). This definition reads as follows:

> "sexual act" means –
>
> (a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or
>
> (b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion of any part of the body (other than the penis) of a person or of any object into the vagina or anus of another person is, consistent with sound medical practices; carried out for proper medical purposes; or
>
> (c) cunnilingus or any other form of genital stimulation."

In addition the *Combating of Immoral Practices Act*, 1980, defines "unlawful carnal intercourse" thus:

'"unlawful carnal intercourse" means carnal intercourse between persons who are not married or who are not partners in a customary union in terms of the traditional laws and customs applied by a particular population group referred to in section 3 of the Representative Authorities Proclamation, 1980 (Proclamation AG. 8 of 1980).'

Taken to its logical conclusion this definition covers anyone who is not married including of course lesbian and gay couples. Heterosexual couples can get around the definition by getting married. Same sex couples cannot.

However the *Combating of Immoral Practices Act*, 1980, appears to apply the concept "unlawful carnal intercourse" primarily to discourage prostitution involving a man and a woman.[19] It appears highly unlikely that this concept could be used successfully in a court to prosecute anyone in a same sex situation.

[18] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others1998 (12) BCLR 1517 (CC).

[19] Section 5: procuring any female for unlawful carnal intercourse; section 6: assisting any male to have unlawful carnal intercourse with a female and section 13: detention of a female for purposes of unlawful carnal intercourse.

The definition of 'sexual act' adopted from the *Combating of Rape Act*, 2000, appears only in section 14 of the *Combating of Immoral Practices Act*, 1980. Section 14 criminalizes sexual offences with children under sixteen. This is perfectly justifiable and cannot be said to discriminate against LGBT persons.

Section 7 of the *Combating of Immoral Practices Act*, 1980, makes it a crime if any person entices or solicits any other person for 'immoral purposes'. Section 8 creates the crime of committing an 'immoral act' in public. This also applies to 'any person'. An immoral act is not defined in the Act. This is very open-ended and can potentially be the thin edge of the wedge if there is intent to go after LGBT persons.

Also section 3 of the *Combating of Domestic Violence Act*, 2003 (Act No. 4 of 2003) contains the following components in the definition of domestic relationship:

> "(1) For the purposes of this Act a person is in a "domestic relationship" with another person if, subject to subsection (2) -
>
> (d) they are or were married to each other, including a marriage according to any law, custom or religion, or are or were engaged to be so married;
>
> (e) they, being of different sexes, live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other;
>
> (f) they have, have had or are expecting a child together, excluding situations -
>
> (i) where the child is conceived as a result of rape; or
>
> (ii) where the parties contributed gametes for artificial insemination, in vitro fertilisation or similar fertilisation techniques, but have no other relationship."

This definition clearly excludes LGBT persons from a domestic relationship and consequently the potential protection of this Act. This is discriminatory.

Finally section 5(2) of the *Labour Act*, 2007 (Act No. 11 of 2007) provides:

> "A person must not discriminate in any employment decision directly or indirectly, or adopt any requirement or engage in any practice which has the effect of discrimination against any individual on one or more of the following grounds –
>
> (a) race, colour, or ethnic origin;
> (b) sex, marital status or family responsibilities;
> (c) religion, creed or political opinion;
> (d) social or economic status;
> (e) degree of physical or mental disability;
> (f) AIDS or HIV status; or
> (g) previous, current or future pregnancy."

LGBT persons are excluded. Applying international principles the argument can be made that 'sex' in this context also includes 'sexual orientation'. However there is no reason why the legislation cannot be explicit in protecting LGBT persons from discrimination in the workplace.

Apart from the above there appears to be no other law in Namibia that explicitly discriminates against LGBT persons. It is largely the absence of any prohibition against such discrimination that is cause for concern.

Conclusion

Namibia is stigmatized internationally as part of the group of countries where homosexuality is illegal.[20] While its neighbour and dominant trading partner, South Africa, abolished the crime of consensual sodomy and recognises same sex marriages.[21] Namibia should do the same. That is what true democracies do.

The Supreme Court judgment in the *Frank* matter is not only outdated it is wrong. The biggest flaw of the judgment is that it did not interpret the Namibian Constitution in a generous and purposeful fashion. In addition the judge misdirected himself by accepting that reference to 'sex' in Article 2(1) of the ICCPR excludes 'sexual orientation' because he was clearly unaware of the clarification by the UN Human Rights Committee in 1994 that the former should be read to include the latter. One can be optimistic that if the opportunity arises now the High Court or Supreme Court will get it right and align Namibian law with international principles.

In addition as demonstrated above at least two legislative provisions[22] exclude LGBT persons from provisions designed to protect individuals. This should be rectified by legislation. The legislation as it stands now is not in conformity with Namibia's international obligations, particularly the undertaking in terms of Article 2(1) of the ICCPR not to make any kind of distinction between individuals on the basis of sexual orientation.

[20] https://76crimes.com/2016/08/30/good-news-from-malaysia-namibia-ukraine/ .
[21] *Minister of Home Affairs v Fourie*; *Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC).
[22] Section 3 of the *Combating of Domestic Violence Act*, 2003, and section 5(2) of the *Labour Act*, 2007.

Land matters in Namibia: The issue of land and the Constitution

Harald Sippel

The issue of land in Namibia

Since Independence in March 1990, the land question, i.e. the access to land for poor and landless citizens, has been one of the main political, social, economic and even emotional matters in Namibia.[1] The idea to change at that time existing conditions of landed property and land use, especially in the commercial farming areas of the country, which were the result of unfair land allocation practises and discriminatory treatment of large parts of the under-privileged indigenous population in the deplorable colonial past of that country, culminated in a comprehensive land reform initiated by civic engagement and carried out by the Government of Namibia. However, purpose of any land reform is to redistribute land rights. In a constitutional State like Namibia the redistribution of land rights has to be realized by implementation of legislation in strict accordance with the rule of law.[2] For that reason the laws regulating the Namibian land reform may not contravene constitutional rights. The aim of this paper is not to describe and analyse the causes for and the process of the redistribution of land in Namibia in detail, an important task which has already been done by several other authors,[3] but to examine main aspects of the land reform in the light of the principles of the Constitution of the Republic of Namibia.[4]

[1] See for instance the contributions in the collective volume edited by Hunter, J (Ed). 2004. Who should own the land? Analyses and views on land reform and the land question in Namibia and Southern Africa. Windhoek: Konrad Adenauer Stiftung & Namibia Institute for Democracy. See also Melber, H. 2014. Understanding Namibia. The trials of independence. London: C. Hurst, pp 89-110; Sippel, H. 2007. "Die Bodenreformgesetzgebung von Namibia". Recht in Afrika – Law in Africa – Droit en Afrique 10, 231-243 (231f); Thran, M. 2014. "Rassengerechtigkeit" und Fetischisierung von Land. Kritik der Landreform in Namibia. Marburg: Tectum Verlag; Woeller, A. 2005. Die Landfrage und Landreform in Namibia. München: Herbert Utz Verlag, pp 100-105.

[2] See in this regard Article 1 (1) of the Constitution of the Republic of Namibia (March 21, 1990).

[3] Since Namibia became independent in 1990 much has been written about the land reform. For an overview see for instance the impressive compilation of documents and literature on land reform in Namibia arranged by Werner, W. 2016. Land reform in Namibia: A bibliography. Windhoek: Integrated Land Management Institute.

[4] Constitution of the Republic of Namibia (March 21, 1990). For more details on the Constitution of Namibia see e.g. Hinz, MO. 1991. "Die Verfassung Namibias (1990): Entwicklung, Hintergrund, Kontext." Jahrbuch des öffentlichen Rechts nF 40, 653-691; Naldi, GJ. 1995. Constitutional rights in Namibia. Kenwyn: Juta; Schmidt-Jortzig, E. 1994. "Namibia – Staatsentstehung durch Verfassungsgebung, in: Verfassung und Recht in Übersee (Law and Politics in Africa, Asia and Latin America) 27, 309-324; Watz, FL. 2004. Die Grundrechte in der Verfassung der Republik Namibia vom 21. März 1990. Göttingen & Windhoek: Klaus Hess Verlag.

However, the issue of land in Namibia has various forms of appearance. Starting in 2002 the land reform also takes place in the communal areas of the country. Furthermore there are several long-term conflicts on land rights between indigenous communities and public authorities with questions relating to the Constitution of Namibia.

Land as mentioned in the Constitution of Namibia

The term "land" in the sense of landed property is only mentioned once in the text of the Namibian Constitution.[5] Under the title "Sovereign Ownership of Natural Resources" Article 100 of the Constitution of Namibia has the wording:

> "Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned."

This means, that land, water and natural resources in Namibia can basically belong not only to the State as public land but also to other natural and legal persons. If land is unlawfully owned by a natural or a legal person the State would be the legitimate owner of that land according to Article 100 of the Constitution of Namibia. At the time of the Independence of Namibia the question arose, if individual Namibian land owners of the early 1990s – most of them of European descent and proprietor of (freehold) land in the commercial farming areas of the country – had obtained land ownership unlawfully just because they had received their land rights during the times of German and South African colonial rule or even in the pre-colonial area.[6] The National Land Conference of 1991 dealt with this problem and came to the conclusion that it would have been impossible to find out the lawfulness of land ownership of the past and that the revision of the status quo of landed property might eliminate blatant injustice but would definitely lead to new wrongfulness.[7] Therefore, the National Land Conference of 1991 decided that

[5] However, sometimes the term "immovable property" is used, e.g. in Article 16 (1) and in Schedule 5 of the Constitution of Namibia. For details on immovable property law in Namibia see Resch, A. 2014. Immovable property law in Namibia. A legal analysis of the rights of immovable property with special emphasis on their transferability, registration and surveying requirements. Windhoek: GIZ & MLR.

[6] For a brief historical overview of land use and land rights in pre-colonial and colonial Namibia see Adams, F & W Werner. 1990. The land issue in Namibia: An enquiry. Windhoek: University of Namibia; Botha, C. 2000. "The politics of land settlement in Namibia 1890-1960". South African Historical Journal 42, 232-276; Sippel, H. 2001. "Landfrage und Bodenreform in Namibia." Verfassung und Recht in Übersee (Law and Politics in Africa, Asia and Latin America) 34, 292-314 (294-305); Werner, W. 1993. "A brief history of land dispossession in Namibia". Journal of Southern African Studies 19, 135-146.

[7] Republic of Namibia. 1991. National conference on land reform and the land question, Windhoek, 25 June to 1 July 1991. Volume 1: Research papers, addresses and consensus document. Prepared by the Namibian Policy Research Unit on behalf to the Office of the Prime Minister. Windhoek: NEPRU. See also Hinz, MO & S Joas. 1998. Customary law in Namibia: Development and perspective (Fourth Edition). Windhoek: CASS, pp 224f; Pankhurst, D. 1996. A resolvable conflict? The politics of land in Namibia. Bradford: University of Bradford, pp 117-122; Schade, K. 1992. "Die Ergebnisse der Land-

the in Namibia at that time existing land rights should not be infringed. Landed property should not be returned to certain previous African land owners and their descendants who were the victims of expulsion and expropriation during Namibia's colonial past. Instead any landless Namibian citizen should benefit from a national land reform regardless of potential existing land claims. This is the reason why Namibia in contrast to e.g. the Republic of South Africa did not implement restitution laws to redistribute landed property.[8] The aforementioned decision of the National Land Conference is, however, in accordance with Article 140 of the Constitution of Namibia, which under the title "The Law in Force at the Date of Independence" reads as follows:

> "(1) 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. …
>
> (3) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, …"

In Article 140 of the Constitution of Namibia the legitimacy of the previous legislation by South Africa and of administrative decisions based on this previous legislation is principally maintained. For that reason also the acquirement of land ownership by natural and legal persons during Namibia's colonial past is assumed to be legitimated.

If land is lawfully owned by other natural or legal persons than the State the constitutional guarantee of property has to be observed. In the Namibian Constitution the property rights are guaranteed in Article 16 (1) which reads as follows:

> "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 and to bequeath their property to their heirs of 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."

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konferenz in Namibia. Eine Relativierung geweckter Hoffnungen?". Afrika Spectrum 27, 303-326.

[8] In the Republic of South Africa several land restitution laws have been enacted, e.g. Restitution of Land Rights Act (No. 22 of 1994), Land Restitution and Reform Laws Amendment Act (No. 78 of 1996) and Land Restitution and Reform Laws Amendment Act of 1999 (No. 18 of 1999). For details see Bismarck, J von. 1999. Wiedergutmachung von Enteignungsunrecht. Landrestitution nach einem Systemwechsel: Das südafrikanische Gesetz zur Restitution von Landrechten von 1994 unter vergleichender Berücksichtigung des deutschen Rechts der öffentlichen Vermögensfragen. Aachen: Shaker Verlag; De Villiers, B. 2003. Land reform: Issues and challenges. A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia. Johannesburg: Konrad Adenauer Foundation; Göler von Ravensburg, N. 2001. "Südafrikanisches Bodenrecht zwischen Verteilungsgerechtigkeit und Wirtschaftlichkeit". Recht in Afrika – Law in Africa – Droit en Afrique 4, 17-55; Miller, DLC & A Pope. 2000. "South African Land Reform". Journal of African Law 44, 167-194.

Any redistribution of landed property within the frame of a lawfully land reform has to be done within the context of the constitutionally guaranteed property rights of the private land owners. However, property rights are not guaranteed for eternity. Article 16 (2) of the Constitution of Namibia gives the empowerment for expropriation:

> "The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament."

According to this regulation the re-distribution of land can even be performed by the expropriation of landed property as long as the aforementioned fundamental legal requirements of expropriation are observed. In this case the guarantee of property as mentioned in Article 16 (1) of the Constitution of Namibia would not apply.

In addition to the freehold land of natural and legal persons there is also communal land in Namibia. Communal land is located in the communal areas especially in the northern and in the eastern parts of the country. In the communal areas there is no private landed property (freehold) but there are certain rights to utilize the land (non-freehold) in accordance with the local customary law. The Constitution of Namibia addresses communal land inter alia in Schedule 5, dealing with the „Property vesting in the Government of Namibia", which has the following wording:

> "(1) All property of which the ownership or control immediately to the date of independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.
>
> (2) For the purpose of this Schedule "property" shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situated, and shall include any right or interest therein.
>
> (3) All such immovable property shall be transferred to the Government of Namibia without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution. …"

Referring to Schedule 5 of the Namibian Constitution, the Government of Namibia regards communal land as land of the State.[9] According to the provisions of the National

[9] Breytenbach, W. 2004. "Land reform in Southern Africa". In Hunter, J (Ed). Who should own the land? Analyses and views on land reform and the land question in Namibia and Southern Africa.

Land Policy communal land has to be administered by the Government of Namibia for the benefit of the members of traditional communities who use to live on that land.[10]

Although the term 'land' is hardly mentioned in the Constitution, the Supreme Law[11] of the country assumes three categories of land existing in Namibia: State land (public), privately owned land (freehold) and communal land (non-freehold). The redistribution of land within the context of a comprehensive land reform does not belong to the objectives of the Constitution of the Republic of Namibia.

Land reform in the commercial farming areas

The first decade of the land reform process concentrated solely on the commercial farming areas located in central and southern parts of Namibia. The farm land is in most cases in private ownership (freehold title) of persons of European origin. The land was often acquired under dubious circumstances and/or to questionable conditions at the time of German and South African colonial rule of the country. Hitherto that land had been owned by indigenous African communities. Since one of the aims of the Namibian land reform is to revise former injustices the first steps of land redistribution occurred in the commercial farming areas.

As mentioned previously, the Constitution of Namibia does not comprise regulations dealing directly with land reform affairs. However, the Agricultural (Commercial) Land Reform Act (No. 6 of 1995) and subsequent legislative changes became the legal basis for the redistribution of commercial farm land in Namibia by providing the right of pre-emption of land by the State and certain regulations for the implementation of expropriation proceedings in conformity with Article 16 (2) of the Constitution. In addition the Government of Namibia implemented the Affirmative Action Loan Scheme by the Agricultural Bank Amendment Act (No. 27 of 1991) and by the Agricultural Bank Matters Amendment Act (No. 15 of 1992). For the purpose of financing the redistribution of land in Namibia a tax on real estate was implemented by the Agricultural (Commercial) Land Reform Second Amendment Act, 2001.

Windhoek: Konrad Adenauer Stiftung & Namibia Institute for Democracy, pp 46-63 (52); Harring, S. 1996. "The Constitution of Namibia and the 'rights and freedoms' guaranteed communal land holders. Resolving the inconsistency between Article 16, Article 100, and Schedule 5". South African Journal of Human Rights 12, 467-484; Werner, W. 2002. "Land reform and land rights in Namibia". In Apelt, W & J Motte (Eds). Landrecht. Perspektiven der Konfliktvermeidung im südlichen Afrika. Wuppertal: Foedus-Verlag, pp 51-72 (62).

[10] Republic of Namibia – Ministry of Lands, Resettlement and Rehabilitation. 1998. National land policy. Windhoek, p 11.

[11] See Article 1 (6) of the Constitution of the Republic of Namibia (March 21, 1990).

Right of pre-emption

According to Section 17 Agricultural (Commercial) Land Reform Act, 1995 the State has the right of pre-emption of land in the commercial farming areas in Namibia.[12] In case of intended disposal of commercial farm land the State can purchase the land on the same terms as the original prospective buyer. The advantage of this so-called willing buyer-willing seller-programme is that constitutionally guaranteed rights of the owner of commercial farm land are not infringed. However, there are also a number of disadvantages: pre-condition for the right of pre-emption of land is always a willing seller and a willing buyer; the State has to accept the price of sale pre-agreed by the initial affiliates; occasional land purchases may complicate comprehensive land redistributions for resettlement programmes. Therefore, the concept of willing buyer-willing seller turned out to be absolutely suitable but time-consuming, expensive and, therefore, not very efficient.

Expropriation

As mentioned previously, landed property is protected by Article 16 (1) of the Constitution of Namibia. According to Article 16 (2) of the Constitution the State may expropriate property in the public interest subject to the payment of just compensation and in accordance with requirements and procedures to be determined by a Parliament Act. For the purpose of land reform the Agricultural (Commercial) Land Reform Act, 1995 provides for further details (Section 20 to be read in conjunction with Section 14). According to Section 14 (1), amended by the Agricultural (Commercial) Land Reform Amendment Act (No. 14 of 2003), the redistribution of land by expropriation of landed property is in the public interest if in this way social, economic or educational based discriminations of Namibian citizens, incurred under the colonial and Apartheid regimes, could be compensated. As laid down in likewise amended Section 14 (2) the Minister of Land, Resettlement and Rehabilitation has the right to determine any commercial farm for expropriation for the purpose of land redistribution after consultation of the Land Reform Advisory Commission. However, as experiences with legal practice show, any expropriation procedure constitutes an isolated case and is connected with a bundle of legal obstacles, which are difficult to observe. Moreover, the expropriated land owner is entitled to receive the payment of just compensation and he or she can take legal steps against the expropriation or the amount of compensation. That is why the procedure of expropriation can not only be time-consuming but can also cause unjustifiably high cost. Around 2004 the Government of Namibia started to expropriate commercial farm land owned by foreigners or by Namibian nationals who were supposed to have contravened against Namibian regulations for the protection of labourers. Although the last-mentioned case had been viewed critically by academics[13], in practice the expropriation was

[12] Read Section 17 (6) (b) in conjunction with Section 14 (1) Agricultural (Commercial) Land Reform Act, 1995.

[13] Odendaal, W. 2006. The SADC land and agrarian reform initiative. The case of Namibia. Windhoek: NEPRU, pp. 24f; Treeger, C. 2004. Legal analysis of farmland expropriation in Namibia. Windhoek: Namibia Institute for Democracy, pp 4f.

successful because the land owner did not challenge the notification of expropriation[14]. In the case of foreigners, who were German nationals, there was a High Court decision that the expropriation procedure suffered on blatant procedural errors.[15] This resulted in the nullity of the notification of expropriation. Subsequently the authorities directly in charge with expropriation of commercial farm land seem to cease doing that work, at least for the time being.

Any act of expropriation is a questionable interference in constitutional rights. For that reason the procedure of expropriation has to be prepared very carefully. Due to time-consuming procedures, impending court cases, concerns of national and foreign investors and the imminent risk of international imbroglios the instrument of expropriation of commercial farm land is hardly an efficient modus operandi for a comprehensive land reform in Namibia.

Affirmative Action Loan Scheme

The idea of the Affirmative Action Loan Scheme[16] of the Government of Namibia is to bring together willing sellers of commercial farm land and willing buyers who belong to previously discriminated parts of the population. For the provision of finance of the purchase the prospective buyer is entitled to receive a loan at reduced rates of interest and with a fixed duration of 25 years by the state-owned Agricultural Bank of Namibia (Agribank). Despite severe critical appraisals[17] on adverse effects of the Affirmative Action Loan Scheme this programme is indubitably in conformity with the Constitution.

Land tax

The realisation of the land reform in Namibia requires substantial financial resources. Therefore, Section 2 of the Agricultural (Commercial) Land Reform Second Amendment Act, 2001 introduced a tax on real estate in Namibia in order to get additional means for the purchase of farm land. Furthermore the introduction of a land tax should motivate commercial farmers to sell redundant land to the State. The taxable base for the land tax is the land value. The value of the land depends on the plot size and the quality

[14] See Allgemeine Zeitung, Windhoek (online archive), "Enteignung vollzogen" (2 September 2005).

[15] See Allgemeine Zeitung, Windhoek (online archive), Gericht kippt Entscheidung" (7 March 2008). In this context also the Foreign Investment Act (No. 27 of 1990) and especially the bilateral agreement of investment protection between Namibia and Germany of 21 January 1994 were of importance.

[16] Introduced by the Agricultural Bank Amendment Act (No. 27 of 1991) and the Agricultural Bank Matters Act (No. 15 of 1992).

[17] Odendaal, W. 2006. The SADC land and agrarian reform initiative. The case of Namibia. Windhoek: NEPRU, p 28; Sherbourne, R. 2004. "A rich man's hobby". In Hunter, J (Ed). Who should own the land? Analyses and views on land reform and the land question in Namibia and Southern Africa. Windhoek: Konrad Adenauer Stiftung & Namibia Institute for Democracy, pp 8-18; Werner, W. 2001. Land reform and poverty alleviation: Experiences from Namibia. Windhoek: NEPRU, pp 9-13.

of the commercial farm land. The annual tax rate is 0.75 per cent of the land value for Namibian nationals and 1.75 per cent of the land value for foreigners. For additional farms of the same owner the annual tax rate increases by 0.25 per cent of the land value. The annual land tax revenue amounts up to 30 million Namibia-Dollars.

The implementation of a land tax in Namibia is per se not in contradiction to the principles of the Constitution. However, complaints by commercial farm owners on the estimation of the land value and on discriminatory treatment in the taxation process resulted in several lawsuits against the revenue authorities.

Land reform in the communal areas

Starting in 2002 the land reform takes also place in the communal areas of Namibia where approximately on third of the country's population of 2.3 million inhabitants resides. Idle and not efficiently used arable land in the communal areas is considered to be redistributed to landless citizens of Namibia. The provisions of the Communal Land Reform Act (No. 5 of 2002) support the process of resettlement. The beneficiaries of the land reform in the communal areas do not obtain landed property but rather acquire usage rights in the form of customary land rights. The objectives of the Communal Land Reform Act include the improvement of tenure security and the development of small-scale commercial farming. However, the local population is not always delighted by the fact that newcomers receive land rights in close proximity. The land in question is sometimes considered as ancestral land and occasionally conflicts on land occurred in the respecting communal areas,[18] albeit infringements of constitutional rights have apparently not been reported.

Land conflicts between indigenous communities and public authorities

Apart from the process of comprehensive land reform in Namibia several land issues with relevance to the Constitution used to burden the relationship between indigenous communities and the State and even court cases can be expected in the near future.

As early as 1992 Damara people of the Aukeigas community who occupied parts of the Daan Viljoen Game Reserve outside Windhoek reclaimed the land of the wildlife reserve referring to the fact that they or their ancestors were forcefully removed from that land in 1956. After one year the conflict was settled out of court when the claimants were resettled to State farms.

[18] Bollig, M. 2004. "Landreform in Namibia: Landverteilung und Transformationen kommunalen Landbesitzes". In Förster, L, D Henrichsen & M Bollig (Eds). Namibia – Deutschland: Eine geteilte Geschichte, Widerstand, Gewalt, Erinnerung. München: Edition Minerva, pp 304-323; Melber, H. 2014. Understanding Namibia. The trials of independence. London: C. Hurst, p 102.

Since the beginnings of the 1990s the planned construction of the Epupa dam on the Kunene River that forms the border between Namibia and Angola is an issue of dispute between State authorities and members of the Himba communities who resist the construction project as it would have detrimental effects on their means of livelihood and would destroy parts of the land they claim to be their ancestors' burial grounds.[19] Although it is very likely that first steps for a lawsuit have already been prepared,[20] the case did not go to court because a final decision to construct the dam has not yet been made.

In 1997 and again in 2001 San people of the Hai//om community occupied one of the entrance gates of the Etosha National Game Park and reclaimed parts of the land of the National Park making reference to the fact that most of their ancestors were evicted from that land in the early 1950s.[21] In this regard the Legal Resources Centre in Cape Town, Republic of South Africa, prepares a class action of the Hai//om people which will be lodged in court in the near future.

The aforementioned conflicts on land have in common that issues of land (restitution) are involved and that certain constitutional rights of the affected indigenous communities could be violated. In this context Article 19 of the Constitution of Namibia, included in the provisions of the Bill of Rights (Fundamental Human Rights and Freedoms), becomes important, which under the title "Culture" has the following wording:

> "Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to 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."

Article 19 has to be read together with Article 66 (1), which guarantees customary law, with Article 102 (5), which provides for the recognition of traditional leaders, and with Article 95, which is on promoting of the welfare of the population as a fundamental concept of State policy. It is argued by lawyers, that Article 19 of the Namibian Constitution implied the stipulation according to which the above mentioned concept of cultural rights and guarantees, the so-called concept of culture, has a constitutional rank equivalent to the guarantee of continued existence enshrined in Article 131 of the Namibian Constitution.[22] However, the possible infringements of constitutionally guaranteed cul-

[19] Himonga, C, H Sippel, U Spellenberg & U Wanitzek. 2003. "The legal dimension of conflicts between cultural rights and economic actions in South Africa and Namibia". In Kopp, H (Ed). Area studies, business and culture. Münster, Hamburg, London: LIT Verlag, pp 282-290 (286f). For further details refer to Bollig, M. 1997. "Contested places: Graves and graveyards in Himba culture". Anthropos 92, 35-50.

[20] Legal Assistance Centre. 1998. The Epupa debate. A Summary of some of the key issues around the proposed hydropower scheme on the lower Kunene river. Windhoek: LAC.

[21] For more details see Suzman, J. 2004. "Etosha dreams: An historical account of the Hai//om predicament". The Journal of Modern African Studies 42, 221-238.

[22] Himonga, C, H Sippel, U Spellenberg & U Wanitzek. 2001. "Konflikte zwischen kulturellen Rechten und ökonomischem Handeln in Südafrika und Namibia". Recht in Afrika – Law in Africa –

tural rights which involve also land issues have not yet been subject matter of court decisions in Namibia. It is to be expected that the aforementioned class action of the Hai//om people will insofar bring further insights.

In that regard not only Namibian law but also international law is of relevance. An important issue is that of legal standing. In Namibia there is no such thing as a representative action. This means that the standing provisions do not provide for a group or a community to bring an application. In this regard Article 144 of the Constitution of Namibia becomes relevant, which reads as follows:

> "Unless 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."

According to Article 144 of the Constitution Namibia is a monist country that allows for the direct application of international law, e.g. the African Charter of Human and Peoples' Rights. Some of the rights provided for by international law are not individual, but group or peoples' rights. Therefore, the case will be taken to court on behalf of the Hai//om as a people. In order to get around the standing issue, it will be launched as a class action. This means that the first phase of the case is an application for certification of the Hai//om people as a class. Once they are certified as a class, they can proceed with the main case which entails claims for ownership of the land and resources in Etosha National Game Park.

Land issues and the Constitution of Namibia

The project of the first National Land Conference of 1991 was very ambitious. The aim to redistribute vast areas of land within short time in strict accordance with the law could not be achieved. Nevertheless, the instruments for the execution of the land reform in Namibia are suitable for a slow but sustainable transformation of the conditions of landed property and land use rights.[23] By the end of 2012 at least 22 per cent or 8,077,163 hectares of commercial farm land were redistributed, and for the acquisition of 2.05 million hectares of commercial farm land from 1990 to the end of 2014 the State spent the amount of 829 million Namibian Dollars.[24] Moreover, in the communal areas currently 80,352 customary land rights have been registered.[25] Although there is a lot of criticism about the slow process of land redistribution among the Namibian population, the total numbers are insofar impressive as the land reform continuously takes place in

Droit en Afrique 4, 177-191 (185f).

