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GUIDE TO CONTRIBUTORS

The *Namibia Law Journal* (NLJ) is a joint project of the Supreme Court of Namibia, the Law Society of Namibia and the University of Namibia.

The Editorial Board will accept articles and notes dealing with or relevant to Namibian law. The discussion of Namibian legislation and case law are dealt with as priorities.

Submissions can be made by e-mail to namibialawjournal@gmail.com in the form of a file attachment in MS Word. Although not preferred, the editors will also accept typed copies mailed to PO Box 27146, Windhoek, Namibia.

All submissions will be reviewed by one of the Advisory Board members or an expert in the field of the submission.

Submissions for the July 2012 edition need to reach the editors by 15 April 2012.

All submissions need to comply with the following requirements:

- Submissions are to be in English.
- Only original, unpublished articles and notes are usually accepted by the Editorial Board. If a contributor wishes to submit an article that has been published elsewhere, s/he should acknowledge such prior publication in the submission. The article should be accompanied by a letter stating that the author has copyright of the article.
- By submitting an article for publication, the author transfers copyright of the submission to the Namibia Law Journal Trust.
- Articles should be between 4,000 and 10,000 words, including footnotes.
- "Judgment Notes" contain discussions of recent cases, not merely summaries of them. Submissions in this category should not exceed 10,000 words.
- Shorter notes, i.e. not longer than 4,000 words, can be submitted for publication in the "Other Notes and Comments" section.
- Summaries of recent cases (not longer than 4,000 words) are published in the relevant section.
- Reviews of Namibian or southern African legal books should not exceed 3,000 words.

The *NLJ* style sheet can be obtained from the Editor-in-Chief at namibialawjournal@gmail.com or at http://www.namibialawjournal.org.

INTRODUCTION

Nico Horn*

Three years have passed since we placed the first Namibia Law Journal in your hands – and that is a great accomplishment! It is slowly but certainly growing from a predominant academic journal to an instrument serving the broader legal fraternity in Namibia.

The contributors to this edition reflect not only a healthy cross-section of the legal fraternity in Windhoek, but also feature a special guest writer, Loammi Wolf, who is a South African researcher and academic author living in Germany.

Felicity !Owoses-/Goagoses, a legal drafter, looks at a specific issue in interpretation: reading down words in a statute. Alet Greeff, a young legal practitioner in Namibia and a graduate of the North-West University in South Africa, gives us some insight into the enforceability of pursuable environmental rights in Namibia.

Florian Beukes, who obtained the highest mark for his LLB (Honours) Dissertation at the University of Namibia (UNAM) in 2011, reveals the standard set by these final-year students. His article is a revised draft of his dissertation on the Pension Fund Act and freedom of testation.

The Konrad Adenauer Foundation has sponsored several meetings at Midgard, bringing together private legal practitioners, practitioners working for the government, the Office of the Prosecutor-General, academics, and members of the judiciary. Dennis Zaire and Holger Haibach tell the story.

We made an exception in this issue and have published a lengthy article by Loammi Wolf on taxation procedure and administrative law. Ms Wolf discusses a burning issue not only in taxation law, but also in other fields of commercial law: the interaction between law and administrative justice.

In the Notes and Comments section, Prof. Manfred O Hinz and UNAM doctoral candidate Clever Mapaure look at another customary law issue: the problematic relationship between customary and statutory water law.

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ARTICLES

Reading down words in a statute, the courts' role, and the place of Parliament: The approach of the Namibian courts

Felicity !Owoses-/Goagoses*

Abstract

Statutory interpretation or *construction*[1] is the process by which the courts find the meaning of statutes. *Reading down* words in a statute is a canon of construction used by courts to interpret a statute in conformity with a Constitution.[2] Reading down is said to allow the bulk of legislative policy to be achieved while trimming off those applications which are constitutionally bad.[3] However, judges are often accused of making law when interpreting statutes, i.e. as encroaching on Parliament's lawmaking power. The cardinal questions that arise, then, are as follows:

- Can this so-called judicial lawmaking be avoided?, and
- When should courts read down words in a statute?

In this regard, in the *Seaford* case, LJ Denning stated the following:[4]

> A Judge must not alter the material of which the Act is woven but he can and should iron out the creases. When a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of the Parliament and then he must supplement the written words so as to give force and life to the intention of the Legislature.

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1 For the purpose of this discussion, the terms *interpretation* and *construction* are used synonymously.

2 Chaskalson, M, J Kentridge, K Klaaren, J Marcus, D Spitz & S Woolman. 1999. *Constitutional Law of South Africa Revision Service 5*. Cape Town: Juta & Co. Ltd; Currie, I & J de Waal. 2005. *The Bill of Rights Handbook* (Fifth Edition). Cape Town: Juta & Co. Ltd, p 204; Hogg, P. 1985. *Constitutional law of Canada* (Second Edition). Toronto: The Carswell Co. Ltd, p 327.

3 Hogg (1995:328).

4 Shaj, NP. 2010. "Cardinal rules for interpretation of tax statutes". Available at http://www.lawyersclubindia.com/articles/CARDINAL-RULES-FOR INTERPRETATION-OF-TAX-STATUTES-2730.asp; last accessed 15 February 2012.

Although Lord Denning's statement supports the necessity of reading down words in a statute, it also calls for caution on the use of this process. Namibia's courts, which have adopted this doctrine in some cases,[5] have followed the lead set by courts in Canada,[6] England,[7] India,[8] South Africa,[9] and the United States of America.[10]

Another question that is often neglected is this: What is Parliament's role when the courts have read down words in a statute? This discussion attempts to address and answer these questions with reference to Namibia's system of judicial review.

The role of Parliament and subordinate legislative authorities

Parliament[11] is responsible for creating the body of laws called *statutory law*.[12] One of the basic features of Namibia's constitutional order is the constitutional supremacy entrenched in the Constitution.[13] *Constitutional supremacy* embodies the notion of the separation of powers, i.e. where power is divided and shared among the three branches of government, namely the executive, the legislative, and the judiciary.[14] Within this division, the Namibian Parliament represents the legislative, and enjoys exclusive legislative competence with the power to make laws subject to the Constitution.[15] Parliament delegates

5 *S v Vries*, 1998 NR 244 (HC); *Protasius Daniel & Another v Attorney-General and Two Others*, 2011 NR HC.

6 Hogg (1985:327–328).

7 Kellaway, EA. 1995. *Principles of legal interpretation statutes, contracts and wills*. Durban: Butterworths, p 127.

8 Shaj (2010:3.4).

9 *S v Bhulwana*, 1996 (1) SA 388 (CC); *Carephone (Pty) Ltd v Marcus NO & Others*, 1999 (3) SA 304 (LAC); Chaskalson et al. (1999).

10 *Welsh v United States*, 398 US 333 (1970); available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=398&invol=333; last accessed 15 February 2012.

11 Articles 44 and 146.

12 "Statute or Statutory Law of any State is the body or accumulation of Laws which have been expressly enacted for it by competent legislative authority" (Caney, LR. 1957. *Statute law and subordinate legislation*. Durban: Prentice-Hall Services, p 1).

13 Article 1(6) of the Constitution of the Republic of Namibia provides as follows: "This Constitution shall be the Supreme Law of Namibia".

14 Burns, Y & M Beukes. 2006. *Administrative law under the 1996 Constitution* (Third Edition). Durban: LexisNexis, pp 29–30; Currie, I & J de Waal. 2001. *The new constitutional and administrative law, Vol. 1: Constitutional law*. Lansdowne: Juta Law, p 95.

15 Articles 44 and 146.

lawmaking powers to subordinate legislative authorities such as Ministers and statutory bodies who make laws in the form of regulations, amongst other things. These are called *delegated* or *subordinate* legislation as they derive their authority from a principal law, such as an Act of Parliament.[16] Clearly, the lawmaking powers of Parliament and subordinate legislative authorities are also subject to the Constitution.[17]

Nature of a statute

Statutory law undoubtedly plays an important part as a source of law in the hierarchy of laws in Namibia. Apart from the Constitution,[18] which has a special status in the hierarchy of laws, statutory law is the second most important source of law. The importance and status of statutory law is evident from the Constitution itself. Statutory law and its relationship to common law,[19] customary law,[20] case law,[21] and international law[22] reflect the primacy of statutory law in the hierarchy explained above.

Statutory law[23] in Namibia consist of Acts of Parliament, Proclamations made by the former Administrator-General of South West Africa, and Ordinances made by the former Legislative Assembly of South West Africa.[24] Other sources of statutory law include subordinate legislation.

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16 Burns & Beukes (2006:29–30); Currie & De Waal (2001:95).

17 Articles 22 and 25, Namibian Constitution.

18 Article 1(6) of the Namibian Constitution provides as follows: "This Constitution shall be the Supreme Law of Namibia".

19 Article 66 of the Namibian Constitution provides as follows:

"(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 parts of Namibia or to particular periods".

20 Article 66, Namibian Constitution.

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

22 Article 144 of the Namibian Constitution provides 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".

23 In this discussion, *statute* is used as a superordinate term to refer to various sources of statute law.

24 Hahlo & Kahn (1968:162).

Statutory law, as a source of law, is considered very important due to its nature:[25]

> Statute is a more powerful and flexible instrument for the alteration of law than any judge can wield.

The advantages of statutory law over case law have been discussed at length in the literature.[26] Suffice it to state here that the statutory law–case law relationship can be seen as supplementary. Joubert[27] states that the exact method and scope of application of a statutory provision depends to a considerable extent upon judicial interpretation. Consequently, case law tends to supplement and direct the application of statute law.

The courts' role

Within the separation of powers, the courts represent the judiciary and the function to interpret the law.[28] Currie and De Waal state that, for a supreme Constitution to be effective, the judiciary must have the power to enforce it.[29] The Supreme Court[30] and the High Court[31] of Namibia act as constitutional checks vis-à-vis laws made by Parliament and subordinate legislative authorities. The constitutional remedies the courts can give are contained in Article 25 of the Constitution, the High Court Act,[32] and the Supreme Court Act.[33] These remedies include the declaration of unconstitutionality,[34] reading

25 (ibid.:146).

26 (ibid.:145–146); Joubert, WA. 1991. *The law of South Africa*, Vol. 25. Durban: Butterworths, pp 183, 258.

27 Joubert (1991:183).

28 Articles 79(2) and 80(2), Namibian Constitution.

29 Currie & De Waal (2005:74).

30 Article 79(2) provides as follows: "The Supreme Court shall be presided over by the Chief Justice and shall hear and adjudicate upon appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The Supreme Court shall also deal with matters referred to it for decision by the Attorney-General under this Constitution, and with such other matters as may be authorised by Act of Parliament".

31 Article 80(2) provides as follows: "The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder".

32 No. 16 of 1990, section 16.

33 No. 15 of 1990, section 19.

34 Article 25, Namibian Constitution; *S v Vries*, 1998 NR 244 (HC).

down,[35] reading in,[36] severance,[37] the declaration of rights,[38] interdicts,[39] and damages.[40] The current discussion confines itself to the use of reading down as a constitutional remedy.

With regard to the advantages of case law over statutory law, Wright[41] states that –

> [t]here are two advantages that case law has over statute in the development of a statutory purpose. First, the development need not be minutely planned in advance; when it comes, it can be shaped to meet real problems that have arisen and not possible problems forecasted. Second, it is elastic, not having to be exactly expressed in words.

Having explored the legitimacy of the judiciary in Namibia's constitutional order, this discussion now looks at statutory interpretation as applied by Namibian courts and the nature of judicial lawmaking in Namibia.

Rules of statutory interpretation that apply in Namibia

What rules of statutory interpretation do Namibian courts follow? Before this question can be answered, it is prudent to glance at Namibia's legal history.

When South Africa received South West Africa as a mandate territory in 1919, it introduced Roman–Dutch law in the form of custom, legislation, treatise on

35 Article 25, Namibian Constitution; *S v Vries*.

36 Article 25, Namibian Constitution; *Hendricks & Others v Attorney-General, Namibia, & Others*, 2002 NR 353 (HC) at 368; *Government of the Republic of Namibia & Another v Cultura 2000 & Another*, 1993 NR 328 (SC) (1994) (1) SA 407 (NmS).

37 Article 25, Namibian Constitution; *Hendricks* case; *Gases & Others v The Social Security Commission & Others*, 2005 NR 325 (HC).

38 Article 25, Namibian Constitution; P*rotasius Daniel & Another v Attorney-General & Two Others*, 2011 (SC); *Mahe Construction (Pty) Ltd v Seasonaire*, 2002 NR 398 (SC).

39 Article 25, Namibian Constitution; *Ex Parte In re: Kamwi v Law Society of Namibia*, 2009 (2) NR 569 (SC); *Government of the Republic of Namibia v Sikunda*, 2002 NR 203 (SC).

40 *Afshani & Another v Vaatz*, 2006 (1) NR 35 (HC); *Hipandulwa v Kamupunya*, 1993 NR 254 (HC).

41 Wright, JS. 1980. "Review: Law and the logic of experience: Reflections on Denning, Devlin and judicial innovation in the British context". Stanford Law Review, 33(1):198; available at http:www.jstor.org/stable/1228527 198; last accessed 14 February 2012.

law and judicial decision, as was being practised at the Cape of Good Hope on 1 January 1920.[42]

Based on Joubert's proposition on South Africa's law of statutory interpretation and the historical linkages between the South African and Namibian systems of law, it is accepted that Roman–Dutch law forms the basis of the law of interpretation of Namibia, but that it has also been supplemented and influenced by English common law.[43]

In relation to statutory law, the rules of interpretation are contained in the Interpretation of Laws Proclamation,[44] the definition or interpretation sections in the statutes themselves, and in the Constitution.

Basis for statutory interpretation

What gives rise to statutory interpretation? This question can be answered with reference to the following two statements in Hahlo and Kahn:[45]

> [N]o matter how carefully words are chosen there is a difficulty in selecting language which, while on the face of it expressing generally the idea of the framer of measure, will not, when applied under the circumstance, go beyond it, and when applied under other circumstance[s], fall short of it.
>
> [T]he court may be confronted with the application of the wording of a statute to a set of facts that was not in the mind of the law-maker when passing it, and will then have to make a decision in light of the competing interest it finds significant.

Joubert defines *statutory interpretation* as follows:[46]

> Statutory interpretation is a process aimed at solving actual or hypothesized legal problems.

42 The Administration of Justice Proclamation 21 of 1919 introduced Roman–Dutch law to South West Africa; see Legal Assistance Centre. 2000. *Index to the laws of Namibia*. Available at http://www.lac.org.na/laws/namlex.html; last accessed 6 March 2012. See also *S v Redondo*, 1992 NR 133 SC at 540, para. H–J and A; *R v Goseb*, 1956 (2) SA 696 (SWA) 700C–D); *Binga v Administrator-General, South West Africa & Others*, 1984 (3) SA 949 (SWA) at 972C–E; *Tittel v The Master of the High Court*, 1921 SWA 58.

43 Caney (1957:3); Joubert (1991:220); Kellaway (1995:5).

44 Interpretation of Laws Proclamation No. 37 of 1920.

45 Hahlo, HR & E Kahn. 1968. *The South African legal system and its background*. Cape Town: Juta & Co. Ltd, pp 176–177.

46 Joubert (1991:283–284).

This is the process of concretisation. This process involves –[47]

> … relating a "set of facts" to the provisions of an enactment on an abstract level, under guidance of the preconceived and conceptualised presumptions and rules of interpretation. In order to complete the process of interpretation, these related data must, however, be re-related to the actual or hypothesized concrete reality.

Concretisation is considered to be a valuable means towards exposing the logic underlying – and the ratio of – an enactment, and an inescapable last step in the process of interpretation.[48] The initial attempt at concretisation is based on certain rules and presumptions, one of which is that language must be understood in its popular sense.[49] Initial attempts at concretisation sometimes fail, however, in which case refuge is sought in the logic- or ratio-directed rules of interpretation.[50] It is latter enquiry that places a judicial duty upon the court to find the meaning of a statute using the rules of interpretation and presumptions.

Justification for judicial lawmaking and reasoning in statutory interpretation

In order to understand judicial lawmaking, it is necessary to understand the nature of the judicial process.[51]

47 (ibid.). As to the nature and status of rules of interpretation and presumption, Joubert (1991:220) states that these are norms applicable to the process of interpretation deriving mostly from common law. Joubert argues that rules of interpretation are legal rules (ibid.). For different views, see Kellaway (1995:12) and Hahlo & Kahn (1968:186).

48 Joubert (1991:283).

49 (ibid.). *S v Russel*, 2000 (1) SACR 398 (Nm) 402; *Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others*, 2009 (2) NR 793 (HC) 797.

50 Joubert (1991:283). In the *Rally for Democracy and Progress* case, the court stated that "the rule is firmly established in the practice of this court that in interpreting statutes recourse should first be had to the golden rule of construction because the plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction, the words of a statute must be given their ordinary, literal or grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it will be permissible for a court of law to depart from such a literal construction, for example where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent".

51 Hahlo & Kahn (1968:307).

The function or duty of a judge is to interpret, to declare, and to apply the existing law of the state and not to make new or fresh law.[52] The basis for this view is that the court's sole interpretive function is to ascertain the intention of Parliament.[53]

Along with others, Dugard criticises this as a narrow approach to the judiciary's interpreting function.[54] He states that the view that the sole task of the court is to discover the intention of the legislature through rules of interpretation lies in the acceptance of positivism as a jurisprudential guide.[55] One important facet of positivism is the notion that a strict division needs to be maintained between law as it is and law as it ought to be. Positivism is based on the premise of strict adherence to rules of law and their mechanical application, and of avoiding speculation about the law as it ought to be.[56] Dugard goes on to say the following:[57]

> The twin principles of positivism – command and separation of law and morality – manifest themselves in statutory interpretation in the following ways: First, our courts have accepted the rigid distinction between the legislative function and the judicial function inherent in the command theory and regard it as their duty to analyse and interpret the will of parliament 'but not to "reason why". This enables the judiciary to apply the harshest of laws with an easy conscience and results in a failure to grasp the extent to which technical rules of interpretation may be invoked to moderate the law's inequalities.
>
> Secondly, the rigid distinction between the law and morality leads to a rejection of legal values – as opposed to positive legal rules – which results in the repudiation of policy considerations in the judicial process.

In his counter-arguments, Dugard perceives lawmaking by judges as an inevitable process:[58]

> Judicial positivism cannot eradicate inarticulate premisses. As long as the judicial function is entrusted to men, not automatons, subconscious prejudices

52 Gibson, JTR. 1977. *Wille's* Principles of South African Law (Seventh Edition). Cape Town: Juta & Co. Ltd, p 6; Hahlo & Kahn (1968:305); Joubert (1991:283).

53 Dugard, J. 1971. "The judicial process, positivism and civil liberty". *The South African Law Journal*, 88:182; Joubert (1991:275).

54 Dugard (1971:182); Joubert (1991:216–218). "The intention theory serves to reinforce the literalist approach, hence neglecting or underestimating other contextually and/or structurally relevant aspects of an enactment in the process of its interpretation" (Hahlo & Kahn 1968:306–307). See also Chaskalson et al. (1999); Currie & De Waal (2005:204); Hogg (1985:327).

55 Dugard (1972:183).

56 (ibid.:185).

57 (ibid.:186–187).

58 (ibid.:187–188).

> and preferences will never be completely removed from the judicial process. They will only be concealed.

Citing Frank J, Dugard states that, in most cases, a judge reaches his conclusion first and then finds a legal rule to justify his decision. This conclusion is shaped by the interaction of the rules of interpretation and the judge's education, race, class, political, economic and moral prejudices.[59]

Dugard also maintains the following:[60]

> Judges are precluded from taking parliamentary speeches into account in their search for legislature's intention. But would not the knowledge that the Government had been obliged to follow this procedure for reasons of international comity be likely to influence a judge in pronouncing on the validity of these regulations?

In short, Dugard, referring to the South African judgements delivered during the period 1960–1970, argues that the major inarticulate premiss of the judges which surfaced in judicial decisions was the loyalty to the status quo. Whether the same argument applies to judicial decisions delivered after the constitutional dispensations in both South Africa and Namibia raises a valid concern worthy of interrogation.

Reasoning in statutory interpretation

In order to understand judicial lawmaking, one also needs to understand the nature of the judicial process. When interpreting statutes, judges reason in a certain manner, according to Hahlo and Kahn,[61] judges profess to reason deductively. This deductive inference rest on the syllogism which he explains as follows:[62]

> The major premiss is the legal rule, viz. that a factual situation X is governed by legal rule Y. The minor premiss is the presence of the factual situation X. By the process known as subsumption, of bringing the minor premiss under the major premiss, a conclusion can be drawn.

In deductive reasoning where the rule is clear and plain, it is applied to the facts and a decision is made. But Hahlo and Kahn warn that "the judicial process by no means operates in this mechanistic way in all circumstances",

59 (ibid.:188).
60 (ibid.:192).
61 Hahlo & Kahn (1968:307).
62 (ibid.). It seems Joubert (1991:283) was referring to deductive reasoning when he spoke of the initial attempt at concretisation. See also Kellaway (1995:7–8).

and that legal rules and principles may change as they are applied to new factual situations.[63] It is in such cases that judges may reason by analogy.

Hahlo and Khan explain *analogy* as follows:[64]

> Though the facts may at first glance seem apt for the application of a legal rule or principle, the judge on close analysis may decide that the rule or principle had hitherto been too widely formulated, and refuse to apply it. Here he narrows the ambit. Conversely, he may extend the application of a legal rule or principle through arguing by example by the method of analogy.

However, Hahlo and Kahn[65] and Steyn[66] warn against the use of analogy in certain instances.

There may be circumstance where there is no settled rule, no major premiss that a judge can profess to apply deductively; in such cases, a judge may be involved in an inductive process of inferring a general rule of decision or principle from a collation of particular instances, whether appearing in books of authority or in law reports, that have a common feature.[67]

Whether a judge reasons deductively, by analogy, or inductively, what is important is judicial discipline and accountability: judicial discipline in applying rules of interpretation with caution when relating a legal provision to an actual or hypothetical reality, and judicial accountability in accounting for the use of rules of interpretation in a certain way.[68]

The concretisation process and applying the doctrine of reading down

Having analysed the nature of the judicial process, the actual application of concretisation to which Joubert[69] refers assumes relevance. In the *Daniel* case[70] referred to earlier herein, the constitutionality of section 14(1)(a)(ii) and (b) of the Stock Theft Act[71] was challenged on the grounds that it violated

63 (ibid.:307–308).
64 Hahlo & Kahn (1968:308).
65 (ibid.).
66 Joubert (1991:288).
67 Hahlo & Kahn (1968:311).
68 Joubert (1991:222–227) proposes certain methods to be adopted in the interpretation process.
69 Joubert (1991:283–284).
70 *Protasius Daniel & Another v Attorney-General and Two Others*.
71 No. 12 of 1990.

the prohibition of cruel, inhuman or degrading punishment provided for in Article 8(2)(b) of the Constitution, and the guarantee of equality in Article 10(1) therein.

Section 14(1)(a) of the Stock Theft Act, as amended,[72] provided as follows:

> (1) Any person who is convicted of an offence referred to in section 11(1)(a), (b), (c) or (d) that relates to stock other than poultry –
> (a) of which the value –
> (i) is less than N$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;
> (ii) is N$500 or more, shall be liable in the case of a first conviction, to imprisonment for a period not less than twenty years without the option of a fine;
> (b) shall be liable in the case of a second or subsequent conviction, to imprisonment for a period not less than thirty years without the option of a fine.

The court adopted the approach followed in the *Vries* case:[73]

> This court also recognised in Vries that, when it assesses the constitutional validity of a statutory sentence, it should obviously do so, not only on the basis of the facts of the particular case before it, but also "with respect to hypothetical cases which ... can be foreseen as likely to arise commonly.

The court related the challenged section 14(1)(a)(ii) and (b) to a hypothetical set of facts.[74] Relating the actual and hypothetical facts to section 14(1)(a)(ii) showed that the sentences mandated by that section would be shocking "with respect to hypothetical cases which … can be foreseen as likely to arise commonly".[75] And on that basis, the court found the challenged sections to be unconstitutional and invalid.[76]

On the question of an appropriate remedy, the court adopted the approach followed by Frank J in *Vries*, where the judge stated as follows:[77]

> (3) Where a statutory minimum sentence resulted in shocking sentence there were four options available to the court, namely –
> (a) to declare the provision of no force or effect for all purposes,
> (b) to declare the provision to be of no force and effect only in a particular class of cases, ie to read it down,

72 Stock Theft Amendment Act, 2004 (No. 19 of 2004).
73 Paragraph 47.
74 Paragraphs 31, 35 and 36.
75 Paragraph 54.
76 Paragraph 82.
77 *S v Vries* at 252–253.

(c) to declare the provision to be of no force or effect in respect to the particular case before the court, ie apply for a constitutional exemption,

(d) to allow the Legislature to cure the defects in the impugned legislation pursuant to the provisions of Article 25(1)(a) of the Constitution.

(4) Where the statutory minimum sentence was found to be shocking in the case before the court the court must then inquire whether it would be shocking "with respect to hypothetical cases which could be foreseen as likely to arise commonly". If the answer to the second inquiry was in the affirmative then the court had to act in one of the respects set out in (3)(a), (b) or (d) above. If the answer to the second inquiry was in the negative the court had to act as set out in (3)(c) above.

Following this approach and applying it to the facts of the *Daniel* case, the court read down the provisions of section 14(1)(a)(ii) and (b) by striking the words "for a period not less than twenty years" from section 14(1)(a)(ii), and the words "for a period not less than thirty years" from section 14(1)(b) of the Stock Theft Act. The court also stated that the reference to "subsections (1)(a) and (b)" in section 14(2) of the Stock Theft Act were consequentially read down to mean subsection (1)(a)(i).[78]

In support of this approach, Geier AJ declared the following:[79]

> I agree that this would be the correct approach as the essence of the sections would remain intact, and as "this approach would at the same time give recognition to the intention of Parliament while also recognising the ordinary citizen's innate right to dignity and the right not to be subjected to 'cruel and/or degrading punishment'".

Whether the choice of remedy in the *Vries*[80] and *Daniel* cases was a proper one is debatable, however. Since the judge did not explore the application of reading down, it is necessary to do so here. Chaskalson et al. state that

78 (ibid.:para. 86).

79 (ibid.:para. 84). The same reasoning was adopted in *S v Vries* at 255–256. In *S v Likuwa*, 1999 NR 151 (HC) 154, Hannah J declared the following: "While I accept that a sentence of ten years' imprisonment for certain contraventions of s 29(1)(a) would not be an inhuman or cruel punishment there is no real doubt in my mind that such a lengthy sentence for a contravention where a machine rifle is obtained and possessed simply for the protection of livestock is. And such cases, as I have earlier demonstrated, are not merely hypothetical. They are real. I reach this conclusion by applying the test propounded by Frank J in the Vries case supra. Such a sentence imposed in the circumstances just referred to is so clearly excessive that I cannot envisage any reasonable man imposing it".

80 Frank J's reasons for choosing to read down the provisions of section 14(1) of the Stock Theft Act are set out at pages 255–256 of the case.

reading down is used in the following specific instance, for example:[81]

> Where a statute will bear two interpretations, reading the statute in line with the interpretation that does not offend the Constitution is the appropriate remedy.

The *Vries* and *Daniel* cases reflect actual application of the deductive and inductive reasoning involved in the process of concretisation advocated by Joubert[82] and Hahlo and Kahn.[83]

Limitations on reading down

As a choice of remedy, reading down is not always feasible.[84] This is evident from the approach the Supreme Court took in the *Kauesa v Minister of Home Affairs & Others*[85] and *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others*[86] decisions. In the *Africa Personnel Services* case,[87] following the approach adopted in *Kauesa*,[88] the court refused to read down the impugned section 128 of the Labour Act.[89] While the court recognised the application of the doctrine of reading down in certain cases, it also recognised the doctrine's limits. Citing Langa DP, the court stated as follows:[90]

> Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section. Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be

81 Chaskalson et al. (1999).
82 Joubert (1991:283–284).
83 Hahlo & Kahn (1968:307–308).
84 *Delhi Transport Corporation v DTC Mazdoor Congress on 4 September, 1990*; available at http://www.scribd.com/doc/40340830/Delhi-Transport-Corporation-vs-D-T-C-Mazdoor-Congress-on-4-September-1990, p 109; last accessed 15 February 2012.
85 1995 Nr 175 (SC) at 197G, 198A.
86 (2) Nr 596 (SC) at para. 89.
87 See also Frank J in *S v Smith NO & Others*, 1996 (2) SACR 675 (Nm): "Because the section cannot be saved by the mere excising of words or phrases but will have to be reconsidered and amended it cannot be down-read".
88 *Kauesa* at 197G, 198A.
89 No. 11 of 2007.
90 *Kauesa*, para. 89.

> resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in conformity with the Constitution". Such an interpretation should not, however, be unduly strained.

In the *Kauesa* case, the court refused to read down the provisions of section 128 of the Labour Act. Dumbutshena AJA opined as follows in this regard:[91]

> Respondents are inviting the court to legislate, that is, to perform the constitutional function of the legislature. Reading down may provide an easy solution to respondents' acknowledged difficulties. It may be in suitable cases a lesser intrusion into the work of the legislature. It must be remembered, however, that legislating is the constitutional domain of Parliament. The court's constitutional duty is to strike down legislation inconsistent with provisions of the Constitution and leave the legislature to amend or repeal where the court has struck down the offending legislation.

What is the inarticulate premiss of Namibian Judges? Both the High Court and Supreme Court decisions discussed here show a striking resemblance, i.e. loyalty to the so-called intention of Parliament. Although all the Judges preached the intention of Parliament, the actual approaches used in reaching their conclusions shows that the Supreme Court, as the highest court of the country, favours the theory of the objective invalidity of a statute[92] as opposed to the case-by-case theory[93] adopted by the High Court. However, it is debatable whether the inarticulate premiss of the Judges tied in with the rules of interpretation were determinant factors for reaching the conclusions concerned.

The effects of declaring unconstitutionality and conclusion

When a court declares a law unconstitutional, it can be disruptive legally, socially, economically or politically.[94] Considering these outcomes, can Parliament re-enact or amend a law declared unconstitutional?

According to Crawford,[95] one view holds that life cannot be breathed into an unconstitutional statute by legislative amendment. On the other hand, an

91 (ibid.:197).

92 Field, OP. 2002. *Effect of an unconstitutional statute*. Clark, NJ: The Lawbook Exchange Ltd, pp 6–11.

93 (ibid.).

94 (ibid.:12).

95 Crawford, ET. 1951. "The legislative status of an unconstitutional statute". *Michigan Law Review*, 49(5); available at http://www.jstor.org/stable/1284649 last accessed 15 February 2012, p 654.

unconstitutional statute can be amended without complete re-enactment.[96] By way of example, Crawford states that –[97]

> … if the legislature had the power to pass the enactment intended originally, it might, without re-enactment but merely by amendment, validate the unconstitutional statute by removing the cause of conflict with the constitution.

Having regard to the above-mentioned views, what are the practical implications of the *Daniel* decision discussed earlier for both Parliament and the courts?. Following the striking down of some of the provisions of the Stock Theft Act, sections 14(1)(a)(ii) and (b) of that Act presently read as follows:

> (1) Any person who is convicted of an offence referred to in section 11(1)(a), (b), (c) or (d) that relates to stock other than poultry –
> (a) of which the value –
> (i) is less than N$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;
> (ii) is N$500 or more, shall be liable in the case of a first conviction, to imprisonment without the option of a fine;
> (b) shall be liable in the case of a second or subsequent conviction, to imprisonment without the option of a fine.
> (2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in subsection (1)(a)(i), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

Thus, while imprisonment is mandatory in terms of section 14(1)(a)(ii), the period of imprisonment is not prescribed. This creates a challenge for the sentencing court, which is left with the discretion to determine the period of imprisonment in respect of an offence under that section. This discretion cannot be viewed in isolation, but seems to be limited by the provisions of the 1977 Criminal Procedure Act[98] and the Magistrates' Courts Act.[99]

Section 284 of the 1977 Criminal Procedure Act provides as follows:

> No person shall be sentenced by any court to imprisonment for a period of less than four days unless the sentence is that the person concerned be detained until the rising of the court.

Section 92(1)(a) of the Magistrates' Courts Act provides as follows:

96 (ibid.:654–655).
97 (ibid.:655).
98 No. 51 of 1977.
99 No. 32 of 1944.

> (1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence –
>
> (a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding five years, where the court is not the court of a regional division, or not exceeding twenty years, where the court is the court of a regional division; …

The sentencing court is faced with the task of reading section 14 of the Stock Theft Act, section 284 of the 1977 Criminal Procedure Act, and section 92 of the Magistrates' Courts Act conjunctively in order to come up with an appropriate sentence, and this clearly poses interpretation problems. Indeed, interpretation problems are likely to arise on the part of sentencing officers, and a magistrate's or regional court case is likely to be set aside on review by the High Court for the incorrect application of section 14 of the Stock Theft Act. Not only does this implication call for the cautionary use of reading down as a remedy, but it also warns Parliament to speedily amend laws declared unconstitutional if they wish such law to continue.

Does Namibia's Constitution provide an enforceable and pursuable environmental right?

Alet Greeff*

Introduction[1]

When it became independent in 1990, Namibia was the forerunner in southern Africa in terms of including an environmental clause in its Constitution.[2] However, Namibia's environmental clause, Article 95(l), is not contained in the constitutional list of fundamental rights and freedoms,[3] but instead has been included in Chapter 11 containing the principles of state policy, and reads as follows:

> The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following: …
> (l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.

Although the environmental principle binds all levels of government, it does not establish an enforceable environmental right: it merely constitutes an abstract objective constitutional provision that should guide the state in any of its decision-making processes that may have an impact on or influence the environment.[4]

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1 This paper reflects the legal position as at 29 February 2012 and stems from the following presentations and publications: Louw, A. [Forthcoming]. "Balancing of interests in environmental law in Namibia". In Faure, M & W du Plessis (Eds). "Balancing of environmental interests in environmental law in Africa". Pretoria: Pretoria Law Press; Louw, A. [Forthcoming]. "The environmental regulation of uranium mines in Namibia: A project life cycle analysis". LLM dissertation, North-West University.

2 Glazewski, J. 2005. *Environmental law in South Africa* (Second Edition). Durban: Butterworths, p 71.

3 Chapter 3, Namibian Constitution.

4 Article 101, Namibian Constitution; see also Du Plessis, A. 2008. "Fulfilment of South Africa's constitutional environmental right". Unpublished LLD thesis, North-

Despite the challenges inherent in a non-enforceable environmental principle of state policy, there are various laudable developments that counter the absence of a justiciable environmental right in the Constitution, including the constitutional provisions for a national Ombudsman[5] with an environmental mandate and a state trust.[6] Article 144 also provides that the general rules of public international law and international agreements are binding on and form part of Namibian law.[7]

However, seeing that the environmental principle does not constitute a fundamental right or freedom, it is not certain whether aggrieved persons are entitled to approach a competent court regarding disputes concerning their environmental rights. This discussion, therefore, aims to determine whether the Namibian Constitution provides such persons with an enforceable and pursuable environmental right in a court of law in Namibia. *Aggrieved persons* include those who claim that their natural world, as a whole or in a particular geographical area in Namibia, has been or is being infringed or threatened or potentially infringed or threatened. The discussion also touches on the environmental framework established and provided for in the Namibian Constitution, and proceeds to analyse case law regarding the judicial interpretation of relevant constitutional provisions as well as the application of international environmental law within Namibia. Based on the principles identified in such case law, the analysis then proceeds to apply such principles to the justiciability of a constitutional environmental right, albeit not, in a Namibian court of law.

Constitutional environmental framework

Article 95(l) defined

Article 95(l) aims at environmental protection and the control of pollution. In order to determine what is meant by *environment*, one needs to consult the definition of the term contained in the Environmental Management Act[8] (EMA), as follows:

West University, p 252.

5 Chapter 10, Namibian Constitution, and more specifically Article 91(c) therein. The functions of the Ombudsman include investigating complaints concerning the over-utilisation of non-renewable resources; the degradation and destruction of ecosystems; failure to protect the beauty and character of the country; and failure to take appropriate action to call for the remediation, correction and reversal of activities related to the above through means that are fair, proper and effective.

6 Article 100, Namibian Constitution.

7 Article 144, Namibian Constitution. See also the subsection on Article 144 in the discussion below.

8 No. 7 of 2007.

> [T]he 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.

The given definition of *environment* covers a wide range of topics and issues that stretch from access to natural resources to adequate planning that regulates circumstances in rural and urban areas as well as human constructions that form part of Namibia's cultural heritage. Consequently, the term *environment* needs to be considered more widely in order to ensure that any rights subsequent thereto are not unacceptably limited.[9]

Due to a general lack of scholarly or regulatory analysis regarding the nature and ambit of Article 95(l), this paper now proceeds to investigate certain relevant aspects of the contents thereof.[10]

In terms of Article 95(l) cited above, the state is directed to perform certain tasks. Although Article 95 does not create an obligation on the part of the state or provide an aggrieved party with a justiciable right, it serves to direct the executive and the legislature in performing their respective duties.

Furthermore, although there is no obligation placed on the state, the word "actively" suggests that the executive and legislature in particular should take action to engage or participate in adopting certain policies, including by way of regulatory or other measures.

The inclusion of the words "promote and maintain" suggests that the state needs to uphold and continue to enable or cause (*maintain*) and continuously engage in actively encouraging, furthering the progress of, and improving (*promote*) the welfare of the people.

Furthermore, this state duty of maintaining the people's welfare needs to occur by means of "policies". If one considers that policy documents are not legally enforceable, it is unclear why, when drafting Article 95, the founding fathers decided to nominate a legal instrument that did not afford accountability in the event of non-compliance. However, the use of "*inter alia*" suggests that the state is not limited to the adoption of policies per se; nor should the explicit use

9 Kidd, M. 2008. *Environmental law*. Cape Town: Juta, p 20.

10 The nature and ambit of Article 95 is also discussed in more detail below, particularly in the section dealing with the relevant case law.

of policies be used as an excuse by the executive or the legislature for failure to address the issues listed in Article 95.[11]

"[W]elfare"

In order to determine the nature and extent of the term *welfare* within the context of an environmental right, it is appropriate to have regard to South African literature, seeing that the Constitution of the Republic of South Africa of 1996 makes use of a similar term, namely "well-being".[12]

Although harm to one's well-being need not amount to mental or physical ill-health, something more than a sense of emotional insecurity or aesthetic discomfort is required to qualify as such harm.[13] Therefore, the term *well-being* stands at the crux of environmental interests, namely a sense of environmental integrity and a realisation that we need to utilise our environment in a morally responsible manner.[14]

Welfare, which is used in the Namibian Constitution, implies some sort of statutory procedure or social effort designed to promote the basic physical and material well-being of the people. It may be argued, therefore, that well-being is, ideally, a consequence of welfare.

Like *well-being*, the term *welfare* has a general and wide application, and should be interpreted broadly. When viewed in the light of Article 95(l), the term certainly includes considerations of social, economic and cultural interests in the environment, as well as spiritual or psychological aspects such as the individual's need to be able to commune with nature.[15] These considerations are to be promoted and maintained by environmental protection policies adopted by the state.

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11 This point is elaborated on in the subsection on policies.

12 Section 24 of the South African Constitution provides as follows:
"Everyone has the right –
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

13 Currie, I & J de Waal. 2005. *The Bill of Rights Handbook*. Cape Town: Juta, p 526.

14 Glazewski (2005:77).

15 Currie & De Waal (2005:526).

The welfare of "the people"

The inclusion of the term *the people* and the focus which is placed on humankind clearly suggests that Namibia follows an anthropocentric[16] approach towards the environment, thereby regarding humankind and its interests as central or most important. The extent of beneficiaries is also limited by the term *people*, thereby excluding animals and other lifeless objects.

Another point worth noting is the use of *the people*, as opposed to *people*. Whereas *the people* would suggest "the mass of citizens in a country" or "the populace", *people* relates to "human beings in general".[17] It would appear as if the founding fathers intended to follow a strict approach in limiting the principles of state policy to Namibians and people that lawfully reside within Namibia.

Locus standi

Locus standi, or the right or capacity to bring an action or to appear in court, is regulated by Article 25(2) of the Namibian Constitution, which reads as follows:

> Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require …

However, and as already mentioned, Article 95(l) does not constitute a fundamental right or freedom: it is a principle of state policy. Aggrieved persons will, therefore, be unable to rely on Article 25(2) in the event that a principle of state policy – in this case the environmental clause – is ignored or infringed on. Instead, Article 95(l) is subject to the provisions of Article 101, which regulates the application of the principles of state policy as contained in Chapter 11 of the Constitution. Article 101 reads as follows:

> The principles of state policy contained in this Chapter [11] 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.

16 (ibid.:525); Scholtz, W. 2005. "The anthropocentric approach to sustainable development in NEMA and the Constitution". *Tydskrif vir die Suid-Afrikaanse Reg*, 1:70.

17 *Concise Oxford English Dictionary* (2002).

Article 101 clearly states that the principles of state policy – and, particularly for the purpose of this article, those expressed in Article 95(l) – are not bestowed with any legal force. It may be deduced, therefore, that the principles merely guide the executive and the legislature to give effect to the principles of state policy and its objectives, while the judiciary, in turn, is limited to having regard to and considering the said principles as objectives to be reached by the state. Hence, in the event that these principles are breached or infringed on, the judiciary is unable to compel positive action in terms of such principles as they are not enforceable in any court of law.[18]

"[P]olicies"

Policy documents merely contain a principle or course of action proposed or adopted by a certain Government Office, Ministry or Agency. Hence, such documents have no legal effect. Put differently, the provisions contained in policies do not constitute enforceable and justiciable rights. As mentioned above,[19] it is not certain why Article 95 makes express provision for the adopting of policies; however, the inclusion of the words "*inter alia*" suggests that Article 95 is not limited to the adoption of policies, but that legislation, regulations and other notices may similarly be adopted so as to include all measures aimed at the promotion and maintenance of the welfare of the people.

It is also important to bear in mind the aim of the provision, namely to promote and maintain the welfare of the people. In other words, the means by which this is to be done – whether by legislation, regulations, policies, or other instruments – should not be the deciding or qualifying factor. Also, if it is clear that the welfare of people will be better promoted and maintained by means of, say, the adoption of legislation and regulations which constitute enforceable and justiciable environmental rights as opposed to policy documents, the state should take that option in pursuance of the nature and objectives of the principles of state policy and in order to truly promote the welfare of the people.

Policies "aimed at"

All policies and other legislative provisions adopted that are aimed at promoting and maintaining the welfare of the people are to do so in accordance with the objectives of Article 95(l), namely, to –

- maintain ecosystems, essential ecological processes and biodiversity
- ensure natural resources are used sustainably, and

18 Article 101 is discussed in more detail in the subsection below that deals with the legal position in case law.

19 See the subsection that deals with the introductory part of Article 95.

- take measures against the dumping or recycling of foreign nuclear and toxic waste.

"[M]aintenance of ecosystems, essential ecological processes and biological diversity"

The EMA defines the term *biological diversity*, but not *ecosystem* or *essential ecological processes*. *Biological diversity* or *biodiversity* is defined as follows in the EMA:[20]

> … the variability among living organisms from all sources, including amongst others, terrestrial and aquatic ecosystems and the ecological complexes of which they are part, and this includes diversity within species, between species and of ecosystems.

An *ecosystem* generally suggests a system that includes all living organisms (*biotic* factors) in an area as well as its physical environment (*abiotic* factors) functioning together as a unit. Essential ecological processes include the interaction of living organisms with each other and with their environment.

The definitions above illustrate the interconnectedness of the environment and the reason why it is vital that environmental components not only be viewed in isolation (a *micro* view of the environment), but also holistically (a *macro* view of the environment).

"[U]tilization of natural living resources on a sustainable basis for the benefit of all Namibians, both present and future"

This provision refers to the notion *sustainable development* in terms of which development has to meet the needs of the present without compromising the ability of future generations to meet their own needs.[21] *Sustainable development* is defined in the EMA as –[22]

> … human use of natural resources, whether renewable or non-renewable, or the environment, in such a manner that it may equitably yield the greatest benefit to present generations while maintaining its potential to meet the

20 Section 1, EMA.

21 WCED/World Commission on Environment and Development. 1987. *Report of the World Commission on Environment and Development: Our common future.* UN Document No. A/RES/42/187. New York: United Nations; also known as the *Brundtland Report*. Available at http://www.un.org/documents/ga/res/42/ares42-187.htm; last accessed 6 March 2012.

22 Section 1, EMA.

> needs and aspirations of future generations including the maintenance and improvement of the capacity of the environment to produce renewable resources and the natural capacity for regeneration of such resources.

Sustainable development is also one of the principles of environmental management as contained in section 3 of the EMA, which requires that sustainable development be promoted in all aspects relating to the environment.[23] Another principle of environmental management requires that renewable resources be used on a sustainable basis for the benefit of present and future generations.[24]

"[I]n particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory"

This third environmental objective contained in Article 95(l) can be distinguished from the previous two objectives due to the inclusion of the terms "in particular" and "shall". The inclusion of these terms raises the question of whether or not this third environmental objective should in fact enjoy elevated levels of consideration. If one considers "shall provide measures" as opposed to "shall actively promote and maintain the welfare of the people by adopting … policies", the former places a clear obligation on the state, as it is more than a mere expression of the state's intention – like a policy would be. Put differently, it appears as if the government is mandated to provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.

Since *waste* relates to all three environmental media, namely air, soil and water, it may be argued that the appropriate management of waste is implicit in the maintenance of ecosystems, essential ecological processes and biodiversity – which is the first environmental objective of Article 95(l)). Put differently, the dumping or recycling of foreign nuclear and toxic waste would incorporate pollution and degradation of the different environmental media. However, environmental degradation can take place in the absence of waste – of whatever kind – being generated, since environmental degradation is not limited to the generation of waste; thus, waste management per se is not implicit in environmental protection, or vice versa.

The reason for the seemingly elevated level of consideration attributed to this third environmental objective, therefore, remains uncertain. Another, perhaps more obvious, explanation for this may be that it serves as a precaution against industrial countries that use Africa as a dumpsite for waste, whether nuclear, toxic or any other, because dumpsites are becoming increasingly scarce in developed countries.

23 Section 3(2)(f), EMA.
24 Section 3(2)(a), EMA.

However, due to the interconnectedness of the environment and its different constituent elements, the management of waste should not be excluded from explicit constitutional recognition and protection. This raises another issue: why does the Constitution exclude foreign nuclear and toxic waste per se? Domestic waste, which may even include nuclear waste generated domestically or within the borders of Namibia in the future, also, like foreign nuclear, toxic – or any other – waste, bears significant environmental consequences.

Although recognising and without derogating from the challenges in relation to the nature of waste, another significant issue is the volume of waste which is currently produced in Namibia, together with waste historically produced as well as the amount of waste that will still be produced in the years to come. However, the Constitution does not explicitly require this to be addressed by the government.[25]

The only significant "measures" introduced by the government since Independence that aim at waste management per se have been the Pollution Control and Waste Management Bill (the *Pollution Bill*, 1999) and, more recently, the Waste Management Policy (2010).[26] Seeing that neither draft legislation nor policy documents are legally enforceable, there is a significant lacuna in Namibia's environmental law framework regarding waste management.