[23] Aamo, SK. 2001. "Comprehensive land tenure systems and land reform in Namibia". South African Journal of Human Rights 17, 87-106; Adams, M. 2000. Land reform in Namibia. Oxford: Oxfam.

[24] Werner, W. 2015. 25 years of land reform. Windhoek: Integrated Land Management Institute, pp 2, 4.

[25] Werner, W. 2015. 25 years of land reform. Windhoek: Integrated Land Management Institute, p 12f.

conformity with the Constitution.

In regard to the question of restoring ancestral land rights the intended class action of the Hai//om people may enable the competent court to turn over a new leaf to redress historical injustices in relation to access to land since the restitution of ancestral land rights has been ruled out in Namibia by the first National Land Conference in 1991.

A second National Land Conference was originally scheduled for November 2016. Due to various reasons the event had to be postponed indefinitely. However, the fact that a second National Land Conference is in process of planning shows impressively that the issue of land continues to matter in Namibia.

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Constitutional Principle of "Mixed Economy" and the Triumph of Neoliberalism in Namibia

Job Shipululo Amupanda

Introduction – What are the issues?

The general understanding, in political science, is that the state exists to provide for the common and greater good of all members of society. For Aristotle, a famous and revered Greek philosopher, the state, as an association of persons, has as its aim the attainment of the 'best life possible' (Haworth: 2012). For John Locke, Thomas Hobbes and Jean Jacques Rousseau, the state exists as a result of a social pact the people enter into. While political philosophers differ on the key reasons that necessitate individuals to consent to this social pact, it is generally accepted that this pact is aimed at achieving the greater good for the members of society as a collective (Heywood, 2012: Haworth, 2012). Given that the overriding purpose of the state is to provide for the greater good of men, as per the social pact - to use the Social Contract language, it then follows that the performance(s) of states is to be assessed by looking at the extent to which it provides and caters for the greater good of men. One of the important aspects of the greater good of men is the economic life of society and its people. It is one of the most important, if not the most important, aspect of human life. Marxists scholars are more pronounced on this score. British Marxist and Sociologist John Scott summarize:

> "People must eat, drink, and be clothed and housed if they are to engage in any other social activities. The production of subsistence is a need that 'must daily and hourly be fulfilled merely in order to sustain human life'. This production of the means of subsistence is conditioned by physical circumstances as these have been modified by human activity over generations, and so any account must begin from the social activities through which people relate to nature. Any particular way of life depends upon the maintenance of a specific and 'corresponding' mode of production that is the basis of the 'mode of life." (Scott: 2011:52)

It is not only western political philosophers and theorists who understood the centrality and importance of economic welfare of the people as the key performance indicator for the state in fulfilling and meeting the greater good of all members of society and people as a whole. President Julius Nyerere, the first President of Tanzania, not only theorized the need for people-centered production but went further to make practical efforts (regardless of success and longevity) of ensuring that the state, in fulfilling its obligation for the greater good of society, decisively intervene in the economic life on the side and on behalf of the people as a whole (Nyerere, 1968: Hyden, 2013). As Kamuzora (2009) further explains on *Pambazuka News* website:

> "[President Nyerere's] aspiration was to attain a self-reliant, egalitarian and human-centred society where all members have equal rights and equal opportunities; in which all

> can live in peace with their neighbours without suffering or imposing injustice, being exploited, or exploiting; and in which all have a gradually increasing basic level of material welfare before any individual lives in luxury." (Kamuzora: 2009)

Nyerere was not alone. Kwame Nkrumah, the first President of Ghana, subscribed to the same principles. Indeed, when Africans had started fighting against colonialisms, the primary motivating factor was the disturbances of their economic life, particularly the dispossession of their land, and the introduction of alien European economic methods of production. Even after colonialism had come to an end and most African states attained independence, the analysis of the economic life remained central. It is this question, the question of economic life, which Pan-African scholar Walter Rodney explores in his 1972 seminal text titled *How Europe Undeveloped Africa*. For some African eminent figures such as Kwame Nkrumah and Cheikh Anta Diop African political independence attainted towards the end of the 1950s meant nothing more than a springboard towards economic freedom. It was for this reason that they strongly argued for continental unity to wage and win the incomplete task of economic emancipation of the African people (Rodney, 1972: Diop, 1974: Nkrumah, 1963).

By the time the United Nations (UN) came to Namibia to implement UN resolution 435 paving the way for Namibia's independence, many were hopeful on a new society that signaled the end of colonialism on the African continent. What awaited this small nation and the African continent, as envisioned by Nkrumah and others, was a clear path, it was expected, towards economic prosperity for the African people. In the words of Hage Geingob, the first Prime Minister of Namibia and current President of the country, "the Organization of the African Unity, the Frontline States and members of the Non-Aligned Movement were happy to see the last colony in Africa become independent" (Geingob: 2010, 106).

What awaited post-independence Namibia is something that many may not have anticipated given the exuberance brought by decolonization. Many saw a smooth ride towards economic prosperity for all. 20 years after independence, it became clear that the promises of post-independence 'milk and honey' have not been fulfilled as Jauch et al (2011) notes in detail:

> "Namibia holds the infamous record of being the country with the highest levels of inequality in the world… 20 years after independence the country is still highly fragmented… the country's negotiated transition to independence ensured that economic structures remained largely intact… despite various attempts by the Namibian government to provide basic services for all and despite several policy interventions aimed at redressing the apartheid legacies, Namibia still ranks amongst the most unequal societies in the world… no systematic programme of redistribution was implemented and thus the country's achievements, in terms of overcoming poverty and inequality, were limited…the rural population, vulnerable workers and informal economy workers [part of the populations majority] experienced only few material improvements since independence." (Jauch et al 2011:161-223)

It is not only local scholars who see the dichotomy resulting from the promises made at independence and the reality of today. Writing for *This Is Africa*, an online forum on African opinion and art, in 2012, a seemingly terrified writer, Siji Jabbar, has the following to say:

> "21 years after independence, Namibia is still ruled and "owned" by the descendants of the German and white South African colonizers. A few thousand white Namibians living large, while the majority black population hews wood, draws water, lives mostly in townships and under the poverty line, and remains mostly unemployed. White Namibians are Namibians, too, of course, but when the wealth gap is so obviously based on race as a result of the country's history, isn't some faster redistribution of the country's wealth called for? At the current rate it will take a few generations to make much of a difference, let alone equitable. A time-bomb waiting to explode, as it did in Zimbabwe." (Jabbar 2012)

What happened and how did Namibia reach this point, the point of neoliberalism that has produced and reproduced inequality, is the concern of this text - distinct in the manner that it approaches the subject matter. Whereas there has been many studies conducted on inequality and economic deprivations of the masses of the Namibian people, such studies have hardly focused and analyzed the supreme law of the land, the constitution, to explore positionality questions and possible contributing factors, resultant of the Namibian constitutional posture and disposition, to the status quo. The text does not pretend to study of the entire constitution but looks at Article 98, on the Principles of Economic Order, particularly the principle of "Mixed Economy" and then juxtapose it to the emergence and the consequences of neoliberalism that is, in practical terms, the real principle of economic order in Namibia. In doing so, the text critically analyses the politics of drafting the Namibian constitution to provide proper context before delving into and interrogating the principle of "mixed economy". It then discusses the rise of neoliberalism and its consequences before concluding with scant perspectives on what is to be done. It is important to again emphasize why the constitution and constitutional principles are centralized. This is so from the perspective stated earlier that the state exists to provide for society's greater good and that of the people as a whole. In assessing the fulfillment, by the state, of this greater good the aspect of economic life remains important. That said, it is the constitution that articulates and provides the foundational framework for what the states does, how, when and where. As such the analysis of article 98 and juxtaposing it to social manifestations such as neoliberalism is indeed an assessment of how the state is faring in the fulfillment of the greater good for society and the people as a whole.

The State, constitution and constitutionalism

For the purposes of clarity, it is necessary to discus, albeit briefly, the key concepts surrounding the subject matter; the state, constitution and constitutionalism. Historically, the concept of the state is traced in the organization of public life in ancient Greece. While Ancient Greek political philosophers, such as Plato, Aristotle and Socrates, debated the disposition of the state, there has been a considerable consensus on the need

for the state to exist. Plato, writing in his seminal text *The Republic*, saw the state as a somewhat pyramid-like structure that is underpinned by excellence and run by the finest of minds – a meritocracy. Haworth (2012:14-15) elucidates:

> "Plato's state's most fundamental feature is its system of administration. There is a pyramidal class structure, with a ruling group of 'philosopher rulers' or 'guardians' [also referred to as philosopher kings and queens] at the pyramid's peak. It is their job, and their alone, to rule. That is because they are philosophers which mean they – and they alone – know what is good and will therefore do what is best. Everyone is supposed to 'mind their own business' and concentrate on what they are best at, leaving the philosopher rulers to get on with the job of ruling… immediately subsidiary to the guardian class is a class of 'auxiliaries'. Their job is to ensure that the rulers' directives are carried out. Finally, at the base of the pyramid, the largest class is composed of everyone who is not a guardian. It is the class of ordinary people."

With the passage of time, Plato's work came to influence other philosophers such as Machiavelli and Thomas Hobbes who argued along the lines of the state being this strong institution of society that is regulating and saving human beings from their evil self. Further supplemented by thinkers such as Hans Morgenthau, this approach to the state became dominant in what later became known as 'classical realism' - the argument for a strong state on the basis that human beings are evil and it is this disposition that characterizes the state (Heywood, 2012: Haworth, 2012: O'Brien & Williams, 2010: Brown & Ainley, 2005). With the passage of time, the approach and understanding of the state kept shifting to new understandings although the basic fundamentals, such as meritocracy, *trias politica*, greater good and the representative government, remained. For example, the modern state is viewed by Heywood (2012: 145) as a "sovereign body that exercises supreme authority over all individuals and associations living within a defined geographical area". In light of the above and in summary, the state – the domineering center of society - is generally understood as a permanent institution of society that is characterized by; the clear territory and boundaries (geographically demarcated area); a permanent population; sovereignty (no domestic equal – no external superior) and International recognition. The state can be looked at from an organic, configurational and interactive approach. The organic view on the state looks at the state in terms of the influence it has on the social and economic processes and how it affects these outcomes. This is to view the state as a structure of domination and a unitary autonomous actor from society that exist to full certain functions. The configuration approach is principally concerned with how the state is structured; the argument that it is the state apparatus that provides the framework of the rules of engagement – what is possible and not possible in a given political system. The interactive approach is concerned with state-society relations; how the two interacts and constitute each other's interest (Carnoy, 1984: Midgal, 2001: Heywood, 1997).

Whereas in Europe the development of the modern state can be traced in the context of historical developments such as the 1648 'Treaty of Westphalia' and the Paris 1789 'Declaration of the Rights of Man and of Citizens' through the process of either the

gradual (a) transformation of existing independent political units such as the medieval monarchies, (b) the unification of independent but isolated political units and (c) the break-up (often called succession) of independent political units into single units – the state in Africa did not go through the similar European experiment (Caramani, 2011: Kasselman et al, 2013: Newton & Van Deth, 2010). In Africa, the development of the modern state can be traced at the 1884/5 Berlin conference whereby Africa was divided between and amongst the select European states for the purposes of imperial conquest. The historicity of state creation in Africa was characterised by colonialism, manipulated and arbitrary boundaries that ignored African realities and the dispossession of the land and other natural resources of the African people. At the core of the creation of the State in Africa, therefore, is the safeguard of imperial capitalist interest of Europeans – an occurrence that remains true of the African state today. The institutions, structures and functions of the colonial state will later present serious difficulty to the African independent state. Most liberation movements that fought for self-determination were more clear about what they did not want – oppression and colonialism – but were hardly concerned with the configuration of the state. It is for this reason that at independence the new governments operated in exactly the same institutions and operated, at most, under the same laws as that of the colonial state (Bayart, 2009: Chabal & Daloz, 1999: Thomson, 2010: Fanon 1963).

There can hardly be a thorough and fitting understanding of the dealings of the state, including the identity and principles, without looking at the constitution of that state. To Thomas Paine, an American political activist credited for the enlightenment-era ideas that influence the American Revolution, a constitution is the "property of a nation, and not of those who exercise the government. [Constitutions]… are declared to be established on the authority of the people" (Paine: 1791). Writing in *Political Science Quarterly* already in 1892, Charles Borgeaud defined a constitution as:

> "…the fundamental law according to which the government of a state is organized, and agreeably to which the relations of individuals or moral persons to the community are determined. It may be a written instrument, - a precise text or series of texts, enacted at a given time by a sovereign power, - or it may be the more or less definite result of a series of legislative enactments, ordinances, judicial decisions, precedents and customs, of diverse origin and of unequal value and importance. Most existing free constitutions are of the first-mentioned type. To the second class belongs the English constitution – the one from which all others are in some degree descended." (Borgeaud 1892: 613)

The written constitutions are the most popular in the study of the modern state. Although contested in some circles, it is argued that the American constitution is amongst the firstwritten, completed, constitutions. Kim Lane Scheppele, a then senior visiting scholar at the National Constitution Center (NCC) in the US, traces the history of written constitutions and writes on NCC website:

> "The American Constitution was the first complete written national constitution. But it was neither the first constitution of a general government, nor the first written constitu-

> tion. A number of governments, starting with the Greek city-states, had customary or partially written constitutions. The American Constitution drew from many sources. Britain was the most obvious. But the comparative knowledge of the Framers ranged from Ancient Greece to then contemporary Poland….Once the American Constitution was ratified, the idea of the single written constitution became popular the world over. Poland adopted its first written constitution in the spring of 1791; France followed with its first written constitution later that year and went through four constitutions in the 1790s alone. Many 19th century changes of government were marked by the adoption of written constitutions…The European Revolutions of 1848 produced dozens of new constitutions in that year alone…In the 20th century, constitutions have become fashionable, especially since the Second World War. Almost all democratic governments now have written constitutions. The United Kingdom, New Zealand and Israel are the notable exceptions." (Scheppele 2016)

The states in Africa, including Namibia, thus followed the state constitutional principles of the European exercise. Hage Geingob, who chaired the Constituent Assembly that drafted the constitution of Namibia, understands the constitution as dealing with two elements; an act of 'constituting' a government and an act of 'limiting' government powers. It is evident that his thought is influenced by Thomas Paine and Charles Howard Mcllwain. He submits that:

> "All constitutional government is by definition limited government or limiting of government. 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 the inheritance of the long history of human thought include democracy, freely elected representatives of the people, rights of man, sovereignty, and liberty." (Geingob 2010: 83-84)

For the case of Namibia, the legal Assistance Center, writing in 1990 to simplify the newly adopted Namibian constitution to the Namibian people, explained that "the Constitution is the most important law in Namibia. It protects the basic rights of all people and guarantees that there will be equal rights for all. The Constitution explains how Namibia will be governed" (Legal Assistance Center: 1990, 1). Accordingly, the above stated perspectives and narratives are contained in Article 1 of the Namibian constitution as follows:

> (1) 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.
> (2)All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State.
> GRN[1] (1990)

[1] Government of the Republic of Namibia.

In post-constitutional order in general and in post-independence societies in particular, one often come across the term constitutionalism. What is constitutionalism? Andre du Pisani, a Namibian professor of Political Science, provides clarity in that "constitutionalism, in a narrow sense, then, is the practice of limited government ensured by the existence of a constitution" (Du Pisani: 2010, 11). This basically means that constitutionalism is the practice or implementation of the order created by the constitution. It then follows the logic of discussions above that with the state discussed, explained and understood, how the state works is outlined by the constitutions. The practice of what is contained in the constitution is what becomes known as constitutionalism.

Professor du Pisani continues providing clarity in that;

> "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; 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, and decentralized authority." (Du Pisani 2010: 11-12)

Central to the idea of constitutionalism is the concept of the 'rule of law', seen as opposed to the 'rule of men'. The LAC[2] simplifies this concept in accessible language that "the rule of law means that everyone must obey the law, even people in positions of power. It also means that the law must apply equally to all people, and that everyone has the right to seek help from the courts if the law is not followed" (LAC: 1990, 2). To understand the constitutional principle of the 'mixed economy' and the triumph of neoliberalism in Namibia, as will emerge clear in the subsequent pages, it was absolutely necessary to provide a brief discussion and understanding on both the state, the constitution and constitutionalism.

The politics of drafting the Namibian constitution

At the Berlin Conference of 1884/5, a conference of European imperial powers organized and chaired by the first Chancellor of Germany Otto von Bismarck, the territory of present day Namibia (then called South West Africa) was self-claimed as a German colony. This conference outcome, contained in what was known as the 'General Act of the Berlin Conference', would then serve as the beginning of a formal process that will inflict pain and suffering to millions of Africans in the form of colonialism – an event whose outcomes are still felt by Africans today. Before the Berlin conference and its outcomes, African livelihoods were organized in political units called kingdoms and empires. The economic life was organized on the basis of what is known as African communalism (Hyden, 2013: Thomson, 2010: Wallace and Kinahan, 2011: Dobell, 2000). The misplaced narratives of Africans as underdeveloped and backward were challenged and discredited by several historians and scholars such as Cheikh Anta Diop and Walter

[2] Legal Assistance Center of Namibia.

Rodney amongst others. These scholars points to the fact that Africans were developed and led their lives well before the arrival of Europeans on the continent. Rodney, for examples, notes that:

> "…under communalism every African was assured of sufficient land to meet his own needs by virtue of being a member of a family or community…African manufacturing had advanced appreciably. Most African societies fulfilled their own needs for a wide range of articles of domestic use, as well as for farming tools and weapons…[for example] through North Africa, Europeans became familiar with a superior brand of red leather from Africa which was termed "Moroccan leather." In fact, it was tanned and dyed by Hausa and Mandinga specialists it northern Nigeria and Mali. When direct contact was established between Europeans and Africans on the East and West coasts, many more impressive items were displayed… Africa was a continent of innumerable trade routes. .. Various communities were producing surpluses of given commodities which could be exchanged for items which they lacked. In that way, the salt industry of one locality would be stimulated while the iron industry would be encouraged in another. In a coastal, lake, or river area, dried fish could become profitable, while yams and millet would be grown in abundance elsewhere to provide a basis for exchange… Indeed, the first Europeans to reach West and East Africa by sea were the ones who indicated that in most respects African development was comparable to that which they knew." (Rodney 1982: 41-69)

While the differences in the scale of development in Europe and Africa existed, it is a discredited – as aptly demonstrated by Rodney above - that Europeans came to Africa to bring development to a 'dark, uncivilized, barbaric undeveloped' continent as is often touted. Europeans came to Africa; it must immediately be submitted, to pursue imperial capitalist goals as contained in the 'General Act of the Berlin Conference'. This is the same with the Germans who occupied Namibia. Henning Melber, a Namibian professor of political science, details how German colonial occupation of Namibia took shape:

> "On 5 September 1884, the German Empire formally declared the south-western coastal strip of Africa under its flag. Soon, however, the area under her "protection" stretched from the Kunene River in the north to the Orange River in the south, and to the sandy desert of the Kalahari in the east. This formal declaration of colonial responsibility was followed by a period in which a representative of the German Empire tried to conclude "protection treaties" with local chiefs… the German empire at this time was preoccupied mainly with building its own internal capitalist system. It was not yet in a position to take systematic advantage of its colonial possessions. Economic interests were mainly represented by a number of "concessionary companies". In the main, these existed only for speculative purposes with regard to land allocation and the exploitation of natural resources…The official German administration established itself in 1893. Only from that time on did a colonial power structure and administrative apparatus come into being, which in its aims and effects was soon to undermine the existence of certain Namibian groups… the German colonial power had, by 1907, gained complete control over the territory." (Melber 2010: 28-37)

The local communities waged several wars, including what is regarded as the War of National Resistance, against the German colonial state. They fought bravely although they did not have modern weaponry as did the colonial state. As a case in point, between

1904 and 1907, the Germans committed what is regarded as the first genocide of the 20th century whereby more than 100 000 Hereros and Namas were exterminated on the order of a German general Lothar von Trotha (SWAPO, 1981: Melber, 2010: Wallace and Kinahan, 2011).

For the purposes of this text, it is important to note that the German colonial state continued with its occupation of the territory - and it had as state policy - the unleashing of brutality upon the indigenous populations in order to achieve its capitalist imperial objectives. Following the Versailles Treaties, and to a certain extent the occupation of Namibia by the South African troops in 1914-15, Germany was forced to relinquish the territory; a profitable colonial booty. Namibia was now handed over to another colonial master who will exploit the country, its people and its resources for another 75 years (Melber: 2010). Du Pisani (2010) provides an account of the circumstances under which Namibia became a colony of South Africa and the subsequent colonial policy:

> "World War I was terminated by the terms of Article 119 of the Peace Treaty of Versailles signed by various parties in June 1919. This transferred sovereignty of the former German colonial Government over to German South West Africa to the Principal Allied and Associated Powers, and they, in turn, transferred the "full powers of administration and legislation" to the Union of South Africa as the mandatory power. Supervisory power over South Africa (as mandatory power) was vested in the Permanent Mandates Commission of the League of Nations… When the Union of South Africa was designated the mandatory power over Namibia in 1919, that country set out to redefine public space and political life in the mandated territory. Political developments, such as the creation of an all-white Advisory Council in 1921, the introduction of English and Dutch as official languages (in January 1920) and Roman-Dutch law as the common law in Namibia, land policy, education policy, as well as the active encouragement of white settlement, all pointed to an attempt to reconfigure public space in Namibia so as to contain the movement of the majority black population. The Vagrancy Proclamation of 1920, which made it an offence for black men to move around the Police Zone… was, one of the keystones of colonial policy." (Du Pisani 2010:53-55)

As previously stated, the indigenous people stood up and resisted both German and South African colonial occupation of Namibia. The local chiefs fought bravely against German colonialism. The South African colonialism was resisted by several nationalist forces and groupings from which the SWAPO[3] later, particularly after the 1960s, emerged as the leading nationalist movement fighting against apartheid and colonialism in favour of freedom and independence in Namibia. Accordingly, SWAPO went to articulate its struggle and vision as that of uniting "all Namibian people, particularly the working class, the peasantry and progressive intellectuals, into a vanguard party capable of safeguarding national independence and of building a classless, non-exploitative society based on the ideals and principles of scientific socialism" (SWAPO: 1981, 275). This conceptualization of a vision attracted the OAU[4] which later, in 1965, recognized SWAPO as the representative liberation movement of the Namibian people. 11 years lat-

[3] South West Africa People's Organization.
[4] Organization of African Unity.

er, in 1976, the UN General Assembly passed resolution 146 'baptizing' SWAPO as the 'sole and authentic representatives of the Namibian people' (Wallace and Kinahan, 2011: Dobell, 2000: UNIN, 1987: SWAPO, 1981). As such, SWAPO's struggle for freedom and independence of Namibia, including its armed struggle, was already internationalized. In fact, there have been Namibians who had made contact with the outside world, including the UN, on the matter of South Africa's occupation of Namibia. One such Namibians includes first petitioners of the UN such as Herero Chief Hosea Kutako, through Rev. Michael Scott, who petitioned the UN in 1946, and later on Mburumba Kerina, Hans Beukes and Jariretundu Kozonguizi, Sam Nujoma and others (Zaire: 2014). From the time when the UN declared SWAPO as the 'sole and authentic representatives of the Namibian people' to the attainment of independence - the struggle, and its discourse, for Namibia's independence and its future became an international affair. As Horn (2014: 63) further consolidates, "both the [UN] General Assembly and the Security Council had maintained constant pressure on South Africa since the 1960s".

It is, therefore, unsurprising that the drafting of the Namibian constitution was highly internationalized. Professor Nico Horn, a professor of Law at the University of Namibia, captures this history, of the internationalized struggle for Namibia, leading up to and characterizing the drafting of the Namibian constitution. It is necessary to reproduce his narration at length:

> "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… the second important international initiative was the drafting in 1981 of the Constitutional Principles by the Western Contact Group (WCG)…consisting of Canada, France, West Germany, the United Kingdom and the United States.. In January 1981, the UN sponsored the so-called pre-implementation conference for the Security Council Resolution 435. The conference [that took place in Geneva] came to naught because the delegation comprising the South Africans and internal parties used the opportunity to attack the UN for its partiality… After the Geneva conference, the WCG started working on constitutional principles that would ease the fears of whites and be acceptable to all parties involved. 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…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." (Horn 2010: 64-65)

Four things emerges clear from this historicity; (1) it was western countries, through the UN, who mostly took a lead and responsibility of the process and content of what later became the Namibian constitution; (2) white fears and interest increasingly became a key factor in the process of drafting the Namibian constitution; (3) SWAPO capitulated its leftist/socialist position in order to gain political power; (4) and that the constitution of Namibia is a product of compromises. These observations are supported by several

writers such as Mudge (2010) and Gurirab (2010) who were also participants in the drafting of the Namibian constitution. In a study on the rhetorical analysis of the making of the constitution of Namibia, Mathe (2009) also found and corroborates the compromises made by parties in the process of the drafting of the Namibian constitution.

Hage Geingob, the chairperson of the Constituent Assembly, confirms, for example, how white fear and interests were taken care of:

> "It was the spirit of compromise that eventually resulted in achieving an outcome satisfactory to all… the United Kingdom, France, and Germany managed to protect their economic and settler interests in the region… the United States of America secured its economic and geo-political interests in the region." (Geingob 2010: 106)

For the purposes of emphasis, this was to place on record that white economic interests are protected by the constitution. Horn (2010: 68) further corroborates SWAPO capitulation in submitting that SWAPO's discussion paper on the Constitution of independent Namibia submitted to the Constituent Assembly did not have an economic policy spelt out but the document did include a paragraph protecting "vested legal rights and titles in property". With evidence of confirmation that settlers and white economic interests were protected in the constitution – and given the confirmation by Geingob (2010: 106) that SWAPO's preoccupation and happiness was that "its many years of struggle had at last borne fruit" – it can be argued that the economic question and agenda for independent Namibia was exclusively framed by westerners. It is westerners, acting in the interest of whites, who conceptually dealt with the economic question in our constitution.

The principles of economic order; interrogating the "mixed economy"

Having discussed the historical background on how the Constituent Assembly dealt with the economic question, it is therefore necessary to look at the specific provision relevant to this text. Article 98 of the Namibian constitution, on the Principles of Economic Order, introduces the concept of "Mixed Economy". For specificities Article 98 (1) and (2) states:

> (1)The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians…
> (2) The Namibian economy shall be based, inter alia, on the following forms of ownership:
> (a) public; (b) private; (c) joint public-private; (d) cc-operative; (e) co-ownership;
> (f) small-scale family.
> GRN (1990)

For the past 26 years, there has been no clarity, on the part of government, to provide clear ideological context to the narratives of what constitute a mixed economy. Some-make use of the basis of the Namibian economy as outlined in Article 98 (2) to explain the principle of the mixed economy. Other argues that there is a difference between the

'principle' and organisational 'forms' of the economy. They argue further that if Article 98 (1) and 98 (2) are the same why did the drafters of the constitution make a numerical distinction? Even the ordinary citizens are confused about the "Mixed Economy". An exchange of letters between ordinary citizens in 2012 is illustrative of the above. On the 27th July 2012, Clarence Mbai wrote a letter to *The Namibian* newspaper titled 'Namibia is a Mixed Economy' arguing as follows:

> "This is in response to Theuns who wrote a letter titled 'Namibia is a socialist state' on Friday 13th July 2012. I totally disagree with the author and his understanding of socialist and capitalist economies is somewhat inaccurate. The major difference between these two systems is that in a strictly capitalist state the means of production (farms, factories, stores etc.) and control of capital is owned by private individuals whereas in a strict socialist model ownership of the means of production is characterised by the state. The second major distinction between the two is that capitalism simply is profit driven whereas in theory the focus in socialism is just to ensure that everyone has enough to make a decent living. Namibia does not even remotely resemble a socialist state because the means of production and control of capital primarily rests in the hands of a few private individuals especially those who benefited the most from the colonial and apartheid era." (Mbai 2012)

A month later, on 10th August 2012, J Shimwafeni wrote a letter in the same newspaper titled "Mixed economy' is a red herring", submitting the following:

> "The letter 'Namibia is a mixed economy' (The Namibian, 27 July) by Clarence Mbai was interesting for various reasons…For us, the idea of a 'mixed economy' arose in the context of the Cold War and referred to a social-democratic system. Besides the fact that this debate excludes the political system, such a 'mixed economy' was supposedly a capitalist society with a well-supported public sector. However, the idea of a 'mixed economy' was really a misnomer, a red herring. It was an attempt to blow smoke into the eyes of the working class to believe that they are living in a mixed capitalist-socialist society. Of course, this is impossible since these two economic systems are fundamentally different. There could never be a 'good balance' between capitalist and socialist ideals… Namibia, quite simply, has a capitalist economy, not a 'mixed economy.' In answering this question, the nature of the ruling class is decisive in terms of characterizing the mode of production. And it cannot be disputed that Namibia has a capitalist ruling class. The main task of this ruling class since political independence has been to further integrate the Namibian economy into the world capitalist system. We should stop trying to fool the Namibian working class that they are living in a 'mixed economy' and by implication that they should therefore not struggle against capitalism. The fact is that the level of social inequality in this country is the highest in the world. So even if there was something like a 'mixed economy,' there is simply nothing to boast about because the majority of the people do not benefit from this." (Shimwafeni 2012)

So disturbing is that even the citizens, who appear to have benefited from higher education, cannot make out what is the actual economic order. Those who argue for the existence of the 'mixed economy' in practical sense, like Mbai above, do not only face sharp questions from the likes of Shimwafeni but are also called upon to explain the practical existence of the provisions of Article 98 (2). While private ownership of economic activ-

ities are understandably provided for by Article 21 (1) (j), some provisions, with the exception of public ownership, remains unexplained. For example, it is still not explained what is meant by "small-scale family" as a form of economic ownership. Scandalously, the public-private framework was only presented to parliament for discussion in 2016. At the time of writing, it was still being debated and had not yet become law.