Furthermore, neither the Pollution Bill nor the Waste Management Policy provides explicit measures against the disposal of foreign nuclear or toxic waste, as referred in Article 95(l) of the Constitution. Toxic substances are currently regulated and controlled in terms of the Hazardous Substances Ordinance, which was incorporated into Namibian law a number of years before the Constitution was enacted. Although a detailed discussion of the regulation of waste management in Namibia does not fall within the ambit of this paper, it suffices to mention that, apart from a clear mandate on the part of government relating to foreign nuclear and toxic waste, the regulation of waste management is currently comprised of the Pollution Bill and the Waste Management Policy – the provisions of which carry no legal force or effect – as well as other provisions relating to waste management as contained in the EMA,[27] the Environmental Impact Assessment Regulations, the Hazardous Substances Ordinance, and other sector-specific legislation.

25 No. 14 of 1974.

26 It is not certain why the government chose to issue a Waste Management Policy in 2010 when a Bill that is more conducive to resolving the same issue has already been in existence since 1999.

27 The following activities are listed in terms of section 27 of the EMA as contained in Government Notice 29, GG 4878 of 6 February 2012, relating to waste which triggers the environmental assessment process is the following: the construction of facilities for the storage and disposal of nuclear fuels, radioactive products and waste (reg. 1(d)); the construction of facilities for waste

Furthermore, it remains uncertain whether this third environmental objective of Article 95(l) should enjoy elevated levels of consideration, given the particular wording. On the one hand, one has have an environmental objective that seemingly places an obligation on the part of the state to perform certain functions, while, on the other, although recognising that this third environmental objective is unique in the sense that it should enjoy elevated levels of consideration, it remains subject to the limitations imposed by Article 101 as well as the nature of constitutional objectives of state policy because it is included under and forms part of Article 95.

As mentioned above in the introductory paragraphs to this paper, the Constitution includes certain provisions that may counter the challenges inherent in a non-enforceable environmental principle of state policy. The analysis now sets out to determine whether these inclusions – namely the Ombudsman, the state trust and Article 144 – enable members of civil society or litigants an enforceable and justiciable environmental right in a Namibian court of law.

Ombudsman

The Constitution makes provision for a national Ombudsman[28] and outlines a number of environmental duties on his/her part.[29] Although the findings or decisions of the Ombudsman are not enforceable by him-/herself, s/he is allowed to take appropriate action to call for or require the remedying, correction and reversal of matters.[30] The Ombudsman, as a regulatory body, may contribute significantly to environmental protection efforts. However,

sites, treatment of waste and disposal of waste (reg. 2.1); any activity entailing a scheduled process referred to in the APPO (reg. 2.2); the import, processing, use and recycling, temporary storage, transit or export of waste (reg. 2.3); the manufacturing, storage, handling or processing of a hazardous substance as defined in the Hazardous Substances Ordinance (reg. 9.1); any process or activity which requires a permit, licence or other form of authorisation, or the modification of or changes to existing facilities for any process or activity which requires an amendment of an existing permit, licence or authorisation or which requires a new permit, licence or authorisation in terms of a law governing the generation or release of emissions, pollution, effluent or waste (reg. 9.2); the bulk transportation of dangerous goods using pipeline, funiculars or conveyors with a throughput capacity of 50 tonnes or 50 cubic metres or more per day (reg. 9.3); the storage and handling of dangerous goods, including petrol, diesel, liquid petroleum gas or paraffin, in containers with a combined capacity of more than 30 cubic metres at any one location (reg. 9.4); and construction of filling stations or any other facility for the underground and aboveground storage of dangerous goods, including petrol, diesel, liquid petroleum, gas or paraffin (reg. 9.5).

28 Chapter 10, Namibian Constitution.

29 Article 91(c), Namibian Constitution; see Footnote 6.

30 Section 5(1), Ombudsman Act, 1990 (No. 7 of 1990).

despite the seal culling issue, which is still under investigation, the Ombudsman has not yet been confronted with situations requiring environmental protection per se; consequently, his/her efforts in this regard cannot yet be applauded or condemned.

State trust

In terms of Article 100 of the Constitution, –

> … the land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial water and the exclusive economic zone of Namibia belong shall to the State if they are not otherwise lawfully owned.

Thus, the Constitution establishes sovereign state ownership of natural resources that are not under the control of others. If one considers the geographical outline of the country as well as its scant population, vast areas of land may indeed fall under state ownership.[31] Can this constitutionally entrenched sovereign state ownership of natural resources be used by civil society at large to call for positive action on the part of the state to take environmental or environment-related responsibility for these areas? In the absence of jurisprudence[32] or scholarly analysis on this provision, it is not certain whether and/or to what extent the Namibian courts will give effect to this public trust doctrine. However, Article 100 is, like Article 95 and the remainder of Chapter 11 of the Constitution, subject to the limitations imposed by Article 101.[33]

Article 144

Namibia follows a monist approach[34] whereby the country is automatically bound by the rules of international law and the contents of international

31 Du Plessis (2008:258).

32 Environment and related case law in Namibia is mostly of a criminal nature. See Ruppel, OC. 2011a. "Foundations, sources and implications of national environmental law". In Ruppel, OC & K Ruppel-Schlichting (Eds). *Environmental law and policy in Namibia*. Windhoek: Hans Seidel Foundation, p 82.

33 See also the discussion on Article 101 contained in the subsections that deal with locus standi and the legal position in case law, respectively, below.

34 Article 144, Namibian Constitution. Dugard, J. 2005. *International law: A South African perspective* (Third Edition). Lansdowne: Juta, p 47; Ruppel, OC. 2011b. "International environmental law from a Namibian perspective". In Ruppel & Ruppel-Schlichting (2011:33). In a monist approach, municipal courts are obliged to apply the rules of international law directly without the need for any act of adoption by the courts or transformation by the legislature.

agreements entered into[35] automatically form part of the law of Namibia. These international agreements include agreements within the African Union (AU) and the Southern African Development Community (SADC). In order to overcome the challenges inherent in a non-enforceable environmental principle of state policy and, hence, when petitioning in favour and support of an environmental right in a court of law in Namibia, a petitioning party may have to rely on Article 144 in pursuance of environmental rights. Article 144 states that –

> [u]nless otherwise provided … the general rules of public international law and international agreements binding upon Namibia … shall form part of the law of Namibia.

Consequently, aggrieved parties may, for instance, rely on Article 24 of the African Charter on Human and People's Rights,[36] an international agreement, in pursuance of relief sought via Article 144 of the Namibian Constitution, thereby establishing an enforceable and pursuable environmental right. Article 24 of the African Charter provides as follows:

> All peoples shall have the right to a general satisfactory environment favourable to their development.

Hence, instead of relying on Article 95(l) in support of a case involving or based on an environmental or related interest, a petitioning party may instead choose to base their claim on relevant provisions as contained in international law and international agreements to which Namibia is a party. In this way, a petitioning party may overcome the unenforceable nature of Article 95(l).

In support of the latter argument, we now turn to the case of *Government of the Republic of Namibia & Others v Mwilima & All Other Accused in the Caprivi Treason Trial*.[37] It is important to note that the case, in its entirety, is not applicable to the subject matter at hand. I merely wish to highlight certain principles laid down by the court in the *Caprivi Treason Trial* case. In some instances, it is necessary to elaborate on the facts of the case in support of the overall and eventual argument.

35 For a detailed discussion of international law applicable in Namibia, see Ruppel (2011b:46–62).

36 African Charter on Human and People's Rights, 1981.

37 *Government of the Republic of Namibia & Others v Mwilima & All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC).

The Caprivi Treason Trial case

Background to and facts of the case

In the *Caprivi Treason Trial* case, the respondents – 128 of them – were all awaiting trial on some 275 counts in total, which include charges of high treason, murder and attempted murder, sedition, public violence, malicious damage to property, robbery with aggravating circumstances, theft, and various contraventions of the Immigration Control Act[38] and the Arms and Ammunitions Act.[39] The respondents were arrested after an armed attack had been launched against certain government offices in the Caprivi Region, as a result of which a state of emergency was proclaimed in the area on 2 August 1999. The state alone planned to call over 500 witnesses, and at least five interpreters were to serve the accused.

The trial was postponed time after time and was finally set to commence on 4 February 2002. During October 2001, the respondents launched an application with the principal purpose of obtaining legal aid in some form so that they could be assured of legal representation during the trial. The appellants opposed the matter.

After the respondents had been refused legal aid, they launched an application in the court a quo for an order directing that such legal aid be granted. The court a quo ordered that the Director of Legal Aid (the second appellant) provide the respondents with such aid. The appellants appealed against this decision as well.

The legal issue

The main issue before the court was whether there was a constitutional duty upon the first respondent to provide the applicants with legal representation if it was shown that they would otherwise not have had a fair trial as envisaged by the Constitution.[40]

The legal position

The constitutional provisions under discussion and subject to interpretation in this case were –

38 No. 7 of 1993.
39 No. 7 of 1996.
40 *Caprivi Treason Trial*, p 253.

- Article 10[41]
- Article 12[42]
- Article 25[43]
- Article 80(2)[44]
- Article 95(h)[45]
- Article 101,[46] and
- Article 144.[47]

Detailed discussions of Articles 10, 12, 25 and 80(2) do not fall within the ambit of this paper and, hence, will not be elaborated on. Observations made by the court regarding Articles 95(h), 101 and 144 will be investigated further in this part.

Article 95(h) of the Constitution provides 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 on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State; … .

In terms of Article 101, the principles of state policy as contained in Chapter 11 of the Constitution are not "of and by themselves … legally enforceable by any Court", but nevertheless have to –

> … 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.

41 Equality and Freedom from Discrimination; this right is included in Chapter 3 of the Constitution and, therefore, constitutes a fundamental right.

42 Fair Trial; of particular note is Article 12(e), in terms of which "[a]ll persons … shall be entitled to be defended by a legal practitioner of their choice". The right to a fair trial is also a fundamental right.

43 Enforcement of Fundamental Rights and Freedoms; this Article is, like Article 10 above, included in Chapter 3 of the Constitution.

44 Article 80 institutes and contains provisions regarding the High Court of Namibia and is contained in Chapter 9, entitled "The Administration of Justice".

45 See below; Article 95(h), like Article 95(l) discussed above, is contained in the Chapter on the principles of state policy.

46 Article 101 provides for the application of the principles of state policy as contained in Chapter 11 of the Constitution. Article 101 is also discussed, respectively, in the subsections above that deal with locus standi, and in the subsection below that deals with the legal position in case law.

47 On international law; see the introductory paragraphs as well as the relevant subsection herein that deals with Article 144.

In the matter at hand, the relevant law is the Legal Aid Act.[48]

As mentioned above, although the case in its entirety is not applicable to the subject matter at hand, the judgment contains various statements that are extremely important to and will be used in support of the research question discussed here. Nevertheless, there are instances where the facts of the case or certain statements are slightly elaborated upon so as to refrain from quoting the judgment out of context and for a clear understanding of the argument posed here.

Decisions and their basis

According to the majority judgment by Strydom CJ, the appeal was dismissed as the complexity of the case required that the respondents be legally represented and that the first appellant was to provide for such representation. Apart from the majority judgment, O'Linn AJA wrote a dissenting judgment and Chomba AJA wrote a minority judgment. Nonetheless, both of the latter judges concurred with the majority statement by Strydom CJ. Here, reference will be made to certain statements made and principles contained in the majority judgment and in the minority judgment.

According to Strydom CJ, –[49]

> … [Article] 95(h) expresses no more than the intention of the first respondent to promote justice by providing statutory legal aid to those who have not the means to afford legal representation … [G]iven Namibia's resources in manpower and finances it would be, and still is, impossible to provide free legal aid for each and every person who is indigent and in need of such assistance.

Strydom CJ also quoted a section from an article by Bertus de Villiers.[50] Although the study refers to the Indian Constitution, the learned judge regarded it as "equally applicable in regard to the expressed Principles of State Policy set out in the Namibian Constitution".[51] Thus, according to De Villiers, –[52]

> [Principles of state policy] have two important characteristics. First, they are not enforceable in any court of law and, therefore, should they be ignored or infringed[,] the aggrieved have no legal remedy to compel positive action.

48 No. 29 of 1990.

49 *Caprivi Treason Trial*, p 251.

50 De Villiers, B. 1992. "Directive principles of state policy and fundamental rights: The Indian experience". *South African Journal on Human Rights*, 29(8):33–34. See *Caprivi Treason Trial*, p 252.

51 *Caprivi Treason Trial*, p 252.

52 De Villiers (1992:33–34), cited in *Caprivi Treason Trial*, p 252.

> Secondly, the principles are fundamental to the governance of the country and oblige the legislature to act in accordance with them. They consequently fulfil an important role in the interpretation of statutes … The unenforceability of the directive principles from a judicial perspective, has led Seervai to describe them as "rhetorical language, hopes, ideals and goals rather than the actual reality of government".

Hence, according to the above statement, although the principles of state policy may direct and guide the legislature and the executive in the performance of their functions, they do not pose an enforceable right and, consequently, are not enforceable by the judiciary.

O'Linn AJA also made some insightful comments regarding the nature and purpose of the principles of state policy as contained in Article 95, as follows:[53]

> Article 95 contains broad policy guidelines that do not in themselves constitute enforceable laws and are in particular not enforceable by the courts except that the courts may have regard to them in those cases where laws based on them have to be interpreted … The provision that the government shall be guided by the principles contained in article 95 in making and applying laws, must be distinguished from the role of the Court in enforcing provisions in the Constitution providing for the protection of the human rights therein entrenched and for enforcing the rights expressed in … section 14(3)(d) of the [International Convention on Civil and Political Rights].

The latter statement is of particular importance in that, according to O'Linn AJA, although the Government may still be guided by the principles of state policy in applying laws to give effect to these fundamental objectives of the state, the courts do not qualify to have regard to these principles of state policy in their interpretation, since no law in fact exists on the subject to interpret.[54]

Apart from Articles 95(h) and 101, which are relevant to the research question, the court also investigated and discussed the applicability of Article 144. As mentioned above,[55] in terms of Article 144, international agreements binding on Namibia under the Constitution form part of the law of Namibia. The subject of argument among counsel in this regard was Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR), 1966. The said Article provides as follows:

> 14(3) In the determination of any criminal liability against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> …
> (d) to be tried in his presence, and to defend himself in person or

53 *Caprivi Treason Trial*, pp 271–272.
54 (ibid.:272).
55 See the introduction to this paper.

> through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; *and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it*.
> [Emphasis added]

By virtue of Article 144 of the Namibian Constitution, Article 14(3)(d) of the ICCPR forms part of the law of Namibia and, hence, is to be given legal effect. It was also held in the Supreme Court judgment in *Namunjepo & Others v Commanding Officer, Windhoek Prison & Another*[56] that the whole of the ICCPR had become part of the law of Namibia and, therefore, had to be implemented.

Preliminary observations

The *Caprivi Treason Trial* case judgment opened the door for litigation based on violation of social and economic rights and perhaps even litigation on environmental rights.

Of particular importance to the research question at hand are the court's interpretation of and decisions made regarding Articles 95, 101 and 144 of the Constitution.

The court opined that Article 95(h) expressed no more than the government's intention to promote justice by providing statutory legal aid to indigent persons. Hence, the court deduced that the principles of state policy, as contained in Article 95, contained broad guidelines that did not in themselves constitute enforceable laws. As stated above, these principles of state policy are not enforceable by a court of law, although the courts may have regard to them in such cases where laws based on these principles have to be interpreted. Thus, although an aggrieved party may have no legal remedy to compel positive action in the event that a principle of state policy is infringed or ignored, such principles are and remain fundamental to the governance of a country. These principles fulfil an important role in the interpretation of statutes as the legislature is required to give effect to the contents of the various principles of state policy.

Indeed, instead of instituting legal action in terms of the principles of state policy, a litigating party may – and perhaps should – base his/her claim on an international right as contained in an international law or agreement binding on Namibia: such a provision, by virtue of Article 144, forms part of the law of

56 *Namunjepo & Others v Commanding Officer, Windhoek Prison & Another*, 1999 NR 271 (SC).

Namibia, unlike the unenforceable principle of state policy that guides state conduct.

Does Namibia's Constitution provide an enforceable and pursuable environmental right?

Although the environmental clause as contained in the Namibian Constitution constitutes a non-enforceable environmental principle of state policy, the Constitution does make provision for some other developments that may offer an enforceable and pursuable environmental right in a court of law in Namibia.

The Ombudsman is bestowed with an environmental mandate. Although this provision does not render an enforceable and pursuable environmental right, it does open the door for investigation and the subsequent taking of appropriate action to call for or take appropriate steps to call for or require the remedying, correction and reversal of matters.

In terms of the sovereign ownership of natural resources in the hands of the state, as established by Article 100 of the Constitution, the state is morally obliged to take environmental or environment-related responsibility for these areas: such constitutionally entrenched sovereign state ownership of natural resources may be used by civil society at large to call for positive action on the part of the state to contribute towards environmental protection. It is not certain whether Article 100 per se establishes an enforceable and pursuable environmental right in a court of law, given the absence of jurisprudence or scholarly analysis on this provision; nevertheless, the public trust doctrine is, as in Article 95, included in the Principles of State Policy Chapter, and, hence, – again like Article 95 – remains subject to Article 101 and the limitation it imposes. Consequently, the author is of the opinion that the public trust doctrine remains a guiding principle in the sense that the government is empowered to make and apply laws to give effect to the fundamental objectives of the idea of a state trust.

The principles of state policy, as Article 95 evidences, contain broad policy guidelines that do not in themselves constitute enforceable laws. Put differently, these principles are neither enforceable nor pursuable in a court of law in Namibia, although the courts may have regard to them in such cases where laws based on those principles have to be interpreted.[57] When viewed against the court's observations in the *Caprivi Treason Trial* case, Article 95(l) merely expresses the government's intention to promote environmental protection. Consequently, an aggrieved party may have no legal remedy to compel positive action in the event that the environmental principle of state policy is infringed or ignored.

57 See Article 101, Namibian Constitution.

In order to overcome the challenges inherent in a non-enforceable environmental principle of state policy and, hence, when petitioning in favour and in support of an environmental right in a court of law in Namibia, a petitioning party may have to rely on Article 24 of the African Charter by virtue of Article 144 of the Namibian Constitution in pursuance of his/her environmental rights.[58]

Conclusion and recommendations

Although Namibia was the forerunner in southern Africa in respect of including an environmental provision in its Constitution, the provision does not constitute a fundamental right: its inclusion in Chapter 11 means it is an overtly stated but non-enforceable principle of state policy – here, on the environment.

The principles of state policy outlined in Chapter 11 of the Constitution are neither enforceable nor pursuable in a court of law in Namibia, although the courts may have regard to them in those cases where laws based on such principles have to be interpreted. When viewed against the court's observations in the *Caprivi Treason Trial* case, Article 95(l) merely expresses the government's intention to promote environmental protection. Consequently, an aggrieved party has no legal remedy in terms of the provision to compel positive action in the event that the environmental principle of state policy is infringed or ignored, and will have to look elsewhere in the Constitution for protection.

It is doubtful whether the public trust doctrine is enforceable or pursuable in a court of law in Namibia, given the limitation imposed on the principles contained in Chapter 11 of the Constitution by Article 101. Although this public trust doctrine does not provide an aggrieved party with a legal remedy to compel positive action in the event that the state does not comply with its role as public trustee of environmental resources, the idea of a state trust remains a guiding principle for the government to make and apply laws and policies to give effect to the fundamental objectives of the idea of a state trust. This public trust doctrine also fulfils an important role in the interpretation of statutes as the legislature is required to give effect to the contents and objectives of the various principles.

Despite the non-enforceability of the provisions in question, the Namibian Constitution contains various laudable inclusions that may allow aggrieved persons to approach a court of law in Namibia in pursuance of a constitutionally entrenched environmental right.

One of the most laudable inclusions with regard to environmental protection in the Namibian Constitution was the granting of an environmental mandate in the hands of the Ombudsman. Although Article 91(c) relating to this specific

58 See the introduction to this paper.

function of the Ombudsman does not render an enforceable and pursuable environmental right, it does open the door for investigation by the Ombudsman and the subsequent taking of appropriate action to call for or require the remedying, correction and reversal of matters.

In order to overcome the challenges inherent in a non-enforceable environmental principle of state policy, and in an attempt to successfully petition in favour and in support of an environmental right in a court of law in Namibia, a petitioning party's best option in pursuance of such environmental right would be to rely on Article 24 of the African Charter or any other provision contained in an international law or agreement binding upon Namibia by virtue of Article 144 of the Namibian Constitution. Such specific environmental provisions in international law or agreements binding on Namibia form part of the law of Namibia by virtue of Article 144 of the Constitution, thereby overcoming the unenforceable nature of Article 95(l). Consequently, the state – or, for instance, an industrial or mining company – are not only required to have regard to the contents of international law and international agreements binding on Namibia, but are also obliged to take positive action to conform to such provisions.

In conclusion and based on the above, the author is of the opinion that the Namibian Constitution, by virtue of Article 144 thereof, does in fact, albeit indirectly, provide aggrieved persons with an enforceable and pursuable environmental right.

Freedom of testation v section 37C of the Pension Funds Act, 1956 (No. 24 of 1956)

Florian Beukes

Background

A particularly interesting case prompted this study and discussion. The facts of the case are briefly as follows: A young man who was previously employed by the Ministry of Defence died on 3 June 2010 and nominated his mother, a certain Mrs ES Gariseb, as the sole beneficiary of his Government Institutions Pension Fund (GIPF) benefit. The deceased also explicitly indicated this in his last will and testament. In June 2010 or thereabouts, Mrs Gariseb, being under the impression that she was the sole beneficiary of the pension benefit as per her son's wish, applied to the GIPF Board of Trustees to effect the pension benefit payout in her name. However, she was informed that, since her son had died childless, his biological father and mother were both legal beneficiaries of his pension, to which they were entitled equal shares.

Mrs Gariseb was further informed that her son's last will and testament bore no significance to this scenario, and that, by virtue of section 37C of the Pension Funds Act,[1] the Trustees of the GIPF had the sole discretion to award the pension benefit as they deemed fit. This infuriated Mrs Gariseb, given that her son's father had never contributed to the upbringing of her deceased son. Acting on the GIPF's advice, the deceased's mother wrote to the Board of Trustees, setting out her grievances and justifying why her son's father should not receive his share of the pension benefit. However, at the time of writing this article, the matter had not yet been finalised. The only development has been that the Board of Trustees has appointed a social worker to investigate the matter and determine to what extent the father was dependent on the deceased son. The social worker's report is intended to assist the Board in its decision as to distributing the deceased's pension benefits.

The legal position

Section 37C of the Act deals with the distribution of pension benefits upon the death of a member of a pension fund. Benefits payable by a pension fund are

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* BJuris, LLB (Honours); Group Legal Officer, United Africa Group.

1 No. 24 of 1956. The Act provides for the registration, incorporation, regulation and dissolution of all funds established with the object of providing retirement benefits for their members and for matters incidental thereto.

excluded from the estate of a deceased member of such a fund**.** The Act further provides that the distribution of pension benefits is the exclusive domain of the board of trustees of the fund in question, and that they are entitled to distribute such funds as they deem fit. If the Fund, within 12 months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit is required to be paid to such dependant/s and in such proportions as may be deemed equitable by the board of trustees managing the business of the fund.[2]

Statement of the problem

An individual normally disposes of his/her pension fund benefits by nominating specific beneficiaries in the policy itself or by stipulating such beneficiaries in a valid last will and testament. In this way, the wishes of a deceased person can be carried out. However, section 37C of the Act establishes a system whereby, notwithstanding anything contained in a deceased person's beneficiary nomination form or last will and testament, the distribution of a deceased's pension is primarily regulated by the Act and not by the deceased's wishes.

This discussion will concentrate on freedom of testation under Namibian law, in particular the current status of such freedom and all the problems and limitations related to it. An in-depth analysis will be premised on section 37C of the Act as a limitation on freedom of testation.

In addition to the above, the questions to be considered here are as follows:

- Why is a deceased person's pension benefit not considered part of his/her estate?
- Why does the law place a limitation on a person in terms of disposing of his/her pension benefit upon death as s/he wishes?
- Who are the persons considered to be "dependants" of the deceased pension holder?
- What is the criterion used by pension fund trustees to determine dependency?
- Can pension benefits be regarded as property?
- How does section 37C of the Act weigh up against an individual's freedom of testation?
- What are the validity and effect of section 37C of the Act?

This paper aims to provide answers to the above questions through examining the current legal and administrative framework which deals with the doctrine of freedom of testation and section 37C of the Act.

2 See section 37C(1)(a), Pension Funds Act.

Significance of this research

Section 37C of the Act has been dealt with haphazardly in the literature. This paper, therefore, attempts to put the record straight. In doing so, the research will point out the harshness of section 37C, and the instances in which section 37C is not best suited for society. Having regard to the account of Mrs Gariseb as the background to this analysis, readers will be given an insight into the practical application of section 37C, in contrast with the theoretical position put forward in the Act.

Section 37C, in its entirety, reads as follows:

> (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:
>
> (a) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants;
>
> (b) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.
>
> (bA) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than

one such dependant or nominee, in proportions to any or all of those dependants and nominees; and

(c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the High Court in terms of section 9 of the Estates Act, 1965 (Act No. 66 of 1965), into the Guardians Fund.

Thus, section 37C clearly sets out that a person's pension is excluded from his/her deceased estate. These are monies – in fact, a person's savings – over whose distribution only a board of trustees and not the person him-/herself has a say. Notably, the deceased person's dependants can claim from his/her deceased estate, whether such dependant is mentioned in a will or not. This, however, relates more to dependent children. Thus, by parity of reasoning, if a person's pension forms part of his/her deceased estate, then his/her dependants should be able to claim for maintenance from the estate.

Structure of the paper

The discussion will first focus on the principle of freedom of testation and its various common law and statutory limitations. The development of the principle of freedom of testation is traced, with a revelation of how this absolute right became restricted over time. The constitutional shift in respect of freedom of testation will be addressed in detail, as will the limitations thereon and how such limitations are justified.

Section 37C of the Pension Funds Act is then analysed to determine the crux behind it. In this regard, the scope of a board of trustees' discretion will be looked at, together with the criteria such boards use to determine dependency in order to distribute a deceased person's pension benefits.

Next is a critical discussion of the principle of freedom of testation in comparison with what is laid down in section 37C. The treatment will establish the basis on which a deceased person's pension fund distribution as per section 37C takes precedence over his/her wishes as expressed in the deceased person's beneficiary nomination form or last will and testament. The paper will also look at freedom of testation from a constitutional perspective, having regard to section 37C. A specific legal issue will be used to illustrate the legal advice that could be offered in such cases.

The paper ends with a conclusion as to the legal issues at stake, and offers recommendations for potential solutions.

Freedom of testation

The law of succession is a branch of private law that regulates what happens to a person's assets and liabilities after his/her death, i.e. the deceased estate, and matters incidental to such succession. The doctrine of freedom of testation can be regarded as one such incidental matter. It should, therefore, be noted that the doctrine of freedom of testation derives from the law of succession.

According to Jamneck et al.,[3] succession can take place in three ways:

- In accordance with a valid will, i.e. testamentary succession (successio ex testamento),
- Through the operation of the law of intestate succession in the absence of a valid will, i.e. intestate succession (succession ad intestate or succession legitima), or
- In terms of a contract or agreement, i.e. contractual succession (successio ex contractu or pactum successorium).

What is a will?

A testator usually manifests his/her intention about who should inherit from his/her estate through a document called a *will*. Section 1 of the Wills Act[4] defines a *will* as "a codicil and any other testamentary writing". The Act does not go into the essence of a will. In this regard, De Waal and Schoeman-Malan[5] add that –

> [a] will is a unilateral declaration of the wishes of the testator in which he sets out the way his assets must be apportioned after his death to designated persons or institutions.

The basic requirements of a will are that –

- there is an intention to make a will (animus testandi), and
- such declaration is voluntary.

It is evident from the above definitions that the expression of a testator's own free will is an important element of establishing a valid testament. It follows that, if the document does not express the testator's own free will, such document does not comply with the definition of a *will* and cannot be seen as

3 Jamneck, J, C Ruatenbach, M Paleker, A van der Linde & M Wood-Bodley (Eds). 2010. *The law of succession in South Africa.* Cape Town: Oxford University Press Southern Africa (Pty) Ltd, p 1.

4 No. 7 of 1953.

5 De Waal, MJ & MC Schoeman-Malan. 1996. *Law of succession – Students' Handbook* (Second Edition). Cape Town: Juta & Co Ltd, p 2.

valid.[6] LeBeau et al.[7] point out that, if the deceased has left a will, then the estate of such deceased person will be distributed according to the provisions of the will, and that a person who makes a will can leave his/her property to anyone. Thus, should it be found that a deceased person's pension benefits are deemed to be property of such deceased person, then that pension-holder is entitled to declare his/her intention in a will as to who the beneficiary or beneficiaries of the proceeds of such pension fund are to be.

Freedom of testation: A brief overview

The doctrine of freedom of testation dictates that a testator is free to dispose of his/her estate in any manner s/he deems fit. Hence, the content of the will is left to the discretion of the testator. As De Waal and Schoeman-Malan[8] remind us, this is because a high premium is placed on the principle of freedom of testation. Thus, a testator is not obliged to leave any property to his/her family in his/her will.

Testamentary freedom has the effect that very little constraint is imposed on a testator disposing of his/her estate under either statutory or common law. Under Roman–Dutch law, at least until legislative intervention in 1990, any person of sound mind and capacity had complete freedom of testation, i.e. the power to bequeath their property by will to whomever they chose.[9] Steyn[10] postulates that, in the past, the testator enjoyed complete freedom of testation and no person – whether spouse, parent or descendant, etc. – could claim to upset a will on the sole ground that s/he was not mentioned in it. This freedom was based on an 'absolute' notion of *ownership*: owners of property had a full and exclusive power to dispose of that property as they wished, even though a will disinheriting the testator's spouse and other intestate heirs could seriously prejudice the material security of surviving members of the family.[11]

The power of an owner of property to determine who is to have it upon his/her death is thought to stimulate economic activity.[12] A property owner is, therefore, allowed to modify the rigid rules of the intestacy laws so as to adapt

6 See *Spies v Smith*, 1957 (1) SA 539 (A) at 546.

7 LeBeau, D, E Ipinge & M Conteh. 2004. *Women's property and inheritance in Namibia*. Windhoek: Pollination Publishers, p 26.

8 De Waal & Schoeman-Malan (1996:2).

9 See e.g. http://www.saflii.org/za/other/zalc/ip/12/12-7.htm; last accessed 12 March 2011.

10 Steyn, G. 1948. *The law of wills in South Africa* (Second Edition). Cape Town: Juta & Co Ltd, p 95.

11 See e.g. http://www.saflii.org/za/other/zalc/ip/12/12-7.htm; last accessed 12 March 2011.

12 Available at http://universalium.academic.ru/132497/inheritance; last accessed 12 March 2011.

them to the particular situation of his/her family by preferring, for instance, a disabled child over one of proven capacity. The freedom to disinherit a child has also at times been used to induce filial obedience.[13]

Once a person dies, his/her will is required to be scrutinised by the Master of the High Court in order to establish the validity of the document. In order to have validity, the will has to comply with a number of general requirements as well as certain formalities stipulated in the Wills Act and other pieces of legislation.[14] This means that the testator's wishes in disposing of his/her assets in a will are obliged to be carried out, except where the law places a limitation on the testator's freedom.

However, the High Court has no general authority to consent to alterations to a testator's will against his/her express intentions. The court is only permitted to rectify a will in certain specified cases. In *Bydewell v Chapman*,[15] the Judge's obiter dictum pointed out that, even if all the beneficiaries agree to it, the court cannot change the binding clauses of a will.[16]

A consequence of the principle of freedom of testation is that the testator can revoke or alter his/her will at any time before death, except in the case of a beneficiary accepting a benefit in terms of a joint or mutual will in which there has been a massing of estates.[17]

Freedom of testation: A Namibian perspective

In the Namibian legal system, a testator derives his/her right to freedom of testation from constitutional law, statutory law, and common law.

Article 1(6) of the Constitution of the Republic of Namibia provides that it is the "Supreme Law of Namibia". In terms of Article 66(1) therein, common law and customary law which were in force on the date of independence now form part of the laws of Namibia unless they are in conflict with the Constitution or other statutory law. Article 140(1) of the Constitution further provides that –

> [s]ubject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.

13 (ibid.).
14 Jamneck et al. (2010:47).
15 1953 (SA) SA 514 (A).
16 See Jamneck et al. (2010:115).
17 De Waal & Schoeman-Malan (1996:4).

It is common knowledge that Namibia was administered under a South African mandate prior to its Independence in 1990. Therefore, in absence of any legislative or judicial authority to the contrary, Articles 1(6) and 140(1) expressly and authoritatively incorporated the South African common and statutory law that obtained prior to Independence into Namibian law. This included the high premium placed on the principle of freedom of testation under South African law:[18] Namibia similarly places a high premium on a person's right to dictate by means of a will how s/he wishes to dispose of his/her property upon death. However, this high premium is nullified by the fact that it is not absolute – as is evident in section 37C.

The concept of *testamentary freedom* cannot be discussed in isolation from the fundamental rights and freedoms that are enshrined in the Namibian Constitution. The advent of the Constitution altered the complexion of the law of property in general, in particular the notion of *succession of property rights.* Article 16(1) of the Constitution states the following:

> 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 or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

This provision guarantees the right to private ownership. The right to private property also includes the right to dispose of one's property during one's lifetime and at the time of one's death. Interpreted this way, Article 16(1) simultaneously guarantees the institution of succession as well as the principles of freedom of testation that support it.[19]

It is also evident that Article 16(1) restricts a testator's right to dispose of his/her property as s/he deems fit, in particular where the testator wishes to bequeath property to a non-Namibian citizen by way of his/her will. The various limitations on freedom of testation can in fact be reconciled with this fundamental right in view of Article 22 of the Constitution – the limitation clause.[20] These restrictions are explained in more detail in the next part of this discussion.

18 (ibid.:2).

19 De Waal, MJ & MC Schoeman-Malan. 2003. *Introduction to the law of succession* (Third Edition). Cape Town: Juta & Co Ltd, p 5.

20 (ibid.).

Restrictions on freedom of testation

A common legal principle dictates that, to every rule, there is an exception. In the case of the doctrine of freedom of testation, however, there are numerous exceptions to the rule governing a testator's freedom to testate.

The limitations of a person's freedom of testation are, in general, based on either economic or social considerations.[21] Any assessment of the merits of this freedom need to take into account the principal social problem: when a family breadwinner dies, the surviving spouse is in immediate need of material support to raise dependent children.[22] People who have the power to dispose of their property by means of a will may, of course, provide for their families, but there is no guarantee that they will use this power so sensibly. Conversely, by insisting that testators pay due regard to the interests of their intestate heirs, the law could guard against imprudent wills.[23]

The limitations are broader than indicated above, however, and encompass a range of instances besides the interests of family members.

Common law limitations on the freedom of testation

De Waal and Schoeman-Malan[24] note that some of the limitations on the freedom of testation are placed on the testator in accordance with common law. One of these limitations is that, generally, property given by testament cannot be tied up by the testator for an indefinite future.

A provision in a will cannot be executed if it is –
- in general unlawful
- against good morals (contra bonos mores)[25]

21 (ibid.:4).

22 See e.g. http://www.saflii.org/za/other/zalc/ip/12/12-7.html; last accessed 12 April 2011.

23 (ibid.).

24 De Waal & Schoeman-Malan (2003:4).

25 A testamentary provision is invalid if its enforcement would be shocking to public morals. Conditions calculated to destroy an existing marriage (see *Ex Parte Swanevelder*, 1949 (1) SA 733 (O)) or those absolutely forbidding a beneficiary to marry are regarded as against public policy and are, therefore, invalid. In *De Wayer v SPCA Johannesburg*, 1963 (1) SA 71 (T), the testator entitled her son to a benefit on condition that he remained unmarried after her death. The court found such provision contra bones mores. See De Waal & Schoeman-Malan (2003:4).

- impracticably vague, [26] or
- impossible,

as such conditions are regarded as not written (pro non scripto).

According to *Levy v Schwartz*,[27] if such a provision exists in a will, the beneficiary nonetheless receives the benefit free of the unlawful, against good morals, impracticably vague or impossible condition – provided that the bequest still makes sense if the condition is deleted.

The freedom of a testator to dispose of the whole or any part of his/her estate as s/he pleases is not absolute, therefore. For example, a testator cannot bequeath any part of his/her estate to a brothel or an animal. S/he is also not allowed to bequeath any part thereof on condition that someone be murdered.

Public policy

The principle that the courts will refuse to give effect to a testator's directions which are contrary to public policy is a well-recognised common law ground limiting the principle of freedom of testation, and has been applied since Roman times.[28] However, this concept changes over time as social conditions change; hence, public policy today is rooted in the norms and values of the Namibian Constitution, thus establishing an objective normative value system.[29] As Hahlo states, "[t]imes change and conceptions of public policy change with them".[30]

In the South African case *Minister of Education v Syfrets Trust*,[31] in his will, the deceased provided for a charitable trust to be created in order to award bursaries to deserving non-Jewish and male Europeans, i.e. whites. The Minister of Education challenged the constitutionality of these conditions, alleging that they unfairly discriminated against other potential applicants on the basis of race, gender and religion and were, therefore, contrary to public

26 Erasmus, HJ & MJ de Waal. 1989. *The South African Law of Succession*. Durban: Butterworths, p 65. See also *Wasserzug v Administrators of Estate Nathanson*, 1944 TPD 369, where the condition that the beneficiary should not marry "out of the Jewish faith" was too uncertain and, therefore, void for vagueness. *De Klerk v De Witt*, 1973 (3) SA 865 (NC), held that a condition which was so vague and uncertain that it was impossible to determine what the testator intended was to be regarded as pro non scripto. See De Waal & Schoeman-Malan (2005:5).

27 1948 (4) SA 930 (W).

28 *Levy NO & Another v Schwartz NO & Others*, 1948 (4) 930 (W) at 937.

29 Jamneck et al. (2010:47); see also *Braun v Blann & Botha*, 1984 (2) SA 850 (A) at 866H, and *Minister of Education v Syfrets Trust*, 2006 (4) SA 205 (C) at 218.

30 Hahlo, HR. 1950. "Jewish faith and race clauses in wills: A note on *Aronson v Estate Hart*". *South African Law Journal*, 231, at 240.

31 2006 (4) SA 205 (C).

policy. The court held that the provisions of the trust were indeed against public policy, and that the conditions should be deleted. In rendering judgment, Griesel J said the following:[32]

> I conclude that the testamentary provisions in question constitute unfair discrimination and, as such, are contrary to public policy as reflected in the foundational constitutional values of non-racialism, non-sexism and equality. It follows, in my judgment, that this Court is empowered, in terms of the existing principles of the common law, to order variation of the trust deed in question by deleting the offending provisions from the will.

Against good morals

The court will not give effect to bequests that can be characterised as being against good morals and the general ethics of society, i.e. contra bonos mores. There are two types of conditions that have frequently been challenged in South African courts as possibly being contra bonos mores, namely conditions that interfere with a beneficiary's marital status, and conditions limiting a beneficiary's freedom of movement.[33] These will be treated in more detail below.

Conditions that interfere with a beneficiary's marital status

In terms of common law, a testator cannot leave a benefit to a beneficiary on the condition that the beneficiary never gets married.[34] Such a condition, as seen in *Aronson v Estate Hart*,[35] is void on the grounds of being contra bonos mores since it dictates to another to remain unmarried.

The same sentiment was adopted in *De Wayer v SPCA Johannesburg*,[36] where the testator's son would forfeit his inheritance if he were to marry after his mother's death. According to the court, it was settled law that a general

32 At 229E. See also *Ex parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will Trust*, 1993 (2) SA 697 (C). The court was asked to delete the word *white* in a bequest in terms of a will executed in 1899 in terms of which the testator had bequeathed the residue of his estate in trust to be applied to "the founding and maintaining of a home for destitute white children". In a judgment described as "an ostensible break with the traditional approach to the validity of particularly racially-orientated charitable testamentary bequests in South African law", it was held by Berman J at 703I–J that the clause in question was contrary to the public interest. See also Erasmus & De Waal (1989:65–66).

33 Jamneck et al. (2010:118).

34 (ibid.).

35 1950 (1) SA 539 (A) at 564–566.

36 1963 (1) SA 71 (T).

restraint on marriage was contra bonos mores. The court accordingly found the restraint to be pro non scripto.[37]

Notably, however, when a condition in a will is declared invalid, the will continues to operate. The only change is that the beneficiary inherits without the initial conditions being attached.[38]

Nonetheless, under common law, it is not considered contra bonos mores to prohibit someone who has been married before to marry again. Therefore, if a testator bequeaths something to his surviving spouse subject to the condition that she does not remarry, such a condition will be valid.[39] Hence, in *Ex Parte Gitelson*,[40] a provision in a will provided that, should the wife remarry, she would have to pay each of the four children a sum equal to one fifth of the value of the estate as at the date of the testator's death. The court held that the condition was valid, and that the applicant had to provide the relevant security should she wish to sell a farm which was part of the estate.[41]

A condition is also considered to be contra bonos mores – and, hence, pro non scripto – if the intention of the testator is to destroy an existing marriage. It should be understood, however, that the destruction of a marriage in question has to have been the testator's intention if the condition in his/her will, if applied, would result in such destruction. Thus, if the destruction of a marriage is simply incidental to the application of the condition, the condition remains valid.[42]

Conditions limiting a beneficiary's freedom of movement

The testator may provide that a beneficiary is to live in a certain place or on a certain property and the court is obliged to give effect to such provisions if they are clear and unambiguous.[43] However, such conditions cannot be vague or unfair, e.g. limiting the beneficiary's freedom of movement.

In *Ex parte Higgs: In re Estate Rangasami*,[44] the will provided that the testator's four sons would forfeit their inheritance if they chose to move out of the family home. The sons wanted to divide the property so that each of them could build his own house on it. As such, the sons and widow approached the court to declare the condition invalid. The court held that the testator's intention was

37 Jamneck et al. (2010:118).
38 (ibid.).
39 (ibid.:119).
40 1949 (2) SA 881 (O).
41 See Jamneck et al. (2010:119).
42 (ibid.).
43 (ibid.:121).
44 1969 (1) SA 56 (D).

to keep his home and family intact; thus, the court found nothing contra bonos mores in that. Furthermore, the court found that it was not impossible to carry out the terms of the condition: the sons could simply extend the house.[45]

Clearly, this case was decided nearly 40 years ago, and by no means reflects today's public aspirations – more so in light of the constitutional dispensation that has afforded privilege and respect to the fundamental rights of the individual. In this regard, cognisance should be given to Article 21 of the Constitution, which incorporates these fundamental rights and freedoms. Article 21(1)(g), for example, states that everyone has the right to "move freely throughout Namibia"; Article 21(1)(h) states that everyone has the right to "reside and settle in any part of Namibia"; while Article 21(1)(e) provides for –

> … freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties; … .

It is also obvious from case law and the gradual development of Namibian common and statutory law that, today, the courts are more inclined to lean in favour of an interpretation to wills that best reaffirm the supreme status of the constitutional rights in the country's legal system. In the words of Cameron J in the South African case *Holomisa v Argus Newspapers Ltd*, –[46]

> [t]he value whose protection most closely illuminates the constitutional scheme to which we have committed ourselves should receive appropriate protection in that process.

Maintenance from a deceased estate: Limitation on the freedom of testation

A person's minor children also have a common law claim for maintenance against his/her estate. It is trite law in South Africa – and Namibia, it should be stressed – that children, including children outside marriage[47] and adopted children, are not only able to inherit intestate, but can also claim maintenance when left destitute as a result of not being provided for in the deceased's will.[48] The maintenance and education of a testator's minor children, whether born outside marriage or not, constitute a claim against the testate estate[49] where

45 See Jamneck et al. (2010:121).

46 1996 (2) SA 588 (W) at 607D–608A.

47 In the past, children born outside marriage could only claim from their mother's estate and not their father's.

48 See LAC/Legal Assistance Centre. 2005. *Customary laws on inheritance in Namibia*. Windhoek: LAC, p 145. Where a parent has died and failed to make provision for his/her children, the court can make an order that maintenance be paid out of the deceased estate.

49 *Glazer v Glazer*, 1963 4 SA 694 (A) 706, 707; *Hoffmann v Herden*, 1982 2 SA 274 (T); *Ex parte Jacobs*, 1982 (2) SA 276 (O).

no provision has been made for a child in a will. Even though such a claim is subordinate to that of creditors,[50] it has precedence above those of heirs and legatees.[51]

The amount of the maintenance will depend on the child's maintenance needs and, if necessary, will continue until s/he attains majority. In addition, a major child who is unable to support him-/herself adequately is entitled to claim support from their deceased father's estate. The parent's duty to maintain the child extends beyond the former's natural life, which is why the child can claim maintenance from his/her late parent's estate.[52]

One of the first cases to deal with a minor after the death of a parent was *Carelse v Estate De Vries*.[53] In this case, the Supreme Court held that the duty to maintain and educate one's dependant did not cease on one's death and, therefore, not only did the payment of maintenance for children have to be paid out of the deceased estate, but that this duty extended to children born outside marriage. Furthermore, in *Shearer v Shearer's Estate*,[54] the court held that the duty to maintain and educate one's children extended to the mother's estate as well. *Lloyd v Menzies NO & Others*[55] further extended the reasoning in the two cases mentioned above. The *Lloyd* case dealt with a widow's application for maintenance for her children from their grandfather's estate. The court held that grandparents were also liable to support minor children.

In *Bydewell v Chapman*,[56] it was held that freedom of testation, based on the principle of absolute ownership, was strictly guarded under common law as a matter of public policy. Yet similarly, as a matter of public policy, freedom of testation should not override the duty of all persons to make provision for the basic needs of their dependants.[57] For this reason, countries such as South Africa, Zambia and Zimbabwe have made provision for the maintenance of the deceased's dependants in situations where a testator has not made adequate provision for their reasonable needs. Zambia and Zimbabwe, for example, allow claims of maintenance even where there is a will.[58] Namibia currently has no general maintenance scheme for dependants. *Dependants,*

50 *Lotz v Boedel van der Merwe*, 1958 (2) PHM16 (O).
51 *Ritchken's Executors v Ritchken*, 1924 WLD 17; *In re Estate Visser*, 1948 3 SA 1129 (C). See LAC (2005:145).
52 See also sections 2 and 3 of the Maintenance Act, 2003 (No. 9 of 2003) regarding child maintenance.
53 1906 23 SC 532.
54 1911 CPD 813.
55 1956 (2) SA 79 (N).
56 1953 (3) SA 514 (A) at 531.
57 LAC (2005:144).
58 (ibid.).

here, includes spouses and parents. As the law now stands, only the children of the deceased are permitted to claim maintenance from his/her estate.[59]

The major criticism advanced against the maintenance system pertains to its failure to make provision for the deceased testator's parent and siblings.[60] Hahlo[61] calls for the protection of parents and siblings in statutory law in conformity with the approach adopted under Roman–Dutch law.

Statutory limitations on the freedom of testation

There is also specific legislation that limits the testator's freedom of testation. These include the following pieces of legislation discussed below.

The Wills Act, 1953 (No. 7 of 1953)

Section 5 of the Wills Act provides that a person who attests the execution of any will or who signs a will in the presence and by direction of the testator or the person who is the spouse of such person at the time of attestation or signing of the will, or any person claiming under such person or his/her spouse, shall be incapable of taking any benefit whatsoever under that will.

Notwithstanding what the testator's wishes were, such wish would be curbed in the event that the beneficiary attested or executed the said will or signed as a witness on the will or spouse of such a person and, for these reasons, this limitation is reasonably justified.