Given that there is no clear conceptual and operational definition of a 'mixed economy' in Namibia, it is necessary to observe international literature in attempt to understand the origin of this concept. Writing in *Equilibrium*, a Ukrainian quarterly Journal of Economics and Economic Policy, Tetiana Bogolib explores the origin of the concept of 'mixed economy':

> "The creation of public sector in the national economy reflects a global process of emergence of a new type of economic system – mixed economy, which is dependent on the correct combination of private and public property… The idea of a mixed economy originated in the late 20th century in the years of the transformation of liberal capitalism into a monopoly and the growth of the state's economic role in these conditions… a mixed economy is an economic system which in a natural way combines institutional elements of market (private sector) and government (public sector) approaches to the allocation of public resources… The more holistic theory of the mixed economy was developed by W. Sombart only in the 1920s of 20th century. In the works "Socialism and the Social Movement" and "Modern capitalism", he equated socialism with all forms of increasing the role of the public sector in the capitalist economy and increasing government intervention in the economy, which gave him the reason to talk about the emergence of a mixed economy … It should also be noted that the concept of a mixed economy is a general undifferentiated in its nature, which suggests the existence of different types of so-called models, depending on the particular value of institutional elements." (Bogolib 2013: 126-128)

From the above account, and from further readings of scholars such as Reisman (1994), it can be understood that a 'mixed economy' is a European construct that sought to explain an economic circumstance whereby the state historically intervened in the capitalist economy to ensure public economic participation and ensure regulations. It was convened in western circumstances to address the above stated circumstances. From the reading of the intentions, it would appear that a 'mixed economy' is somewhat a flirtation with a developmental state – a concept that is presently dominant in contemporary African political economy discourses. When the case of Namibia is considered, the concept is not explained properly prompting ordinary citizens, such as Shimwafeni to conclude that "the idea of a 'mixed economy' was really a misnomer, a red herring. It was an attempt to blow smoke into the eyes of the working class to believe that they are living in a mixed capitalist-socialist society" (Shimwafeni: 2012).

The rise and consequences of Neoliberalism in Namibia

Three important observations emerged clear from the discussion on the mixed economy above. One is that SWAPO took a back seat, abandoning its long held socialist beliefs, allowing the Western Contact Group and Apartheid negotiators to take a lead on the

economic architecture of independent Namibia that is to be contained in the national constitution. Writing for one of leading newspaper in the US just a day after Namibia's independence on 22 March 1990, *The New York Times*, Christopher Wren observes this shift in ideological positions:

> "As Namibia celebrated its first day of independence today, President Sam Nujoma proclaimed his Government's commitment to a mixed economy and invited foreign investors to come and help break the country's dependence on South Africa… In its election statement last year, Swapo declared that it still considered socialism superior to capitalism. But it admitted that a mixed economy might be in Namibia's immediate interests. After having the opportunity to study the economic problems facing his Government, Mr. Nujoma sounded less equivocal. Mr. Nujoma made no reference to nationalization of industries or to land distribution, two policies that Swapo initially endorsed." (Wren 1990)

The second observation relates to the first one. SWAPO's shift in ideological positions as far as the economy is concerned meant that it allowed westerners and whites to take a lead. This was done to accommodate whites who were ready to handover political power as long as they maintained their grip on the economy. Robin Sherbourne, an Economist who conducted comprehensive study on the Namibian economy, notes the extent to which SWAPO went to accommodate white interests as far as the economy is concerned:

> "In what was widely regarded as a signal that the new government intended to follow orthodox economic and fiscal policies, Otto Herrigel, a conservative white Namibian with a background in business, was picked as the country's first Minister of Finance. While there is no doubt that Herrigel's presence did much to reassure the nervous white business community, it was not clear [if] he was he right choice to steer the country's finances in the new direction required… Herrigel ended up resigning from Cabinet in April 1992 over the issue of the Presidential jet about which he had been kept in the dark and was replaced with another white Namibian… Gert Hanekom." (Sherbourne 2013: 29)

The third observation is that on the part of many Namibians, and as shown by the absence of legislative clarity of which some are only under discussion in 2016, there is no uniform understanding of what constitute a 'mixed economy'. Where there is such an understanding, debates still ringer as to whether the 'mixed economy' contained in the constitution is supported by daily outplay of the economy. Be that as it may, westerners and whites seem to profit from this lack of clarity. As illustrated by European literature discussed earlier on the origin of the 'mixed economy' it is understood as a situation, given financial and economic crisis, wherein some minimum levels of state interventionism is allowed in the capitalist economy. It can be argued, on the question of the principles of economic order, that it is only westerners who understood this construct and how it will serve their interest. Indeed, as Hage Geingob who was chairing the Constituent Assembly confirmed, westerners managed to protect the economic interest of the whites. Where the principles of economic order might have suggested that there is indeed room for some socialist policies in the 'mixed economy' westerners ensured that all principles of state policy, including principles of economic order of "Mixed Economy", are restricted

to an arena of dreams. Article 101 of the Namibian constitution is thus very clear:

> "The 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." (GRN 1990)

This basically means that even if there is such a thing as a 'mixed economy' ordinary citizens cannot compel the state to implement it for the constitution is immaculate in that these principles "shall not of and by themselves be legally enforceable by any Court". Article 101 reduces these principles to a mere 'guide'. Understanding this limitation, the westerners ensured that the right to property and right to business are contained in chapter 3 of the Namibian constitution as Article 16 and 21 respectively.

What becomes clear, over the past 26 years of independence, is not only the history of the constitutional economic architecture and privileging white economic interest; it also became clear that there is nothing or little mixed about our economy. It became clear that Namibia is a neoliberal capitalist economy. Heywood (2012: 50) defines neoliberalism as an idea in classical political economy whose:

> "central theme is that the economy works best when left alone by government, reflecting a belief in free market economics and atomistic individualism…in short, the neoliberal philosophy is: 'market: good; state: bad'. Key neoliberal policies include privatization, spending cuts (especially in social welfare), tax cuts (particularly corporate and direct taxes) and deregulation. Neoliberalism is often equated with a belief in market fundamentalism, - absolute faith in the capacity of the market mechanism to solve all economic and social problems."

Neoliberalism became dominant with the rise of Margaret Thatcher of the United Kingdom and Ronald Reagan of the US. As Heywood (2012: 49) further explains:

> "Neoliberalism had its greatest initial impact in the two states in which free-market economic principles had been most firmly established in the nineteenth century, the UK and the USA. However, in the case of both 'Thatcherism in the UK and Reaganism' in the USA, neoliberalism formed part of a larger, new right ideological project that sought to fuse laissez-faire economics with an essentially conservative social philosophy."

Similarly, Hickel (2012) explains how neoliberalism moved beyond the borders of the UK and the US, arguing that "while Western countries like the United States and Britain have experimented with neoliberalism in their own economies, they have also aggressively – and often violently – forced it on the postcolonial world, and in even more extreme measures". For sub-Saharan Africa the neoliberalism project came in the 1980s through the World Bank and International Monetary Fund's Structural Adjustment programmes which had a devastating effect on Africa's economic development. Hickel (2012) expounds:

> "Prior to the 1980s, developing countries enjoyed a per capita growth rate of more than 3%. But during the neoliberal era growth rates were cut in half, plunging to 1.7%. Sub-Saharan Africa illustrates this downward trend well. During the 1960s and 70s, per capita income grew at a modest rate of 1.6%. But when neoliberal therapy was forcibly applied to the continent, beginning with Senegal in 1979, per capita income began to *fall* at a rate of 0.7% per year. The GNP of the average African country *shrank* by around 10% during the neoliberal period of structural adjustment. As a result of this, the number of Africans living in basic poverty has more than doubled since 1980."

At the time of the drafting of the Namibian constitution, neoliberalism was the popular economic policy in international political economy – prompting Margaret Thatcher to proclaim that there was no alternatives to neoliberalism (Hickel: 2012). The UK and US, countries that propagated neoliberalism, played a key role, as has been established earlier, on the content of the constitution. It would be a wild imagination to expect them to produce principles of economic order that advocates for a socialist planned economy. It can be argued that entrenching of Article 16 and 21 and the insertion of Article 101, was a well calculated strategy to ensure that capitalist principles remains permanently embedded in the constitution while the little proviso that can be used for socialist demands are reduced to a mere guide and not enforceable in the court of law. Indeed, an argument can be submitted that at the core of this constitutional design is a strategy to ensure that the economic order remains neoliberal.

Post-independence Namibia, as per the above design, did indeed become characterized by neoliberal economic order. Said differently, post-independence Namibia witnessed a radical manifestation of neoliberalism. In their study on inequality in Namibia, Jauch et al (2011) buttresses this point:

> "Namibia's economic policies followed largely the neo-liberal dogma and were shaped by the desire to accommodate foreign investments, which was regarded as the engine of economic growth and job creation…experiences in Namibia and elsewhere in Africa point to the urgent need to depart from the neoliberal, free market approach to social and economic policy. Changing the entrenched neo-liberal development paradigm will certainly be an ongoing struggle as different class interests (and imperial interests) will inevitably clash. An alternative development agenda will have to be built from below and place redistribution and social justice above the interests of global corporations and their allies among governments. The market- based paradigm of the past decades simply offers no hope for the poor." (Jauch et al. 2011: 224-225)

It is thus prudent to recall the words of Shimwafeni (2012): "the idea of a 'mixed economy' was really a misnomer, a red herring. It was an attempt to blow smoke into the eyes of the working class to believe that they are living in a mixed capitalist-socialist society. Of course, this is impossible since these two economic systems are fundamentally different. There could never be a 'good balance' between capitalist and socialist ideals… Namibia, quite simply, has a capitalist economy, not a 'mixed economy". If the Shimwafeni (2012) is exaggerating, a confirmation from a state official is warranted. Nahas Angula, one of the drafters of the Namibian Constitution and a former Prime Minister, confirmed

that Namibia is a neoliberal state in the following telling text:

> "The structure of the Namibian economy illustrates a branch plant economy. Players in the Namibian economy are companies which are branches of foreign mother companies: A branch plant economy does not have internal synergies for sustained growth. In other words, the Namibian economy is neo-colonial. If conditions for economic take-off were to be created the structural challenges in our economy must be addressed… The neo-liberal policies of our Government have created necessary conditions to build on. These included macro-economic stability; governance institutions; sound physical infrastructure; communication infrastructure; national savings; and political stability. These conditions though necessary are not however sufficient to create the preconditions for take-off… these constraints can best be overcome through direct State interventions. The Namibian State must therefore become a Developmental State." (Angula 2011)

At the time of writing, confirming the "neoliberal policies" of government, Nahas Angula was the seating Prime Minister. As a custodian of government policy, there could be no confusion that Namibia is, indeed a neoliberal state.

Conclusion – What is to be done?

This text locates itself within the discourses of political economy. It looked at the constitutional principle of 'mixed economy' and analyzed the realities of neoliberalism in Namibia. Of course there was a puzzle; why is it that despite the riches, the majority of the Namibian people remains in poverty? Why is it that Namibia has one of the highest records of inequality despite its small population? The answers to these questions, and indeed the response, require a good understanding of Namibian political economy. In answering this question, most studies focused mainly on the symptoms - the meanings and impacts of inequality. There have been few studies that looked at the constitution and the role it plays in creating and sustaining the economic circumstances our society finds itself in today. There have been several studies conducted on the Namibian constitution as well. One such study was the 2010 volume titled *"Constitutional Democracy in Namibia: A Critical Analysis After Two Decades*" edited by Anton Bösl, Nico Horn and Andre du Pisani. This volume covered various aspects on the Namibian constitution but fell short of contributions on political economy in general and specific focus on the 'mixed economy', as constitutional principle of economic order, in particular. This is one of the reasons why this text is unique.

The evidence provided in this text leads to at least six conclusions; (1) as is the case elsewhere in Africa, the state in Namibia did not develop organically – it was established to achieve settler's imperialist capitalist goals. The post-independence state still battles the legacies left behind by the 106 years of colonialism and apartheid. Worse, for Namibia, westerners who played an important role in the crafting and designing of the national constitution ensured that the supreme law is designed in such a way that- the economic fundamentals protecting white privilege remains intact; (2) scandalously, the former liberation movement (by own admission) openly capitulated and embraced

the capitalist neoliberal economic order in exchange for political power. In mischievous language, SWAPO leadership traded their revolutionary outfits for air-conditioned office as opposed to the total transformation of society – a vision for which it fought for more than 20 years at independence. (3) The inequality, poverty and underdevelopment characterizing the black majority can be placed at the doorsteps of SWAPO in general and its capitulation at the negation tables in particular. More alarming is the reality that the SWAPO elites are often heard at public platforms confirming their capitulation and its consequences yet unwilling to make clear reform interventions, 26 years after independence. It was, therefore, no surprise that President Hage Geingob disclosed to the world his fear of white retaliation should he intervene on the land question as per the demands of the majority of the Namibian landless masses (Windhoek Observer: 2016); (4) there seems to be no determined effort to deal with past ambiguities and provide clarity on fundamental economic aspects, such as 'mixed economy', which are perpetuating economic despondency of the majority of the Namibian people. The black elites in power have joined their former oppressors to become oppressors against their own people as explained by Paulo Freire in the *Pedagogy of The Oppressed*; (5) there are voices, albeit few, that are beginning to speak against neoliberalism; (6) lastly, it has been unearthed that Namibia's constitutional principles of economic order in general and the principle of 'mixed economy' is suspect as a cover for neoliberalism.

The question, in this concluding note, is what is to be done. Former Prime Minister Nahas Angula attempted to answer as outlined earlier: "the Namibian State must therefore become a Developmental State." For such a dream to take place there must be a relook at the principles of economic order in general and the principle of 'mixed economy' in particular. This is what Nahas Angula did not mention; there is a need to relook at the 'compromise' riddled constitution to address the economic question. As Jauch et al argued earlier: "an alternative development agenda will have to be built from below and place redistribution and social justice above the interests of global corporations and their allies among governments. The market-based paradigm of the past decades simply offers no hope for the poor".

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The relevance of comparative jurisprudence in the Nambian legal system

Sam Amoo

Prof. HC Gutteridge made the important point that comparative law serves a wide variety of purposes. "[I]f the comparative process", he said, "is to meet with success, it is eminently desirable, if not essential, that its employment should not be hampered by confining it to specified categories…[1]. This view was supported by Prof Charles John Hamson, Professor of Comparative Law: "Comparative law is not in bondage to, or even in the service of any one particular purpose, not even that of legislation, for which it is extremely useful."[2] It is therefore important to recognise that there are several closely related academic and practical aims which may be served by the systematic application of the comparative technique to legal study and research. The existence of multiple objects also means that a comparative lawyer enjoys considerable freedom in deciding which of these purposes to pursue in any particular study.

Prof Walter J Kamba[3] suggests the following to be the main functions of comparative law. He, however, adds that they should not be regarded as exhaustive or in any way watertight compartments.

(1) Academic Studies.
(2) Legislation and Law Reforms.
(3) The Judicial Process.
(4) Unification and Harmonisation.
(5) International Law.
(6) International Understanding.

The Namibian legal system has been described as hybrid primarily as a result of the introduction of the South African legal system, including Roman Dutch law, as the legal system of the erstwhile South West Africa. This involved the introduction of the common law as the legal system of the territory and principles of Roman Dutch law as the substantive law in certain branches of the law, such as the law of property, contract etc. The juxtaposition of the received legal system and customary law, for example, has resulted in internal conflicts of legal principles, both statutory and the common law, the resolution of which has involved recourse to comparative jurisprudence by both the Legislature and the Judiciary alike. The inherent law-making functions of the Judiciary, which is a basic characteristic of the common law judicial precedent system, has granted the Namibian Judiciary the basis for the exercise of judicial activism. In the process, the

[1] Gutteridge, *Comparative Law* 2nd ed Cambridge, 1949 p. 26.
[2] Hamson, *The Law: Its Study and Comparison* (1955), p. 22.
[3] Comparative Law: A Theoretical Framework.

Judiciary in Namibia has developed a body of legal principles informed by the general rules of public international law, international agreements and conventions, universal human rights norms and comparative jurisprudence from foreign jurisdictions (such as Canada, the United Kingdom, the United States and South Africa) and based on the values and norms of the Namibian people as embodied in the Constitution. These include internal conflict rules and principles of substantive law in both public and private law. This article seeks to discuss and review some of these cases to highlight the relevance of comparative jurisprudence in the legal system of Namibia.

The discussion that ensues will establish that comparative legal research is a *sine qua non* for the legal fraternity, more especially the Judiciary. Courts are increasingly confronted with various types of problems which can be dealt with more efficiently by invoking the aid of comparative legal study and research. In the context of judicial process in Namibia, comparative law has played an important part in the national judicial process. For example, the jurisprudence evolving from the decisions of the Namibian Courts since independence has established a discernible epistemological paradigm that has been informed and influenced by the comparative jurisprudence from foreign jurisdictions and international law and conventions, especially in the areas of the interpretation of the provisions of the Bill of Rights. These cases include the interpretation of the constitutionality of legislative provisions or practices relating to corporal punishment[4], the restraining of prisoners by chaining them to each other by means of metal chains[5], homosexual relationships[6] property rights, fair trial including trial within a reasonable time, the admissibility of illegally obtained evidence, corporal punishment etc.

It has been stated that comparative law fulfils one of its main practical assignments when it is employed as an aid to the legislative process and to law reform by legislation. The Oxford Professor, Henry James Sumner Maine[7] stated that the chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of the law. In the area of legislation in Namibia, various pieces of legislation such as the Companies Act, Environmental Management Act, the Water Act, and the Human Tissue Act were promulgated after extensive research in other jurisdictions especially in the SADC region and one objective of this comparative enterprise is the achievement of harmonization of laws in the region for the pursuit of some common purpose. A fundamental principle underpinning the functions of the Namibia Law Reform and Development Commission, for example, in the discharge of its statutory functions is the incorporation of best practices in its recommendations to Parliament. This objective however cannot be achieved by reference only to internal institutions. The search for best practices is best achieved by investigation into comparative and norms and practices from outside

[4] See *Ex Parte Attorney-General, Namibia : in re Corporal Punishment 1991(3) SA 76 (NmS).*
[5] See *Namunjepo & Others v. Commanding Officer, Windhoek Prison & Another,* 2000 (6) BCLR 671 (NmS).
[6] See *The Chairperson of the Immigration Selection Board v. Erna Elizabeth Frank & Another,* Supreme Court of Namibia Case No. SA 8/99.
[7] Maine, *Village Communities* (1871), p. 4.

jurisdiction, namely, a comparative study of laws in foreign jurisdictions in order to ensure compliance with best practices and recognised international norms and conventions.

Consequently, the Commission undertakes a great deal of comparative legal studies and research aimed at law reform and general restatement of the law.

Prior to the attainment of nationhood and the promulgation of the Namibian Independence Constitution, which creates an independent Judiciary and a Supreme Court of a sovereign nation, the courts of Namibia were an extension of the judicial system of South Africa . Following the imposition of South African administration over South West Africa, after the granting of the League of Nations Mandate over the territory to South Africa, one obvious historical fact was the assumption of legislative powers over the territory by South Africa and the resulting extension of the South African legal system. The *Administration of Justice Proclamation 21 of 1919* established the High Court of South West Africa, and the *Appellate Division Act No. 12 of 1920* granted the appellate division of the Supreme Court of South Africa jurisdiction over decisions of the High Court of South West Africa to hear appeals from the judgments and orders from the court. By virtue of the provisions of the *Supreme Court Act No. 59 of 1959***,** the judiciary of South West Africa was amalgamated into that of South Africa resulting in the High Court of South West Africa being constituted as the South West Africa Provincial Division of the Supreme Court of South Africa. Logically, this meant the maintenance of the jurisdiction of the Appellate Division of the Supreme Court of South Africa over the decisions of the South West Africa Provincial Division of the Supreme Court of South Africa to hear and finally determine matters brought before it on appeal from the South West Africa Division or any other provincial or local division.

With the promulgation of the Namibian Independence Constitution in 1990, the Supreme Court of Namibia became the highest court of appeal for Namibia[8]. It must also be added that by *Proclamation 21 of 1919*, which *inter alia* provided that Roman Dutch law was to be applied in the territory 'as existing and applied in the Province of the Cape of Good Hope', Roman Dutch law became the common law of the territory. The overall impact of all these proclamations on the judicial and legal systems of South West Africa was that the decisions of the Supreme Court of South Africa and the Roman Dutch law that were developed by the South African Courts, until independence, became binding on the Courts of Namibia. This position was affirmed by article 66 (1) of the Constitution of Namibia which provides that 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 law or common law does not conflict with this Constitution or any other law.

It has been pointed out that the South African legal system was constrained before the promulgation of that country's new Constitution by the jurisprudence and principles of

[8] See also Hosten, WJ. et al. *Introduction to South African Law and Legal Theory***,** 2nd. ed. p. 398.

legislative supremacy and analytical positivism[9]. John Dugard asserts that an empirical study of the legal process in South Africa leads to the conclusion that "judges adopt a neutral, non-activist position in their approach to human rights issues and that a form of positivism may account for this phenomenon"[10]. This position has been confirmed by MM Corbett, the then Chief Justice of South Africa, in his presentation to the Truth and Reconciliation Commission in these words:

> "(t)here are, and in the past always have been, constraints upon the exercise of judicial power. A judge is not always at liberty to do what he thinks is the best or most fair or expedient. He is required to dispense justice in accordance with the law. In the ideal situation law and justice coincide, but this need not necessarily be so, especially where the law consists of legislation. These truths are reflected in the oath which a judge is required to take upon assuming office. Prior to the coming into effect of the Interim Constitution, Act 200 of 1993, the oath prescribed was by s. 10 (2) (a) of the Supreme Court Act 59 of 1959 and it required the judge to swear to '… administer justice to all persons alike without fear, favour or prejudice, and … in accordance with the law and customs of the Republic of South Africa."[11]

Prior to the coming into effect of the Namibian Independence Constitution, also for reasons stated above, the Namibian judiciary comprised South African-appointed judges applying South African law with the constraints imposed by reliance on the jurisprudence of legislative supremacy and analytical positivism. However, with the enactment of Proclamation R. 101 of 1985 by the South African Government, the Namibian legal system assumed a dimension that engendered an important differentiation and digression, both in principle and practice, from the South African legal system. The Proclamation provided for a Bill of Rights[12] against which the Namibian Courts could test and review the validity of certain laws and administrative decisions and actions.

Due to the extent that the South African Appellate Division prevented the Namibian judges from giving effect to the Bill of Rights through judicial review, those judges often used grounds other than the Bill of Rights to emasculate repressive legislation and in the process created a bully pulpit to take the place of genuine judicial review.

However, as indicated earlier, after the attainment of independence and sovereignty Namibia adopted a Constitution with an entrenched Bill of Rights and a provision that

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[9] Dugard J., The Judicial Process, Positivism and Civil Liberty, (1971) *88 SALJ* p. 181 – 200 and Some Realism About The Judicial Process And Positivism – *A Reply 98 SALJ* p. 372-387.

[10] Dugard J., *Some Realism About The Judicial Process and Positivism – A Reply* (1981),.98 SALJ p. 373.

[11] *The Truth and Reconciliation Commission, and the Bench, legal Practitioners and Legal Academics,* (1998) 115 SALJ p. 18.

[12] These rights included protection against execution without due process (art. 1); liberty, security of person and privacy (art. 2); equality before the law (art. 3); fair trial (art. 4); freedom of expression (art. 5) peaceful assembly (art. 6); freedom of association (art. 7); participation in political activity (art. 8); freedom of culture, language, tradition and religion (art. 9); freedom of movement and residence (art. 10); and ownership of property (art. 11).

elevates the Constitution as the supreme law of Namibia[13]. This effectively replaced the doctrine of legislative sovereignty, which from the history of the legal systems of both South Africa and Namibia, was equated with legislative supremacy, with that of constitutional supremacy, which has provided the Namibian judiciary with a constitutional leverage to promote the principles of the rule of law and constitutionalism and protect and advance the fundamental rights of the individual. This exercise has involved the interpretation of the Constitution and the Namibian Courts since independence have adopted a values-oriented approach to the interpretation of the Constitution and thereby developed a jurisprudence based on value judgments and an epistemological paradigm rooted in the values and norms of the Namibian people. G.J.C. Strydom, the Chief Justice of the Republic of Namibia, in his address to the judicial officers at the first Retreat of the Office of the Attorney-General at Swakopmund 20-22 November 2002, stated:

> "(I)t is trite that ordinary presumptions of interpretation will not independently suffice in interpreting such a document (constitution) and that our Courts must develop guidelines to give full effect to the purport and aim of our Constitution. The Constitution remains the Supreme Law of Namibia from which all laws flow and against which all laws can be tested ….. in interpreting the Constitution, particularly Chapter 3, the Courts are often called upon to exercise a value judgment. It was this exercise that led the Court in the Corporal Punishment[14] decision to encompass both aspects of constitutional interpretation and judicial independence."[15]

Chapter 3 of the Namibian Constitution provides for the fundamental human rights and freedoms, which are entrenched. The Constitution, however, draws a distinction between rights and freedoms and with regard to the latter, Article 21[16] (2) for example, provides 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."

These limitations together with the general nature of the provisions of a constitution, *prima facie,* require the exercise of the constitutional jurisdiction of the courts in interpreting the grey or penumbra areas of the Constitution as to for example what constitutes decency or morality. The Namibian Courts have since independence been called upon to interpret similar provisions of the Constitution and as mentioned earlier have adopted what may be termed , to borrow John Dugard's expression ,a natural law-cum -realist or a purposive approach and have developed a particular jurisprudence based on the values of the Namibian people. These cases include the interpretation of the

[13] Article 1 (6) of the Constitution of Namibia provides that this Constitution shall be the Supreme Law of Namibia.
[14] 1991 (3) SA 76 (NmS).
[15] The address was entitled, *Namibia's Constitutional Jurisprudence-The First Twelve Years.*
[16] Article 21 provides for the freedom of speech and expression, thought, religion, association, etc.

constitutionality of legislative provisions or practices relating to corporal punishment[17], the restraining of prisoners by chaining them to each other by means of metal chains[18], homosexual relationships[19] property rights, fair trial including trial within a reasonable time, the admissibility of illegally obtained evidence etc. In the process of interpreting the provisions of the Bill of Rights in these areas, the Superior Courts of Namibia have relied on the comparative jurisprudence on human rights from international norms and conventions and foreign jurisdictions.

In the address mentioned above, Mr. Justice Strydom stated:

> "In the two Mwandingi cases the High and Supreme Courts of Namibia accepted the principle that a Constitution and more particularly one containing a Bill of Rights, calls for an interpretation different from that which courts traditionally apply to ordinary legislation. Dealing with instances where the courts were required to make value judgments the corporal punishment case authoritatively laid down that a court, in coming to its conclusion, should objectively articulate and identify the contemporary norms, aspirations and expectations of the Namibian people and should have regard to the merging consensus of values in the civilized international community. These cases set the tone for Namibian Courts and the way it was required of them to interpret the constitution."[20]

The Namibian Constitution embraces and recognizes the general principles of international law. The Constitution regulates the relationship between international law, both customary and conventional, within the national legal sphere. Article 144 of the Constitution provides *inter alia* as follows:

> "Unless otherwise provided by this constitution or act of Parliament, the general rules of public international law and international agreements binding upon the Namibian state, shall form part of the law of the land."