Maintenance Act, 2003 (No. 9 of 2003)

Namibia has gone to great lengths to ensure that children are entitled to claim maintenance from their parent's estate, whether they are included in the deceased parent's will or not. Article 15 of the Constitution imposes a legal duty on parents to support their minor children, which duty also extends to major children (e.g. disabled children) in need of support throughout their lives.[62]

59 (ibid.). See the Maintenance Act, as well as *Frans v Paschke & Others*, (PI1548/2005) [2007] NAHC 49.

60 Visagie, ME. 2002. "The concept of freedom of testation and its operations in a modern day Namibia". Unpublished LLB dissertation, University of Namibia, Windhoek, p 32.

61 Hahlo, HR. 1959. "The case against freedom of testation". *South African Law Journal*, 76:435–447 at 446.

62 Visagie (2002:37).

The Maintenance Act was introduced to give full expression to the duty imposed by the said Article 15 and by common law. In terms of section 3(1)(a) of the Act, both parents of a child are liable to maintain that child regardless of whether the –

- child in question is born inside or outside the marriage of the parents
- child is born of a first, current or subsequent marriage, or
- the parents are subject to any system of customary law which does not recognise both parents' liability to maintain a child.

Section 3(3) further imputes that a parental duty to maintain a child includes the rendering of support which the child reasonably requires for his/her proper living and upbringing, and this includes the provision of food, accommodation, clothing, medical care and education. It is on this basis that dependent children are entitled to claim for maintenance from their deceased parent's estate, notwithstanding anything to the contrary contained in the testator's will or in any law.

Prior to the introduction of statutory law to cater for this deficiency, under common law, spouses whose marriages were terminated by death had no claim for maintenance against the deceased estate. This enabled persons to disinherit their spouses and families. South Africa now has the Maintenance of Surviving Spouses Act,[63] which is a statutory framework allowing for a surviving spouse to claim against his/her late spouse's estate. In Namibia, the Maintenance Act provides that husbands and wives are primarily responsible for each other's maintenance.[64] However, the Act is silent as to whether spouses can claim maintenance from each other's estates.[65] Section 26(4) of the Maintenance Act provides that a maintenance order made in favour of a spouse ceases with respect to that spouse if and when such spouse dies or remarries or, subject to the law relating to divorce, an order of divorce or a decree of nullity is made in respect of the marriage.

Section 26(5) of the same Act, on the other hand, provides that a maintenance order made in respect of a parent remains in force for as long as the parent is unable to maintain him-/herself, no other person has become liable to maintain the parent, and the child is able to support the parent.

Section 28(5) of the Maintenance Act also provides that, notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit is liable to be attached or

63 No. 27 of 1990.

64 See section 3(2)(a).

65 See *Robinson v Volks*, 2005 (5) BCLR 446 (CC), where the court held that the widow was entitled to maintenance from her spouse's estate. The court also held that the duty to maintain had to precede death, i.e. such duty had to have existed at the time of marriage and could not be imposed posthumously.

subjected to execution under a warrant of execution or an order issued or made under Chapter 7 of the Act in order to satisfy a maintenance order. According to Sigwadi,[66] Chapter 7 deals with maintenance in arrears and provides a mechanism for recovering moneys due, including through the attachment of pension fund benefits. However, Chapter 7 does not deal with securing future maintenance. In *Magewu v Zozo*,[67] the issue was whether the law allows for the attachment of pension fund benefits to secure the payment of future maintenance for a child. The court concluded that there was no logical reason why such an order should not be made to protect the interest of the child.

It is evident, then, that a child who is dependent on his/her deceased parents can claim from the parent's estate, and that the parent's duty to maintain his/her children justifies such a claim. It should, however, be noted that a person is still at liberty to decide how his/her estate should be distributed upon his/her death – unlike in the case of section 37C of the Pension Fund Act, which takes away the right of a pension member to decide how to distribute his/her pension benefits which, arguably, could be considered the pension fund member's property. Suffice it to argue that the Maintenance Act can be used as a model to do away with section 37C. Instead of annihilating the testator's right to determine the distribution of his/her pension benefits, a claim for maintenance against the deceased estate seems as a more practicable and justified way to go about things. This will ensure that a pension holder is able to decide by way of a nomination form or will how his/her pension benefits are to be distributed, but limited to claim of maintenance against it and can specify a limit to any claim of maintenance against those benefits. All in all, this system is more justified and would create some sort of equilibrium between the freedom of testation and the purported intention of section 37C.

Children's Status Act, 2006 (No. 6 of 2006)

With respect to testate inheritance, the Act does not affect testamentary freedom,[68] but provides that the terms *children* or *issue*, if appearing in a testamentary disposition, are to be interpreted as applying equally to children born outside marriage.[69] This provision is aimed at assisting courts in the interpretation of wills.

66 Sigwadi, M. 2005. "Pension-fund benefits and child maintenance: The attachment of a pension-fund benefit for purposes of securing payment of future maintenance for the child". *South African Law Journal,* 17(3):340.

67 2004 (4) SA 578 (C).

68 Section 16(4) provides that "Nothing in this section is to be understood or interpreted as affecting the freedom of testamentary disposition".

69 Section 16(2) provides that "Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by testamentary disposition, be treated in the same manner as a person born inside marriage".

The Act also provides that any child born of parents who marry each other after the child's birth is to be treated as having been born within marriage if the parents were in a position to conclude a valid marriage at the time of the child's conception.[70]

Thus, it is submitted that, on the death of either parent, a child who has not been adequately provided for under the will of such deceased parent becomes entitled to a discretionary claim for maintenance against the estate.

Subdivision of Agricultural Land Act, 1970 (No. 70 of 1970)

This Act limits a person's freedom to dispose of property as s/he please in that, if the Minister does not give consent[71] to the subdivision of a particular plot of agricultural land in accordance with a testamentary disposition or intestate succession, or to vesting of any undivided share in such land in accordance therewith, the executor of the estate concerned is empowered to sell the land or undivided shares in question, and dispose of the net sale proceeds in accordance with the said testamentary disposition.[72]

Immovable Property (Removal of Modification of Restrictions) Act, 1965 (No. 94 of 1965)

If a testator bequeaths something to a person subject to the condition that, when the testator dies or after a period of time after his/her death, the benefit will accrue to another, the first heir is the *fiduciary* and any succeeding beneficiary is a *fideicommissary*. Thus, one can nominate fideicommissaries ad infinitum for movable property.

For immovable property, the testator's freedom is limited to nominating only two fideicommissaries.[73] Thus, for immovable property, first the fiduciary would inherit, followed by the first fideicommissary and then the second fideicommissary. Even if the testator has provided for fideicommissaries ad infinitum in respect of immovable property, his/her wishes will be limited to the first two fideicommissaries.

70 Section 16(3) provides that "It must be presumed that the words 'children' or 'issue' or any similar term used in a testamentary disposition, apply equally to persons born outside marriage and children born inside marriage, unless there is clear evidence of a contrary intention on the part of the testator".

71 Section 4 deals with applying for the Minister's consent, and the imposition, enforcement or withdrawal of conditions set by the Minister.

72 Section 5(1), Subdivision of Agricultural Land Act.

73 See section 6, Immovable Property (Removal of Modification of Restrictions) Act.

Pension Fund Act, 1956 (No. 24 of 1956)

Section 37C[74] of the Act dictates that benefits payable by a pension fund are excluded from the estate of a deceased member of such a fund.

Constitutional restrictions on the freedom of testation

In another important development, human rights instruments have led to –[75]

- restrictions on freedom of testation
- the removal of succession rules which discriminate against, for instance, the child born outside marriage, and
- a reconsideration of aspects of customary succession systems.

Article 16(1) of the Constitution provides that all Namibian citizens have the right to acquire, own and dispose of immovable and movable property and to bequeath property to their heirs and legatees. Thus, no limitation is placed on the types of property that can be disposed of and, as such, the provision can be interpreted as favouring the common law concept of *testamentary freedom*.[76] The question that now arises is whether the fundamental rights in the Bill of Rights have any influence on the principle of freedom of testation.

De Waal and Schoeman-Malan[77] propose that the various limitations on freedom of testation referred to above can, in fact, be reconciled with the fundamental right set out in Article 16(1) in view of the 'limitation clause' reflected in Article 22 of the Constitution.[78] Indeed, the Constitution contains provisions that place limitations on the testator. These limitations include the following:

74 Section 37, as a limitation to freedom of succession, will be discussed later in this paper.

75 See http://www.mpipriv.de/ww/en/pub/research/research_work/foreign_law_comparative_law/person_family_inheritance/exploring_the_law_of.cfm; last accessed 16 April 2011.

76 Interpreting Article 16(1) in the strict sense would contradict the norms the Constitution sets out to promote where property disposal within the private sphere is permitted without regard to the equality clause, and the socio-economic impact this may have on vulnerable members of society, especially women and children. Children in Namibia have a right to be cared for by their parents, according to Article 15(1) of the Constitution, which also specifically recognises the plight of women due to past discrimination (Article 10, Namibian Constitution). See LAC (2005:7–8).

77 De Waal & Schoeman-Malan (2003:5).

78 Article 22 provides that fundamental rights can be limited, if so authorised, provided any law limiting such rights is of general application, does not negate the essential content of those rights, and is not aimed at a particular individual.

- Article 10 (the 'equality clause'): In terms of this Article, no person is allowed to be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.
- Article 7: No person is permitted to be derived of "personal liberty except according to procedures established by law".
- Article 14 (Family): In terms of Article 14(3), the family constitutes the natural and "fundamental group unit of society and is entitled to protection by society and the State". The Constitution contains no definition of family, but the concept of extended family is widely known in Namibia.79 Those persons who were truly dependent on the deceased testator during his/her lifetime, and who continue to display dire need for support after the testator's death, are entitled to claim maintenance against the estate.
- Article 15 (Children's Rights)
- Article 19 (Culture), and
- Article 21(c), (e) and (g): These provisions respectively guarantee individuals the right to practise any religion, freedom of association, and the freedom to move freely throughout Namibia.

To prevent the testator from requiring a beneficiary to stay in a particular place would be regarded as against public policy and in violation of Articles 7 and 21; while limiting a person because of their race, sex, faith or culture would be in violation of Articles 10, 19 and 21. Article 15, under which children have a right to be cared for by their parents, limits a testator to always consider the best interests of his/her children in the will. Accordingly, a testator could not require a beneficiary to marry a person from a certain race, faith, culture, etc. or even prevent them from marrying at all, as that would be in contravention of Article 14, which relates to one's right to family as well as guaranteeing one's right to marry without any limitation due to race, colour, ethnic origin, nationality, religion, etc.

In *Muller v President of the Republic of Namibia*,[80] in dealing with Article 10(2), Strydom CJ said that –

> … there is no room in modern Namibia to permit legislation or customary law practices or indeed any practice that overrides the constitutional protection of non-discrimination.

The Supreme Court of Appeal in South Africa, in *The Curators Ad Litem to Certain Potential Beneficiaries of the Emma Smith Educational Fund v The*

79 Hubbard, D. 2001. *Law for all. Volume 3: Family law*. Windhoek: Out of Africa Publishers, p 1. An *extended family* is one which consists of children, their parents, their grandparents, and other relatives such as aunts, uncles and cousins, all of whom live together in the same household; see Visagie (2002:34).

80 1999 NR 190 (SC).

University of KwaZulu-Natal,[81] dismissed an appeal against a judgment that set aside a racially restrictive clause limiting the beneficiaries of the Emma Smith Educational Fund to white women. The University applied to the High Court to have the racially restrictive clause removed and the residential qualification of "Durban" amended to "Ethekwini Municipality". The court accordingly held that the constitutional imperative to remove racially restrictive clauses that conflicted with public policy from the conditions of an educational trust intended to benefit prospective students in need, administered by a publicly funded educational institution such as a university, took precedence over freedom of testation – particularly given the fundamental values of the South African Constitution.[82]

The Namibian Constitution, however, does not expressly guarantee the right to inheritance. Quite commonly, in the event of a death – whether there is a will or not – inheritance can become a contentious issue. In particular, the Constitution does not cover the rights of children born outside marriage as far as inheritance is concerned, while children born within marriage depend on whether or not the deceased has died intestate.[83] In the case of *Frans v Paschke & Others*,[84] the constitutionality of the Roman (common) law rule that provides for children born outside marriage being prohibited from inheriting intestate from their fathers was challenged.[85]

The court also turned to Article 10(2) of the Constitution, which provides as follows:

> No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

The court concluded that, as far as intestate inheritance was concerned, there was indeed a differentiation between children born within and outside marriage, and that such differentiation, based on the social status of children born outside marriage, amounted to discrimination against them as being 'illegitimate'. The court ultimately held that the common law rule had become invalid and unconstitutional on 21 March 1990 and, therefore, that children

81 [2010] ZASCA 136 (1 October 2010).

82 Available at http://www.polity.org.za/article/curators-ad-litem-to-certain-potential-beneficiaries-of-emma-smith-educational-fund-v-the-university-of-kwazulu-natal-and-others-51009-2010-zasca-136-2010-10-01; last accessed 16 June 2011.

83 Ambunda, LN & WT Mugadza. 2009. "The protection of children's rights in Namibia: Law and policy". In Ruppel, OC (Ed). *Children's rights in Namibia*. Windhoek: Macmillan Education Namibia, pp 5–51 at 23.

84 (PI1548/2005) [2007] NAHC 49 (11 July 2007). Judgment by Heathcote AJ and Judge President Damaseb.

85 Available at http://www.saflii.org/na/cases/NAHC/2007/49.html; last accessed 29 February 2012.

born outside marriage could inherit from their parents despite their status in society.[86]

By parity of reasoning, statutory law, and the cases discussed above, it is argued that a child has the right inherit or at least claim for maintenance from his/her parent's estate, whether or not there is a will excluding such a child.

It follows that provisions in contravention of the above Articles would in all likelihood be deemed to be against public policy and the boni mores and, therefore, invalid.

Contractual limitations on the freedom of testation

De Waal and Schoeman-Malan[87] state that a contract in terms of which the parties attempt to arrange for the disposal of the whole or part of the assets of one or both parties, a so-called pactum successorium[88] or pactum de succedendo[89] is, thus, in principle invalid, being contra bonos mores.

An agreement by the testator not to revoke his/her will is invalid, therefore. Any agreement in terms of which the contracting parties purport to regulate the devolution (successio) of the estate or part of the estate of one or both parties after the death of such a party is, therefore, an invalid pactum successorium (pactum de succedendo).[90]

A pactum successorium is invalid whether it relates to the whole inheritance or to particular property. The objectionable features of the pactum successorium are, firstly, that it restricts a person's right to free testation and, secondly, that succession by contract amounts to an evasion of the formalities necessary for the execution of a valid will.[91] Whether an agreement is a binding contract

86 Ambunda & Mugadza (2009:23).

87 De Waal & Schoeman-Malan (1996:4).

88 Such a contract places an unacceptable limitation on the principle of freedom of testation; thus, it not only limits the person's freedom to dispose of his/her assets at will, but also – and especially – restricts his/her power to revoke or alter testamentary provisions before death.

89 This is a contract in terms of which a person contracts to renounce his/her hope or expectation (spes) of inheriting from another. See De Waal & Schoeman-Malan (1996:157).

90 Erasmus, HJ & MJ de Waal. 1989. *The South African law of succession*. Durban: Butterworths, p 124. See also *Van Aardt v Van Aardt*, 2007 (1) SA 53 (E) at 55C–D, where Jones J defined pactum successorium as an agreement which purports to limit a contracting party's freedom of testation by irrevocably binding him/her to post-mortem devolution of the right to an asset in his/her estate.

91 De Waal & Schoeman-Malan (1996:155).

or an invalid pactum successorium depends upon the construction of the agreement in issue.[92]

Jamneck et al.[93] propose an interesting notion, namely that, by placing a prohibition on the pactum successorium, another freedom is encroached upon, i.e. freedom of contract. As a result of this notion, the question arises as to whether it is defensible to protect one freedom, namely freedom of testation, at the expense of another, namely freedom of contract. Jamneck et al.[94] argue that a person should be free to decide which one of the two freedoms comes first. Therefore, it suffices to concur with Jamneck et al.[95] that preventing a testator from exercising his/her freedom of contract by way of placing a prohibition on a pactum successorium seems to be an anachronism.

Analysis of section 37C

Pension funds are formed and administered in terms of the Pension Funds Act.

Pension Funds are regulated by the Namibia Financial Institutions Supervisory Authority (NAMFISA)[96] under the Pension Funds Act, and the approved rules of a particular fund. Each pension fund has its own rules that regulate the procedures adopted in the disposition of pension benefits. Common pension funds found in Namibia are the GIPF, Mutual & Federal Pension Fund, and Alexander Forbes Pension Fund – to mention but a few. Each of these funds has its own board of trustees. Pension funds are required to have a board of trustees that consists of persons elected by fund members (in terms of the pension fund rules) and appointed by employers. The trustees' duty is to protect the interest of the members in all actions they perform on behalf of the fund concerned.[97] This requires trustees to act with care, competence

92 Erasmus & De Waal (1989:124). A donatio mortis causa and a testamentary provision in an antenuptial contract are not regarded as invalid forms of pactum successorium. A donatio mortis causa is a donation made in contemplation of the death of the donor. See De Waal & Schoeman-Malan (1996:156–157).

93 Jamneck et al. (2010:227).

94 (ibid.:277–228).

95 (ibid.:288).

96 The institution is created under the Namibia Financial Institutions Supervisory Authority Act, 2001 (No. 3 of 2001). NAMFISA regulates and supervises pension funds.

97 NAMFISA/Namibia Financial Institutions Supervisory Authority. 2010. *Regulation of pension funds and their service providers*. Available at http://www.inamibia.co.na/news-and-weather/13-business/1862-regulation-of-pension-funds-and-their-service-providers.pdf; last accessed 25 October 2011. This duty is what is referred to as *fiduciary duty*, which is a legal obligation on trustees stemming from common law.

and diligence, amongst other things, failing which the trustees could be held personally liable.[98]

Section 37C of the Pension Funds Act deals with the disposition of pension benefits after a pension fund member dies. The pith and marrow of section 37C is that benefits payable after the death of a fund member do not form part of that deceased member's estate, but are to be distributed in terms of section 37C.

This part of the discussion will examine the complexities surrounding the interpretation and application of section 37C, as well as the rationale behind the introduction of section 37C and the reason why it has survived the new constitutional dispensation.

Understanding section 37C

Manamela[99] depicts that section 37C establishes a compulsory scheme in terms of which death benefits payable after the death of a pension fund member have to be distributed to the deceased's dependants. The section expressly restricts the deceased member's freedom of testation in respect of the death benefits payable under a pension fund in that such benefits cannot form part of the testator's estate.[100]

Notably, section 37C has been the subject of much consternation among potential beneficiaries. Dooka-Rampedi[101] postulates that the Pension Funds Adjudicator has had occasion to determine many such disputes over the years. These disputes have also been the subject of litigation before the High Courts.

The purpose of these disputes, arguably, is premised on the notion that section 37C gives the pension fund trustees discretionary powers to distribute death benefits in terms of what they deem equitable. According to Morris,[102]

98 (ibid.).

99 Manamela, T. 2005. "Chasing away the ghost in death benefits: A closer look at section 37C of the Pension Fund Act". *South African Mercantile Law Journal*, 1(3):277.

100 (ibid.). See also *Mashazi v African Products Retirement Benefit Provident Fund & Another*, 2003 (1) SA 629 (W) at 632H–633A; *Kaplan & Another NNO v Professional and Executive Retirement Fund & Others*; *Kaplan & Another NNO v VIP Retirement Annuity Fund & Others*, 1998 (4) SA 1234 (W) at I237E–F.

101 Dooka-Rampedi, T. 2010. "Sharing the death benefit pie equitably". Available at http://www.cover.co.za/retirement/sharing-the-death-benefit-pie-equitably; last accessed 16 April 2011.

102 Morris, D. 2006. "Section 37C of the Pension Funds Act". Available at http://mclarens.co.za/?p=178; last accessed 16 April 2011.

section 37C is fraught with great difficulty, and is to be carefully followed by the trustees.

Section 37C imposes three duties on the board of a pension fund:[103]

- To identify the dependants and nominees of the deceased: In some instances, it has proved difficult for trustees to determine who does and who does not qualify as a dependant, and for those that qualify, the order in which they should benefit
- To effect a distribution amongst the said beneficiaries, and104
- To determine an appropriate mode of payment.

Very often, those who have been nominated on the relevant pension fund form –[105]

> … think that they are the only beneficiaries of the deceased's death benefits and that nobody else should receive anything; they think that they are automatically entitled to that particular percentage of benefit allocated to them by the deceased member.

As a result of these and other problems, a large number of complaints are brought to the Pension Funds Adjudicator to challenge decisions made by various pension fund boards.[106] The research done for this paper shows that, in Namibia, no cases have been brought before the Pension Funds Adjudicator since the Pension Funds Act does not provide for such an office.

It is evident that section 37C grants the trustees a 12-month period from the death of the member to search for his/her dependants. This needs to be done despite the existence of a nominated beneficiary.

Although the pension fund trustees are granted discretionary powers in awarding a member's death benefits, the overriding consideration is equity in their distribution.[107] The trustees not only need to execute distribution to the beneficiary nominated in the policy or to the dependants they find, but are also obliged to exercise the discretion provided to them by section 37C in doing so. The beneficiary nomination acts as a guideline to the trustees as to the

103 Dooka-Rampedi (2010).

104 Here, the trustees have to consider the 12-month period stipulated in the section. Should the trustees fail to act timeously and without good reason, it might place the fund in mora and even render it liable to pay interest. See Manamela (2005:278).

105 (ibid.).

106 (ibid.).

107 Pillay, D. 2010. "Death benefits and section 37C". Available at http://www.sanlam.co.za/wps/wcm/connect/7e5ca60042cf6c229311ff203ecafd9d/Legal%2BMatters%2B-%2BSection%2B37C%2B-%2BMay%2B2010.pdf?MOD=AJPERES; last accessed 21 July 2011.

member's wishes, but in no way diminishes their responsibility in determining who should receive the death benefit.[108]

The trustees' discretionary powers

A pension fund's board of trustees is established by statute. Thus, they are considered to be an administrative body. Being such a body, the board has to act fairly and reasonably when exercising the discretion conferred on it by section 37C of the Pension Funds Act. The board is also obliged to comply with all common law and statutory requirements, particularly section 37C. Manamela[109] points out that the board is not permitted to exceed or unduly fetter the exercise of their discretionary power. For example, a decision by such a board which is unreasonable will either constitute an improper exercise of power or amount to maladministration.[110]

In addition, all board actions are subject to an administrative type of review.[111] In terms of Article 18 of the Constitution, everyone has the right to administrative action that is lawful, reasonable and procedurally fair; the same values in its decision-making are expected from the board of a pension fund.[112]

In effecting an equitable distribution, the board is obliged to take into account the following factors, as developed over the years by the Pension Funds Adjudicator:[113]

- The wishes of the deceased, as expressed in the beneficiary nomination form or in other testamentary writing
- The financial status of each beneficiary
- The future earning capacity of each beneficiary and his/her employment prospects
- The extent of each beneficiary's dependency
- The ages of the beneficiaries
- Each beneficiary's relationship with the deceased, and
- The amount available for distribution.

When allocating death benefits in accordance with section 37C, therefore, there is a greater onus on trustees to communicate with potential beneficiaries,

108 (ibid.).
109 Manamela (2005:279).
110 (ibid.).
111 (ibid.).
112 (ibid.:280).
113 Marx, GL & K Hanekom. 2002. *The Manual on South African Retirement Funds Benefits and Other Employee Benefits*, Vol. 1. Durban: Butterworths, pp 179–180. See also *Mtshayi v Liberty Life*, PFA/WE/3731/01SA in paragraph 24 at 10.

to disclose the criteria in terms of which an allocation is being made, and to give reasons for their determinations.[114]

Dependants under the Pension Funds Act

As indicated earlier, in terms of section 37C, the board of trustees may also consider dependants when it comes to distributing a pension fund member's death benefit. However, it has proved to be quite difficult for trustees to determine who does and who does not qualify as a dependant in terms of the Act.[115] A dependant is defined in section 1 therein as follows:

> '[D]ependant', in relation to a member, means –
> (a) a person in respect of whom the member is legally liable for maintenance;
> (b) a person in respect of whom the member is not legally liable for maintenance, if such person –
> (i) was, in the opinion of the person managing the business of the fund, upon the death of the member in fact dependent on the member for maintenance;
> (ii) is the spouse of the member, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion;
> (iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child; [and]
> (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.