The superior courts of Namibia have positively pronounced themselves on the application of customary international law by the Courts. In the case of *Kauesa v Minister of Home Affairs & Others*[21], the Supreme Court of Namibia commenting on the domestic status of the African Charter on Human and People's Rights of 1981 succinctly indicated the relevance of comparative jurisprudence as follows:

> "The Namibian Government has, as far as can be formally established recognised the African Charter in accordance with article 143 read with article 63(2) (d) of the constitution. The provisions of the Charter have therefore become binding on Namibia and form part of

[17] See *Ex Parte Attorney-Genera, Namibia: in re Corporal Punishment* 1991(3) SA 76 (NmS).
[18] See *Namunjepo & Others v. Commanding Officer, Windhoek Prisnon & Another,* 2000 (6) BCLR 671 (NmS).
[19] See *The Chairperson of the Immigration Selection Board v. Erna Elizabeth Frank & Another,* Supreme Court of Namibia Case No. SA 8/99.
[20] See footnote 16 supra.
[21] 1995 (1)SA 51 (Nm SC).

> the law of Namibia in accordance with article 143, read together with article 144 of the constitution".

In the case of *Minster of Defence v. Mwandinghi*[22] the Namibian Supreme Court approved the *dictum* in *S v. Acheson*[23] that

> "(T)he 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 tenor of the Constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion."

In the case of *Government of the Republic of Namibia & Another v. Cultura 2000***,** the Late Mahommed CJ, reiterated this approach to the interpretation of the Constitution as follows;

> "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."[24]

As mentioned above, this approach requires judicial decisions oriented to value judgments and have been followed in Namibian decisions but the value-judgment approach raises questions relating to the following;

i. the identification of not only the values but also the authoritative source that has the mandate to do so;
ii. the inherent elements of the subjectivity of this approach
iii. the nature of the mechanism to be employed to ascertain the values and norms
iv. the binding effects of the values

These issues will be addressed in the analysis of the cases in which this approach has been used to interpret relevant provisions of the Constitution. One could perhaps refer to the views of Mr Justice Strydom on the question of the ascertainment of the norms and aspirations of the people of Namibia as an initial point of reference. In the same address he stated:

[22] 1992 (2) SA 355 (NmSC).
[23] 1991 NR 1 (HC) at 10 AB.
[24] I993 NR 328 (SC) at 340 B-D; 1994 (1) SA 407 NmSC, at 418 F-G. See also *Minister of Defence, Namibia v. Mwandinghi,* 1993 NR 63 (SC) at 68-71 (1992 (2) SA 355 (Nms) at 361- 3); *S v. Acheson,* 1991 NR 1 (HC) at 10A-C at 10 A-C (1991 (2) SA 805 (Nm)) at 813 A-C).

> "…to determine the contemporary norms, aspirations and expectations of the Namibian people is a most important requirement when it comes to the interpretation of the Constitution and how it should be applied. What those norms and aspirations are is not always easy to determine and the parameters thereof is always not limitless. When the Constitution says that there shall be no discrimination on the grounds of sex, even if there is a majority who may be in favour of such discrimination it cannot change the express prohibition against discrimination, set out in the Constitution. Many of the norms and aspirations of the people are contained in the Constitution itself. Discrimination on the basis of certain stereotypes is rooted out. The dignity of all persons is guaranteed by the Constitution. The theme against the violation of a person's dignity starts with the preamble of the Constitution and can be traced to many of the provisions of Chapter 3 and other provisions of the Constitution. These and other provisions should constantly be in the mind of the judge called upon to interpret the Constitution."[25]

The matter relating to the identification and ascertainment of the norms and values of the Namibian people, unfortunately, does not rest there. It is trite that Constitutional provisions and legislation *sui generis* are couched in a language that is often broad and vague and therefore, will require judicial interpretation. The Constitution may be the reference point to identify these norms and values but as Justice Srydom correctly pointed out the parameters of determining them are limitless.

The late Justice Mahomed in deciding whether corporal punishment authorized by law can properly be said to be inhuman or degrading and therefore whether it was inconsistent with Article 8 of the Constitution[26] in the case of *Ex Parte Attorney General. Namibia: in re Corporal Punishment* used the national institutions and emerging consensus of values in a civilized international community as sources of identification of norms and values of the society and therefore added another dimension to the jurisprudence He stated;

> "(T)he question as to whether a particular form of punishment authorized by the law can be said to be inhuman or degrading, involves the exercise of value judgment by the Court. It is however a value judgment 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 having regard to the emerging consensus of values in a civilized 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

[25] See footnote 24 supra.

[26] Article 8 of the Constitution of Namibia provides 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 person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

> might appear to be today's heresy … There is beginning to emerge an accelerating consensus against corporal punishment for adults throughout the civilized world."[27]

In coming to this decision, the court had regard to the African Charter of Human and Peoples' Rights as a source of its law. It court recognised the fact that the African Charter forms part of the law of Namibia and it was used as evidence in court. In essence the court held that corporal punishment contradicts the spirit and tenor of the constitution and aspirations of the African people as enunciated in the Charter. Accordingly, the court declared corporal punishment to be unconstitutional.

Similarly, in the case of the *Government of the Republic of Namibia & Another v Cultura 2000 & Another*[28] the Court reiterated the importance of comparative jurisprudence in the Namibian legal system and specific reference was made to the application of the African Charter on Human and Peoples 'Rights and the general rules of International Human Rights Law, when it stated as follows:

> "It is manifest that the constitutional jurisprudence of a free and independent Namibia is premised on the values of a broad and Universalist Human Rights culture which has begun to emerge in substantial areas of the world in recent times. Article 144 sought to give expression to the intention of the constitution to make Namibia part of the international community by providing that international agreements binding upon the country shall be part of the country's law."

Similar position of the law was stated in the case of the *Government of the Republic of Namibia v Mwilima & Others*[29] where the court held that the state not only had an obligation to foster respect fort international law and treaties as laid down by article 96(d) but specifically that the International Covenant on Civil and Political Rights was binding upon the state and formed part of the law of Namibia by virtue of article 144 of the constitution.

Furthermore, *S v Mushwena & Others*[30] which involved the apprehension, abduction and deportation of 13 respondents from Botswana to Namibia where they were charged, *inter alia* with treason and murder allegedly committed in Namibia, reference was made to the International Covenant on Civil and Political Rights[31], the Convention Relating to the Status of Refugees and to Article 144 of the Constitution. The Court stated that:

> "As a matter of fact, as I have shown … the International Covention on Civil and Political Rights, and the UN Covenant and Protocol Relating to the Status of Refugees by virtue of Article 144 have become part of the law of Namibia."

[27] 1991 (3) SA 76 (NmS) at 91 DF.
[28] 1994 (1) SA 407 at 412.
[29] 2002 NR 235(SC).
[30] SAFLII 2004 (SC).
[31] United Nations1951 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

The court concluded that these instruments had not only become part of Namibian domestic law by virtue of the Namibian constitution but that some of their basic principles have been incorporated into the Namibian laws.

The Namibian Constitution under Article 16 recognises the right to property and the limitation imposed on the right of ownership by virtue of the right of expropriation granted to the state. The exercise of the right is subject to two conditions; it must be exercised in the public interest and subject to the payment of compensation. Unlike for example, the constitutions of Ghana and South Africa where there are more elaborate on what constitutes public interest and the criteria for the assessment of compensation. The *Kessl* case involved the resolution of issues relating to the determination of public interest and constraints imposed on the State in the exercise of the right of expropriation. The Court in its final judgment, relied on international authorities such as *Sporrong v Lonnrof v Sweden* 1982(5) EHRR 35; *Tre Traktorer AB v Sweden (1989)* ECHR series A, vol 159; Permanent Court of International Justice in the case concerning certain German interests in Polish Upper Silesia (1926) PCIJ series A, No. 7 page 22 and laid down very important and seismic principles on the Nambian property jurisprudence, that the exercise of this power is subject to Article 18 and secondly that public interest does not mean private interest and includes consideration of the right of the farm workers, extending the traditional definition of eminent domain.

However, it must be noted that state sovereignty in the context of the Namibian judicial system and especially the jurisdiction of Superior courts dictates that the precedents of the Superior courts of Namibia take precedence of foreign precedents. Foreign precedents are persuasive. Under Practice Directive 37 of the High Court rules counsel is enjoined to cite foreign case law if they have certified that after a diligent search they are unable to find local case law. This directive has been extensively discussed in the case of *West Coast Fishing Properties v Gendev Processors Ltd &Another.*[32] The implication of this directive and the *Coast Fishing* case is that constraints are put on the development of comparative law. For example it will be observed from the *Cultura 2000* case that even though the Court laid down the value oriented or purposive approach to the interpretation of the Constitution as one to be used by the Namibian Courts in interpreting the Constitution, in the *Corporal Punishment* case, Late Mahomed went further to identify some sources i.e. the institutions and the Constitution where these values may be articulated.

In the case of *The Chairperson of the Immigration Selection Board v. Erna Elizabeth Frank And Elizabeth Khaxas*[33], the Court identified some of these institutions and gave some guidelines as to how the norms and values are to be identified. In the words of Justice AJA O'Linn:

> "The 'institutions 'referred to were also described in the decision of the High Court in

[32] 2013 (4) NR 1036 (HC).
[33] Supreme Court of Namibia Case No; SA 8/99.

> State v Tcoeib.[34] The Shorter Oxford English Dictionary was referred to wherein the following definition appears: an established law, custom, usage, practice, organization or other element in the political and social life of the people; a well-established or familiar practice or object; an establishment, organization or association, instituted for the promotion of some object, especially one of public utility, religion, charitable, education, etc."

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 organizations can be regarded as institutions for the purposes hereof.

In this Court's judgment in *S v. Namunjepo*[35], it was also accepted that "Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current day values of the people".

This attracts a few comments and observations. First of all, Parliament's legislative function is exercised by way of debates in order to ascertain the weight of authority to be placed on an opinion and in most cases a decision is taken by the requisite majority vote followed by the enactment of the relevant legislation. In this case, the guideline being offered here is not adequate as it does not indicate whether the contemporary values or the norms of the Namibian people are those that have been articulated and enacted in the form of legislation, or whether they are those that constitute mere expressions of opinions of members of Parliament in the form of debates etc. To do justice to the decision of Mr. Justice O'Linn, however, it must be added that with reference to the recognition of homosexual relationships in Namibia, certain specific reasons and yardsticks were provided for the reliance on Parliament as one the sources of the identification of the values and norms of the Namibian people. He stated that:

> "Although homosexual relationships must have been known to the representatives of the Namibian nation and their legal representatives when they agreed on the terms of the Namibian Constitution, no provision was made for the recognition of such a relationship as equivalent to marriage or at all. It follows that it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual relationship….In Namibia as well as Zimbabwe, not only is there no such provision, but no such legislative trend. In contrast, as alleged by the respondents, the President of Namibia as well as the Minster of Home Affairs, have expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships. As far as they are concerned, homosexual relationships should not be encouraged because that would be against the traditions and values of the Namibian people and would undermine those traditions and values. It is a notorious fact of which this Court can take judicial notice that when the issue was brought up in Parliament, nobody on the Government benches, which represent 77 % of the Namibian electorate, made any comment to the contrary. It is clear from the above that far from a "legislative trend" in Namibia, Namibian trends, contemporary opinions, norms and values tend in the opposite direction."

[34] 1993 (1) SACR 274 Nm at 284 d-e.
[35] *Namunjepo & Others v. Commanding Officer, Windhoek Prison & An*other, 2000 (6) BCLR, 671 NmS, 678 H.

This position, however, has received some comments and criticisms and in this regard reference is made to the observations of Cassidy EK[36] when she commented:

> "The decision assumes, without including any additional support, that the comments of the other two government officials (albeit ones in very high positions) necessarily reflect the views of the majority of Namibians in this matter. Their argument would have been stronger logically with more definitive evidence of public opinion. The majority did not consider, for example, the possibility that the silence of the ruling party Parliamentarians may have reflected party loyalty and/or respect for the President and Minister rather than agreement with their views."

The other questions relating to the identification of the norms and values are the methods of verification and the subjectivity or objectivity of such methods used in the process of the identification and ascertainment of the ethos of the Namibian people.

Justice O'Linn in the *Elizabeth Frank* case[37] on this subject gave these guidelines;

> "The value judgment, as stated in S v.Vries[38], can vary from time to time but which is one not arbitrarily arrived at but which must be judicially arrived at by way of an attempt to give content to the value judgment by referral to the prevailing norms which may or may not coincide with the norms of any particular judge. As was pointed out in Coker v. Georgia 433 US 584 (1977) at 592 ; these 'judgments should not be, or appear to be, merely the subjective views of individual justices; judgment should be informed by objective factors to the maximum possible extent'.
>
> The objective factors can be derived from sources which include, but are not limited to: the Namibian Constitution; all the institutions of Namibia as defined supra including: debates in Parliament and in the regional statutory bodies and legislation passed by parliament; judicial or other commissions; public opinion as established in properly conducted opinion polls; evidence placed before Courts of law and judgments of Courts; referenda; publications by experts."

He continues*;*

> "(T)he relevance and importance of public opinion in establishing the current or contemporary values of Namibians when the Court makes its value judgment, has been discussed in various decisions, including the decision in State v. Vries. To avoid any misunderstanding, I reiterate what I said I said in State v. Vries in this regard; 'In my respectful view the value of public opinion will 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

[36] Cassidy, EK *Article 10 of the Namibian Constitution: A look at the first ten years of the interpretation of the rights to equality and non-discrimination and predictions of the future* in Manfred Hinz, Sam Amoo, Dawid van Wyk (ed.) *The Constitution at work: 10 years of Namibian nationhood, p.186*

[37] See footnote 22 supra

[38] 1996 (2) SACR 638 (Nm) at 641 c-d

> 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…. 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.
>
> The methods of which a Court can avail itself to obtain the necessary facts for the purpose of the enquiry, include, but is not limited to: taking judicial notice of notorious facts; testimony in viva voce form before the Court deciding the issue; facts placed before the Court by the interested parties as common cause; the compilation of special dossiers compiled by a referee in accordance with the provisions of Article 87 (c) read with Article 79 (2) of the Namibian Constitution and sections 15 and 20 of the Supreme Court Act and Rule 6(5) (b) of the Rules of the Supreme Court and Rule 33 of the High Court Rules."

He concludes that the essence and advantage of the evidential enquiry are that it serves as an objective assessment mechanism. As he puts it:

> "It may be the only appropriate way to achieve the purpose of establishing the contemporary norms and values etc, and that if the Court refuses to launch an evidential enquiry, it will fall into the trap of substituting its own subjective views for an objective standard and method. The requirement to consider the Namibian norms and values will then become a mere cliché to which mere lip service is paid."

The issue of public opinion raises questions relating the doctrine of separation of powers and the very nature of public opinion as a legitimate source of law because of *inter alia* the vicissitudes inherent in the nature of public opinion. It would appear from the position taken by the Court in this case with regard to the integration of public opinion as legal norm by the Courts is a balance between what Max du Plessis calls the 'utopian' and 'Rawlsian' approaches to the issue of public opinion.

The other element involved in the issue of public opinion is one relating to separation of powers. It is recognized that it is within the purview of the mandate of the legislative branch of government to legislate for matters raised to the level of national awareness by public opinion. It is also an acceptable principle that in the interpretive jurisdiction of the Courts, the Courts have a creative role which may involve the interpretation of the constitution or an ordinary legislative enactment. The Courts therefore in certain circumstances will be called upon to make authoritative pronouncements on grey or penumbra areas of the law, sometimes involving areas of public policy and values of the society, without first referring the matter to the Legislature to be settled in a legislative enactment. The Courts will therefore have to play a balancing act to avoid what might constitute usurpation of the functions of the Legislature. The degree of reliance of on pubic opinion has to be determined by whether the issue involves the interpretation of a constitutional provision or a mere legislative enactment. In this regard the Courts will have to be mindful of the fact that values may not be equated with public opinion and

that it is the function of the Courts to protect the rights of minorities in the face of the vicissitudes of the public opinion of the majority.

With regard to the binding effect of the values, the general principles of the judicial process, including the principles of separation of powers judicial precedent and *stare decisis*, are that these values become binding if they are incorporated in legislation which is not inconsistent with the higher imperatives of a constitution or where they are given the status of legal principles through judicial interpretation. The source of the binding effect of values elevated to principles of law through judicial interpretation is located and inherent in the constitutional jurisdiction of the Courts and therefore, these values get the authoritative stamp of legal principles and the force of law through the decisions of the Court and in this regard, through decisions involving interpretation of the Constitution.

Judge O'Linn in addressing this issue in the *Erna Elizabeth Frank* case, draws a distinction between the provisions[39] in the South African and Namibian Constitutions relating to the role of the Courts in interpreting and giving effect to the Constitution and concludes that (i)n South Africa, the judicial authority is stated in Art. 165 to vest exclusively in the Courts but… Art. 39 vests wide powers, not only in the Courts but in tribunals or forums which appear to have judicial powers when interpreting the Bill of Rights. 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 Article78 (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 functions, Art.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, .. 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 view tends to suggest that the relationship between the Judiciary and the Legislature with regard to the binding effect of the constitutional interpretations of the Courts leads to a position of a vicious circle but the relationship as envisaged under Art. 81 of the Namibian Constitution is a logical result of the principles of separation of powers. This relationship is not meant to create a never ending process. It is meant to create an element of finality in the process and even though the courts have the role of interpreting the constitution and upholding the rights of the individual as enshrined in the constitution, yet the legislative function of parliament must be recognized and maintained subject of course to the proviso that legislative enactments are not inconsistent with the Constitution.

[39] See Art. 39 (1) and (2) and Art. 165 of the Namibian Constitution.

The Constitutional history of Namibia, prior to the promulgation of Proclamation R.101 of 1985 and the 1990 Independence Constitution depicts a legal and judicial system that was constrained by the concept of legislative supremacy and analytical positivism. The promulgations of the two constitutional instruments saw the evolution of a new constitutional paradigm oriented towards the achievement of the rule of law and the promotion and maintenance of human rights, from the decisions of the Courts

Article 5 of the Namibian Constitution provides as follows;

> "The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of 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."

This provision imposes a collective responsibility on all the organs of State and requires a judiciary that is both willing and able to maintain its integrity and independence against the onslaught of executive intimidation, interference and political patronage. The record of the Namibian Judiciary indicates that from 1985 to date, it has demonstrated the willpower and integrity not to compromise its independence and to interpret and apply the laws of Namibia to uphold and protect the rights of the individual as provided in the Bill of Rights. In the process the Namibian Courts have adopted a particular constitutional jurisprudence and a related epistemological paradigm oriented towards value judgments and rooted in the current and contemporary values of the Namibian people. This approach, however, raises questions relating to the Courts' jurisdiction as the custodian of minority rights and the integration of public opinion in the interpretive process of the Courts.

Legal pluralism is a basic feature of the legal systems of jurisdictions that experienced colonial rule and these include Namibia. As stated earlier, the Namibian legal system has been described as hybrid primarily as a result of the introduction of the South African legal system, including Roman Dutch law, as the legal system of the erstwhile South West Africa. This involved the introduction of the common law as the legal system of the territory and principles of Roman Dutch law as the substantive law in certain branches of the law, such as the law of property, contract etc. The juxtaposition of the received legal system and customary law, for example, has resulted in internal conflicts of legal principles, both statutory and the common law, the resolution of which has involved recourse to comparative jurisprudence by both the Legislature and the Judiciary alike. The inherent law-making functions of the Judiciary, which is a basic characteristic of the common law judicial precedent system, has granted the Namibian Judiciary the basis for the exercise of judicial activism. In the process, the Judiciary in Namibia has developed a body of legal principles informed by comparative jurisprudence from the rules and norms of public international law and foreign jurisdictions (such as Canada, the United Kingdom, the United States and South Africa) and based on the values and norms of the Namibian people as embodied in the Constitution. These include internal conflict rules and principles of substantive law in both public and private law.

Infusions of the Constitution into the Common Law

Dianne Hubbard

"The common law is not to be trapped within the limitations of its past."[1]

Introduction

Common law refers to the law made over time through the cumulative effect of court decisions, in contrast to law made by legislation enacted by the legislature. It is the uncodified body of legal rules which can be found in judicial opinions.[2] It is clear how the Namibian Constitution influences the shape of the common law when an aspect of common law is challenged on grounds that it is unconstitutional.[3] But the Constitution has also influenced the application and the development of common law more indirectly, providing context and content to the exercise of judicial discretion and guiding the evolution of common law in directions more consistent with constitutional values.[4] This chapter will examine some of the areas where this kind of constitutional influence has been most apparent.

The court's power to develop the common law

The courts have always had the power and duty to develop the common law, even in the pre-Constitutional era. This is part of what allows the law to remain dynamic and relevant to contemporary society, while still providing a reasonable level of predictability and certainty.

For example, the 2002 case of *Namibia Breweries Ltd v Seelenbinder, Henning & Partners* considered and approved an extension of the law to allow a plaintiff to be awarded damages arising from an engineering defect, even though the plaintiff was not the owner

[1] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at para 86 (Mahomed DP) concurring judgment).

[2] See, eg, Mr Justice FDJ Brand, "The role of good faith, equity and fairness in the South African Law of Contract: The influence of the common law and the Constitution" 2009 *SALJ* 71-90; Brighton Mupangavanhu, "Yet another Missed Opportunity to Develop the Common Law of Contract? An Analysis of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd"* [2011] *ZACC* 30.

[3] Two key instances of this are *Myburgh v Commercial Bank of Namibia* 1999 NR 287 (HC); 2000 NR 255 (SC), which abolished the common law concept of marital power, prior to the promulgation of the Married Persons Equality Act 1 of 1996 which repealed it, and *Frans v Paschke & Others* 2007 (2) NR 520 (HC), which held that the common law rule that children born outside marriage may not inherit intestate from their fathers was unconstitutional – although, by the time the *Myburgh* case came to court, Parliament had in fact already done away with that common law rule in the Children's Status Act 6 of 2006, which had been passed by Parliament but had not yet come into force.

[4] See Judge Kate O'Regan, "The Best of Both Worlds? Some Reflections on the Interaction between the Common Law and the Bill of Rights in our New Constitution", 1999 *PER /PELJ* Vol 2 No 1 at 11.

of the property in question at the time of the defect. In considering the common law on the Aquilian action for damages, the court noted that this action is by nature a flexible remedy which has been "judicially and judiciously extended in modern jurisprudence on a number of occasions" in light of "the demands of fairness, reasonableness and justice of the community within which it is applied" – noting that this development has assured its continued relevance.[5] This case spoke about the need to consider the legal convictions and attitudes of the community in determining what breaches of duty should be regarded as unlawful,[6] but made no reference to the Constitution.

Unlike the Namibian Constitution, the South African Constitution makes specific reference to the courts' power to develop the common law, charging courts to promote constitutional values when engaged in this process.[7] There is academic disagreement over whether the Constitution places a *duty* on the courts to develop the common law to incorporate constitutional values where these are insufficiently present, or merely to incorporate constitutional values when they are exercising their traditional *power* to develop the common law.[8]

In Namibia, it was asserted by Justice O'Linn in the case of *Chairperson of the Immigration Selection Board v Frank and Another*[9] – in *obiter dicta* – that the Namibian courts "are in a much weaker position than their counterparts in South Africa" with regard to developing the common law because of a kind of circular ambiguity in the Namibian Constitution. According to Justice O'Linn, the courts are independent and neither Cabinet nor the Legislature may interfere with them in the exercise of their functions. Parliament, as the elected representatives of the people, could in an exceptional case contradict the Supreme Court – but only if Parliament in so doing was acting within the "letter and

[5] *Namibia Breweries Ltd v Seelenbinder, Henning & Partners* 2002 NR 155 (HC) at 163B-D, 163I-J (Maritz, J), quoting *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 384D.

[6] Id at 164.

[7] Constitution of the Republic of South Africa, 1996, section 8(3): "When applying a provision of the Bill of Rights to a natural or juristic person…, a court (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)." Section 39(2): "When interpreting any legislation, and when developing the common law or customary law or legislation, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.... " Section 173: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[8] See, for example, Brighton Mupangavanhu, "Yet another Missed Opportunity to Develop the Common Law of Contract? An Analysis of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011) ZACC 30", [2013] *Speculum Juris* 7; Anton Fagan, "The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development" 2010 *SALJ* 611-627; Mr Justice FDJ Brand, "The role of good faith, equity and fairness in the South African Law of Contract: The influence of the common law and the Constitution" 2009 *SALJ* 71-90.

[9] *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC).

spirit of the Namibian Constitution".[10] With respect, this approach appears to be based on a misunderstanding of the respective roles of the courts and the legislature. Although this issue could be the subject of an article on its own, the more well-accepted view appears to be that the Constitution establishes a separation of powers in which an independent judicial branch is responsible for the interpretation of the Constitution, and a legislature which must exercise its powers subject to the Constitution.[11]

Several years later, the case of *Permanent Secretary of the Ministry of Finance and Others v Ward,*[12] in the course of considering whether the termination of a particular agreement was contractual or reviewable administrative action covered by Art 18 of the Constitution, the Court stated, "No argument was presented to us in what way the values of our Constitution should apply to the common law and this is therefore an issue which will have to stand over until proper argument is heard."[13]

That question was answered a year later in *Trustco Group International Ltd and Others v Shikongo,*[14] where the Supreme Court held that the Constitution must inform the development of the common law – and, as will be discussed below, proceeded to illustrate this principle. It was argued in that case that the Constitution does not permit the courts to develop the common law, but reserves that power to Parliament through Art 66 of the Constitution – which provides that the common law and customary law in force at Independence remain valid to the extent that they do not conflict with the Constitution or with statute law, and that any part of such common law or customary law may be repealed or modified by Act of Parliament.[15] However, this proposed interpretation of Art 66 was

[10] Id at 141A-H (O'Linn, AJA), citing Art 78(1)-(2) and Art 81.

[11] See, for example, *S v Heita and Another* 1992 (2) NR 403 (HC) at 406J-407H (again O'Linn J); *Cultura 2000 and Another v Government of the Republic of Namibia and Others* 1992 NR 110 (HC) at 124B ("All legislation emanating from Parliament is… subject to the Constitution. The Constitution is not subject to such legislation."); *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1993 NR 328 (SC) at 124B; *Medical Association of Namibia Ltd and Another v Minister of Health and Social Services and Others* 2010 (2) NR 660 (HC) at para 160 ("The Constitution provides also that for instance the President, the Legislative Assembly and cabinet ministers must exercise their powers subject to the Constitution."[footnotes omitted]); *Minister of Justice v Magistrates' Commission and Another* 2012 (2) NR 743 (SC) at para 22 "Namibia is a constitutional democracy that upholds the doctrine of separation of powers the rule of law and the independence of the judiciary. These principles presuppose a culture of mutual respect between the executive, the legislature and the judiciary."); and *Sebatane and Another v Mutumba and Others* 2013 (1) NR 284 (HC) at para 12 ("The Namibian Constitution is the supreme law of the land against which all laws are measured for validity.").

[12] *Permanent Secretary of the Ministry of Finance and Others v Ward* 2009 (1) NR 314 (SC) (Strydom AJA).

[13] Id at para 72.

[14] *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC).

[15] Namibian Constitution, Art 66: "Customary and Common Law. (1) 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. (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular

"firmly rejected" by the Court, which held that that the principle that the courts will develop the common law incrementally "to take account of changing circumstances" is part of the inherent nature of common law as judge – made law – and that this fundamental characteristic of common law is not affected by Art 66.[16]

In South Africa, the Constitutional Court has noted that judges should "be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary".[17] On the other hand, it noted in the same breath that, in light of the fact that the new constitutional regime introduced a completely new set of legal norms, "the courts should not be hesitant to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights".[18] The Court went on to state that this responsibility applies to both civil and criminal law and arises regardless of whether or not any of the parties to a particular case raise this issue.[19]

In Namibia, as in South Africa, the new constitutional dispensation brought about a radical sea-change in the legal landscape which would seem to necessitate a re-thinking of some common-law positions. Thus, despite the fact that Namibia's Constitution has no explicit provision on the role of the court in developing the common law, Namibia and South Africa appear to share a common understanding that the common law must take cognizance of the influence of the Constitution.

The Constitution's influence on the common law

The Constitution is the Supreme Law,[20] which means that all other laws must be interpreted in light of its tenets.

In Namibia, a good starting point is the general statement by Judge Mahomed in *S v Acheson*[21], a case involving the question of whether or not bail should be granted to an accused who had been charged with the murder of Adv Anton Lubowski, a prominent

parts of Namibia or to particular periods."

[16] Id at para 34 (O'Regan AJA). The discussion also referred to *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC), in which the Supreme Court considered the proper approach to Art 66. According to O'Regan, the *Myburgh* case "held that art 66 'renders invalid any part of the common law to the extent to which it is in conflict with the Constitution'. The corollary of this principle is that the rule of the common law that is in conflict with the Constitution was rendered invalid at the date of Independence. It does not only become invalid once a court rules that it is inconsistent with the Constitution. In *Myburgh*, however, the court did not consider the question whether the courts retained the power to develop the common law as that issue was not before the court." Id at para 33. See also *JS v LC and Another*, Case No: SA 77/2014, 19 August 2016, as yet unreported, at paras 51-54 (Smuts JA).

[17] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (Ackermann & Goldstone, JJ) at para 36.

[18] Id at para 33.

[19] Id at para 36.

[20] Namibian Constitution, Article 1(6): "This Constitution shall be the Supreme Law of Namibia."

[21] *S v Acheson* 1991 (1) NR (HC) (Mahomed, AJA).

member of SWAPO. The Namibian Constitution was treated as the guiding star in this case, even though it did not involve a constitutional challenge to any element of statute or common law. The Court held that the exercise of judicial discretion in this case must have regard to "the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution"[22]:

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 over and permeate the processes of judicial interpretation and judicial discretion…[23]

The case went on to say that the rights guaranteed by the Constitution constitute a "constitutional culture" that no judge should ignore "where it is relevant, in the interpretation or application of the law or in the exercise of a discretion".[24] The case held that bail should be allowed, subject to stringent conditions designed to minimise the danger that the accused might abscond or otherwise prejudice the interests of justice, and allowed the state an adjournment of only a few days to attempt to secure the attendance of crucial absentee witnesses from South Africa, refusing the state's application for a six-week adjournment for this purpose. According to the Court, its decision was influenced by the Namibian Constitution's "insistence upon protection of personal liberty in art 7, the respect for human dignity in art 8, the right of an accused to be brought to trial within a reasonable time in art 12(1)(b) and the presumption of innocence in art 12(1)(d)".[25]

In South Africa, the underpinning of common law by the constitutional regime has been even further elaborated by the Constitutional Court, which made the following statement:

> "The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims… This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply."[26]

In another case, the South African Constitutional Court similarly noted that "all law must conform to the command of the supreme law, the Constitution, from which all law derives its legitimacy, force and validity…", and that "[i]t is in this context that courts are

[22] Id at 9J.
[23] Id at 10A-B.
[24] Id at 10C.
[25] Id at 10B-C.
[26] *Pharmaceutical Manufacturers Association of SA and Another; In re Ex parte President of Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 49 (Chaskelson, P).

enjoined to apply and, if necessary, to develop the common law…".[27]

As will be seen below, the Namibian courts have taken a rather fluid approach to integrating constitutional values into the development of the common law. In South Africa, in contrast, the Constitutional Court set out a more structured two-step enquiry for this purpose, in the 2001 *Carmichele* case. According to that case, the first step is to consider whether the existing common law on a specific issue needs development, in light of the constitutional framework within which it operates.[28] For instance, this could be required when a common law rule is inconsistent with a constitutional provision and requires adaptation to resolve the inconsistency, or when a rule of the common law is not actually inconsistent with the Constitution but needs adaptation to be in harmony with the Constitution's spirit and values.[29] The second step is to consider how the development of the common law should take place – in terms of both substance and procedure.

In terms of substance, the common law must be developed within the "matrix" of the "objective normative value system" established by the Constitution, and "in a way most appropriate for the development of the common law within its own paradigm".[30] Before the introduction of the Constitution, the refashioning of the common law in certain areas might depend on policy decisions and value judgments which were intended to reflect "the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people" - based on what the court "conceives to be society's notions of what justice demands".[31] But the wishes of the people will now be embodied in and enriched by the objective value system embodied in the Constitution.[32]

More specifically, the range of possibilities for development was canvassed by the South African Constitutional Court in the case of *K v Minister of Safety and Security.*[33] There, the Court noted that incremental development of the common law can take the two extreme forms of changing a common-law rule altogether, or introducing a completely new rule. The third and more usual form of development will take place within the framework of an existing rule, where a court extends or restricts the ambit of the rule by determining whether it applies to a new set of facts which does not clearly fall within any previous

[27] *S v Thebus and Another* 2003 (6) SA 505 (CC) at para 24 (Moseneke J) (footnotes omitted).
[28] *Carmichele v Minister of Safety and Security and Another (Centre For Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 40.
[29] *S v Thebus and Another* 2003 (6) SA 505 (CC) at para 28.
[30] *Carmichele v Minister of Safety and Security and Another (Centre For Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras 54 and 55.
[31] Id at para 56, quoting *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318G, which quotes a passage from former Chief Justice MM Corbett "Aspects of the Role of Policy in the Evolution of the Common Law", (1987) *SALJ* 104.
[32] Id at para 56. See also B Zitke, "RH v DE 2014 6 SA 436 (SCA)", *De Jure* 48, Vol 2 2015 atn458. See also, for example, *Van Eeden v Minister of Safety and Security (Women's Legal Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) at para 12 ("The concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the Constitution.")
[33] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) (O'Regan J).

applications of the rule.[34] In all of these scenarios, courts must be "alert to the normative framework of the Constitution".[35]

In respect of procedure, the Constitutional Court emphasised in the *Carmichele* case that it is "not ordinarily in the interests of justice for a court to sit as a court of first and last instance," – because this negates the possibility of appealing against the decision given, removes the advantage of having more than one court considering the issues raised, and denies the losing party the opportunity of challenging the reasoning on which the first judgment is based by refining arguments previously raised in light of the initial judgment.[36] In South Africa, this approach was considered to be even more compelling in respect of questions of whether or how the common law is to be developed under the Constitution because of the expertise of the Supreme Court of Appeal and the High Courts in common law issues.[37]
The issue in the *Carmichele* case, in which South Africa's two-step approach was formulated, was the parameters of the common law duty of care in respect of the state's duty to protect members of the public from dangerous criminals with a history of violence. The approach to development of the common law laid out in *Carmichele* has also been applied to a range of other issues - including to find a negligent omission by a public official unlawful for the purpose of delictual liability;[38] to impose a legal duty on paternal grandparents to support their extra-marital grandchildren to the same extent that maternal grandparents are liable,[39] and to place delictual liability on the State for criminal acts committed by a police officer on standby duty.[40] As a converse example, the test was applied to the common purpose doctrine in criminal law, producing a conclusion that this doctrine passes constitutional muster and does not require development.[41]

In Namibia, the Constitution has informed the application and development of the common law in respect of several issues, with some of the key cases and lines of cases considered below.

[34] Id at para 16.
[35] Id at para 17.
[36] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras 50-51.
[37] Id at paras 53 and 55; at 55: "The proper development of the common law under s 39(2) requires close and sensitive interaction between, on the one hand, the High Courts and the Supreme Court of Appeal which have particular expertise and experience in this area of the law and, on the other hand, this Court."
[38] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); see also *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2002 (6) SA 180 (C) reversed on appeal in *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA).
[39] *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 (2) SA 56 (C).
[40] *K v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC).
[41] *S v Thebus and Another* 2003 (6) SA 505 (CC).

The criminal context

The cautionary rule in rape cases

In the 1992 case of *S v Damaseb and Another*, the Namibian High Court cast doubt on the Constitutionality of the special cautionary rule in sexual offence cases.[42] In comments later ruled by the Supreme Court to have been *obiter dicta*,[43] the Court stated that "the cautionary rule evolved in cases of rape has no rational basis for its existence and should therefore not form part of our law and is probably contrary to the provisions of the Namibian Constitution", citing the constitutional provision on sexual equality.[44]

In the 1996 High Court case of *S v Katamba*[45], the Court found that the "observation" on the cautionary rule in the *Damaseb* case had been "tentative", proceeding to apply it in the case at hand with the result that the conviction of the alleged rapist of an 11-year-old girl was overturned. This judgment was, however, overruled on appeal by the Supreme Court.[46] The Supreme Court asserted that the cautionary rule applied to sexual offence cases did not arise from sexism, but from the complex emotions and passions involved in sexual encounters.[47] Nevertheless, relying on the South African case of *S v Jackson,*[48] and after considering both the presumption of innocence in Art 12 of the Constitution and the "constitutional duty to protect the fundamental rights of victims", particularly women and children, the Court concluded that the rule "has outlived its usefulness" and that there "are no convincing reasons for its continued application".[49]

Accused's right of access to police dockets

In the 1994 case of *S v Nassar*[50], the accused's right of access to information held by the prosecution was considered in light of the constitutional right to a fair trial guaranteed by Art 12. The charge in this case was unlawful diamond buying, and the accused sought an order compelling the State to disclose its witness statements as well as certain video and audio tapes in the police docket. The State resisted disclosure on the basis that this would

[42] *S v Damaseb and Another* 1991 NR 371 (HC) (Frank J). The common law at that stage identified several kinds of evidence which need to be treated with particular caution in deciding whether guilt in a criminal case has been proved beyond a reasonable doubt. Among such categories of evidence were the uncorroborated evidence of a single witness; the evidence of an accomplice to the crime; the evidence of young children – and the uncorroborated evidence of the complainant in cases which involve sexual offences such as rape. See D Hubbard, "A Critical Discussion of the Law on Rape in Namibia", in Susan Bazilli, ed, *Putting Women on the Agenda*, Raven Press, 1991 for a discussion of the legal background to this rule.
[43] See *S v Katamba* 1999 NR 348 (SC) at 350I-351J.
[44] At 375E, citing Art 10 of the Namibian Constitution.
[45] Unreported (Mtambanengwe J).
[46] *S v Katamba* 1999 NR 348 (SC) (O'Linn J).
[47] At 353-355.
[48] *S v Jackson* 1998 (1) SACR 470 (SCA).
[49] At 361C-D. Section 5 of the Combating of Rape Act 8 of 2000 essentially codified this holding.
[50] *S v Nassar* 1994 NR 233 (HC) (Muller AJ).

prejudice the ability of the police to investigate cases of this nature, such as by revealing the names of informants and police methods, or prejudice the case outcome, such as by enabling accused persons to adjust their defences or opening the door to harassment of State witnesses. The Court's conceptual starting point was the principle that, if an aspect of existing common law "appears to fall short of enabling a person to exercise a fundamental right conferred on him by the Constitution" – such as the "fundamental right of an accused person to a fair trial" - the Court has "not only the right but the duty to investigate and determine whether it is not in conflict with the Constitution".[51] The Court finally traced the evolution of the common law rule that a witness statement is a privileged document to which an accused is not entitled – referred to as the "docket privilege". It set out the relevant constitutional provisions and the relevant aspects of the Criminal Procedure Act 51 of 1977, considered relevant case law in other countries and discussed alternative ways to address the practical arguments against disclosure. The Court held that the right to be presumed innocent until proven guilty (Art 12(1)(d)) requires "that an accused is put in the position whereby he knows what case he has to face so that he can properly and fully prepare his defence". If found that this right also embodies the right to call witnesses and to cross-examine State witnesses, which can only be properly exercised if the accused is informed in advance of the trial what the case against him or her is going to be.[52] The Court also held that the information in the police docket must be disclosed when the indictment is served on the accused, and that the State must provide all relevant documentation even if no specific request for this is made.[53] Thus, the common-law position was developed in some detail in order to accord with the right to a fair trial.

Sentencing in gender-based violence cases

The Constitution has also influenced the application of the common law on sentencing in cases involving gender-based violence. Sentencing in general is based on a well-established triad of factors: the personal circumstances of the accused, the nature of the crime and the interests of society.[54] Since Independence, a number of cases have treated the vulnerability of women and children as crime victims as an aggravating actor in sentencing, based on society's concern about the prevalence of domestic and gender-based violence.[55] For example, constitutional values were cited as an aggravating factor in sentencing in a rape case as early as 1999.[56] However, in 2007, constitutional values were

[51] At 245J-246B.
[52] At 257A-F.
[53] At 259H-260B.
[54] See, for example, *S v Zinn* 1969 (2) SA 537 (A); *S v Rabie* 1975 (4) SA 855 (A); *S v M* 2007 (2) NR 434 (HC) at para 14 (Muller J).
[55] See, for example, *S v Kaanyuka* 2005 NR 201 (HC), which mentions the Constitution but does not refer to constitutional values as a basis for aggravation of sentence.
[56] *S v Rudath* (CA 109.98) [1999] NAHC 13 (21 September 1999) (Maritz J): "The brutal sexual violation of a fellow being's physical integrity, human dignity, security of person and psychological well-being to satisfy the assailant's most primitive and bestial urges of lust, sexual domination and power should not be tolerated in any society - least in ours, which has constitutionally committed itself to the recognition and protection of the dignity, freedom and equality of all its members." See also *S v Gaseb and Others* 2000 NR 139 (SC) at 155D: "The acts of rape committed by a gang constitute the

cited in the rape case *S v M* as a basis for development of the common law on sentencing. The Court proposed that a fourth factor should be added to the traditional triad – the circumstances of the victim – because of the introduction of a Constitution which enshrines the sanctity of life and respect for human dignity.[57]

This approach does not appear to have been taken forward. The 2007 case of *S v Bohitile* cited constitutional values in connection with sentencing in a case involving domestic violence, saying that sentences for such crimes "should reflect the determination of courts in Namibia to give effect to and protect the constitutional values of the inviolability of human dignity and equality between men and women".[58] In contrast to *S v M*, this factor was not presented as a basis for developing the common law on sentencing, but proposed as an aggravating factor. Since then, many other cases have similarly made reference to constitutional values as aggravating factors and/or components of the interests of society when imposing sentences for crimes which took place in the context of domestic violence, often citing *Bohitile*. For example, in the 2014 case of *S v Kadhila*, another case involving domestic violence, while considering the interests of society, the Court referred to the "sanctity of life" as "a fundamental human right enshrined in law by the Namibian Constitution which must be respected and protected by all", citing the domestic context of the crime as an aggravating circumstance.[59]

The constitutional values of dignity and sanctity of life have also been referenced in respect of sentencing for rape, as general factors bearing on sentencing.[60]

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most cowardly, vile and despicable oppression of the victim and the repeated and deliberate violation of her constitutional rights."

[57] *S v M* 2007 (2) NR 434 (HC) at para 14 (Muller J) (date of judgment 5 June 2007).

[58] *S v Bohitile* 2007 (1) NR 137 (HC) at 21 (Smuts J) (date of judgment 154 November 2007). In this case, a sentence on a conviction of culpable homicide for assaulting a long-term intimate partner and causing her death was increased from 5 years with 1 year suspended to 8 years with 2 years suspended.

[59] *S v Kadhila* CC 14/2013 [2014] NAHCNLD 17 (12 March 2014) at paras 17-18 (Liebenberg, J). See also, for example, *S v Shilongo* (CC 04/2015) [2016] NAHCMD 127 (25 April 2016) at paras 6-7 (Usiku J); *S v Katjivi* (CC 01/2016) [2016] NAHCMD 258 (9 September 2016) at paras 9-10 (Liebenberg J) (which refers to both *Bohitile and Kadhila*); *S v Ngatjizeko* (CC 23/2008) [2013] NAHCMD 167 (18 June 2013) at para 12 (Ndauendapo J)(quoting *Bohitile*); *S v Britz* (CR 86/2013) [2013] NAHCMD 381 (20 December 2013) at paras 14-15 (Smuts J) (quoting *Bohitile* and the unreported case of *S v Shaduka*, Case No. 71/2011, 13 December 2012, unreported); *S v Kamudulunge* (CC 20/2010) [2011] NAHC 326 (31 October 2011) at para 15 (Liebenberg J) (quoting *Orina*); *S v Orina* (CC 12/2010) [2011] NAHC 137 (20 May 2011) at para 9 (Liebenberg J); *S v Farmer* (CC 06/2010) [2013] NAHCMD 138 (23 May 2013) at para 8 (Ndauendapo J)(quoting *Bohitile*); *S v Soroseb* (CC 08/2010) [2010] NAHC 41 (18 June 2010) at para 15 (Tommasi J) (quoting *Bohitile); S v Soroseb* (CC 08/2010) [2010] NAHC 41 (18 June 2010) at para 15 (Tommasi J) (quoting *Bohitile*); *S v Nkasi* (CC 02/2010) [2010] NAH*C 33 (12 April 2010) at para 8 (Liebenberg J) (quoting *Bohitile*).

[60] In addition to the case of *S v M* 2007 (2) NR 434 (HC) discussed above, see *S v Katzao* (CC 25/2010) [2013] NAHCMD 87 (4 April 2013) at para 5 (Ndauendapo J) and *S v Libongani* 2015 (2) NR 555 (SC) at paras 25-26 (Mainga JA).

On the other hand, in the course of criminal sentencing, courts have also frequently made reference to societal concerns about domestic violence or the general prevalence of gender-based violence, *without* any reference to constitutional values.[61] And, although the constitutional values of dignity and the sanctity of life could be cited in respect of crimes other than domestic violence, the Constitution has seldom been referenced in sentencing in other contexts. One notable exception is *S v Van Wyk*, where constitutional condemnations of racism were cited in support of treating a racist motive for a crime as an aggravating factor, holding that "a court of law, when considering an appropriate punishment for a crime which has been motivated by racism, will in fact be acting in accordance with the constitutional commitment and public policy referred to above if it considers such racist motive to be an aggravating circumstance and therefore places additional emphasis on the retributive and deterrent objects of punishment in order, inter alia, to contribute to the eradication of racism."[62]

The upshot is that, with the exception of the neglected approach put forward in *S v M*, it is murky as to whether constitutional values have permeated the application of the common law on sentencing because of their constitutional status, or whether the Constitution is merely being cited as evidence of a particular societal interest in preventing certain forms of violence.

Criminal defences

In 2002, in the unreported case of *S v Matheus*, the Supreme Court briefly considered whether the advent of the Constitution had altered the common-law principles on self-defence by virtue of its protection for the right to life, and concluded that it had not, since the constitutional protection applies to the life of the victim as well as the life of the aggressor.[63] This conclusion was endorsed by the Supreme Court in 2006 in the reported judgement of *S v Jonkers.*[64]

[61] See, for example, *S v Basson* (CC 23/2010) [2011] NAHC 186 (1 July 2011) at para 5 (Damaseb, JP); *S v Gabriel* (CC 17/2010) [2011] NAHC 45 (23 February 2011) at para 12-14 (Tommasi J); *S v Likuwa* (CC 18/2010) [2011] NAHC 30 (2 February 2011) at paras 15-17 (Tommasi J); *S v Wilbard* (CC 40/2008) [2009] NAHC 78 (29 July 2009) at paras 14-16 (Shivute AJ); *S v Nepando* (CC 12/2007) [2007] NAHC 37 (10 May 2007) at para 9 (Miller J).

[62] *S v Van Wyk* 1993 NR 426 (SC) at 451-453, quote from 453A-B (Ackermann AJA), supported in the separate judgments of Berker CJ at 455-456 and Mahomed J at 456-457. Other examples of cases where the Constitution has been cited in respect of crimes which did not encompass domestic or gender-based violence are *S v Gaoseb and Another* (CC 19/2010) [2011] NAHC 57 (25 February 2011) at para 13 (Liebenberg J); *S v Rickerts* (08/2015) [2016] NAHCMD 47 (3 March 2016) at para 11 (Liebenberg J); and *S v Shihepo and Another* (SA23/03 ,SA23/03) [2004] NASC 7 (25 November 2004), referring to murder being committed "in contempt of the Constitution" (Mtambanengwe ACJ) (citing the unreported appeal judgement *Raymond Landsberg v The State*, delivered on 2 December 1994). No other examples could be located.

[63] *S v Matheus* (SA11/01A) [2002] NASC 7 (2 April 2002)(O'Linn AJA).

[64] *S v Jonkers* 2006 (2) NR 432 (SC) at 446 (Chomba AJA).

A recent Supreme Court case, S *v Hangue*[65], considered the criminal defence based on intoxication in a situation where a man who had consumed significant quantities of alcohol had fired shots at an Independence Day celebration, killing a 3-year-old child and seriously wounding the child's mother. He was convicted at trial on charges of murder and attempted murder. The common law issue at stake was the defence of temporary non-pathological criminal incapacity induced by voluntary intoxication – in other words, that he was too drunk to appreciate the wrongfulness of his actions. Prior to Independence, the initial position (as articulated in the *Johnson* case) was that voluntary drunkenness was no defence in respect of an offence committed in that state of drunkenness.[66] In terms of this theory, the voluntary act of drinking to excess essentially substitutes for the criminal intent of the crime committed while drunk. This was changed as a result of the subsequent South African Appellate Division case of *Chretien,*[67] which held that the legal convictions of the community did not accept that a person should be punished for a crime merely because he had voluntarily ingested alcohol to the point where he lacked the ability to be held criminally responsible.

The latter position was how the law stood in Namibia at Independence, but the Namibian Supreme Court had to consider what approach to this defence should apply under Namibia's new Constitutional regime, after "close and independent scrutiny" undertaken "with due regard to the values entrenched and ideals articulated in our Constitution".[68]

Carrying out this task, the Court found difficulty with the notion that blameworthiness attaching to an overindulgence in liquor can substitute for the element of intent required for the commission of a particular crime, stating that to hold otherwise "would violate the presumption of innocence". The Court found that it would similarly be wrong to infer automatically that a person who becomes intoxicated would foresee the commission of an offence. Thus, the old approach stated in the *Johnson* case "would not have survived the constitutional transition on independence, given the provisions of arts 12(1)(d) and 66(1) of the Constitution".[69] The Court held that the Namibian position is that persons who are so intoxicated that they do not appreciate the unlawfulness of their actions, or are unable to act in accordance with that appreciation, cannot be held criminally liable. Intoxication to a lesser degree may not affect criminal culpability, but could have a mitigating or aggravating effect on sentence, depending on the circumstances of the case.[70] However, applying this principle to the case at hand, the Court found that the accused had not factually established a defence based on his state of intoxication, and so the convictions were upheld.[71]

[65] *S v Hangue* 2016 (1) NR 258 (SC) (Maritz J).
[66] See *S v Johnson* 1969 (1) SA 201 (A).
[67] *S v Chretien* 1981 (1) SA 1097 (A).
[68] *Hangue* at para 25.
[69] At paras 28-29.
[70] At paras 32-33.
[71] At paras 57-67.

Locus standi under the Constitution

Another area where the common law has been developed for constitutional ends concerns standing under Articles 18 and 25(2) of the Namibian Constitution, which refer respectively to the right of redress of "persons aggrieved" and "aggrieved persons".[72]

The High Court initially interpreted standing for this purpose to be identical to standing under the common law[73], which requires the applicant to demonstrate "a direct and substantial interest" in the subject matter and outcome of the application".[74]

However, the 2009 case of *Uffindell v Government of Namibia*[75] seemed to point in the direction of a more liberal approach to standing in respect of Constitutional issues. In that case, the applicant bid at the auction for a trophy hunting concession, but lost. Other parties were invited to attend the auction, but were not permitted to register or bid – and these parties subsequently sought to have the auction declared an unconstitutional violation of their rights to equality, to administrative justice and to freely practice a profession or occupation or carry on a business. To remedy the alleged constitutional violation, the Minister made an additional trophy hunting concession available and sold it privately to one of these parties. The applicant then brought a separate action challenging the private sale as unconstitutional, on similar grounds. The other parties challenged the applicant's *locus standi*, contending that the applicant could not have been joined as a party in the original lawsuit and therefore had no interest in the settlement. The Court agreed that the applicant lacked a legal interest in the original litigation, but was nonetheless affected by the subsequent private sale, holding that the applicant had standing to challenge the administrative decision if "a rational connection is shown to exist between the challenged administrative action and the constitutional rights and legal interests of the applicant allegedly affected by it which**,** ***in a constitutional setting*****,** must be sufficiently direct and substantial to confer upon the applicant the legal right to challenge it under art 25(2) of the Constitution as an 'aggrieved person'".[76]

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[72] Namibian Constitution, Article 18-Administrative Justice: "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal." [emphasis added]
Namibian Constitution, Article 25- Enforcement of Fundamental Rights and Freedoms: "(2) Agrieved 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…" [emphasis added].

[73] *Kerry McNamara Architects Inc and Others v Minister of Works, Transport & Communication and Others* 2000 NR 1 (HC).

[74] *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC) at paragraph 45.

[75] *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) (Maritz J).

[76] At para 11 (emphasis added).

The Court stated that "it is especially within the context of the protection and promotion of human rights values after the new constitutional dispensation created at Independence" that a more purposive approach to standing must be adopted to ensure that individuals and classes of individuals can enjoy the full benefit of their constitutional rights.[77] After noting cautionary remarks from previous Namibian cases warning that constitutional law "should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time",[78] the Court proceeded to consider the question of *locus standi* in the case at hand, finding that the applicant in the case did have standing.[79]

The question of whether constitutional standing is in fact broader than common law standing seems to remain unsettled, however. For example, in the unreported 2010 case of *Maletzky and Others v Attorney General and Others,*[80] the High Court held that "Article 25 (2) was not intended to widen the ambit [of *locus standi*] to include persons who would otherwise not have had standing to bring proceedings. The Namibian Constitution has … not extended the common law requirements of *locus standi.*"[81] In contrast, the *Uffindell* approach was followed by the High Court in the 2011 *Petroneft* case.[82] This case involved the legality of a Cabinet decision to revoke the mandate of the National Petroleum Corporation of Namibia (Pty) Ltd ("Namcor") to import 50% of Namibia's annual required petroleum products. The question was whether international oil traders, Petroneft and Glencoe, had standing since they were not parties to the mandate at issue, which Namcor did not seek to challenge. It was disputed as to whether these traders had a direct and substantial legal interest in the continuation of the mandate, or merely a financial and commercial interest. Counsel for the applicants relied mainly on the *Uffindell* decision, asserting that standing "should be viewed more widely in the context of constitutional challenges".[83] The High Court agreed with the fundamental approach to constitutional standing taken in the "well reasoned judgement" in the *Uffindell* case, which Smuts J quoted at length, with approval, finding that the applicants did have standing.[84]

In the 2011 *Namib Plains* case,[85] it was argued in the Supreme Court that the principle

[77] At para 224.
[78] At para 15, citing *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 184B (Dumbutshena AJA).
[79] The Court concluded (at para 18) that "the applicant had adequate cause to be aggrieved and to claim enforcement or protection of his fundamental rights as contemplated in art 25(2) of the Constitution" and proceeded to consider the merits of the case, ultimately finding that no violation of the Constitution had taken place.
[80] *Maletzky and others v Attorney General and others* [2010] NAHC 173 (HC) (Shivute J).
[81] At para 29.
[82] *Petroneft International Glencor Energy UK Ltd and Another v Minister of Mines and Energy and Others* [2011] NAHC 125 (Smuts, J), reversed on other grounds in *Minister of Mines and Energy and Others v Petroneft International Ltd and Others* 2012 (2) NR 781 (SC). The Supreme Court did not consider the issue of standing.
[83] At para 61.
[84] At paras 61-64, and at para 66.
[85] *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and others* 2011 (2) NR 469 SC.

of *locus standi* should be extended in environmental cases in order to give the phrase "persons aggrieved" in Art 18 of the Constitution a wider and more "constitutionally meaningful interpretation" in the environmental context – with a ruling being requested on this issue despite the fact that this issue was not considered by the lower court.[86] However, the Supreme Court declined to consider the issue of standing because the dispute at hand had become moot.[86]

In another 2011 Supreme Court case, *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others,*[87] the Court held that the applicants had *locus standi* at common law, finding it therefore "unnecessary to consider the argument raised by the appellants concerning the scope of the phrase "aggrieved persons" in Article 25 of the Constitution"[88] – again leaving the issue of standing undecided. However, in *dicta*, the Court noted that citizens in a "constitutional State" are entitled to approach courts to exercise and determine their rights, and that the rules of standing "should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements".[89]

The existing legal position was subsequently summarised by the High Court in the 2012 case of *Lameck and Another v President of Republic of Namibia and Others* as follows:[90]

> "This court has correctly stressed that a broad approach to standing should be adopted in constitutional challenges.[91] The Supreme Court has confirmed this approach."[92]

The High Court's summary of the Supreme Court's position is somewhat overstated, since its characterisation of the Supreme Court statement in the *Trustco* case fails to indicate that the paragraph cited is clearly *obiter dicta.*[93]

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[86] It was anticipated at the time that the question of *locus standi* in respect of environmental issues would arise between the same litigants in another similar application pending in the High Court, but this case did not proceed as expected with the result that the Namibian courts have as yet made no ruling on *locus standi* in environmental matters.

[87] *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC).

[88] At para 19.

[89] At paras 15-19.

[90] *Lameck and Another v President of Republic of Namibia and Others* 2012 (1) NR 255 (HC) at para 11 (Smuts J).

[91] Citing *Uffindell t/a Aloe Hunting Safaris v Government of Namibia* 2009(2) NR 670(HC).

[92] Citing *Trustco Insurance Limited t/a Legal Shield Namibia v Deeds Registries Regulation Board* SA 14/2010 at para 18.