Generally, a *dependant* is someone whom a member is legally (in the case of a de-iure dependant) or factually (in the case of a de-facto dependant) liable to maintain, or whom the member would in future have become legally liable to maintain.[116] It is clear from the above-cited definition of *dependant* that spouses, children, and parents of the deceased member all qualify as dependants and are eligible for a benefit. These are as follows:[117]

- Spouses, including those married in accordance with African customary law, are dependants in terms of section 1(b)(ii)
- Biological children qualify in terms of section l(a)
- Step-children are covered in section l(b)(i)
- Parents are covered in terms of both section 1(a) and 1(b)(i)

114 (ibid.:190B).
115 Manamela (2005:280).
116 (ibid.:281). See also *Welens v Unsgaard Pension Fund*, (2002) 12 BPLR 4214 (PFA), where a mother, who was not a dependant at the time of a member's death, was considered a dependant for a future date.
117 Manamela (2005:280).

- Live-in girlfriends or boyfriends qualify as dependants in terms of section 1(b)(i) if it can be proved that they depended on the deceased member for support, and
- People who live together in a same-sex relationship qualify in terms of section 1(b)(i) and fall into the category factual dependants.118

The trustees are required to establish who the persons are who were dependent on the deceased member. The trustees would also have to investigate the existence of dependant/s and do everything in their power to trace dependants.

From the provisions in section 37C, the order of priority in which dependants should benefit is not clear. Also, the definition of *dependant* is too broad.[119] For this reason, trustees need to take into account whatever extraordinary circumstances may exist at the time of the member's death in respect of his/her existing and potential dependants.[120] Once all dependants have been traced, their needs have to be determined. These would be indicated by the income already available to them, their living expenses, the costs or charges they incur every month, any recurrent expenses, and so on. Once these needs have been established, the trustees make the necessary awards either to the dependants directly or to a trust established on behalf of minor dependants.[121]

The investigation is a factual one and the trustees are required to conduct their investigations as thoroughly as possible, taking all surrounding factors and circumstances into account. The wishes or otherwise of the deceased, and the nomination of beneficiaries which s/he has made, can all largely be ignored for this first part of the enquiry.[122]

Finally, according to Manamela,[123] once the maintenance needs have been met or no longer exist, or it has been established that there are no such needs, freedom of testation becomes the determining factor in respect of distributing a deceased member's pension fund benefits.

Distribution to dependants

Where the deceased member has failed to nominate a beneficiary, but is, however, survived by dependants known to or traced by the pension fund, the board of trustees rely on section 37C(1), which requires the board to pay

118 (ibid.:281).
119 (ibid.:283).
120 (ibid.).
121 Morris (2006).
122 (ibid.).
123 Manamela (2005:283).

the benefit to the dependants in such proportions as deemed equitable.[124] Manamela[125] purports that a cardinal question in this section is whether the board is obliged to take a decision within the stipulated 12-month period, or whether it is required to wait 12 months before effecting a distribution.

In *Dobie v National Technikon Retirement Pension Fund*,[126] it was held that a purposive and contextual reading of section 37C as a whole indicated that the phrase *within 12 months of the death of a member* did not refer to the period within which payment was to be made: the provision did not prevent a distribution within 12 months, nor did it compel a distribution after the lapsing of 12 months. Indeed, whether the pension fund acts in accordance with section 37C(1)(a) cannot be determined exclusively with reference to a time frame. The crucial question in law will always be whether a board has taken all reasonable steps to comply with its duty to trace dependants. Such reasonable steps need not necessarily be limited to a time frame of 12 months.[127]

Distribution exclusively to nominees

Section 37C(1)(b) dictates that, where a deceased member has designated to the fund a nominee in writing who is not a dependant and the board has not become aware of or traced a dependant within the 12-month period, the board is obliged to distribute the benefit to that nominee on the expiry of 12 months, unless the aggregate amount of the debts in the member's estate exceeds the aggregate amount of its assets.[128] Unlike the situation in section 37C(1)(a), in section 37C(1)(b), the time frame clearly qualifies the duty to pay.[129]

Distribution to dependants and nominees

Section 37C(1)(bA) requires payment to be made within 12 months of the deceased member's death where the member has dependants and has designated a nominee, and that such distribution should be as the board deems equitable.[130]

124 (ibid.:285).
125 (ibid.).
126 PFA/KZN/207/99.
127 Available at http://www.pfa.org.za/sitesmart/uploads/files/A7012A55-EC86-475A-935B-97DB96342AA4.pdf; last accessed 16 August 2011.
128 Manamela (2005:285).
129 (ibid.).
130 (ibid.:286).

Distribution to the estate and a nominee

There are only two scenarios in which a death benefit is permitted to be paid into a deceased estate in terms of section 37C, namely –[131]

- where the deceased has no dependants and has not nominated a beneficiary: In this case, the benefit accrues to the estate in terms of section 37C(1)(c), and
- where the fund has not discovered any dependants within 12 months after the pension fund member's death, where there is a nominated beneficiary, and where the deceased estate's liabilities exceed its assets: In this case, the fund has to pay an amount into the estate equalling the difference between the liabilities and assets, but subject to the amount of the death benefit (section 37C(1)(b)).

As is the case with section 37C(1)(a), subsection (1)(c) does not stipulate a time for performance, nor does it require the board to make any decision at all. Where no dependants are found within 12 months, but the deceased has nominated someone to receive a portion of the benefit, the board is obliged to distribute the benefit between the nominee and the estate, accordingly.[132]

Grievance procedure

In Namibia, every pension fund has its own rules and procedures that relate to the specific fund concerned. The board of trustees, the members, their beneficiaries, and/or nominees of the fund are all obliged to follow these rules and procedures. Thus, a person aggrieved by a decision taken by the trustees of a pension fund should follow the grievance procedure set out in the rules and procedures of the given pension fund. After South Africa amended its Pension Fund Act, such an aggrieved person is allowed to lodge a complaint with the Pension Funds Adjudicator in terms of Chapter VA of the Pension Funds Act.[133] In terms of section 30K therein, legal representation for the aggrieved person is explicitly prohibited unless permitted by the Adjudicator.[134] The main object of the Adjudicator is to dispose of complaints in a procedurally fair, economic and expeditious manner.[135] Section 30O of South Africa's Pension Funds Act provides that the Adjudicator's determination is deemed to be a civil judgment of any court of law, and is binding and directly enforceable by the sheriff of the court which would otherwise have jurisdiction, or by the sheriff of a High Court.

131 Available at http://www.pfa.org.za/sitesmart/uploads/files/A7012A55-EC86-475A-935B-97DB96342AA4.pdf; last accessed 16 August 2011.

132 Manamela (2005:287).

133 Section 30A(3) of South Africa's Pension Funds Act, 1956 (No. 24 of 1956), as amended.

134 See Manamela (2005:280).

135 Section 30D of South Africa's Pension Funds Act, as amended.

Access to court is provided for by section 30P of South Africa's Pension Funds Act, in that any party which is aggrieved by the Adjudicator's determination can, within six weeks after the date of such determination, apply to a Division of the Supreme Court which has jurisdiction for relief.[136]

The common procedure, as set out by various pension funds such as the GIPF and Mutual & Federal, provides as follows:

- A person aggrieved should first write a letter of complaint to the Principal Officer[137] of the pension fund and request his/her to review the decision of the board of trustees
- In the event that the above approach is futile, the aggrieved person can refer the matter for internal arbitration, as provided for by the fund rules[138]
- If the outcome of the arbitration is adverse, the aggrieved person can approach NAMFISA to review and investigate the board of trustees' decision, and
- Should the aggrieved not be satisfied with NAMFISA's decision, s/he is entitled to approach the High Court of Namibia for redress.

It suffices here to point out that the South African grievance procedure is much more flexible and accessible than its counterpart in Namibia. It is proposed, therefore, that Namibia should adopt the grievance procedure applicable in South Africa. As is evident, the legislative base comprised of the Pension Funds Act and other legislation dealing with financial institutions is no longer adequate for dealing with contemporary practices. Hence, NAMFISA has been redrafting the various financial services laws it uses to regulate and supervise the range of financial institutions within its regulatory ambit. The draft legislation, entitled the *Financial Institutions and Markets Bill* (FIM Bill), is intended to cover regulatory gaps that have originated from the aforementioned

136 Section 30P of South Africa's Pension Funds Act, as amended. See also Manamela (2005:280).

137 Section 8(1) of the Act provides that every fund is required to have a principal executive officer.

138 The arbitrator is required to be appointed by mutual agreement between the parties, and has to be someone with the necessary experience and expertise in the field of pension funds and related matters, and, particularly, expertise in matters of a similar nature to those in dispute. Should the parties be unable to agree on an arbitrator, the Registrar can be requested to designate one for a GIPF dispute. See GIPF. "Rules and procedures". Available at http://www.gipf.com.na/fund_rules/index.php#; last accessed 18 October 2011. Mr Dieter Schrywer, Chief Compliance Officer for Social Security, stated during an interview conducted on 25 October 2011 that the arbitration process was rarely used when a dispute arose, and that aggrieved persons opted to approach NAMFISA directly.

developments in the industry as well as give NAMFISA broader powers in respect of dealing with non-compliance when it comes to the law.[139]

The new legislation is also specifically designed to be flexible, thus enabling the regulator to react timeously to new developments in the market.[140] Under the proposed Act, NAMFISA will be empowered to remove trustees who do not meet the "fit and proper" criterion. Furthermore, service providers such as administrators will have to register with NAMFISA and become regulated entities that comply with the code of conduct relevant to them.[141] It is proposed, therefore, that the new FIM Act should create a Pension Funds Administrator – similar to the office created by virtue of amendments to South Africa's Pension Funds Act – in order to dispose of complaints in a procedurally fair, economical and expeditious manner.

Case studies illustrating the Adjudicator's jurisdiction in action

Jacobs NO v Central Retirement Annuity Fund & Another[142]

In the *Jacobs* case, the executor (complainant) requested the fund to pay its member's death benefit into the deceased estate, which proceeds the executor undertook to deal with in the liquidation and distribution account. The pension fund refused to do so. The fund argued that it first had to conduct an investigation in respect of the deceased's dependants. Once this investigation was completed, it would effect an equitable distribution amongst the dependants in terms of section 37C of the Act. There was a subsequent exchange of correspondence between the parties, wherein each maintained its respective position. The Adjudicator, John Murphy, eventually ruled that the pension benefit was to be distributed by the board of trustees and was not to be paid into the deceased estate.[143]

It is clear from the ruling in this case that pension fund benefits do not form part of the deceased estate, but will be distributed by the board of trustees at their discretion.

139 NAMFISA (2010).
140 (ibid.).
141 (ibid.).
142 PFA/WE/280/98/NJ, unreported. Available at http://www.pfa.org.za/sitesmart/uploads/files/A7012A55-EC86-475A-935B-97DB96342AA4.pdf; last accessed 16 August 2011.
143 (ibid.).

Kowa v Corporate Selection Retirement Fund[144]

The complainant in this matter was the mother of a deceased man who passed away in 2005. Upon his death, a total lump sum death benefit of R62,158.47[145] became available for distribution. The board, after completing its investigation regarding the circle of beneficiaries, decided to pay the complainant an amount of R3,000.00 although she had been nominated as the sole beneficiary by the deceased. The board's investigation established that the complainant had been nominated prior to the birth of the deceased member's son. Thus, the balance was placed in a trust for the benefit of the deceased's minor child, Kabelo Justice Kowa which subsequently prompted the complainant to lodge a complaint with the Office of the Pension Funds Adjudicator (OPFA) in terms of section 30A of South Africa's Pension Funds Act, as amended.[146]

The complainant contended that she was the sole beneficiary of the pension benefit, based on the fact that she was the sole beneficiary in terms of the deceased's nomination form.[147]

In resolving this complaint, the Adjudicator held that the complainant could not claim that she was entitled to receive the whole amount of the death benefit merely on the grounds that the deceased had nominated her to receive 100% of his benefit. The deceased's son qualified as a dependant in terms of section 37C. The Adjudicator reaffirmed the Board's decision, therefore.[148]

Matlakane v Royal Paraffin Provident Fund[149]

In the complaint between *Matlakane v Royal Paraffin Provident Fund*, the complainant lodged an appeal to the OPFA in terms of section 30A(3) of the Pension Funds Act. The complaint related to the payment of a death benefit in terms of section 37C(1)(a) therein.

The facts of the case are briefly as follows: On 30 March 2000, Mr Matlakane, i.e. the complainant's husband, passed away. Upon his death, a pre-tax lump sum of R85,201.80 payable by the fund became available for distribution. The fund first conducted the required investigation to determine the circle of beneficiaries, and then effected an equitable distribution amongst them. During the investigation, it emerged that the deceased was survived not only

144 PFA/GA/14151/2007/SM, unreported.
145 1 South African Rand = 1 Namibia Dollar.
146 Available at http://www.saflii.org/za/journals/PEP/2009/10.html; last accessed 16 August 2011.
147 (ibid.).
148 (ibid.).
149 PFA/GA/3426/01/NJ; available at http://ftp.fsb.co.za/public/pfa/Matla.pdf; last accessed 22 May 2011.

by his spouse, the complainant, but also by his mother, Ms Martha Moshwane Matlakane, who was born on 7 January 1911. The deceased had fathered no children during his lifetime. It also emerged that the deceased was his family's breadwinner, and had supported and cared for his elderly mother. Immediately prior to his death, he had been living with his mother and sister. Based on the above evidence, the fund decided to award 50% (R42,690.00) of the benefit to the complainant and 50% (R42,690.00) to the deceased's mother.[150]

The complainant submitted that she was dissatisfied with the relevant board's decision. She contended that she had been married in community of property to the deceased during his lifetime, and had been nominated as the representative of his estate. She believed that, for this reason and because there were no other nominated beneficiaries, she alone was entitled to the entire lump sum. Accordingly, she sought an order directing the fund to award her the entire benefit to the exclusion of Ms MM Matlakane.[151]

As a result of this dispute and the complaint lodged with the OPFA, the fund did not effect payment of the benefit. It was contended that, by virtue of Ms MM Matlakane's age and her need for financial assistance, a portion of the benefit had to be awarded to her.

The Pension Funds Adjudicator held that simply because the complainant had been married in community of property to the deceased and had been nominated as the representative of his estate did not in law entitle her to receive the death benefit ipso facto. In terms of section 37C(1)(a), a board of trustees is required to effect an equitable distribution amongst all the dependants of the deceased. In exercising this discretion, the board needs to consider relevant factors such as the various dependants' ages, the wishes of the deceased, the relationship between the deceased and his/her dependants, the financial status of each dependant, and the future earning capacity or potential of each dependant.[152]

Accordingly, the Adjudicator was satisfied that the board had considered all relevant factors and had discarded irrelevant considerations. Furthermore, it had not fettered its discretion, nor did its decision reveal an improper purpose. Its decision was, therefore, reaffirmed.

The great debate: Section 37C v Freedom of testation

In terms of the law of succession, a person may either die *testate* or *intestate*. The former relates to where a person has left a valid will upon his/her death; in

150 (ibid.).
151 (ibid.).
152 (ibid.).

terms of the latter, a person dies without a will. Once a person dies, an executor is appointed to administer the estate.[153] Freedom of testation dictates that the contents of a will are primarily left to the individual testator's discretion. The reason for this is that South African law – which was taken over by Namibia upon Independence – placed a high premium on the principle of freedom of testation.[154] However, this freedom is not absolute: a testator's wishes will be carried out as stipulated except in as far as a particular provision is illegal, immoral, against public policy, vague, or impossible to enforce.[155]

Freedom of testation may also, in certain respects, be limited by constitutional law, common law or statutes, on both economic and social grounds.[156]

Section 37C is one of the statutory laws which overrides the freedom of testation in that the benefits payable by a pension fund in the event of death of a pension fund member, do not form part of the deceased's estate and gives the discretionary powers to distribute such benefits to the board of trustees in proportions deemed equitable by the board.[157] The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion.[158] Ultimately section 37C which gives preference to need and dependency above the pension fund member's choice.[159]

Section 37C is an example of how freedom of testation can be limited on social grounds.[160] Not only does this section take away a person's freedom of testation in respect of deciding what to do with his/her pension benefit, it also dictates that such pension benefits do not form part of the pension fund member's estate. This totally flies in the face of freedom of testation, and practically renders a pension member's wishes wanton.

Unlike the other statutory limitations on freedom of testation discussed earlier herein, section 37C is virtually the only instance where, ironically, although a person's freedom is not limited, in effect no freedom exists at all.

153 Hahlo (1959:435).
154 Manamela (2005:290).
155 (ibid.). See also De Waal & Schoeman-Malan (1996:2–3).
156 Manamela (2005:291).
157 Mhango, MO. 2010. "What should the board of management of a pension fund consider when dealing with death claims involving surviving cohabitants? ". *Potchefstroom Electronic Law Journal*,13(2). Available at http://www.saflii.org/za/journals/PER/2010/15.html; last accessed 16 August 2011.
158 *Mashazi v African Products Retirement Benefit Provident Fund*, 2003 (1 SA) 629 (W) at 632–633. See also Manamela (2005:291).
159 Mhango (2010).
160 Manamela (2005:279–291).

Freedom of testation connotes that a person may exclude a family member from his/her estate where such family member should be chastised for poor behaviour or for unworthiness. Not all dependants are worthy of benefiting from a person's estate – and the same should go for pension benefits. Trustees do not normally exercise their discretion fairly, which renders their decision unjust – as in the case of Mrs Gariseb, referred to at the beginning of this paper.

Justification of section 37C

Section 37C is seen as a type of social security measure, in that it places the benefit payable on a member's death under the control of the fund to be paid to the member's dependants in such proportions as the fund deems equitable.[161]

In *Mashazi v African Products Retirement Benefit Provident Fund & Another*,[162] the court per Hussain J states the following:[163]

> Section 37C of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. Section 37(c)(1) [sic] specifically excludes the benefit from the assets in the estate of a member. Section 37(c) [sic] enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors. The fund is expressly not bound by a will, nor is it bound by the nomination form. The contents of the nomination form are therefore merely as a guide to the trustees in the exercise of their discretion.

However, in South Africa, section 7(7) of the Divorce Act[164] (as amended) provides that, in the determination of the patrimonial [sic] benefits to which the parties in any divorce action may be entitled, such parties' pension benefits are deemed to be part of their respective assets.[165] Thus, in *Eskom Pension and Provident Fund v Krugel*,[166] it was held that, in any divorce action, a party's pension benefits also form part of his/her estate when the patrimonial benefits to which the party in such action are determined.

161 Dooka-Rampedi (2010).

162 2003 (1) SA 629 (W).

163 (ibid.:632H–633A); available at http://ftp.fsb.co.za/public/pfa/Matla.pdf; last accessed 22 May 2011.

164 No. 7 of 1989. This Act does not apply in Namibia. However, section 37C of the Pension Funds Act does. Thus, the Divorce Act can be used as persuasive authority to level criticism against section 37C.

165 Available at http://edivorce.co.za/blogs/index.php/Divorce-Attorney-Cape-Town-Blog/family-law/divorce/divorce-and-pension-funds-in-south-africa; last accessed 16 August 2011.

166 (689/10) [2011] ZASCA 96.

It is quite interesting how pension benefits can sometimes form part of a person's estate, and then at others be excluded. This obviously indicates that there are certain exceptions to section 37C of the Act, under which a pension fund benefit is deemed to be part of a fund member's deceased estate.

Section 37C ensures that dependency overrides the clear wishes of the deceased.[167] Manamela notes that section 37C is intended to protect pension benefits from the imprudence of pension fund members by restricting their capacity to dispose of such benefits upon their death.[168] The section is seen as a social security measure since it places the benefit payable on a member's death under the control of the fund, which is obliged by law to pay the benefit to the member's dependants in such proportions as it deems equitable.[169]

In addition Mhango[170] argues that the policy underlying this social security measure is to ensure that the monies in respect of which the state allows major tax concessions should, in theory, be applied towards the benefit of the deceased member's surviving spouse, children and other dependants, thereby reducing the state's liability and promoting social protection.

Mhango's argument is problematic, however. For the state to shrug its shoulders is simply another way in which it fails to perform its duty to actively contribute towards the social welfare of Namibian citizens. However, this social security measure, as provided for in section 37C, could arguably be read in line with Article 95 of the Constitution, which provides that the state should put policies in place to enhance the social welfare of Namibians.

The main purpose of social security is to alleviate poverty and ensure that all citizens are provided for in respect of their basic needs.[171] In its role of strengthening such social security, section 37C endeavours to ensure that no one in the circle of beneficiaries who was dependent on the deceased pension fund member is left destitute by his/her death. Section 37C achieves this by providing how benefits should be allocated.[172]

Moreover, Manamela[173] depicts that section 37C is in line with the Constitution on the issues of equality[174] and human dignity,[175] because it sees to all the interests of dependants of a deceased member without discriminating among

167 Manamela (2005:279).
168 (ibid.:278).
169 (ibid.:278–279).
170 Mhango (2010); see also Manamela (2005:279).
171 Dooka-Rampedi (2010).
172 (ibid.).
173 Manamela (2005:279).
174 Article 10, Namibian Constitution.
175 Article 8, Namibian Constitution.

them on impermissible grounds.[176] The section in question can also be seen as a measure that enforces the right of dependants to support, in tandem with the common law duty that rests on certain people to support others, e.g. the duty of support existing between parents and their children. Moreover, the said section strengthens the power of courts to grant maintenance orders in favour of certain individuals, for example, divorced spouses and children born outside marriage.[177]

Death benefits as property

The cardinal issue that begs consideration is whether death benefits are a form of property and, if they are, whether the limitation brought about by section 37C on the right to property is reasonable and of general application in terms of Article 22 of the Namibian Constitution.[178]

Although Article 16 only refer to movable and immovable property, *property*, in Article 16, can be interpreted to include both real rights, e.g. ownership of property, servitudes, and mortgages; and personal rights, e.g. one's right to a salary, to the proceeds of a life insurance policy, and to other forms of contractual performance.[179] According to Manamela,[180] a pension benefit qualifies as a type of property and is, therefore, protected under Article 16.

In respect of the call for a purposive interpretation of the Namibian Constitution by the courts, it is evident that the Article includes a guarantee to the right of private ownership, which would include not only the right to hold property in ownership, but also the right to dispose of such property both during life and upon death. As such, any guarantee of private ownership is closely linked with the principle of freedom of testation.[181]

However, Article 21(2) of The Namibian Constitution specifically provides for a general restriction on freedoms only as far as they are exercised "subject to the law of Namibia".[182] Moreover, Article 22 (the 'limitation clause') restricts a

176 South African and, of course, Namibian courts have consistently held that there is a close correlation between the right to equality and the right to dignity. In this regard, see generally *Larbi-Odam v Member of the Executive Council of Education (North-West Province) & the Minister of Education*, 1998 (I) SA 745 (CC); and *Government of the Republic of South Africa & Others v Grootboom*, 2001 (1) S A 46 (CC). See Manamela (2005:279).

177 See sections 2, 3 and 4, Maintenance Act; see also Manamela (2005:279).

178 Manamela (2005:291).

179 (ibid.). See how property is dealt with under section 25(1) of the Constitution of the Republic of South Africa of 1994.

180 Manamela (2005:291).

181 (ibid.).