[93] Furthermore, the *Lameck* case did not actually appear to require an expanded notion of standing. See para 11: "The applicants are currently charged with offences which include contraventions of and the impugned provisions of [the Prevention of Organised Crime Act] and others relating to them as well as contraventions of [the Anti-Corruption Act] dependent upon the impugned definitions of that Act. This would in my view give them standing to challenge the coming into operation of [the Prevention of Organised Crime Act] and the provisions in [the Prevention of Organised Crime Act] and [the Anti-Corruption Act] raised in the charge sheet against them."

In the 2013 *Jack's Trading* case, the *dicta* in the *Trustco* case was cited again, by the same judge, as authority on a standing issue. That case involved an application to set aside a notice imposing additional duty upon the importation of Portland cement. A local cement company sought to intervene on the basis that it was an infant industry that the additional duty had been intended to protect, asserting accordingly that it had a direct and substantial interest in the relief sought and that it should be recognised as a necessary party. The Court did not accept that the intervening party was a necessary party, but granted the application to intervene nonetheless because it was unopposed and also "in view of the broader view of *locus standi* which has been expounded by the Supreme Court…".[94]

The development of the common law here appears to be somewhat unsettled, with some disagreement between High Court cases, several cases expressing support for a broad approach to constitutional standing without actually needing to resort to that breadth in the cases at hand and the Supreme Court not yet having given a definitive ruling on the issue. Only the *Uffindell* and *Petroneft* cases appear to have expressly relied upon expanded approaches to standing in the constitutional context for their decisions.

In any event, this topic is something of a special case, given that standing for purposes of constitutional challenges is a novel question which obviously arises only since the advent of the Constitution – so it is natural to suppose that the existing common-law approach might not be appropriate.

It is in the same vein that the holding of *S v Huseb* on another aspect of the common law should be viewed. There, the High Court held that the common-law rule which normally suspends the execution of a judgment pending an appeal is *not* applicable to declarations of constitutional invalidity of legislation.[95] (This case referred to the 2011 holding of the High Court that the minimum sentences in the Stock Theft Act 12 of 1990 are unconstitutional,[96] with the outcome of the appeal of that decision still being awaited at the time of writing.) This is not so much a *development* of the common law in light of the Constitution, but rather a consideration of whether a common law rule developed in

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[94] *Jack's Trading CC v Minister of Finance and Another (Ohorongo Cement (Pty) Ltd Intervening)* 2013 (2) NR 491 (HC) at para 10 (Smuts J), citing *Africa Personnel Services* 2009 (2) NR 596 (SC) paras 37-44 (which held that the phrase "all persons" in Art 21(1) pf the Namibian Constitution encompasses both natural and legal persons) and *Trustco* 2011 (2) NR 726 (SC) paras 12-19 (on the more general issue of standing).
See also *Matador Enterprises (Pty) Ltd v Minister of Trade and Industry and Others* 2015 (2) NR 477 (HC) at para 80 (Smuts J), where the Court found that the applicant had a sufficient interest to justify standing in a review of administrative decision on import issues by a company which was not itself an importer but exported its dairy products from South Africa to Namibia through other parties. In reaching this conclusion the Court noted "the fundamental principle expressed in the *Trustco* matter that '(t)he rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements'." (citing *Trustco* 2011(2) NR 726 (SC) at paras 17-18).

[95] *S v Huseb* 2012 (1) NR 130 (HC) at paras 9-17 (Smuts J).

[96] *Daniel v Attorney-General & Others; Peter v Attorney-General & Others* 2011 (1) NR 336 (HC).

one context should apply to constitutional matters which are an entirely new element in the legal landscape.

Family law issues

Common law in the family law realm is an area which is ripe for development, as its rules are rooted in times when society had very different attitudes about the roles of men and women and the relationship between parents and children, and before it was possible to scientifically prove paternity.

However, some changed approaches seem to have permeated the law in this field without fanfare or even very thorough discussion. For example, the 2008 case of *DM v SM* held that the "fundamental and guiding principle concerning custody disputes and all matters involving children is that a child's best interests are of paramount importance".[97] The Court also noted here, quoting a single South African case, that –

> "in recent cases, the value systems and societal beliefs underpinning the maternal preference or tender years principle have been challenged and the Courts have stressed that parenting is a gender-neutral function and that the assumption that a mother is necessarily in a better position to care for a child than the father belongs to a past era. Evidently, the overriding reason for this development is merely that the interests of the child must prevail."[98]

The case quoted by the Court went on to note that a gender-neutral approach was consistent with the Constitutional principle of sexual equality.[99] The Court proceeded to consider the parties' contentions and the social worker's evaluation, then awarded custody of the ten-year old child to the father on the basis that he was the parent better suited to promote and safeguard the child's welfare.

Another example of a muted evolution of a family law precept is the case of *JT v AE,*[100] which incorporated principles from the Constitution and the Convention on the Rights of the Child (which is applicable through Art 144 of the Constitution) into the application of common law on access by an unmarried father to a child born outside marriage. Furthermore, this case also held, citing a South African case, that the issue of access is a matter for judicial enquiry as to what is best for the child, with no particular onus of proof on either party[101] – which is a significant departure from the common-law starting point that the father of a child born outside marriage has no legal right to access. (In fact, the common law position on custody and access of children born outside marriage had already been changed legislatively by the Children's Status Act 6 of 2006, but this seems to have gone unnoticed by all.)

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[97] *DM v SM* 2008 (2) NR 704 (HC) at para 4 (Silungwe AJ), citing *McCall v McCall* 1994 (3) SA 2001.
[98] Id, citing *P v P* 2007 (5) SA 94 (SCA).
[99] Ibid.
[100] *JT v AE* 2013 (1) NR 1 (SC) (Shuvute AJ).
[101] At para 19, citing *B v S* 1995 (3) SA 571 (A).

Both of these cases embody welcome developments, but the lack of explication is curious, particularly given that the South African cases cited post-dated Namibian Independence and were therefore only persuasive rather than binding precedent.

In contrast, the case of *Main NO v Van Tonder NO & Another*[102] extended the common law on maintenance from the estate of the deceased parent to provide for a major child in need, after extensive discussion of the reasoning for this extension. In brief, the Court found that binding precedent had already placed a duty on a deceased parent's estate to support an indigent *minor* child, and that there was no basis either in principle or public policy "in this day and age" for making a distinction between an indigent *minor* child and an indigent *major* child – particularly since *living* parents have a duty to maintain both major and minor children in need.[103] The extension under discussion had already been sanctioned by the High Court in South Africa, and the Court justified taking a similar position in Namibia on the basis that the legal convictions of the community favour support to weaker members of the family, as evidenced by the legislation passed by their elected representatives in the form of the Maintenance Act 9 of 2003 which illustrates a "progressively humanitarian approach".[104] The Court also referred to the public interest, asserting that it "cannot be in the public interest that the offspring of a deceased should be left without support", to "rely on the community or on charity, while the estate of the deceased parent is possessed of sufficient means to support such child".[105]

Although not technically belonging to the realm of family law, the most recent development of the common law which touches on family issues is *JS v LC and Another*,[106] where the Supreme Court held that the delict of adultery is no longer sustainable in law. The posture of this case was peculiar, in that it came to the Supreme Court for a ruling on an issue relating to the boundaries of marital privilege,[107] whereupon the Court itself raised the issue of whether a claim by a spouse against a third party for damages resulting from adultery was still sustainable in law. As noted above, courts in South Africa have asserted that it is particularly inappropriate for one forum to act as court of both first and last instance in cases involving the development of the common law.[108] Counsel for the third party in this case expressed some unease about the procedure, particularly since the question to be decided had been ventilated in argument in another High Court case in 2015, with judgment reserved and expected to be delivered soon. Counsel also raised concerns about the possibility that this issue might require evidence on the views

[102] *Main NO v Van Tonder NO & Another* 2006 (1) NR 389 (HC) (Damaseb JP).
[103] At paras 22-24.
[104] At para 25.
[105] At para 26.
[106] *JS v LC and Another*, Case No: SA 77/2014, 19 August 2016 (Smuts JA), as yet unreported.
[107] The specific question was whether marital privilege would prevent the alleged adulterous third party from calling as a witness the spouse who was alleged to have been party to the affair – and the holding was that the privilege cannot be invoked against the calling of a witness, but merely precludes a spouse from being compelled to disclose a communication made to the other spouse during the marriage. At para 18.
[108] *Carmichele v Minister of Safety and Security and Another (Centre For Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras 53 and 54.

of society.[109] The Court's justification for its unusual procedural step was that it would err in remitting the matter to the High Court for the continuation of the trial if the delict of adultery were no longer sustainable.[110]

The starting point for the consideration of the common law was that a delictual claim by its very nature requires an element of wrongfulness, which must be "determined with reference to the legal convictions of the community and public policy which is now informed by our constitutional values and the changing nature of the prevailing norms of society".[111] However, interestingly, the views of society were gleaned only from court judgments and constitutional values. The key factors cited by the Supreme Court for its decision were as follows:

- The action for adultery against a third party originated in "the antiquated notion of a husband's property rights in his wife" and has been abolished in many jurisdictions, which shows a changing society attitude towards adultery as well as towards children born of such relationships.[112]
- A 2013 High Court case in Namibia stated: "It may well be that in this age, society views with less disapprobation than in the past the commission of adultery."[113]
- While the right to marry is entrenched in the Constitution, the delictual action does not protect marriage because it "does not strengthen a weakening marriage or breathe life into one which is in any event disintegrating".[114]
- It is anomalous that the action is available only against the third party and not against the adulterous spouse.[115]
- It is outdated that the action serves as compensation for the insult suffered by the non-adulterous spouse, since (in current times), the adultery does not so much humiliate the innocent spouse as damage the reputation of the guilty spouse.[116]
- The action may expose children of the marriage to harmful publicity and cause emotional trauma which would not be in their best interests, and the cross- examination may injure the dignity and privacy of the alleged adulterous spouse.[117]

The Court concluded that the action has "lost its social and moral substratum"[118] and is incompatible with the constitutional values of equality of men and women in marriage and rights to freedom and security of the person, privacy and freedom of asso-

[109] *JS v LC and Another* at para 23.
[110] At para 21.
[111] At para 34.
[112] At para 40-41.
[113] At para 42, quoting *Van Wyk v Van Wyk and Another* [2013] NAHCMD 125.
[114] At paras 43-45, quoting the South African case of *RH v DE* 2014 (6) SA 436 (SCA), confirmed on appeal in *DE v RH* 2015 (5) SA 83 (CC).
[115] At para 46, quoting *RH v DE* 2014 (6) SA 436 (SCA).
[116] At para 47, citing *RH v DE* 2014 (6) SA 436 (SCA).
[117] At para 48, citing *RH v DE* 2014 (6) SA 436 (SCA).
[118] At para 39.

ciation", while the perpetuation of its patriarchal origin in the form of the damages to be awarded is incompatible with the "constitutional values of equality in marriage and human dignity".[119] The Court concluded that the action for adultery therefore lacks the wrongfulness necessary to sustain a delictual claim – and so abolished it without actually declaring it to be unconstitutional.[120]

A week after the judgment was delivered in *JS v LC*, the High Court in the case of *Van Straten v Bekker* independently came to the same conclusion. The reasoning began with a survey of recent damages awards for adultery in Namibia as well as the legal position in other jurisdictions.[121] Like the Supreme Court, the High Court cited a statement in a Namibian court judgement as evidence that "modern society has become more tolerant towards incidences of adultery" (citing a different case than the one cited by the Supreme Court).[122] The High Court also quoted cases questioning the appropriateness of the action as long ago as 1929 and 1944.[123] The additional factors cited by the High Court as the basis for its decision were as follows:

- Judicial criticism has identified Namibia's fault-based divorce laws as being out of touch with the modern approach of irretrievable breakdown.[124]
- The action has a patriarchal history and continues to be used primarily by men in Namibia.[125]
- The constitutional duty to protect the family would be better served by pre-marital and post-marital counselling and other support services than by the action for adultery. "Awarding damages may actually be tantamount to treating the symptom rather than the disease. The court cannot be a shepherd cracking a whip to nudge errant spouses back into the rails of marriage when they are no longer willing for whatever reason."[126]
- The action assumes that the third party is always responsible for the adultery, when that third party may have been enticed by the errant spouse – even possibly as part of a conspiracy by the spouses to utilise the action as a path to enrichment;[127]

[119] At para 55.
[120] At para 58. This is the same finding made by *RH v DE* 2014 (6) SA 436 (SCA), confirmed on appeal in *DE v RH* 2015 (5) SA 83 (CC).
[121] *Van Straten v Bekker* (I 6056-2014) [2016] NAHCMD 243 (25 August 2016) (Masulu J).
[122] At para 44, citing *Burger v Burger and Another* (I 3742/2010) [2012] NAHCMD 15 (10 October 2012).
[123] At paras 46-47, quoting *Viviers v Kilian* 1927 AD 449 and *Rosenbaum v Margolis* 1944 WLD 147.
[124] At paras 40-41, citing *Voigts v Voigts* (I 1704/2009) [2013] NAHCMD 176 (24 June 2013), reported as *HV v SV (2)* 2014 (3) NR 842 (HC).
[125] At para 43.
[126] At paras 48-52.
[127] At paras 52-53.

- It offends the constitutional rights to freedom of association[128] and privacy.[129]
- It may cause damage to children from the public scrutiny of a parent's immoral actions.[130]

The Court colourfully summarised its rationale as follows:

> "The courts should and actually bear the responsibility to carry and light the torch even in the dark alleys informed by custom, entrenched sexist ethos and sensibilities, which are steeped in the patriarchal perceptions and practices of the past. In this regard, the duty to shine the constitutional light in areas that may have been canopied and pervaded by what may now be outmoded and unconstitutional ethos remains critical. This should particularly be the case where these actions and practices run counter to the values and ideals espoused in the Constitution of this great Republic."[131]

The High Court judgment concluded by observing that the Supreme Court had come to a similar conclusion in an opinion that placed heavy reliance on a recent South African case which came to the same conclusion. It also emphasised that the abolition of the delict based on adultery should not be seen as encouraging or giving a licence to the commission of adultery.[132]

So the delictual action for adultery in Namibia has, as it were, been killed with a double-barrelled shotgun.

In contrast to a case like *Main* which *expanded* an existing common law rule, there seems to be a rather fine line between *abolishing* a common law action by finding it incompatible with constitutional values, and declaring that common law rule to be unconstitutional – as was the case in two other Namibian cases on family law issues.

In 2000, in *Myburgh v Commercial Bank of Namibia*, the Supreme Court declared that the common law rules relating to marital power were "in conflict with the provisions of the Constitution", meaning that "they ceased to exist when the provisions of the Constitution took effect on Independence".[133] Upon applying the procedure laid down by the Supreme Court in *Müller v President of the Republic of Namibia and Another*[134] for the application of Article 10(2) of the Constitution, the Court found that the sex differen-

[128] At paras 42 and 54.
[129] At para 55.
[130] At para 56.
[131] At para 61.
[132] At para 72. The High Court also says in this paragraph that adultery has not been "legalized" or "decriminalized", but adultery does not actually constitute a crime in Namibia. See *RH v DE* 2014 (6) SA 436 (SCA) at para 34, which notes that the crime of adultery had become abrogated through disuse 100 years previously.
[133] *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC) (Strydom CJ) at 266I-J
[134] 1999 NR 190 (SC).

tiation in the common-law rules in question 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.[135]

In 2007, in *Frans v Paschke and Others,* the High Court struck down as unconstitutional the common law rule that children born outside marriage cannot inherit intestate from their fathers. The Court found that the common law rule in question constituted unconstitutional discrimination on the basis of social status, and was thus invalid. In explaining this decision, the Court traced the history of the rule in Roman-Dutch law, and found that it unjustifiably transferred the social stigma historically attached to adulterous and incestuous children to all children born out of wedlock, even those born to loving couples. The Court also noted that the common-law rule at issue essentially punished such children for the sins of their supposedly-lustful parents, finding this to be more germane than the observation that "society looks upon illegitimate children in a much more benevolent manner than was the case a couple of hundred years ago".[136] The Court thus concluded, upon applying the *Müller* test for the application of Art 10(2) of the Constitution, that the differentiation in the rule constituted unfair discrimination and thus could not survive.

The approach to testing unconstitutionality in these cases was clearly and uniformly structured, in contrast to the more unstructured judgments (with their varying approaches) which justified the two pronouncements on the abolition of the delictual action for adultery.

Duty of care

Development of the common law has taken place in a line of cases on the concept of "duty of care" as it applies to delictual liability. When it comes to the consequences of omissions, it is settled law that the determination of whether an omission will be considered unlawful will be based on whether "the legal convictions of the community demand that the omission ought to be regarded as unlawful and that the damage suffered ought to be made good by the person who neglected to do a positive act".[137]

The first case in this thread of development was *Dresselhaus Transport CC V The Government of the Republic of Namibia.*[138] This case concerned police liability after members of the public openly looted beer from a South African Breweries truck which over-

[135] At 265H-266J, *per* Strydom CJ.
[136] *Frans v Paschke and Others* 2007 (2) NR 520 (HC) at para 17 (Heathcote AJ).
[137] *Kennedy and Others v Minister of Prisons and Correctional Services* 2008 (2) NR 631 (HC) at para 15 (Maritz J), referring to *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A- C which has been followed in a long line of decisions.
[138] *Dresselhaus Transport CC v The Government of the Republic of Namibia* 2005 NR 214 (SC) (O'Linn, AJA).

turned on a public road outside Tsumeb, after police arrived and took charge of the scene along with personnel from a private security firm.The police did not make any attempt to intercept the looters, retrieve the stolen goods, or prosecute those involved in the criminal activity. The transport company, which incurred substantial financial loss as a result of the looting, argued that the police had a legal duty to protect persons and property based on the Namibian Constitution and the Police Act 19 of 1990. The police rejected this assertion on the basis that they had handed control of the situation over to the security firm, that they were powerless against the large crowd and that they could not have foreseen the resulting damage. The case was dismissed by the High Court.[139] On appeal, the Supreme Court held that "the Namibian Constitution and Police Act not only amplify the common law in relation to the law of delict, but override it where the common law is inconsistent or inadequate";[140] examining the facts of the case against this backdrop, it found that the police failed to take reasonable steps to fulfil their duty, and that this negligent omission was the direct cause of the plaintiff's loss. It was noted by the Court that its findings of liability "accord with the legal conviction of the law-abiding citizens of Namibia".[141]

The *Dresselhaus* case relied heavily on the seminal South African case of *Carmichele v Minister of Safety and Security,*[142] where the court was called upon to decide on whether the Minister of Safety and Security bears a legal duty to protect persons from dangerous criminals with a history of violence after the applicant was viciously attacked and injured by an accused criminal out on bail while awaiting trial on a charge of rape and attempted murder. That case noted that conclusions on the existence of a legal duty in cases for which there is no precedent involve policy decisions and value judgments,[143] and that the South African Constitution justified an expansion of the "net of unlawfulness" because of the constitutional obligations on the state "to respect, protect, promote and fulfil the rights in the Bill of Rights"[144] – "particularly the right of women to have their safety and security protected" flowing from the Constitutional rights to dignity and the freedom and security of the person.[145] The matter was referred back to the High Court for consideration in light of the Supreme Court's discussion of the obligation to develop

[139] *Dresselhaus Transport CC v Government of the Republic of Namibia* 2003 NR 54 (HC) (Levy AJ).
[140] At 250A-B.
[141] At 251J-252A. In a subsequent case alleging police failure to prevent looting of fish under similar circumstances, the approach taken by *Dresselhaus* was accepted ("the 'convictions of the community' must necessarily now be informed by the norms and values of our society as they have been embodied in the Namibian Constitution" at para 17), but absolution from the instance was granted on the grounds that there was insufficient evidence of what reasonable steps the police should have taken to prevent the theft. *Four Winds Logistics CC v Government of the Republic of Namibia* (I 918/2012) [2015] NAHCMD 122 (3 June 2015).
[142] *Carmichele v Minister of Safety and Security and Another (Centre For Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (Vivier J).
[143] At para 7.
[144] At para 57.
[145] At para 62.

the common law,[146] and the High Court held that the police and prosecutors in the case at hand had a legal duty to protect Ms Carmichele against the risk of sexual violence resulting from the release of the accused.[147] This outcome was upheld on appeal to the Supreme Court of Appeal.[148]

A similar outcome ensued in the subsequent Namibian case of *Vivier NO and Another v Minister of Basic Education, Sport and Culture.*[149] This was an action for damages against the Ministry that arose from the rape of a mentally impaired child resident at Môreson School which allegedly occurred while she was in the care of a staff member over the weekend. The child's grandmother, as her foster parent, had requested that the child be allowed to stay at the school hostel on that weekend. The hostel superintendent gave permission for the child to go home with a staff member for the weekend, but the grandmother was not notified of this. This staff member left the child at her house, where she was allegedly raped by the boyfriend of that staff member. It was argued on behalf of the child that the school (which resorts under the Ministry) was liable for damages because it negligently breached its legal duty of care, resulting in a rape that caused shock and trauma to the child. Citing some South African delictual cases that had followed on *Carmichele,*[150] the Court noted that the "norms, values and principles contained in the Constitution must now also be considered in the concept of the legal convictions of the community"[151] and held that the conduct of the hostel superintendent was an unreasonable infringement of the child's right to bodily integrity and human dignity, and therefore delictually wrongful.[152]

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[146] At para 83.

[147] *Carmichele v Minister of Safety and Security* 2003 (2) SA 656 (C) (Chetty, J).

[148] *Carmichele v Minister of Safety and Security* 2004 (3) SA 305 (SCA) (Harms, JA)

[149] *Vivier NO and Another v Minister of Basic Education, Sport and Culture* 2007 (2) NR 725 (HC) **(**Hoff J).

[150] *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

[151] At para 32.

[152] At para 45. The case was appealed only on the issue of whether or not a rape or indecent assault had indeed occurred, and in respect of damages. *Minister of Basic Education, Sport and Culture v Vivier NO and Another* 2012 (2) NR 613 (SC). The Supreme Court's summary of the trial court's findings stated: "Whether a legal duty to act exists, the trial judge reasoned, falls to be objectively assessed in the circumstances of each case with reference to the contemporaneous legal convictions of the community concerned including, but not limited to, the expression they find in prevailing legal principles, instruments, pronouncements and policies." It reported that the trial court reasoned that "the *boni mores* takes into account the ability of a person to look after him- or herself in potentially harmful circumstances and, therefore, demands a higher standard of care and imposes a more onerous obligation on caregivers to prevent harm from coming to children generally, and disabled ones in particular." The "collective weight of these considerations" applied to the facts of the case persuaded the court that the hostel superintendent had acted in breach of a legal duty to protect the child in question from harm, and was therefore wrongful. At para 10.

In the case of *Kennedy and Others v Minister of Prisons and Correctional Services,*[153] the issue was whether the Ministry was liable for injuries suffered in a prison fight between rival gangs which took place in full view of the prison warders. The injured prisoners claimed damages arising from the warders' negligence in failing to take reasonable steps to protect inmates. In considering wrongfulness, the Court drew on the Prisons Act 17 of 1998 which was then in force and the Constitution's protection for human dignity both generally and in the course of punishment, finding that "in the assessment and interplay of the many factors which a court must objectively consider to determine the legal perceptions of the community, these constitutional guarantees, statutory responsibilities and the corollary duty to respect and uphold them, must be accorded sufficient weight".[154] However, in considering the facts of the case, the Court felt that it lacked the expertise to conclude that the warders present in the dangerous situation which had arisen could have reasonably averted the injuries to the plaintiffs without endangering themselves or possibly even exacerbating the situation, and so found no liability.[155]

The recent case of *Van Straten NO and Another v Namibia Financial Institutions and Another*[156] involved a claim of delictual liability made by a large number of investors against the Namibia Financial Institutions Supervisory Authority (Namfisa) and a firm of auditors. The investors who lost assets which had been placed with Prowealth Asset Managers asserted that Namfisa failed in its duties of oversight, and that the auditing firm should have become aware of the fraudulent scheme which was in operation and blown the whistle. The appeal case concerned the High Court's acceptance of exceptions raised by the defendants, and its holding that the particulars of claim could not sustain an action. The part of the case relevant to this discussion was the Supreme Court's holding that Namfisa has statutory duties to protect investors and to maintain the integrity of financial institutions, and that failure to carry out those statutory duties could be the basis for a wrongful omission.[157] In theory, the imposition of legal duties on public authorities may be inhibited by concerns about the chilling effect of the threat of endless litigation and liability for omissions to fulfil these duties.[158] However, the Court held – citing *Dresselhaus* - that fears of such a chilling effect should be discounted because of the "foundational constitutional values"of the rule of law, justice for all and accountability.[159]

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[153] *Kennedy and Others v Minister of Prisons and Correctional Services* 2008 (2) Nr 631 (HC) (Maritz J).
[154] At paras 16-19.
[155] See conclusions at paras 48-49, and the preceding analysis of the facts. "The difficulty I have in finding that the failure of the prison authority or members to respond more expeditiously and adequately and that their failure, objectively assessed, falls short of the measure of justice demanded by society in the circumstances, is that the court does not possess the expertise to authoritatively conclude that alternative measures could have been effectively introduced beforehand or taken at the time to stop the assault earlier and no expert evidence was presented to justify such a conclusion." At para 48.
[156] *Van Straten NO and Another v Namibia Financial Institutions and Another* (SA 19/2014) [2016] NASC 10 (8 June 2016) (Smuts JA).
[157] At paras 102-112.
[158] At para 107, quoting *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).
[159] At para 108.

Similarly, the "legal convictions of the community may well consider it unacceptable for an auditor not to speak up and blow the whistle" on a scheme of the sort at issue.[160] Thus, the cases against both defendants should have been allowed to proceed to trial.[161]

It now seems to be a well-established principle in delictual actions in Namibia that assessments of wrongfulness must be based on the legal convictions of the community as informed by the norms and values embodied in the Namibian Constitution.

Defamation

The seminal point in the development of the common law on defamation is the Supreme Court case of *Trustco Group International Ltd and Others v Shikongo*,[162] which was already referred to above as authority for the general premise that the courts have a clear power to develop the common law in a common-law system, and that this development must take place with reference to the Constitution.

Defamation had previously been considered by the High Court in light of the Constitution in the *Afshani* case, which noted that Article 21(2) of the Constitution endeavours to strike a balance between the right to freedom of speech and the protection afforded by the law of defamation to the right of personal dignity – but found no need to reassess the prevailing common law approach in light of the Constitution. Thus, the *Afshani* case accepted the prevailing position that once the defamatory content of a publication has been proved, this establishes a presumption that the defendant intentionally published it with knowledge of its defamatory meaning, and a presumption that the publication of the defamatory matter was unlawful. The defendant must rebut these presumptions on a balance of probabilities.[163]

However, the *Trustco* case found that the common law of defamation *does* require development to give effect to the constitutional right to freedom of speech and the media – particularly given that it is expressly flagged by the Constitution itself in Art 21(2) as a part of the law that may limit rights as long as it does so by the imposition of reasonable restrictions which are necessary in a democratic society.[164]

The Supreme Court noted that jurisdictions worldwide "have recognised the need to provide greater protection for the media to ensure that their important democratic role of providing information to the public is not imperilled by the risk of defamation claims".[165]

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[160] At para 148.
[161] At paras 112 and 151.
[162] *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) (O'Regan AJA).
[163] *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC), discussion at paras 24-34, holding at para 31 (Maritz J).
[164] *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) at para 49; see also para 35.
[165] At para 50.

It considered three approaches which could serve this end. One possibility would be to provide for a defence based on an absence of any intention to injure - but this would not give sufficient protection to the constitutional principle of human dignity as it would not operate to encourage the media to check the truth of publications if there was no malicious intent behind them.[166] A second possibility would be to require plaintiffs in defamation cases to prove that the publication was false. But this would be an unfair burden on plaintiffs which would put their constitutional rights at risk - just as requiring publishers to prove the truth of every statement in the publication would be so onerous that it would put their constitutional rights at risk.[167] The third possibility considered and adopted by the Court, was the one which would operate to protect the constitutional rights of all parties - the development of a defence of reasonable or responsible publication of facts that are in the public interest.[168] The Court found that this approach would hold the media accountable without preventing them from publishing material that is in the public interest, thereby resulting in "responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals" and so maintaining "a balance between the important constitutional rights of freedom of speech and the media and the constitutional precept of dignity".[169]

This defence was extended to non-media defendants by the High Court in 2013 in *Kandando and Another v Namibia Medical Care and Another*[170] and again in 2014 in *University of Namibia and Others v Kaaronda and Others*.[171] However, conversely, the *Kaaronda* case refused to extend to media defendants the defence of qualified privilege - which justifies a publication on the basis that the publisher had a duty or a right to communicate the defamatory matter to another, and that the recipient of the information has a reciprocal interest in receiving the communication - on the grounds that the defence crafted in the *Trustco* case essentially covered this eventuality for the media.[172]

In another 2013 case, *Ntinda v Hamutenya and Others,*[173] the High Court applied constitutional values to assess whether or not a statement was defamatory. The plaintiff had alleged that an article associating him with an opposition political party had injured his reputation by painting him as dishonourable person lacking integrity and dignity. The Court found that the question of whether or not the statements could

[166] At paras 50-51.
[167] At para 52.
[168] At paras 53-55.
[169] At para 56. This outcome was similar to the approach in the South African case of *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA), approved by the South African Constitutional Court in *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) – with both cases being cited in the *Trustco* case.
[170] *Kandando and Another v Namibia Medical Care and Another* (I 2047/2010) [2013] NAHCMD 86 (4 April 2013). That question had been was left open in the *Trustco* case.
[171] *University of Namibia and Others v Kaaronda and Others* (I 1838/2010) [2014] NAHCMD 221 (23 July 2014).
[172] At para 154.
[173] *Ntinda v Hamutenya and Others* (I 1181/2012) [2013] NAHCMD 150 (6 June 2013).

reasonably be considered defamatory must be considered though the "prism of the Constitution".[174] It found that, since the rights to freedom of association, and to form and join political parties, are protected by the Namibian Constitution, along with the right to dignity, no reasonable person could have drawn negative inferences from the statements in question.