182 Naldi, GJ. 1995. *Constitutional rights in Namibia: A comparative analysis with*

person's freedom of testation, provided that such restriction is authorised by law, of general application, and not limited to a particular individual. It is clear, therefore, that the guarantees contained in Article 16 are not absolute, i.e. they can be limited.[183]

The law of general application in question is also obliged to serve a constitutionally acceptable purpose, and there has to be sufficient proportionality between the harm done by the law and the benefit it is designed to achieve.[184] The harm done by section 37C is that a person's freedom to decide over his/her death benefits is not absolute, and, as such, is limited in accordance with the provisions of Article 22 of the Constitution on the basis that provision has to be made for social security benefits to society at large, and in an attempt to alleviate poverty.

The legal issue of Mrs Gariseb

Having regard to the above discussions, one could now turn to the issue of Mrs Gariseb referred to at the beginning of this paper. It is common cause that Mrs Gariseb was the only nominee listed by her son, as well as the only beneficiary in her son's will in respect of acquiring his pension benefits upon his death. From the foregoing discussions, it is now clear that the pension benefit does not form part of her late son's estate and, thus, cannot be paid into such estate, as per the judgment in *Jacobs NO v Central Retirement Annuity Fund & Another.*

It is also clear that, notwithstanding the fact that Mrs Gariseb was the only nominee listed, her mere sole nomination does not automatically imply that she alone will receive her deceased son's full pension benefit. It is at the GIPF Board of Trustees' discretion to distribute the pension benefit in accordance with section 37C as they see fit. In exercising their discretion, the Board needs to consider numerous relevant factors, such as whether the deceased member had other dependants, what their ages are, what the deceased's wishes were, the relationship between the deceased and such dependants, the financial status of each dependant, and the future earning capacity/potential of each dependant.

Thus, the Board of Trustees are obliged to investigate who the dependants of the deceased former member of its fund are. By virtue of section 37C(1)(a) and (b)(i) of the Pension Fund Act, the parents of a deceased member are considered to be his/her dependants. The Board will now need to conduct an investigation in order to determine whether the deceased was liable to legally

international human rights. Cape Town: Juta & Co, Ltd, p 31.

183 Article 22, Namibian Constitution.

184 Manamela (2005:292).

maintain his father, what the relationship between son and father was, and what his father and mother's financial status is.

In this regard, section 4(2) of the Maintenance Act provides as follows:

> Where a beneficiary is a parent, the maintenance court must, in determining the liability of a child to maintain a parent or the nature or amount of maintenance payable to the beneficiary, have regard to the following principles –
> (a) the liability of the child arises where the parent is unable to maintain himself or herself due to circumstances beyond that parent's control;
> (b) the child must, having regard to his or her own needs, be able to support the parent; and
> (c) the right of a parent to be maintained arises only where that parent's spouse or other person who is legally liable to maintain that parent is unable to do so.

One could argue, therefore, that the father is entitled to benefit from her pension fund if he meets the above-mentioned criteria.

According to Marx and Hanekom,[185] pension fund benefits can only be allocated to parents where they survive the deceased member, and to the extent that they were factually dependant on or had a legal claim for maintenance against such member. Once the maintenance needs have been identified, an equitable distribution will be obligatory.

However, should the GIPF Board of Trustees conduct a full investigation, in order to serve justice and fairness, they should award the pension benefits entirely to Mrs Gariseb. Should they, however, fail to do so, Mrs Gariseb is not left without remedy and can challenge the discretion and decision employed by the Board. She could first write a letter of complaint to the Principal Officer of the GIPF and should, that fail to resolve her matter, she could request an arbitration hearing to be conducted as provided for by GIPF rules and procedure. If the outcome of the arbitration hearing is unfavourable, Mrs Gariseb can approach NAMFISA and only thereafter seek redress before the High Court of Namibia.

Conclusion

The law of succession affords the testator the freedom to dictate to whom his/her estate is destined upon his/her death. It is a right which testators derive from both common law and constitutional law. The right, however, is not absolute and, thus, does not exist without limitation: the law in fact imposes certain restrictions on the freedom of a testator to freely devolve his/her property upon

185 Marx & Hanekom (2002:190F).

death. Common law restrictions are determined by yardsticks of public policy and the good morals of society, whereas constitutional limitations are usually effected in light of the constitutional rights and freedoms of the people. Section 37C of the Pension Funds Act is an instance in which freedom of testation is limited by statutory law. The section dictates that a person's pension benefits do not form part of his/her deceased estate.

The balance between freedom of testation and the obligation to make provision for dependants is achieved in some jurisdictions through the application of a reasonable needs test, and in other jurisdictions through the apportionment of a percentage of the estate to the dependant.[186]

In *Glazer v Glazer*,[187] it was pointed out that the maintenance and education of a testator's minor children, whether born outside marriage or not, constituted a claim against the testate estate where no provision had been made for a child in a will.[188] This common law rule was legislated in the Maintenance Act, which entitles children – including adopted children and children born outside marriage – to claim maintenance from a deceased person's estate and even maintenance from a member's pension fund. Even though such a claim is subordinate to that of creditors,[189] it has precedence above those of heirs and legatees.[190]

Towards the end of 1998, an industry work group in South Africa recommended that, over the long term, section 37C should be removed from the Pension Funds Act and that the duties be transferred to the deceased member's executor.[191]

One could add the following recommended changes as well:[192]

- That section 37C of the Pension Funds Act be done away with altogether
- That pension benefits form part of the deceased estate and be administered by its executor
- That the Maintenance Act be amended to provide for all the deceased's dependants to be able to claim maintenance from his/her estate
- That dependant be defined, albeit broadly, to include those referred to in section 1 of Pension Funds Act, i.e. –

186 LAC (2005:144).
187 1963 (4) SA 694 (A) 706, 707. See LAC (2005:145); See also *Hoffmann v Herden*, 1982(2) SA 274; *Ex parte Jacobs*, 1982 (2) SA 276 (O).
188 (LAC 2005:145).
189 *Lotz v Boedel van der Merwe*, 1958 (2) PHM16 (O).
190 *Ritchken's Executors v Ritchken*, 1924 WLD 17; *In re Estate Visser*, 1948 (3) SA 1129 (C). See also LAC (2005:145).
191 Marx & Hanekom (2002:190A).
192 (ibid.).

- a surviving spouse, including one married in accordance with African customary law
- a divorced spouse who was entitled to maintenance
- biological children
- stepchildren
- major children who have a mental or physical disability or educational needs
- parents, and
- a live-in girlfriend or boyfriend, including those who live together in a same-sex relationship, and

- That provision is made to allow dependants to apply for maintenance within a prescribed period, based on their reasonable needs, and that such maintenance be available to all the deceased's dependants whose reasonable maintenance needs are not adequately provided for by a will or in terms of intestate succession rules.

This approach, as set out in the above bullet list, would protect all of the deceased's dependants, thereby upholding the main purpose of the social security measure of section 37C, and without compromising freedom of testation. However, the primary disadvantage of a maintenance system based on needs is the greater administrative burden involved in assessing needs-based claims. Another disadvantage of this approach is the fear that persons in need might not have the requisite knowledge or ability to assert their claims.[193] Protracted maintenance claims may ensue due to family feuds – as is the case with many intestate estate claims in Namibia.

It should be noted that, when it comes to drafting and implementing new legislation in Namibia, it is a voluminous and protracted task. Although not expressly related to section 37C, in 2005 the Legal Assistance Centre previously proposed that legislation could incorporate maintenance from a testate or intestate estate by means of an application process initiated by the widow or other dependants of the deceased. Action on this suggestion has failed to materialise to date.

Notwithstanding the above, it should be noted that that the state had good intentions with section 37C.[194] Moreover, it appears that the state has no intention of doing away with section 37C or even amending it to provide that death benefits should form part of a deceased pension fund member's estate. The intention of the state has been made emphatically clear in section 153 of the FIM Bill, which is soon to be enacted, which reiterates that pension benefits will not form part of a deceased pension fund member's estate and will be distributed by the board of trustees of that pension fund.

193 LAC (2005:147).
194 Manamela (2005:292).

Furthermore, the limitation on freedom of testation by way of section 37C can be justified well and benefits society at large. This is because section 37C serves to ensure that each dependant receives a portion of a deceased pension fund member's death benefit in accordance with what the board of the trustees of the relevant pension fund deems equitable, without having to engage in the protracted process of lodging a claim for maintenance from the deceased estate and probable litigation to enforce that right.

Alternatively, it is proposed that section 37C be retained and that the Pension Funds Act be amended to incorporate the Pension Funds Adjudicator as in the case of South Africa. To eliminate some of the existing problems with regard to the interpretation and application of section 37C, there should be clear guidelines to be followed by trustees when making their determinations in respect of it. For example, the Pension Funds Adjudicator could set out the steps to be taken by the board in determining the existence of dependants, their whereabouts, and the extent of their dependency.[195] Alternatively, the provisions of section 37C could be simplified, e.g. by introducing the order of priority in which dependants should receive benefits.[196] To a certain extent, this has been considered in the drafting of the FIM Bill: it provides for prudential standards under section 162 that have to be followed by the board of trustees. It is evident that the intention is to simplify section 37C, and set clear guidelines for board of trustees to follow.

With the proposed introduction of a Pension Funds Adjudicator, an aggrieved party such as Mrs Gariseb can have her grievances heard by an independent party on a speedy basis without the need for legal representation. Instead of setting up a new system which may create more problems, it is best to perfect the one currently in place.

195 (ibid.:293).
196 (ibid.).

The Midgard Process

Dennis U Zaire* and Holger Haibach**

Introduction

The Namibian legal system comprises various interdependent subsystems that need to function in a synchronised manner in order to facilitate the realisation of a state that operates fully in accordance with the principles of democracy and the rule of law, and enables high-quality administration of justice in the country. However, with so many subsystems, it is not always easy for the legal system to function flawlessly. Existing and new legal problems and challenges in Namibia's legal system have been a serious concern to those that have been working within and dealing with the administration of justice for a long time. The effects of these problems and shortcomings affect not only the individuals concerned, but also society at large.

In any functioning constitutional democracy founded on the principles of democracy, the rule of law and justice for all,[1] as Namibia is, the legal system which has the judiciary as one of its core components occupies a central role. In fact, in Namibia, the judiciary constitutes one of the three organs of state,[2] together with the executive and the legislature. In respect of the judiciary's specific function in the administration of justice, Article 78(1)–(2) of the Constitution of the Republic of Namibia states the following:

> (1) The judicial power shall be vested in the Courts of Namibia … .
> (2) The Courts shall be independent and subject only to this Constitution and the law.

Thus, the constitutional foundation on which the judiciary is based allows it to play a central role in the administration of justice. The judiciary, in turn, is responsible for upholding the principles of the Supreme Law. In doing so, it is required to be independent at all times, and is subject only to the Constitution and the law. Although its role is to interpret the laws made by Parliament, it is not answerable to Parliament or the executive. Crucially, the judiciary, by way

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1 Article 1(1), Namibian Constitution.

2 Article 1(3), Namibian Constitution.

of the courts, also ensures that laws are clearly understood, and that cases are heard and adjudicated upon in both civil and criminal matters.

Over the years, a number of problems and shortcomings have been identified in the administration of justice in Namibia. The identification of such problems and the discussions that ensue in an attempt to rectify issues within the legal system require time and effort. Similarly, drawing comparative analogies in respect of how other countries deal with similar challenges and shortcomings in their legal systems, and finding solutions that meet Namibia's needs also requires time, planning, good coordination, expertise and resources.

Thus, everyone that is involved in the administration of justice in Namibia needs to come together to brainstorm solutions to the issues facing the country's legal system. Such conventions allow the experts to take a look at the future and the lessons that need to be learned in order to strengthen and improve the legal system as the country works towards achieving its development goals set by Vision 2030.

In acknowledgement of this need and identifying an opportunity to meet it, in 2007, the Konrad- Adenauer-Stiftung (KAS) brought together various legal experts from a range of institutions at a retreat at the Midgard Country Lodge, some 85 km from the capital city, Windhoek. The initial workshop was successful and marked the beginning of what came to be known as the *Midgard Series of Workshops*, also referred to as the *Midgard Process*, and has since then become a yearly gathering of experts.

The Midgard Process: A brief background

At a seminar entitled "The universality of human rights and Namibia's legislation: Challenges for national implementation", which KAS convened in Windhoek on 15 November 2007, it became evident that, although the invited stakeholders knew each other, they rarely met to discuss issues of common and mutual interest. KAS, in partnership with the then Dean of the Law Faculty of the University of Namibia, Professor Nico Horn, therefore took the initiative and, in early 2008, launched a platform on which experts in the rule of law and human rights could meet once a month to discuss relevant issues.

The positive response to these meetings encouraged KAS to convene its first brainstorming retreat in Midgard in September 2008. The first retreat – Midgard I – was entitled "The Namibian legal system". Shortly thereafter, Midgard II was held on "The independence of the judiciary in Namibia". At Midgard III in October 2009, entitled "Access to justice", the Law Reform and Development Commission – through Mr Tousy Namiseb, who had attended Midgard I and II – joined the Midgard Process as KAS's official partner.

The Midgard concept was born of a number of factors. Firstly, as already mentioned, Namibia's legal system faced and continues to face serious challenges and shortcomings that need to be addressed. Secondly, the frustrations by those involved in the administration of justice in the country are self-evident. Thirdly, a lack of coordination of information among the various institutions and departments involved in the administration of justice resulted in issues piling up and not being addressed properly – if at all. Finally, there was a need for a forum that would bring together experts, eminent members of the Namibian legal fraternity, eminent scholars and academicians, as well as those involved in the administration of justice to look at the issues critically and recommend solutions to them.

The Midgard Process was not to be regarded as the formation of a pressure group, however. For this reason, after each workshop, the participants were themselves tasked with ensuring that progress was made and that the recommendations put forward were understood and communicated to the right agencies through proper channels.

Over the years, the Midgard Series has attracted experts from various local institutions, including the Ministry of Justice's Law Reform and Development Commission; the Legal Practitioners, Magistrates and Judges Association; the Law Society; the Office of the Ombudsman; the Legal Assistance Centre; Senior Commissioners from the Namibian Police; Judge Sylvester Mainga of the Supreme Court of Namibia; various Directorates of the Ministry of Justice; and the University of Namibia's Law Faculty as well as its Human Rights and Documentation Centre. The Midgard Process also benefited from expertise in the southern African region with the likes of Prof. Joseph Diescho, a Namibian academic who is currently with the University of South Africa; Prof. Evans Kalula from the University of Cape Town; Prof. Christian Roschmann, Head of the KAS Rule of Law Programme for Sub-Saharan Africa based in Kenya; and the prominent South African Judge Albie Sachs of the South African Constitutional Court.

Presentations from such experts are informed, concrete and factual, and they shape the discussions on critical issues. They also clarify and offer advice on the problems faced by Namibia in the administration of justice, presenting comparisons with other countries as well as case studies.

The resolutions agreed at each workshop are later discussed with policymakers and other relevant institutions like the Law Reform and Development Commission, the Law Society, UNAM's Law Faculty, the Ministry of Justice, and the Parliamentary Standing Committee on Constitutional and Legal Affairs. Because such recommendations create opportunities to lobby lawmakers and other stakeholders, the Midgard Process is regarded as an important value-addition mechanism to the administration of justice in Namibia.

Midgard Workshops I–V

Midgard Workshop I

Midgard Workshop I, which took place on 12–14 September 2008, was convened on the theme "The legal system of Namibia: Challenges and opportunities". The meeting discussed the administration of justice in Namibia in four sessions. Session I concentrated on the synergy between the Lower Courts and the Superior Courts, between which various areas of interaction exist, including the supervision of the Lower Courts by the Superior Courts. Workshop participants detected several areas where the synergy could be improved, and made the following recommendations, among others:

- That the referral of review judgments to the High Court by Magistrates' Courts should take place within seven days after the judgment of the latter had been delivered.
- That the current situation in which Magistrates felt inferior to Judges should be addressed.
- That the training of Magistrates in the then dormant Magistrate's training course at the Justice Training Centre (JTC) should be revised.
- That the Community Courts should be recognised as an important link, and
- That the Community Courts Act[3] should be implemented.

Also addressed was the link between the theory of legislative drafting and law reform initiatives on the one hand, and, on the other, what occurred in practice.

Another aspect the participants criticised was the government's lack of promptness in responding to the Law Reform and Development Commission recommendations for change. The participants also suggested that responsible and meaningful debates supporting law reforms should take place in Parliament. In addition, more clarity was needed on how the focus on law reform was decided, and the Criminal Procedure and Community Courts Acts required follow-up.

As regards the relationship between law enforcement and the judiciary, problems regarding the negative effect of inadequate investigation in the adjudication process were also pointed out. Among these problems were the following:

- Delays in delivering judgment
- Inconsistency in sentencing
- Insufficient appreciation of the law and procedure, especially by the Lower Courts

3 No. 10 of 2003.

- Poor investigations, and
- Substandard prosecution.

It was proposed that police officers be given guidance on the investigation of crimes, either through proper training or via a manual on investigation procedure as well as training by prosecutors.

Session 2 focused on the independence of the judiciary in Namibia. The experts noted that, because the prosecution service could be seen as a quasi-judicial function, the independence of the Prosecutor-General was vital. In this regard it was detected that –

- the current composition of the Judicial Service Commission was not in line with Article 85(1) of the Constitution, and
- legal education played a very important role in preparing judges for their role.

Session 3 looked at the challenges facing legal practitioners. This session agreed that most of these challenges related to the training and admittance procedures that applied to them. The participants, therefore, proposed that –

- legal training through the JTC be reviewed
- the level of experience of their lecturers be raised
- amicus curiae matters be made compulsory for all legal practitioners, and
- the possible establishment of Small Claims Courts be investigated.

Session 4 discussed human rights and constitutionalism in Namibia, and the possible threats to these two concepts. The meeting criticised the lack of judicial activism, the weak civil society, and the subsisting ill-definition of the separation of powers, especially negative aspects of the composition of the Cabinet of Ministers on the independence of the legislature. In this regard, the Midgard Workshop I participants –

- required clarification of Article 144 of the Constitution
- questioned the rationale and reasons for the impending amendments to the Constitution, especially those on citizenship, and
- requested a follow-up workshop to further discuss pressing issues that had been identified.

Recommendations were made and a report was drafted and distributed to the relevant stakeholders.

Midgard II

Midgard II, which took place on 15–16 November 2008, was convened under the theme of "The independence of the judiciary in Namibia: Challenges and opportunities". This workshop benefited from the expertise of Prof. Joseph Diescho in particular.

Session 1 of the workshop focused on the history, implication and limitations of the paradigm of an independent judiciary. The expert explained that there were cultural limitations from within society that resisted the concept of an independent judiciary, and gave the example of customary law, where the village chiefs are not subject to the law. He referred to the problem of the legal (technical) language which leads to misunderstandings in the interpretation of the law and court rulings because many people do not know the appropriate terms in their native languages. Another participant added that no person could exclude their education from the way they were, so judges also represented the values of society. Furthermore, it was proposed that judges should ask for assistance as soon as they did not understand a case properly, e.g. by an assessor, whose influence should not be underestimated. The argument here is that consistency in court judgements is important. Examples of elements that could affect judges' independence included threats and psychological factors such as the fear of being wrong.

Session 2 dealt with the judiciary in pre-independent Namibia. The gathering was informed that, up to Independence, judges used to be appointed by the bar, which has been rather liberal in Namibia. In the discussion that ensued, the significance of having a constitution was stressed, because values were set out in writing in it, making them clearer. This ensured genuine independence for judges and courts.

Session 3 addressed the post-Independence structure of the judicial system and its relevance for an independent judiciary. It was pointed out that –

- Namibia had relied heavily on South African jurisprudence in the development of law, but should now try to create its own
- Namibia needed judges who could handle the law on all levels, and
- a situation where certain cases got specialised judges and some did not should be avoided because equality before the law could not be maintained by such practices.

Session 3 also discussed the role of the courts and the legal profession in a constitutional democracy. A debate took place on how the media could harm the image of the judiciary and about possible reactions from judges to defend themselves. Noting that it was hard to judge whether criticism from the media – which was notably interested in sensational issues – was legitimate or contemptuous, the meeting agreed that –

- the Law Society was in charge of both criticising and protecting judges, and
- the bar was also tasked with protecting judges.

The discussion moved on to deal with the uniqueness of the position of the Namibian Prosecutor-General (PG). It was stated that the PG did not have to give reasons as to why s/he would not prosecute a case, and that there was no way to appeal the PG's decisions except by going to court. Even the

Ombudsman could not compel the PG to prosecute if s/he had elected not to do so. This fact was strongly criticised as some participants argued that it was a constitutional right to know the reasons for a judgement, and that it was difficult to evaluate a judgement otherwise.

Session 4 compared the Office of the PG with its counterpart in South Africa, namely the Prosecution Authority. The latter has more of an executive function than a judicial one, whereas the PG in Namibia is appointed by the President, based on the recommendation of the Judicial Service Commission. Namibia's system was preferable, the participants felt.

In Session 5, which covered traditional courts and whether they represented a part of the judiciary, it was noted that –

- the Customary Law Act had still not been implemented
- there were up to 46 recognised local authorities
- language barriers limited the proper functioning of these authorities.

The participants asserted that customary law was also procedural law, whether written or not, and that compensation played an important role in such law. It was also asserted that there was no separation of powers because chiefs were not subject to customary law. However, if the chief him-/herself was involved in a dispute, there were mechanisms available to resolve the issue, such as calling on another chief to decide the case.

Session 6 recorded that the creation of a Magistrates' Commission negatively affected the independence of judges.

Session 7 discussed the Judicial Service Commission and the system of appointing acting judges, stating that the latter was necessary in order to solve cases. The workshop participants stated that the President was constitutionally obliged to follow the recommendations of the Judicial Service Commission when it came to the appointment of judges,[4] but that there were no rules regarding this. The Law Society's concerns regarding the appointment of High Court judges to the Supreme Court were also raised, namely that a judge might be faced with having to overrule his/her own judgments or those of his/her colleagues.

In Session 8, which covered the role of the executive in safeguarding judicial independence, participants criticised the fact that judges' salaries were low in comparison with others in the legal profession, and that this fact could compromise a judge's independence, e.g. s/he could be tempted to be bribed. However, it was stressed that, compared with other African countries, Namibia's judicial independence was functioning well.

4 Article 82(1), Namibian Constitution.

In Session 9, which debated the independence of the legal fraternity in its entirety, the participants resolved that –

- more pro bono work should be done
- the Legal Assistance Centre should be supported in order to secure a high standard of legal education and the independence of the legal profession
- senior practitioners should be encouraged to share their experience
- the Ministry of Justice had to become more involved, particularly with respect to financing the education of legal practitioners
- the importance of the independence of the judiciary should be emphasised to clients: lawyers were simultaneously officers of the court and should, therefore, include educating their clients about legal issues as part of the services they rendered.

At the end of the workshop, discussions on the way forward reached consensus concerning the fact that the Midgard Process should be a platform that enabled discourse on the rule of law and other legal issues by the various stakeholders.

Midgard III

Midgard III took place on 23–25 October 2009, and deliberated on the theme "Access to justice". The workshop covered broad topics on the theme, such as access to criminal justice, access to civil justice, and the 2004 Criminal Procedure Act,[5] which had revised and updated the 1977 Criminal Procedure Act.[6]

During the discussions, the participants identified certain issues that people faced when they tried to gain access to justice. The workshop –

- criticised that trials were not being conducted within a reasonable time frame
- pointed out the lack of competence and impartiality in the Lower Courts in particular, and
- addressed issues such as the right to legal representation and the presumption of innocence.

The workshop participants declared that the interests of society in gaining access to criminal justice could not be overemphasised. If one addressed problems holistically, without necessarily concentrating on the ensuing reactions after a crime had been committed, other rights to which citizens were entitled also had to be given effect – and this might help reduce the

5 No. 25 of 2004.
6 No. 52 of 1977.

crime rate. For example, if there was good delivery on economic rights like employment and decent living conditions, the crime rate might go down.

Key challenges to gaining access to civil justice were identified as being overloaded court rolls, costly proceedings, complex rules and procedures, the lack of other remedies such as Small Claims Courts, and the lack of relevant information to the general public.