Conclusion and future directions

This overview of areas where the Constitution has influenced the common law is not comprehensive, but it covers enough different topics to give a sense of how the process is being undertaken by the Namibian courts.[175] The developments of the common law considered in this survey are both welcome and a bit worrying – welcome because they ensure that the Constitution is, as intended, the lodestar of all law in Namibia, and worrying because the approach to the development of the common law seems to be very subjective in some cases. Namibia would benefit from formulating and applying a more consistent approach to testing common law against the Constitution.

For example, Derek Van der Merwe,[176] commenting on South African cases which have developed the common law, criticises those which approach the question as one which merely requires a balancing of competing fundamental rights – particularly in areas where the Constitution is being applied to private law. He supports a distinct two-step process whereby the first question is to determine whether the common law in question gives due recognition to the constitutional right which is implicated, and if so, then to develop the law in a way which remedies the deficiency – which is in fact the process which was subsequently put forward in the *Carmichele* case discussed at the beginning of this chapter.[177] Van der Merwe suggests that this analysis must be anchored in an "institutional approach" which considered the purpose of the rules in question and the social conditions and relationships they are intended to serve, with developments tailored to preserve the integrity and coherence of the common law. Again, this seems to be what was prescribed in the *Carmichele* case which, as noted above, refers to the need to

[174] At para 10, quoting *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* and at para 20.

[175] One case not discussed herein is *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC and Another*, Case No: SA 87/2014, Supreme Court of Namibia (17 November 2016), as yet unreported, where the Court held (per Smuts J) that no case had been made out to develop the common law to provide for a right of access to documentation of administrative bodies at a pre-litigation stage, even when the common law is considered in light of Art 18 (administrative justice) and Art 12 (fair trial) of the Constitution.

[176] Derek van der Merwe, ''Constitutional Colonisation of the Common Law: A Problem of Institutional Integrity'' *Tydskrif vir die Suid-Afrikaanse Reg* (2000) 12–32. The author is the Dean, Faculty of Law, Rand Afrikaans University.

[177] This approach is also suggested by the structure of section 8 of the South African Constitution, but it is a logical approach even without that impetus.

develop the common law "within its own paradigm".[178]

A 1966 South African case describes the process of applying a "constitutional audit" to principles of common law:

> "…[T]he Constitution could never have envisaged such a fundamental rejection of precedent so as to empower an individual Judge to overturn decades of precedent…. Nonetheless the Constitution mandates each court to examine the common-law rules afresh and if necessary to ensure that the content thereof accords with the principles thereof. This must be done cautiously after a careful examination of the existing principles which underpin the common-law rules and a comparison thereof with the key principles of the Constitution."[179]

But there is no need to be too cautious about ensuring that all law is permeated by the Constitution. Constitutions are Supreme Laws because they are intended to express societal values which are broad enough and flexible enough to transcend the politics of the day and withstand the test of time. It is appropriate for the Constitution to influence all law and all judicial decisions in Namibia.

One positive upshot of the increasing infusion of the Constitution into the common law is that it seems that the Constitution *must* now be part of any valid considerations of public interest or public policy. This has been seen in areas ranging from the interest of the public in sentencing and the legal convictions of the community in determining the wrongfulness necessary to sustain a delict – as well as in some areas not discussed here, such as whether a term in a contract is contrary to public policy.[180] This could arise in many other contexts in the future. One possibility which springs to mind is whether same-sex marriages concluded in other jurisdictions would be recognised in Namibia, or whether this recognition could be refused on grounds of "public policy".[181]

The development of the common law to align it with the Constitution seems to be gaining momentum, but there has been little comparable development of customary law in this regard.[182] This could be an interesting area of activity in future, particularly if the possibility of appeal from traditional authorities constituted as community courts becomes a practical reality rather than just a theoretical possibility.[183]

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[178] *Carmichele v Minister of Safety and Security and Another (Centre For Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras 54 and 55.

[179] *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C) at 87D-E (Davis AJ).

[180] See, for example, *Moolman and Another v Jeandre Development* CC 2016 (2) NR 322 (SC) at Smuts JA at paras 65 and 74 (contracts "premised upon fraud and deceit are immoral and inimical to the community. They run counter to social and economic expedience and offend the principle of the rule of law enshrined in art 1 of the Constitution. They are thus against public policy and unenforceable"), citing the more extensive discussion of this principle in *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

[181] See the discussion of this issue in Legal Assistance Centre, *Namibian Law on LGBT Issues*, 2015 at 135-36.

[182] One example is *Hikumwah and Others v Nelumbu and Others* 2015 (4) NR 955 (HC) (Geier J).

[183] The Community Courts Act 10 of 2003 defines "customary law" means the customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict

Independence and the advent of the Constitution re-shaped Namibian society and continues to re-shape Namibian law in all its forms. The duty of the courts and the legal profession is to try and ensure that this process takes place thoughtfully and wisely.

with the provisions of the Namibian Constitution or any other statutory law applicable in Namibia" (section 1) and provides for appeals to a magistrate's court and thence to the High Court (sections 27-29). The recent case of *LM v JM and Others* 2016 (2) NR 603 (HC), in which the applicant sought to set aside an order of a community court, found that no evidence had been led to make a case that customary law on marriage violated the Constitution. See also *Tjingaete v Lakay NO and Others* 2015 (2) NR 431 (HC).

Transformative Constitutionalism: A Post-Modern approach to Constitutional Adjudication in Namibia[1]

Nico Horn

Introduction

When the democratic forces in Namibia and South Africa gained momentum in the 1970's South African academics raised their voices against the rigid legal positivism of the courts during the apartheid era. Several of them linked the heritage of the apartheid era with Western positivism and liberalism.[2]

Witwatersrand academic John Dugard observed that the South African judges approached their judicial function in an unduly narrow manner. [3]The positivist approach of the judiciary resulted in a juxtaposition between rules and values. Consequently, the pre-democratic courts made a radical distinction between law and morality. Already in the 1970's Dugard proposed that judicial positivism should be replaced by a value-based approach. [4]Dugard's approach, however, should not be seen as radical in the sense of the rising critical legal studies movement that developed in the 1970's in the United States and Europe. While his leanings was towards the creativity of the bench proclaimed by the American Realists, linked with an acknowledgement of natural law values, [5]Dugard was never a radical thinker.

He blamed the positivist approach of the South African judges under apartheid for the narrow interpretation of the law. The result of this positivism was a self-imposed blindness or as Dugard calls it, a "jurisprudential cloak of concealment" which is paraded as analytical jurisprudence, while it is in fact the judicial expression of conservative politics.[6]

Dugard suggested that this damning influence of political conservatism could have been countered by what he calls "traditional natural law values". Dugard described these natural law values as freedoms and rights:

- Freedom from arbitrary arrest and detention without trial;
- Freedom from cruel and unusual punishment;

[1] This chapter is based on researched done for my PhD (or Dr Juris, as it is called in Germany).
[2] See the articles of Klare, Langa and Woolman/Davis below.
[3] Dugard, J. 1971. The Judicial Process. Positivism and Civil Liberties, *SALJ*, Vol. 88, p.181 ff.
[4] Dugard, J. 1978. *Human Rights and the South African Legal Order.* Princeton: Princeton University Press, p. 400ff.
[5] Ibid, p. 197.
[6] Ibid, p. 189.

- The right to legal representation;
- The right to be heard before one's liberty is taken away;
- Freedom of speech and literary expression;
- Freedom of the press;
- Freedom of assembly; and
- Freedom of movement.[7]

Shortly after the first democratic governments were instated in Namibia (1990) and South Africa (1994) a colleague of John Dugard, Ettienne Mureinik, published an article on constitutional interpretation. [8]His emphasis was not on interpretation *per se*, but an attempt to assign a broader task to the South African constitution and the courts. Constitutional interpretation, he asserts, is much more than declaring the law. He used the metaphor of a bridge to explain his understanding of constitutional jurisprudence. The constitution is a bridge to take a nation from oppression to liberation, from injustice to the rule of law, from inequality and division to unity, from apartheid to justice. In other words, constitutional adjudication must keep the ideals of the constitution and the constitutional state in mind. The judgments of the courts must be contextualised. It has to be the vehicle to attain the high values and expectations of the constitution.

Once both Namibia and South Africa have obtained majority rule, even the term 'liberalism' became suspect. It was no longer seen as an expression of progressive thinking challenging the ideological apartheid heresy. The natural law approach of Dugard and the liberal Dworkinian model of Mureinik came under the same scrutiny as positivism.[9] Progressive academics and legal practitioners were looking for more radical interpretive model to deal with the negative influence of apartheid on the legal system and legal theory in southern Africa.

An article by Karl Klare set the scene for the jurisprudential debate on the role of a post-modernist or CLS approach (or at least an approach sympathetic to CLS insights) *vis-à-vis* traditional liberal jurisprudence.[10]

The challenge did not go unanswered. Traditional liberals and positivist thinkers eventually challenged the initial strong appreciation of what is now known as transformative constitutionalism. They did not suggest that the post-apartheid society should give up

[7] Ibid, p. 197.
[8] Mureinik, E. 1994. A Bridge to where? Introducing the Interim Bill of Rights.*10 SAJHR*, p. 31.
[9] The articles of Karl Klare and Woolman and Davis, discussed below, are indications of the changed understanding of the word liberalism or the phrase legal liberalism after 1994. In the apartheid era, it identified the political centre left, i.e. the proponents of non-racial democracy who opted to work for an inclusive democracy within the structures of government in Namibia and South Africa. The non-racial Namibia National Front of Bryan O'Linn in Namibia and the Progressive Party led by Van Zyl Slabbert but personified by Helen Suzmann, are proponents of these groups. While they were not part of the liberation movements, they were seen as allies in the struggle for justice and democracy. After 1994, activist often saw liberalism as an obstacle to progressive thinking and reform.
[10] 1998. Legal Culture and Transformative Constitutionalism, in *14 SALJHR*, p. 146 ff.

all the victories of the constitutional jurisprudence either. However, they strongly challenged the idea that liberal positivist jurisprudence of the likes of Herbert Hart or the liberal natural law approach of Ronald Dworkin is necessarily unfit for a progressive constitutional jurisprudential model.[11]

Transformative Constitutionalism

Karl Klare's article stirred the South African constitutional debate.[12] His attack on a liberal literalist interpretation of the South African Constitution and the insistence that a post-liberal constitution justifies a post-liberal interpretive model found wide support, so much so that a conference was organised in 2008 to evaluate the development of transformative constitutionalism in ten years since the appearance of his article.[13]

Klare used Mureinik's article to elaborate on the significance and uniqueness of constitutional interpretation and more directly the transformative role of the new constitution in South African adjudication.[14] The democratic transition of South Africa, personified and spearheaded by the constitution, "is intended to be a bridge from authoritarianism to a new culture of justification, a culture in which every exercise of power is expected to be justified'".[15]

He quotes quote Mureinik to introduce his understanding of exactly what transformation should mean for the South African legal system. Mureinik looked at the repressive legislation and the serial state of emergencies in the last years of the apartheid government and questioned the role of a conscientious judge. Without mentioning Chief Justice Corbett, Mureinik refers to the dilemma Corbett discussed in his representation to the Truth and Reconciliation Commission. If the conscientious judge, faithful to his oath to uphold the laws of the day, yet forced to do it in such a way that he/she nullifies or at least minimizes the effect on the victims, Mureinik saw no way that such a legal system can provide justice.[16] The fetters of unjust law will eventually destroy such judges' capacity to act free and fair. The constitutional dispensation, Klare commented, needs a new way of looking at the role of the legal system in general and judges in particular. Klare calls it 'transformative constitutionalism'. He defines transformative constitutionalism as;

.. a long term project of constitutional enactment, interpretation and enforcement committed ... to transforming a country's political and social institutions and power relation-

[11] The strongest challenge came from Theunis Roux, now professor at the University of New South Wales. Other proponents of the positivist challenge are Alfred Cockrell and Anton Fagan.
[12] Klare, E. 1998. Legal Culture and Transformative Constitutionalism, 14 *SAJHR* 146.
[13] University of Stellenbosch: *Conference of Transformative Constitutionalism after ten years*, held on 8 August 2008
[14] See p. 147. Mureinik, E. 1994. A Bridge to Where? Introducing the Interim Bill of Rights. *10 SAJHR*, p. 31.
[15] Klare, p. 147, quoting Mureinik, p. 32.
[16] Mureinik, E. 1988. Dworkin and Apartheid, in Corder, H (ed). *Essays on Law and Social Practi ce in South Africa*, p.181 on p. 182.

ships in a democratic participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large scale social change through large scale nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but short of or different from 'revolution' in any sense of the word.[17]

Klare's point of departure is that the South African Constitution signifies a break with traditional liberalism and the creation of what he calls 'an empowered model of democracy'.[18] The South African constitution should therefore not be read as if it is just another product of liberalism. Klare called it a post-liberal constitution. He identified the features that signify the break as' multiculturalism', close attention to gender and sexual identity, emphasis on participation and governmental transparency, environmentalism and the extension of democratic credentials into the private sphere".[19]

Klare is not always clear on how important it is for issues of adjudication to accept a post-liberal reading of the constitution. On the one hand he states that his article is not meant to convince everyone that a post-liberal reading is the correct interpretation of the constitution, but rather to invite dialogue.[20] However, he also raised the problem with opting for a liberal interpretation without dialogue. Since the liberal approach has always been seen as the correct 'legal' interpretation and post-liberalism as 'political', Klare doubted that transformative interpretation would get a fair hearing if post-liberalism *vis-a-vis* liberalism, as foundations of interpretation were not debated.[21] The political dimension of interpretation is the real issue that Klare dealt with. It seems clear that transformative constitutionalism is closely linked to a post-liberal reading.

Once both Namibia and South Africa have obtained majority rule, even the term 'liberalism' became suspect. It was no longer seen as an expression of progressive thinking challenging the ideological apartheid heresy. The natural law approach of Dugard and the liberal Dworkinian model of Mureinik came under the same scrutiny as positivism.[22]

Since, the drafters of the Constitution, dramatically moved away from liberalism, one can expect the interpreters not to interpret the South African Constitution by using 'clas-

[17] Klare, 1998.p. 150.
[18] Ibid, p. 152.
[19] Ibid, p. 151.
[20] Ibid. p. 152.
[21] Ibid.
[22] The articles of Karl Klare and Woolman and Davis, discussed below, are indications of the changed understanding of the word liberalism or the phrase legal liberalism after 1994. In the apartheid era, it identified the political centre left, i.e. the proponents of non-racial democracy who opted to work for an inclusive democracy within the structures of government in Namibia and South Africa. The non-racial Namibia National Front of Bryan O'Linn in Namibia and the Progressive Party led by Van Zyl Slabbert but personified by Helen Suzmann, are proponents of these groups. While they were not part of the liberation movements, they were seen as allies in the struggle for justice and democracy. After 1994, activist often saw liberalism as an obstacle to progressive thinking and reform.

sical legalistic methods'.[23] Klare sees it as a legal necessity that that a "transformative conception of adjudicative process and method" be applied to interpret the South African Constitution.[24]

The critics of a transformative constitutional model emphasise the problematic relationship between law and politics in adjudication, and the tension between judicial constraint and judicial activism. Klare opted not to use the word "activism" but rather spoke of the freedom of judges "to accomplish justice".[25] The constitution so dramatically altered the substantive constitutional foundations and assumptions that it is impossible to believe that the drafters assumed that the constitution would be interpreted "constraint by the intellectual instincts and habits of mind" of the lawyers of the apartheid era.[26]

> "But we balk at the idea of transformative adjudication, because this suggests an invitation to judges as distinct from legislators, to attempt in their work to accomplish political projects."[27]

Klare, quoting CLS scholar and Harvard professor Duncan Kennedy,[28] repeated the old argument against a reliance on the text only: Texts do not self-generate their meaning, but need to be interpreted. Constraint, however, is not an objective legal rule with defined rules and therefore hardly measurable. If anything, constraint is culturally constructed. In other words, they are constrained less by the clear and unambiguous language than by a traditional fear to enter the political arena.

Yet, judges, lawyers and academics, in the words of Duncan Kennedy, have no specific legal criteria to come to correct conclusions apart from the persuasive "deployment of the argumentative tools that legal culture makes available to judges trying to generate the effect of legal necessity". Consequently, in contested cases it is hardly possible to speak of a correct, non-strategized legal solution, or a solution derived only from legal argument rather than strategic use of the law. [29]

Klare dedicated one section to go over the old arguments that constraint and judicial activism are equally political. He used the realist argument that judges cannot exclude the personal and political values from the interpretive process. The question is no lon-

[23] Ibid, p. 21.
[24] Ibid, p. 156.
[25] Ibid. p. 149.
[26] Ibid. p. 156.
[27] Ibid, p. 157.
[28] Ibid, p. 161, quoting Kennedy: 1980. Towards An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850 – 1940, *Research in Law and Sociology, Volume 3,* pp.3-24. It is interesting that Kennedy thanks Klare for his helpful comments in his Acknowledgements, an indication of the close relationship between Kennedy and Klare.
[29] Ibid, p. 164, quoting Kennedy: 1996. Strategizing Strategic Behavior in Legal Interpretation. *Utah Law Review,* p. 787. See also Kennedy, D. 1997. *A Critique of Adjudication* (fin de siècle), Cambridge, MASS: Harvard University Press, p. 2.

ger, to what extent can a judge distance herself from her *a priori* convictions, since "the traditional rule-of-law ideal is quite simply impossible".[30] Further, not only the Realists or CLS advocates rely on external extra-legal personal or political sources to adjudicate in matters where there is no clear legal answer. Klare points to Hart's solution for the penumbral question, or Dworkin's method of coherence and integrity.[31]

Klare saw his position as a direct response to the philosophy embedded in the constitution, which he defines as post-liberal and perceived transformative constitutionalism as something more that adjudication and interpretation of the wording of the constitutional text. The adjudicators need constant reminders through the process of adjudication to be aware of the values and objectives of the constitution and to consider it. The interpreting, adjudication and implementing the constitutional text must lead to fulfil the ideals of the constitution: a non-racial, non-discriminatory, democratic society. In this process it is inevitable to include political issues and conclusions.

Klare's interpretive model closely relates to the values and views of the American Realists and to some extend the CLS movement, more specifically the position of Duncan Kennedy. He warned that the constraint literalist approach of the apartheid era could hardly be duplicated in the new constitutional dispensation. One cannot speak of a broad, purposive interpretation of rights and at the same time ignore the clear objectives of the constitution envisaged in the Preamble and the total structure of the document. An activist judge, or as Klare chose to call it, a progressive bench, is the tool to implement transformative constitutionalism.

The known models of interpretation that encourage an activism searching for truth beyond the written text, and what is known as legal issues, are American Realism and CLS. Duncan Kennedy has become synonymous of CLS. Realism and CLS are both open to include other disciplines such as philosophy, sociology and even political science to interpret the constitutional text. In addition, it does not shy away from an open-minded understanding of the political consequences texts to be interpreted.

When it comes to post-1994 jurisprudence, the South African Constitutional Court has stated on several occasions that constitutional interpretation demands more than a literalist approach:

- Kriegler stated that "the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large",[32]
- Mahomed, CJ in the same case stated that the South African constitution "represents a decisive break from and a ringing rejection of that part of the past which is dis-

[30] Klare, p. 163.
[31] Ibid, p. 158.
[32] *S v Makwanyane*. 1995 (6) BCLR 665 CC, par 207. See also the judgment of Mokgoro, J at par 302 – 304.

gracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and inspirationally egalitarian ethos, expressly articulated in the Constitution"[33];

- Mandala, J refers to " ...a document that seeks to transform the status quo anteinto a new order."[34] The list goes on.

The need for transformative constitutionalism is clear. What Klare has done is rolling out a model that will fit the demand of transformation. While Klare repeated several times that he is not necessarily advocating a post-liberal constitutional tag, neither does he want to sell a specific interpretive mode, he only gave attention to the post-liberal understanding of the constitution and only used the basic approach to judicial activism usually identified with American Realism and CLS.

Klare is at pains to point out that he does not use the terms *progressive* and *conservative* in a political sense of 'left' and 'right'. A progressive judgment in the USA often comes from a political conservative bench and *vice versa.*[35]

Coming back to Klare's initial rejection of the dichotomy between pure legal arguments and results on the one hand and political arguments and results on the other, Klare concluded that the constraint judgment is also political and influenced by the judge's own environment, personality and understanding. The difference between the judge constraint by the *status quo* and an activist, or progressive judge is not a legal approach *vis-a-vis* a political approach. The progressive judge or scholar has a clear understanding of the process of incorporating other scientific fields, and the necessity of political judgments and political consequences of his/her judgments. The conservative judge, however, bound by perceived constraints, locks anything out of his/her consideration that does not fit his/her traditional understanding .of the watertight separation between law and politics.

Klare observed that the initial process of transformation in South Africa was marked by a strong element of legal conservatism.

> "In this context "conservatism" does not refer to political ideology. I mean rather cautious traditions of analysis common to South African lawyers of all political outlooks. Even the most optimistic proponents of progressive social change often display the same jurisprudential habits of mind as shown by their more pessimistic or political conservative colleagues."[36]

Klare suggests that the hermeneutical key for constitutional interpretation is to be found in the political framework and structure of the constitution. He further contends, in the same line of thinking as Judge Chaskalson that it is not a case of the post-independent

[33] Ibid. par 262.
[34] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC), par. 157.
[35] Klare, p. 170.
[36] Ibid, p. 152.

interpretation being political and the interpretation of the previous dispensation being pure legal interpretation. The apartheid interpretation was as political as any value-based interpretation can be.[37]

As we have seen, he opted for an *a priori egalitarian* point of departure. Since the South African constitution like the Namibian one, is in the first place the bridge to take South Africa from apartheid to a just, inclusive society, one cannot interpret sub-divisions without constantly being reminded of the foundation and intention of the document as a whole. Klare's point is well taken. One cannot speak of values as if they are eternal, non-changing universal principles that are somewhere out there for the judges to discover. This rigid, natural law approach does not have that followers in a post-modern pluralist society. Klare further demonstrated that a *pure legal argument* does not exist. He uses the concepts *legal constraint* and *adjudication* to explain the conflict between aspects of law that a judge deals with and the extra-judicial material that comes into play to determine values.[38] All legal texts maintain elements of constraint that binds the interpreter. However, even the constraints are not clear-cut legal principles, but matter of interpretation, "not an innate, (i.e. uninterpreted [sic] property of the material themselves that we can know objectively)".[39]
The adjudicators are not subjective interpreters who come to the text in total objectivity. They work with the materials of previous adjudicators (an important aspect of the common law with its *stare decesis*-rule). They also bring their culture, history and personal values to the table.

In a lecture at Stellenbosch University former Chief Justice Pius Langa looked at transformative constitutionalism in a broader sense. [40]Without the reliance on American Realism or CLS, Langa nevertheless dealt with most of the issues raised by Klare. He gets his definition of transformative constitutionalism from the Epilogue of the constitution:

> "…a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."

Langa shared most of Klare's criticism of the courts in the apartheid era. His emphasis on economic transformation is even stronger than that of Klare. For him the skewed "provision of services to all and the levelling of the economic playing fields" must be central to any concept of transformative constitutionalism.[41] For Langa socio-economic justice are more than protecting individuals from state interference. It is not enough to burden the state to allow formal equality without doing anything. Transformation means

[37] Ibid, p. 150f.
[38] Ibid, p. 160ff.
[39] Ibid, p. 160.
[40] Prestigious Lecture delivered in Stellenbosch on 9 October 2006. Printed as Langa, P. 2006. Transformative Constitutionalism.*17 Stellenbosch Law Review,* p. 351.
[41] Ibid, p. 352.

access to education and an active obligation on the State to implement structures such as affirmative action to create opportunities for those left behind in the previous unjust system. [42]Langa bemoaned the fact that the South African legal culture emphasises a formalist approach to law rather than substantive argument.[43] The role of judges in the new dispensation must be a total round about turn -

> *"*..., judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.*"*[44]

Quoting Botha and Van der Walt,[45] Langa questioned Mureinik's constitutional metaphor of a bridge. While the interim constitution could be seen as a bridge or a space between an unstable past and an uncertain future, real transformative constitutionalism does not fit the metaphor. It is a permanent ideal and not a temporary route to equal access to resources and services. The constitution will always create the space for dialogue and contestation, where no practice or idea is cast in stone and where new "ways of being are constantly explored and crated".[46]

Looking at several examples, Langa opines that the Constitutional Court of South Africa has made the transition to a progressive, transformative court, without throwing away the baby with the bathwater. Where words are clear, he asserts the courts have no rights to enter the arena of the legislator.

> *"*Were the courts to completely discard any adherence to the text they would enter squarely into the domain of the legislature as creators rather than interpreters of the law. That is clearly not what the Constitution envisages.*"*[47]

It falls outside the scope of this paper to analyse the South African Constitutional Court or its judgments. Suffice it to take note of the fact that a respected chief justice of South Africa embraced the principle of transformative constitutionalism without simultaneous opted for an interpretive module linked with the American Realists or CLS. Referring to the accusation (of Klare?) that the South African legal culture is generally caught in the web of formalism and conservatism, Langa stated that not all the members of the legal fraternity are like that. He quoted the resistance against apartheid by the legal fraternity as evidence of the opposite.[48]

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[42] Ibid.
[43] Ibid, p. 357.
[44] Ibid, p. 353.
[45] Botha, H. 2004. Freedom and Constraint in Constitutional Adjudication. *20 SAJHR* p. 249*;* Van der Walt, A. 1995. Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law, *11 SAJHR* p. 169.
[46] Langa, p. 354.
[47] Ibid, p. 357.
[48] Ibid.

It falls out of the scope of this paper to discuss Woolman and Davis' proposed radical break with legal positivism in their discussion[49] of the case of D*u Plessis v De Klerk.*[50]

Suffice it to say that Woolman and Davis, calling their model Creole Liberalism since the South African constitution can no longer be seen as a classical liberal document. Their Creole Liberalism is, if not just another expression of transformative constitutionalism, then at least an interpretive approach with the same objectives and post-liberal understanding of the law.

Space does not permit me to discuss the criticism of authors such as Roux[51], Fagan[52] and Cockrell[53] in their defence of positivism and Dworkin's theory[54] - a project for another day. The objective of this paper is to look at the application of transformative constitutionalism as an interpretive model for the Namibian Constitution and look at one judgment where the Court used the model in its adjudication.This does not mean that the Namibian Supreme Court relied on Klare or Chief Justice Langa, or that the two benches were even aware of the writings of Klare and Langa.The Namibian Supreme Court did not refer to the authors and it is unlikely that the honourable justices would rely on authorities without acknowledge them. Yet, one clearly sees a shared interpretive foundation in the Namibian judgments and the writings of Klare and Justice Langa.

The Namibian Constitution as a Transformative Instrument

One can accept that despite the international influences, the constitution is a document by the Namibian people. As a compromise document with an objective to stop the war, allow the exiles to come home and to form a government where former enemies can work together, the Namibian Constitution had to be transformative to succeed. If it did not produce a "new nation", in other words be transformative, an independent Namibia could have been a failed state from the outset.

In that sense "transformative constitutionalism" needs a somewhat broader definition than Klare's "long term project". It also entails a short-term project that will end the war

[49] Woolman, S and Davis, D. 1996. The Last Laugh: Du Plessis V De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions, in *13 SAJHR* p. 361.

[50] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

[51] Roux, T. 2009. Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference? *Stellenbosch Law Review*, Vol. 20, No 2, p. 258.