The participants then discussed whether it had been a wise decision to draft a completely new Criminal Procedure Act to replace the 1977 statute. They criticised the new 2004 Act as not having been thought through well enough, and feared that it would cause new problems instead of offering solutions. They proposed discussing the issue at an even broader forum with the judiciary, organised professions, and academia. Their recommendations in this respect were as follows:

- That the reintroduction of the Judge Certificates be considered in order to ensure legal aid was obtained in all deserving cases
- That the current legal aid system be replaced by a public defender system, and
- That, in order to improve magistrates' competence and impartiality, they receive sustained training, an incentive system, and a bursary scheme offered by the Magistrates' Commission, and
- That the Law Society be represented on the Magistrates' Commission as well.

As a result, KAS agreed to fund a training programme for magistrates as from 2010.[7]

The participants also addressed constitutional matters and issues of law, recommending that –

- the Ombudsman approach the Supreme Court on contentious legal issues
- Chapter 11 of the Constitution be reviewed
- the 2004 Criminal Procedure Act be repealed
- Small Claims Courts be introduced to improve access to civil justice
- public awareness through the media be enhanced
- mediation and arbitration be encouraged as alternatives to dispute resolution
- an investigators' handbook be drafted and published for public prosecutors and the police in order to improve their training

7 This programme began as scheduled. It currently takes place in Swakopmund and is ongoing.

- the legal training offered by the JTC and UNAM be revised to include more practical aspects as well as maintenance training for magistrates,[8] and
- the Office of the PG, the Law Society, UNAM, the Polytechnic of Namibia and the Israel Iyambo Training College set up a committee to steer the process of augmenting these training syllabi.

Midgard IV

Midgard IV took place on 13–15 October 2010. The workshop deliberated on the theme "Legal education in Namibia" in order to reveal the shortcomings of such training and make proposals on how to address the problems being encountered. The meeting made comparative analyses with other jurisdictions and legal systems in order to more fully comprehend Namibia's strengths and weaknesses in this regard.

Starting with the history and development of legal education in Namibia, the participants saw the need to publish the findings obtained from reports and committee investigations, as well as Cabinet and legislative efforts since Independence in order to enhance the understanding of legal education. Such publications could also help policy- and decision-makers to improve and strengthen legal education in the future.

Other comments included the shortcomings in access to justice, and that they needed to be improved because a lack of such access was a violation of people's rights. The challenges facing UNAM were also discussed as the institution faced a shortage of human capacity and financial resources, which gave rise to many problems. For instance, it was stated that UNAM could not compete with other institutions or universities across the Southern African Development Community (SADC) region as it was not able to attract enough qualified staff. It also reportedly did not help to develop staff because the staff development policy was weak and inadequate. The Faculty of Law in itself was small and poorly funded, and the programmes it offered were said to have limited choices. The courses were also comparatively longer, and had become less competitive over time.

As regards practical legal education, it was reported that shortcomings were faced by students in terms of the practical aspects of their internship. It was mentioned that the JTC and the law curriculum did not confront them with the practical realities of the profession, such as what court procedures were, or what to expect when one became a magistrate. The lecturers also did not offer the students practical applications of theory that could enhance their

8 UNAM's review of its curriculum is expected to be completed in the course of 2012.

understanding of the real world of legal practice. However, even without this kind of important experience, after JTC training, anyone could establish their own law firm. This could compromise the quality of services offered to clients, and could damage the image of the profession in the long term.

After having identified the above shortcomings, the workshop participants turned to a discussion on comparative case studies in Europe, South Africa and Zimbabwe. The case studies provided valuable and interesting findings, that where debated further. The participants were especially impressed with the findings from the Bologna Process,[9] for example, as it provided useful information on the structure of academic programmes at law schools as well as on the practical requirements for becoming a lawyer. The comparative focus allowed participants to learn from other countries and jurisdictions to see how they dealt with problems such as the academic and professional training of students and staff in the judiciary, and how one could apply the remedies devised in other countries to the shortcomings faced by Namibia.

The recommendations drawn from the debates included the following:

- That the JTC focus on procedural law instead of substantive law
- That the JTC provide for a mandatory attachment with legal practitioners of at least one year
- That the JTC nominate a full-time Director who would be required to review the students' progress periodically during their attachment
- That, after candidates had completed their JTC training, they spent at least two years with an experienced practitioner before opening up their own firms
- That, in order to improve access to justice, prescribed fees be controlled and lowered
- That UNAM should investigate opportunities for training paralegals
- That the Memorandum of Understanding between UNAM and the Ministry of Justice be revised in order to enhance staff development in the Law Faculty
- That regional trends and developments in the Law Curriculum Review in 2012 be considered by UNAM, and that professionals and students be included in the review process so that the curriculum balances academic qualifications with the needs of stakeholders in the market
- That due consideration be given to the selection of compulsory subjects
- That the academic programmes be evaluated by various stakeholders on a regular basis

9 The Bologna Process is named after the Bologna Declaration, signed in Bologna, Italy, on 19 June 1999. It aims is to create a European Higher Education Area based on international cooperation and academic exchange.

- That the growth in the number of students be controlled and limited, and
- That the BJuris Degree be replaced by the LLB Degree as a four-year programme, followed by the LLM Degree.

Midgard V

Midgard V took place on 8–10 July 2011. The theme from Midgard III was resumed, namely "Access to justice: Current obstacles and creative solutions". The experts proposed various means of addressing the shortcomings associated with access to justice. In this respect, they criticised the absence of Small Claims Courts and stated that ways needed to be found to engage the Minister of Justice, the Law Reform and Development Commission and the Parliamentary Standing Committee on Constitutional and Legal Affairs on the issue. The legal fraternity itself would also draft a letter to the Minister of Justice on the topic.

As regards improving access to Community Courts, the workshop emphasised that –

- the Community Courts Act should be reviewed and amended in collaboration with and agreed by all relevant stakeholders
- the Community Courts Act should also be harmonised with the Constitution and other relevant laws, and special attention should be paid to gender issues
- the Office of the Labour Commissioner should endeavour to prepare better, more timeous and more efficient arbitration records for appeal or review purposes at the Labour Court
- the training of conciliators and arbitrators should be improved in order to ensure more efficient proceedings
- in disputes, conciliators and arbitrators should not be the same person in proceedings
- Labour Court rules and procedures should be simplified
- the period for appeals and reviews should commence once the Labour Court has received the arbitration records
- the Labour Act should be amended to provide for the filing of arbitration awards in Magistrates' Courts; in this way, they would become orders of the Magistrate's Court and could be enforced in terms of Magistrates' Court rules, which would speed up and simplify procedure
- alternative means of resolving disputes should be found in the Labour Court process
- a new case management should be devised which should provide voluntary or prescriptive mediation, and judges and legal practitioners should be trained in the advantages of the mediation technique
- the shortcomings of Magistrates' Courts should be addressed by insisting that the Magistrates' Commission arrange for magistrates to

be on duty at all times, that regional Magistrates' Courts be properly staffed, and that they be mandated to handle civil cases

- the Ministry of Justice should be called on to provide proper accommodation for its staff
- shift justice be introduced, e.g. courts could operate in the evenings and on Saturdays to allow better use of existing infrastructure and reduce the workload
- apart from sustained training for magistrates, a criminal and civil procedure bench book for magistrates be published[10]
- Circuit Courts be used to deal with divorce matters
- a clear distinction be drawn as to what could be litigated at District or High Courts in civil matters
- the Legal Practitioners Act be amended and that pro bono work be made compulsory
- the reintroduction of judges' certificates for legal aid be considered
- communication should be continued with relevant stakeholders about contingency fees for practitioners
- police services should be improved by addressing capacity-building issues, especially in the areas of the Criminal Procedure and the Combating of Rape Acts, human rights issues in general, and domestic violence and human trafficking in particular
- ways to improve the speed at which investigations are carried out should be discussed
- the relationship between the police and the judiciary should be improved by convening monthly meetings to address common concerns
- there was a need for proper guidance and supervision to be provided by Regional Crime Investigation coordinators in order to ensure reported crimes were speedily investigated
- the notion of Station Commanders conducting daily inspections to provide guidance to police officers on duty should be promoted
- the private sector, e.g. non-governmental organisation, could be asked to provide training to the police in technical areas, complex aspects of the law, and the Constitution, so that they could cope better with complex cases
- the police, in turn, needed to identify and use internal human resources for training and capacity-building in order to increase the provision of important skills
- the police should ensure that 10111 emergency personnel know the chain of command and communicate the correct contact numbers to the public, and
- the after-hours numbers of personnel on duty should be physically posted at courts and at Women and Child Protection Units.

10 This project is currently under way.

An overview of achievements due to the Midgard Process

The Midgard Process succeeded in creating a platform for different players in the legal sector to meet and brainstorm solutions to problematic issues. The forum has also provided eminent scholars and other equally distinguished participants with a rare opportunity to discuss critical issues affecting not only the administration of justice in Namibia, but also contemporary Namibian society.

A significant achievement of the Midgard Process is its success in breaking down the barriers to communication between different government offices, ministries and agencies (O/M/As) and other stakeholders. For example, because the various O/M/As such as the Office of the Ombudsman, the Office of the PG and the Ministry of Justice all operate within their respective mandates, there is seldom an opportunity for them to be under one roof together to share information. The Midgard Process has enabled O/M/As to communicate better among themselves and with other stakeholders across the legal arena to discuss and integrate their thoughts on topical issues of law. In this way, the workshops have complemented the activities of the various legal sectors. The Midgard Process has, therefore, established itself as a platform for sharing information and for education. One could rightfully argue that it has become a think tank.

Furthermore, since the Midgard Process's establishment in 2007, a number of important projects and publications have been completed as a direct result of the ideas and proposals made at these important gatherings. They include the following:

- In April 2008, a publication entitled Human rights and the rule of law in Namibia edited by Dr Anton Bösl[11] and Prof. Nico Horn appeared, under the auspices of UNAM's Law Faculty. The publication focuses on major aspects of the current status of the management of the rule of law in Namibia as well as the degree to which basic human rights are respected in Namibia, with critical analyses of the successes and shortcomings observed.
- Also in 2008 another publication by edited Dr Bösl and Prof. Horn appeared, entitled The independence of the judiciary in Namibia. The volume offers an insight into the inner life of the Namibian judicial system, and discusses the implications and limitations of an independent judiciary in the country.
- The year 2009 saw the launch and subsequent establishment of the biannual Namibia Law Journal.
- The Midgard IV report, which contained recommendations on the reform of legal education in Namibia, was adopted by UNAM's Faculty

11 The KAS Resident Representative for Angola and Namibia at the time.

of Law as the key working document for the curriculum review process
- Magistrates now receive specialised training to instil and enhance skills they need in administering the law, and
- There is improved cooperation with the Parliamentary Standing Committee on Constitutional and Legal Affairs through the sharing of information.

Many other recommendations made during the Midgard Process workshops have also been acted on and implemented by government O/M/As. These steps have been recorded and positive feedback has been received to that effect. Thus, the Midgard Process has contributed significantly to maintaining the rule of law and enhancing the administration of justice in Namibia.

The future

Midgard workshops have proved to be a multi-purpose tool: they have served as a platform for discussion and exchange for all the institutions and individuals that make up the legal fraternity in Namibia. They have also offered a means of establishing common ground and a common understanding as to the direction in which the country's legal system should develop. In addition, they have successfully initiated action to enhance the legal service to the benefit of the Namibian people.

Logically, therefore, this successful formula should and in all likelihood will continue to be applied. Even though the most pressing issues have been dealt with in the past, as illustrated in this paper, much remains to be done.

Indeed, there are plans and ideas that have already been put forward for at least another ten Midgard workshops. These themes span from the implementation of international treaties, covenants and conventions on the issue of land reform, to the need for a comprehensive administrative law. Much more will be on the agenda if one takes into account the rapid changes this globalised world is currently undergoing, and will undergo in future. How will a country like Namibia react with respect to legislation when it comes to the issue of climate change, for example? How will it address the question of migration, internally and externally? How will Namibia go about regulating the Internet and other web-based media? In what way will Namibia be able to strike a balance between individual rights and the need to protect the state and society?

With particular respect to the diversity of the topics mentioned above, the Midgard Process has the potential to prove itself as an adequate means to address future challenges. Certainly, it has always had a core group of 'drivers' that have added to its sustainability and substance; but it always been able and should continue to 'co-opt' groups, institutions and individuals who are able to add value to the subject at hand. This kind of flexibility may be

regarded as one of its most important assets. It is also a way to ensure that a variety of important topics continue to be raised and discussed in order to find valid solutions.

Conclusions

A well-known German saying holds that if you want to preserve a lot, you will have to change a lot. In the same vein, progress in any sector of society – especially one as important as the rule of law – will always depend on striking a balance between what needs to be preserved and what needs to change. In order to separate elements into these two groups, stakeholders in the legal fraternity will need space – both physically and mentally. The work by KAS the world over has always been based on the understanding that both stability and change in a society will never be sustainable if imposed from outside: these have to be created by the inhabitants of the country concerned themselves. Since there is hardly ever a 'one size fits all' solution to important matters, the ways and means of reaching the various goals have to be found in a consultative process and then put into effect. The Midgard workshops have served this purpose quite well so far. Hopefully, they will continue to do so in future. Thus, even though there may be changes every now and then, the underlying formula of the Midgard Process being a platform for free discussion, cooperation and accomplishment should be preserved.

As a final note, KAS is grateful for the privilege of being part of the Midgard Process, not only to our long-standing partners in this effort, namely the Law Reform and Development Commission and UNAM's Faculty of Law, but also to all the other partners involved in the project. We thank you and look forward to continuing with our successful cooperation in future.

Namibian taxation procedure in the light of just administrative action

Loammi Wolf*

Proper taxation procedures are an integral part of just administrative action, which should conform to the norms of Article 18[1] of the Constitution of the Republic of Namibia, containing the Bill of Rights. The transition to the constitutional state model after 1990 required close scrutiny of existing legislation to make sure that it conformed to the new norms.

The main difficulties in transcending from the Westminster system relate to a different power balance of state organs. Under the former Westminster constitutions of 1910, 1961 and 1983, of South Africa, which were also invoked in relation to Namibia, the doctrine of parliamentary sovereignty entailed that parliament was subject to very little constraint when it came to the kind of legislation it could adopt. No Bill of Rights curbed parliament or the executive's statutory power; nor were legislation or the exercise of executive power subject to constitutional review. In particular, only very limited review of administrative action was possible. For example, a major problem with regard to taxation procedure, as it is currently practised, remains the taking of administrative action by the executive branch of government. The following aspects deserve attention:

1. Distinguishing the actual taking of administrative action from empowering statutory powers conferred on the executive
2. Distinguishing administrative action from statutory obligations resting on taxpayers in general
3. Distinguishing an administrative act from the internal deliberations of the executive, which do not have any direct external effect with binding legal consequences for the taxpayer. This distinction will be

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This article is based on a seminar for chartered accountants and lawyers presented at the Institute of Chartered Accountants of Namibia (ICAN) in Windhoek during August 2011.

1 Article 18 reads as follows: "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".

drawn with reference to the different stages of in the coming about of an administrative act in taxation, and

4. The legacy of the former Westminster system tends to blur the boundaries between administrative action that can be taken by the Ministry of Finance and the investigation and prosecution of criminal offences like tax evasion, which is the domain of the state prosecution. However, the separation of powers envisaged by the Westminster system does not clearly separate the functions of state organs invoking criminal law and administrative law, respectively, with the result that the boundaries between administrative justice and the administration of justice are blurred.[2] In this context, the foundation of interest currently charged as a penalty for non-payment of taxes will be critically analysed. Apart from that, the procedures for the recovery of taxes do not clearly delineate the functions of the executive from those of the judiciary.

Acting within the confines of constitutionalism

All state action is required to conform to the norms of constitutionalism laid down by the Namibian Constitution. The paradigm of the constitutional state distinguishes between a *formal* and a *material* (*substantive*) aspect. The *formal* notion of the constitutional state consists of five components:[3]

- The omnipotence of the Constitution and statutes that conform to constitutional norms
- The subjugation of state administration to laws which do not hamper the fundamental rights and freedoms of individuals or legal persons
- Access to legal remedies to challenge undue encroachment upon fundamental rights in courts of law
- Laws that are generally applicable and a warranty against prejudicial implementation of statutes, and

2 Namibia's Income Tax Act, 1981 (No. 24 of 1981) was taken over from South Africa's Income Tax Act, 1962 (No. 58 of 1962) when Namibia was granted self-administration, and further amendments were adopted after Namibia's independence in 1990. Australian tax law originally served as a model for these statutes. In the Westminster constitutional model, prosecutors are treated as part of the executive branch and, thus, the applicable law invoked by executive organs and prosecutors is often blurred. This might explain why penalties, which should form part of ordinary administrative procedures, are unnecessarily sanctioned as criminal offences. For a discussion of this dilemma, see Wolf, L. 2011a. "The prosecuting discretion: An administrative-law or criminal-law power?". *Tydskrif vir die Suid-Afrikaanse Reg*, 703–729.

3 See Blaau, LC [sic]. 1990. "The Rechtsstaat idea compared with the rule of law as a paradigm for protecting rights". *South African Law Journal*, 107:76 at 80; on the constitutional state paradigm, see Kunig, P. 1986. *Das Rechtsstaatprinzip: Überlegungen zu seiner Bedeutung für das Verfassungsrecht der Bundesrepublik Deutschland*. Tübingen: Mohr Siebeck.

- The creation of a systematised public-law order.

The *substantive* (material) aspect of the constitutional state aims at keeping law and justice in harmony with each other, and provides for the protection of rights within the normative structure of the Constitution.[4]

The core elements of constitutionalism are captured by the Namibian Constitution in the following provisions:

- Article 1(1) emphasises that Namibia is a republican democracy founded on the principles of rule of law and justice for all
- The omnipotence of the Constitution as the supreme law is spelt out in Article 1(5)
- Article 5 explicitly binds all branches of state power – including the legislature and the executive – to uphold fundamental rights and freedoms enshrined in the Bill of Rights
- Article 22 sets limits to the exercise of state power, and
- Access to the courts and legal remedies to enforce the limits of state power are guaranteed by Article 12.

The principle of constitutionalism has been endorsed at the highest level by the courts. In *Ex Parte: Attorney-General In Re: Constitutional Relationship between the Attorney-General and the Prosecutor-General*,[5] the Supreme Court emphasised the importance of the principle of constitutionalism in Namibia.

Fundamental rights have two functions, which can be described as two sides of the same coin. On the one hand, the fundamental rights of natural and legal persons are protected vis-à-vis organs wielding state power; on the other, they also offer guidelines as to how such power should be exercised and demarcates its scope.[6] Article 22 of the Constitution determines that fundamental rights can only be limited by law that has general application.[7] There are clear boundaries to statutory powers of the legislature. These boundaries are twofold: firstly, there is an explicit prohibition of ouster clauses to negate specific fundamental rights; and secondly, the essential content of a right may not be encroached upon.[8] This means that the basic core of a right

4 Blaau (1990:85–88).

5 (1995) NASC 1; 1995 (8) BCLR 1070 (NmS).

6 Blaauw-Wolf, L. 1999. "The 'balancing of interests' with reference to the principle of proportionality and the doctrine of Güterabwägung – A comparative analysis". *SA Public Law*, 14(1):178 at 179–180.

7 To adopt a lex ad personam, which is directed at a specific person, is not allowed.

8 Article 22 of the Namibian Constitution stipulates the following:
"Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:
(a) be of general application, shall not negate the essential content thereof, and

must be able to survive.[9] Such limitations usually require a pressing need of public interest. The provision of Article 22 is very similar to that of Article 19(2) in the German Bill of Rights.[10]

The right to fair administrative action may, therefore, only be limited statutorily under specific conditions.[11] Restrictions of fundamental rights such as administrative justice are further subject to the principle of proportionality. The purpose is to curb excesses of state power in general.[12] Thus, the principle of proportionality applies to all state action.

The meaning and contents of the principle of proportionality depend on its application: firstly, as the basis for binding the legislature in determining the relationship between fundamental rights and their restriction; secondly, as a constitutional norm binding the executive in exercising its discretionary powers in terms of administrative law; and, thirdly, as a general rule of interpretation of constitutional norms by the courts.[13] Both the legislation conferring specific administrative powers upon the executive as well as the action taken by the executive are required to be proportional to the objective pursued. With regard to administrative action, the least infringing measure is always the preferable one.[14]

The legislature does not have the power to overrule the provisions in the Bill of Rights with ordinary legislation in an attempt to legitimise unfair administrative

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shall not be aimed at a particular individual;

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest".

9 On the essential content guarantee, see Blaauw-Wolf (1999:180–187, 201ff).

10 For a discussion of valid limitation of fundamental rights in terms of these provisions, see L Blaauw-Wolf & J Wolf. 1996. "A comparison between German and South African limitation provisions". *South African Law Journal*, 113:268ff; and Blaauw-Wolf (1999:180ff).

11 Fundamental rights can be restricted by or pursuant to a law, by other fundamental rights, or by the immanent limits of the rights themselves; see Blaau (1990:187–191).

12 On the principle of proportionality, see Blaauw-Wolf (1999:191ff). See the cutting-edge work of Lerche, P. 1961. *Übermaß und Verfassungsrecht: Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismässigkeit und der Erforderlichkeit*. Köln: Heymann, p 21. The principle of proportionality was confirmed by the *Bundesverfassungsgericht* (German Constitutional Court) in BVerfGE 34, 238 at 245 (decision of 31 January 1973).

13 Blaauw-Wolf (1999:193–194).

14 On the three elements of the requirement of proportionality of administrative action, namely suitability, necessity and reasonableness, see Blaauw-Wolf (1999:194–197). On the proportionality of administrative action in South Africa, see Hoexter, C. 2007. *Administrative law in South Africa*. Cape Town: Juta, pp 309–312, 316; and on the proportionality of administrative discretions in German law, see Maurer, H. 2006. *Allgemeines Verwaltungsrecht* (Sixteenth Edition). Munich: CH Beck, pp 142, 250.

action or procedures. Once it has been clarified that a statute complies with the constitutional norms, the executive power is bound to exercise powers conferred upon it within the limits of such powers.

One of the central tenets of a constitutional state is the legality and predictability of administrative action.[15] This is an important precondition to protect individuals and legal persons against arbitrary, unreasonable, or unfair administrative action. Article 18 of the Constitution guarantees this explicitly and determines that all executive bodies (such as the Department of Inland Revenue) and administrative officials (e.g. tax officials) –

> … shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation.

Thus, it is not a discretionary power but an obligation to act justly when administrative action is taken. This right creates the basis for legal certainty in administrative law, which is important for the smooth running of the state administration.[16] Persons who feel aggrieved by administrative action have the right to seek legal redress.

In recent years, the Namibian Law Reform and Development Commission of the Department of Justice explored the feasibility of adopting enabling legislation that would regulate fair administrative procedures generally. One of the problems pointed out at a conference held in Windhoek in 2008 on the promotion of administrative justice is that executive state organs often fail or refuse to give reasons for administrative action they take as part of fair administrative procedures.[17] In practice, this forces aggrieved persons to take a matter to court although such disputes could easily have been resolved at

15 The doctrine of legitimate expectation was introduced by the Appellate Division in *Administrator, Transvaal v Traub*, 1989 4 SA 731 (A) to ensure greater fairness of administrative action. See Hoexter, C. 2004. "The principle of legality in South African administrative law". *Macquarie Law Journal*, 165 at 171; De Ville, J. 2005. *Judicial review of administrative action in South Africa.* Durban: LexisNexis Butterworths, pp 359–361; Quinot, G. 2004. "The developing doctrine of substantive protection of legitimate expectations in South African administrative law". *SA Public Law*, 19:540. See also Burt, K. 2004. "The justification for s79(1) of the Income Tax Act and the hypothetical application of the doctrine of substantive legitimate expectations in the tax context". *South African Law Journal*, 121:544.

16 Glintz, C. 2009. "The right to be given reasons as part of fair administrative procedure: A comparative study of Namibian, South African and