[52] Fagan, A 1995: In Defence of the Obvious: Ordinary Language and the Identification of Constitutional Rules, *SAJHR*, Vol. 11, p. 545 ff.

[53] Cockrell, A. 1996. Rainbow Jurisprudence in *12 SAJHR*, p. 1.

[54] I have written extensively of the criticism of these authors in my doctoral thesis, published as Horn, N. 2017. *Interpreting the Interpreters. A Critical Analysis of the Interaction Between Formalism and Transformative Adjudication in Namibian Constitutional Jurisprudence,* Windhoek: Konrad Adenauer Foundation.

and enmity and creating an immediate platform for former political enemies, and warring groups, to work together in the forming of a new nation. To reach this objective even the so-called compromise articles carries an element of transformation. Article 16 (1) may have been included to protect white interests – the protection of farmland owned by white farmers – but article 16 (2) gives the new government enough options to transform the racial uneven distribution of farmland.

Klare in his ground breaking article on constitutional democracy understands the South African constitution as a post-liberal constitution. In the same vein Woolman and Davis, refer to a *Creole* liberal constitution. I agree with Klare's observation that the reading of the constitution from a liberal or Dwokinian perspective does not necessarily exclude a transformative constitutional approach. I also agree with Roux and Cockrell that positivism does not necessarily equates conservatism and heresy.

Transformative constitutionalism is not a jurisprudential or interpretive model. It is an *a priori* point of departure to implement the values of the constitution in the lives of the people. With this definition we did not answer the issue of the political or ideological framework of the constitution. Woolman and Davis understood this exercise to be fundamental in the understanding and interpretation of the constitution.

The Namibian Constitution does not include economic and social rights in Bill of Rights (Chapter 3). It forms part of Chapter 11 (Government Policy). Is this not a clear indication that the Constitution identifies itself as a typical liberal constitution? The Constituent Assembly made it clear that they do not want to be accountable for providing economic and social rights.

One may well conclude that the Namibian Constitution cannot be classified as anything but a typical 20th century liberal constitution. There are undoubtedly strong liberal elements in it. The differentiation between enforceable civil and political rights on the one hand and 'soft' economic and social rights that cannot be enforced by a court of law,[55] are typical liberal traits, as is the exclusion of the latter from the Bill of Rights and its special entrenchments.

The Constituent Assembly followed the strict path of liberal constitutionalism in this regard. However, the inclusion of social and economic rights in chapter 11 of the Constitution is not meaningless. It places a burden on the State to be a caring, inclusive society. It may even be possible to enforce some of these rights in a court of law.[56] Placing social and economic rights in the Bill of Rights, does not necessarily guarantee economic and social rights better than the Namibian Constitution Access to basic rights is still a challenge in South Africa, despite including socio-economic rights in the Bill of Rights. As long as the availability of resources is a main consideration in providing economic

[55] See Article 101 of the Constitution.
[56] See *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC).

rights, it will play the same role as Art 101 of the Namibian Constitution.

The emphasis on gender in articles 10 and 23(3), multiculturalism in articles 10, 19 and 23, environmentalism, transparent and participatory government and the extension of democratic principles to the private sphere are all elements of the Namibian Constitution.

One can argue that the Namibian Courts in interpreting the Constitution do not emphasise sexual identity, but opt for the more conservative fundamentalist Christian approach keeping sodomy as a crime in post-independent Namibia and turned down the option to recognise same sex unions as a constitutionally protected union. However, Article 10 (2) was meant to give close attention to sexual identity and the present conservative views of the Supreme Court[57] are the result of President Nujoma's round-about-turn in the mid 1990's. Until then there were indications that the word 'sex' in the non-discriminatory clause includes sexual orientation. I shall return to this point.

Constitutionalism is never rigid. Progressive constitutionalists do not see the so-called doctrine of original intent (i.e. seeing the intention of the drafters or constitutional mothers and fathers) as the ultimate key to interpretation. I will return to attempts by the Namibian bench to use the values of the people as a tool to keep the Constitution alive and relevant. What is important at this stage is to accept that constitutional principles can lay the foundation for the interpretation of issues that was not envisaged by the original drafters and ideologues.

Article 95 created the opportunities for the disenfranchised Namibians to knock at government's door for relief. Even the non-enforceable clause, article 101, cannot undo the fact that certain economic and social rights have been given to the Namibian people. While the Supreme Court has already enforced an article 95 right,[58] the growing importance of state responsibility under constitutions worldwide will place more pressure on the Namibian courts to recognise and enforce social rights in future.[59] The opportunities created by Art 95 of the Namibian Constitution, makes a social democratic reading or even a moderate post-liberal reading as defined by Klare a viable proposition, especially since the Constitution explicitly stands for a mixed economy.[60]

Taken these factors into account, it is not an over breath to emphasize the economic rights of Chapter 11. Even if one cannot call it a social democratic or Creole liberal constitution, transformative constitutional jurisprudence can be the tool to develop the responsibilities of the Constitution.

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[57] *The Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SCA).
[58] *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial.*
[59] See for example Hinz' analysis of the development of the constitutional phrase 'social market economy' in Germany. Sixty years of social market economy in Germany – Legal sociological observations, in *Namibia Law Journal*, Volume 2, no. 1.
[60] Art. 98.

Without making Klare's transformative model the alpha and omega for southern African constitutional interpretation, and taking full cognisance of the criticism of liberal and "soft" positivist interpreters (especially Roux[61] and Cockrell[62]), transformative constitutionalism can make a useful contribution to constitutional jurisprudence in Namibia.

The Constitution has definite elements of a caring community. The State is more than just a referee or observer. In the typical tradition of social democracy,[63] Chapter XI, Principles of State Policy, declares that "(t)he State shall actively promote and maintain the welfare of the people". It then sets out proposed policies to secure equality for women, the health of workers, and the independence of trade unions, fair employment practices, right and access to public facilities for all, a decent standard of living for the aged, a living wage for all workers, and an acceptable level of nutrition and standard of living of the Namibian people.[64]

The last word about chapter 11 has not been said. It remains a contradiction of a caring society when social and economic rights are not part of the Bill of Rights. While civil and political rights are entrenched in chapter 3, economic and social rights are carefully hidden behind state policy. Chapter 11, unlike the Bill of Rights (chapter 3) can be amended by a 2/3 majority even if it means the removal of rights.

While any violation of chapter 3 rights can be addressed by an application to the High Court in terms of Article 25 of the Constitution, Article 101 explicitly excludes legal action as a remedy to enforce so-called Article 95 rights. The "soft" rights of Article 95 remain vague policies, always dependent on state resources and the goodwill of the politicians.

Some observers may suggest that the way in which the Constitution deals with the two categories of human rights usually personified by the two international covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, indicates a choice for a liberal democracy rather than a real social democratic option.

Like any compromise, the constitution did not meet all the expectations of the parties. The lack of trust, different parties represented in the Constituent assembly, and especially a deep distrust that the DTA had in the new government, led to explicitly strict rules for

[61] Klare, pp. 258 – 285.
[62] Cockrell, p. 7.
[63] Social democracy is a political system with many faces. It falls outside the scope of this thesis to go into the debates on what constitutes a true social democracy. One could even use the term caring state. Suffice it that the emphasis of a caring state or social democracy is on the welfare of its entire people. In the process government intervention is perceived to be part of good governance.
[64] The mere fact that the Constitution sets the standard for a caring state does not mean that post- independent Namibia is indeed a welfare state. As a compromise, the Constituent Assembly included second-generation rights under state policy in chapter 11 rather than the enforceable Bill of Rights in Chapter 3.

changing the Constitution. A two-third majority is generally needed for a constitutional change, while none of the rights protected in the Human Rights Charter (Chapter 3) can be limited or taken away.[65]

This rigid approach has been criticized by Steytler[66] and in by the High Court in *S v Tcoeib*[67]. Steytler suggested that this unrealistic protection could threaten the future of the Constitution since the rigidity could eventually frustrate the government and leads to its dismantling. Judge O'Linn made the following comment on the fact that Article 3 is unchangeable:

> *"*To prohibit altogether the repeal or amendment of the provisions of Chapter 3 where the amendments diminishes or detract from the fundamental rights and freedoms, not only makes the Namibian Constitution excessively rigid, but also makes nonsense of the provisions of Art. 1(2), which provide: All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State.*"*[68]

The composition of the Judicial Service Commission (JSC) is another area of contention in its limitation of the power of the majority party. The JSC is very important since the President appoints the judges of the High and Supreme Courts, the Prosecutor-General and the Ombudsman *at the recommendation of the JSC.* The JSC consists of the Chief Justice, another judge appointed by the President, the Attorney General and two members of the legal profession. It is clear that it will not be easy for the government or the majority party to manipulate the body. As we noted, Steytler criticizes the composition as a strategy to keep the white judges of the old order in power and prevent the government through judicial intervention in politics to transform the new Namibian society. In practice, the white judges of the apartheid dispensation adapted to the new constitutional dispensation during the period of the TGNU before independence. Within the first ten years white male judges were no longer the majority on the Bench.

In conclusion: Without being legalistic, one can say the Namibian Constitution has enough elements of a caring constitution to be classified as a post-liberal, or if the term is not acceptable, a social democratic constitution.

The Right to Legal Representation: Transformative Constitutionalism in Action

The high treason case against the so-called Caprivi secessionists had a very important legal off shoots. The case ended in the Supreme Court when the government appealed

[65] Art 131 and 132 (5) (a).
[66] 1993, *SAJHR*, p. 477.
[67] 1993 (1) SACR 274 (NM).
[68] Ibid.

against a High Court judgment[69] (hereafter the *Mwilima* case) dealt with the right to free legal representation.

The respondents (applicants in the court *a quo*), 128 of them, were all accused of high treason after an uprising and eventual attack on several targets in Katima Mulilo in the Caprivi. They were all refused legal aid and launched an application in the High Court (the Court *a quo* in this case). The Court *a quo* ordered the second appellant, the Director of Legal Aid to appoint legal counsel for the respondents. The government appealed against this decision.

The legal question focussed on the enforceability of Art 95(h) of the Constitution. Unlike first generation or civil and political rights, social, economic and cultural rights are not entrenched in the Bill of Rights (chapter 3). They are part of Article 95 under the Principles of State Policy (chapter 11).

The government argued that Article 95(h) – the right to free legal representation -, unlike the basic right to legal representation in Article 12(e), are limited to defined cases and resources of the State.[70] The respondents did not agree with the issue of limited responsibility, but argued that in this particular case the facts and legal issues are such that the accused will not get a fair trial unless they get legal representation. Since the State refuses to or is unable to provide legal representation in terms of Article 95(h), the Court should make a ruling in terms of Article 12(e) – the right to legal representation to ensure a fair trial.

An unfortunate amendment to the Legal Aid Act, 29 of 1990, was the subtext of this case. Initially Section 8(2) gave a High Court bench the authority to issue a legal aid certificate to an unrepresented accused if there is sufficient reason why the accused should be granted legal aid. The certificate compelled the Director of Legal Aid to grant legal aid to the accused.

The government wanted to limit the rights of the courts to make decisions that could place a financial burden on the State. "Government felt that certificates were issued indiscriminately by the judges without due regard to available funds with the result that during successive years the funds allocated for legal aid were exceeded".[71] Parliament amended the Act and removed the mentioned sections of the Act.

The applicants in the court *a quo* concentrated on the amendments and requested the

[69] *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial,* 2002 NR 235 (SC).

[70] Art. 95 (h) reads as follows: *The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: .....(h) a legal system seeking to promote justice eon the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State.*

[71] Commentary of the Chief Justice in *Mwilima case*, p. 250.

High Court to declare them unconstitutional. The High Court found it unnecessary to entertain the constitutionality or not of the amendments. The effect was that the granting of legal aid in terms of the Act was taken from the High Court and placed solely in the hands the bureaucratic structures of the Ministry of Justice.

The government attorney, who represented the appellant in the Supreme Court, argued that since a Court in terms of Article 101 cannot legally enforce principles of state policy, the courts have no jurisdiction whatsoever to determine if and under what circumstances legal aid should be awarded. Any instruction by the Court to the State to grant legal representation to an accused would be inappropriate and an intrusion "on the exclusive domain of Parliament to decide how and in what way funds should be allocated to its various ministries".[72]

The majority judgment, written by Justice Strydom, agreed that that art 95*(h)* expresses only the intention of government to facilitate equality and justice by providing statutory legal aid to those who qualify. The implementing legislation that gives effect to Article 95(h) is the Legal Aid Act. With the amendment, the judges can no longer intervene where the Legal Aid Board or the Director have turned down an application for legal aid. The Court called this form of legal aid statutory legal aid.[73] However, this is not the last word on the responsibility of the Court. It may be that the Court is of the opinion that a accused will under certain circumstances not receive a fair trial in terms of Articles 10(1) and 12, especially sub-article 1(e), if he/she is not represented. Then it is the duty of the Court to ensure that steps are taken to guarantee a fair trial. Article 12, being part of the enshrined Bill of Rights, is not part of the principles of state policy and not subjected to budget constraints or availability of resources.

How can the court obtain the authority to instruct the government to grant legal aid if it can no longer issue legal aid certificates and prevented by Article 101 to compel government to provide legal aid? The Court began its argument by pointing out that the categories of fair trial elements mentioned in Article 12 are not closed. In *State v Scholtz*[74] where the Court looked at the principle of equality before the law in Article 10(1) of the Constitution and concluded that state disclosure is a principle of a fair trial, although state disclosure is not one of the fair trial categories of Article 12.

Consequently, Article 10(1) is also a test to determine if a trial is fair in terms of Article 12. There can be instances where two suspects have equally strong defences. Yet one may not get a fair trial because he/she does not qualify for legal representation in terms of the provisions of the Legal Aid Act or because of a lack of state resources. The limitations of Article 95(h) and the Legal Aid Act still stand in the way of a fair trial for the accused. The Chief Justice found the answer in Article 144 of the Constitution:
Unless otherwise provided by this Constitution or Act of Parliament, the general rules of

[72] Ibid, p. 255.
[73] Ibid.
[74] 1998 NR 207 (SC).

public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Since Namibia ratified both International Covenant on Civil and Political Rights (ICCPR) and its optional protocols, it forms part of Namibian law in terms of Article 144 of the Constitution. Although the Court did not go into the general rules of direct application, it found that the ICCPR is indeed part of Namibian law and the courts must accede to it. Section 14(3) of ICCPR is a combination of Articles 12(1)(e) and 95(h), without the limitations of Article 95, providing legal aid "... in cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it*"*. Consequently, as a party to ICCPR, Namibia is bound to apply section 14(3) in its municipal courts.

The two judges who wrote separate judgments agreed with the principle that the State is bound under the specific situation to grand legal aid to the accused. Judge O'Linn suggested that the idea of two forms of legal aid is confusing. All legal aid, he held, is grounded in the Legal Aid Act. Nevertheless, in terms of the provisions of ICCPR and taking Article 95(h) in consideration as a principle of the state policy in effecting justice, the Court can instruct the State to provide legal aid, irrespective of the fact that a specific budget is depleted.

The Court made it clear that legal aid will never be automatic. The Court will always have to satisfy itself that it is indeed in the interest of justice to grant legal aid in a specific case, and that the refusal of legal aid will make a fair trial impossible.

The judgment was a clear message to the legislator. The protection granted by the Constitution and especially the Bill of Rights (chapter 3), cannot be annulated by innovative legislation. Justice O'Linn made the following comment:

> *"*If the intention of the amendment was to exclude the function of the Court, it was an exercise in futility, because as shown in this decision, the Court retains the power in accordance with articles 5 and 25 of the Namibian Constitution to decide whether or not legal aid must be supplied by the Government (the executive) and/or the Director of Legal Aid to ensure a fair trial as contemplated by articles 12 and 10 of the Namibian Constitution and section 14(3) (d) of the aforesaid convention on political and human rights which is part of the law of Namibia.*"*[75]

The direct application of the Section 14 of the ICCPR was an innovative and exciting development in constitutional jurisprudence in Namibia, albeit somewhat naïve. The constant reference to *The Covenant* gives the reader the impression that the Court is not aware of the other Covenant – The Covenant on Social, Economic and Cultural Rights, (ICSECR) which was ratified by Namibia on 28 November 1994, the same day that it ratified ICCPR.

[75] Ibid, p. 279.

Nevertheless, the judgment opened the door for litigation based on a violation of social and economic rights. If the Constituent Assembly included Article 101 to make sure that government is not burdened with litigation laying claims on economic and social benefits envisaged in Article 95, the *Mwilima case* came as a wakeup call.

Nakuta reminded us that Namibian litigation has done little to improve the socio-economic fate of the vast number of poor people and to narrow the gap between the rich and the poor.[76] He pointed out that the Vienna Convention declared that all human rights are universal, indivisible, interdependent and interrelated.[77]

However, in Namibia, civil and political rights have a vast advantage over social and economic rights, mainly because of the exclusion of social and economic rights from the Bill of Rights and the limitation to litigate placed on it by Article 101. Nakuta argued correctly that the drafters of the Constitution "bought into the idea that social and economic rights were not true rights*"*.[78] As a consolation prize, some social and economic rights were listed in Chapter 11 as Principles of State Policy. Instead of second-generation rights being human rights entitlements and tools of empowerment, the poor are left at the mercy of government policies and programmes.[79]

Without referring to the use of the ICCPR in the *Mwilima case*, but with reference to two other Namibian cases,[80] Nakuta concluded that aggrieved persons could litigate for economic and social rights relying on Article 144 of the Constitution. He also proposed an indirect application of civil and political rights to litigate for second-generation rights.[81] Several civil and political rights have social and economic consequences. If the right to dignity (Article 8 of the Constitution), is taken seriously, social and economic issues cannot be ignored. How can a person have dignity if he/she is forced by poverty to live on the streets, have no prospect to earn a decent living or the possibility to take care of his/her children?

Nakuta quoted an Indian case – India has the same limitation clause and inferior position of economic rights in its constitution – to prove his point:[82]

> "(t)he right to life includes the right to live with human dignity and with all that goes with

[76] Nakuta, J. 2008. The Justiciability of Social, Economic and Cultural Rights in Namibia and the Role of the Non-governmental Organisations, in Horn, N. and Bösl, A. 2008. *Human Rights and the Rule of Law in Namibia.* Windhoek: MacMillan Namibia, pp. 89 ff.
[77] Quoted in ibid, p. 91.
[78] Ibid, p. 95.
[79] See ibid, p. 95, as well as the work quoted by Nakuta: Asbjørn, E and Allan, R. 2001. *Economic and Social Rights and Cultural Rights: A universal Challenge.* Dordrecht: Martinus Nijhoff, p. 3.
[80] *Kauesa v Minister of Home Affairs and Others* 1995 (1) SA 51 (NM), also reported as 1994 NR 102 (HC). See also *Muller and Engelhard v Namibia*, CCPR/c/74/D919/2000.
[81] Nakuta, pp. 98 ff.
[82] Ibid, p. 99.

it, namely the bare necessities of life such as adequate nutrition, clothing, shelter……"[83]

The *Mwilima case* opened the door for more innovative jurisprudence. One question remains: Is it a valid interpretive model used by the judges or is it what the government attorney called "inappropriate and an intrusion on the exclusive domain of Parliament", and to add Judge O'Linn's comment, a "wrongful and unlawful intrusion"?[84] It addressed an area of the society in dire need of transformation: the social inequalities of the Namibian nation. While it dealt with a basic civil right, it has an economic agenda – free legal representation. The Supreme Court, in an excellent exercise of legal activism linked free legal representation with the right to a fair trial guaranteed in both Article 12 of the Constitution and the International Covenant on Political and Civil Rights.

In this case, the gap between Art 95 social and economic rights and the civil and political rights of chapter 3 have dramatically been narrowed. One would have expected a floodgate opening up of aggrieved citizens claiming their social and economic rights from the right to health to the general right to a decent living. None of it happened. *Mwilima* remains a once off successful attempt to unlock the economic rights of Article 95. Yet, the effect of the judgment is important. Two aspects of the judgment hold the key for future litigation by aggrieved citizens who are being deprived of their social and economic rights:

- The Namibian courts will, in following the *Mwilima* case, treat Article 95 as a corpus of enforceable rights that can be enforced and not merely as a meaningless statement of state policy; and
- While Article 101 limits litigation prospects for aggrieved citizens, it does not exclude all remedies. The *Mwilima* judgment opened the door to scrutinize the Constitution for other remedies. The litigant may find some possibilities in Article 144 and the ratified covenants and other treaties. The litigant may link a violation of an Article 95 right with a comparable right in Chapter 3. The right to health can be linked to the right to life (Article 6), or the right to a decent living to the right to education. The list goes on.

The South African experience – where economic and social rights form part of the Bill of Rights - unfortunately does not give social and economic litigants hope for real societal transformative constitutionalism. The availability of resources played an important role in both the acclaimed *Grootboom* case[85] and the *Soobramoney* case.[86] The Constitutional Court recognised Ms. Grootboom's right to housing. Yet, despite the countless number

[83] *Mullin v The Administrator,* 1981. 2SCR 516 at 529, quoted in ibid.

[84] If the intrusion is not illegal and wrongful, the judge suggested, the Court is left with "nothing more and nothing less than a function and duty placed on it by the Namibian Constitution itself" to see that accused persons' constitutional rights are not violated. See *Mwilima* (SC), p. 275.

[85] *Government of the Republic Of South Africa And Others v Grootboom and Others* 2001 (1) SA 46 (CC).

[86] *Soobramoney* v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC), also reported as 1997 (12) BCLR 1696 (CC).

of articles written about the case and the conferences around the world to discuss this groundbreaking development, Ms Grootboom died homeless and penniless.[87]

At the time of the judgment Judge Richard Goldstone, who was not on the bench, referred to the Grootboom judgment as "the first building block in creating a jurisprudence of socio-economic rights".[88] At the time of her death her advocate, Ismael Jamie, said to the Mail and Guardian - "The fact that she died homeless shows how the legal system and civil society failed her".[89]

Soobramoney's fate was worst. He suffered from chronic renal failure. His life could be prolonged if he by an on-going dialysis treatment. The hospital denied his application for treatment since its limited resources only gave the treatment to people eligible for a kidney transplant. Soobramoney approached the Constitutional Court, linking his right to treatment with his right to life. The Constitutional Court refused to intervene, since "the right to medical treatment does not have to be inferred from the nature of the State established by the Constitution or from the right to life which it guarantees". Soobramoney died of kidney failure.[90]

The South African Constitutional Court took cognisance of the limited resources, restricted the application of their judgment in the Grootboom case, and refused Soobramoney relief.

The Namibian Supreme Court opted to prioritise the rights of the suspects and not the financial burden the judgment placed on the State. Unfortunately, while the judgment opened the door for societal transformation, it did not change society. The dramatic possibilities for future socio-economic adjudication went unnoticed in the legal fraternity. The Court rejected an interpretation seeing Article 101 as an absolute rule to prevent the enforcement of chapter 11 socio-economic rights. For some reason the legal fraternity never saw it as an invitation to start with an aggressive adjudication to enforce socio-economic rights listed in Article 95.

Something needs to be said about the foundation of the judgment. The obvious positivist approach would be to accept Article 101 as absolute. The Court opted to go beyond Article 101 and interpreted the prohibition in the light of two other constitutional principles: the right to a fair trial envisaged in Article 3 and the monist approach to international law in Article 144.

Cockrell and Roux's submission that positivism does not exclude transformative consti-

[87] Joubert, P. 2008. Grootboom dies homeless and penniless. *Mail and Guardian Online*, 8 August 2008, published at http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and- penniless, accessed on 28 April 2011.
[88] Ibid.
[89] Ibid.
[90] BCLR 1996 (CC), par. 19.

tutionalism has merit. While the Court did not work with an "original intent" approach, it worked with the text. Even if the intention of the Constituent Assembly was to prevent expensive enforcement of socio-economic rights, they did not close all the possible constitutional avenues allowing remedies to enforce Chapter 11 rights to aggrieved citizens. The Court only investigated two of those avenues and found that the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by Namibia and part of Namibian law, and Article 12 of the Constitution, also provide for legal representation to ensure a fair trial.

There was no purposive interpretation, no broad CLS approach and no judicial activism. All it took to come up with an extremely valuable transformative interpretation was a mere acknowledgment that Article 101 is not the only word on the enforcement socio-economic rights.

The old majoritarian argument also applies here. It was well articulated by the Government Attorney. The Constitution makes the granting of legal aid dependent upon resources and the kind of cases, and the Constitution further stated that the Courts cannot enforce Chapter 11 rights (or Principles of State Policy).

How is it then possible that a Court can intrude on this exclusive domain of Parliament and force government to allocate money to suspects in a case where State functionaries denied them legal aid? Is the Court not making law here? In addition, how can the Court rely on a human rights instrument if Article 144 clearly states that Namibian statutory law and the Constitution take precedence over principles of international law?[91]

The Government Attorney gave more weight to her position by stating that the government believes in equality before the law. Therefore, it cannot deplete its legal aid budget on just one case. This seems to be a fair point.

The decision of the Prosecutor-General to prosecute all 128 accused for high treason does not make legal sense. Since high treason has to do with the attitude of the accused, his/her intention to overthrow the government, even the apartheid government seldom succeeded in convicting high numbers of accused in one case.[92] Taken into account that many of these accused were linked to the crime only indirectly by applying the so-called common purpose doctrine, [93]the *modus operandi* of the Prosecutor-General is question-

[91] *Unless 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.* (Emphasis mine JNH).

[92] The well-known *R* v *Adams and others*, 1959 (1) SA 646 (SCC); 1959 (3) SA 753 (AD) is a case in point. The South African government spent several years and huge resources to prosecute the leaders of the movements resisting the apartheid government and its policies. Yet, none of the accused was convicted.

[93] The doctrine, valid and acknowledge by most common law jurisdictions, is applied primarily when an obvious conspirator cannot be linked directly to a crime. The textbook example is the driver of the runaway car in robbery cases. While he/she is not present when the pistol is pulled, or the money tak-

able. While the Prosecutor-General cannot be blamed for using the traditional test of a *prima facie* case, the external pressure did not make things easier.[94]

Although the Prosecutor-General could have made the process less complicated, it still does not solve the conflict between the government and the Supreme Court. The *Mwilima* case is the textbook example of transformative constitutionalism. The easy way out for the interpreter would be the "clear wording of the text', in this case Article 101 of the Constitution. What can be clearer than that?

> "The principles of state policy contained in this Chapter shall not of and by themselves be legally enforced 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."

However, the words "*shall not of and by themselves be legally enforced"* opened the door for a progressive application of Chapter 11. Consequently, once the Court established that free legal aid could not be enforced by law in all cases, it is not the end of the enquiry. The process of transformative adjudication will start when the interpreter is convinced that the text does not tell the whole story. In this case, the justice behind Article 95(h) can hardly be reconciled with the harsh *No!* in Article 101.

This conviction may be politically motivated, but as Klare pointed out, it is no more political than the opposition to legal aid by the government attorney. Her reliance on the clear meaning of Article 101 does not address the issue and would have lead to gross injustice for the 128 accused. However, the debate on where the conviction came from not to be satisfied with the obvious answer of Article 101, is unimportant. More important is the fact that the No! in Article 101 is not the last word.

By turning to Articles 12 and 144 of the Constitution, the Court did not opt for a political interpretation, but a result that fits the spirit and objective of Chapter 11 and more particular Article 95(h). The issue may have been controversial, but the judgment, while answering a political *cum* legal ethical question, is not political.

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en, his/her actions showed that he/she had common purpose with the main perpetrators. In the apartheid era, the doctrine was often used against people who joined a looting mob or were part of a protest march where some protesters committed crimes. See Dubach, A. 1990. *Upington. A story of trials and reconciliation.* Cape Town: David Philip Publishers for a description of how the State used the doctrine in one of the last cases where Anton Lubowski was involved. The Supreme Court of Appeal in South Africa eventually rejected the doctrine in this case.

[94] This is not to say that the Prosecutor-General made a political decision. Since the Prosecutor- General does not have to give reasons for his/her decisions, the public will never know why he prosecuted as he did. The Prosecutor-General at the time was not known as one who tried to please politicians (see the *Ex Parte Attorney-General/Prosecutor-General case* above). It is nevertheless possible that all the pressure and emotional appeals did not make it easy for the Office of the PG.

The *Mwilima*[95] case could have been one of the most dramatic examples of transformative constitutionalism at work. Unfortunately, the superior courts did not enforce any other socio-economic right in following *Mwilima,* partly because the legal fraternity did not attempt to bring new cases to the courts.

While the characters of the judges on the Bench can be overemphasised, it is important in this case to take note of the fact that two judges wrote judgments, Chief Justice Strydom and acting Supreme Court Justice O'Linn, formed the Bench of the overturned Kauesa High Court judgment. O'Linn was known for his insistence of adhering to the text. In this instance, however he, together with the then Chief Justice came up with ground breaking transformative constitutionalism.

[95] *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC).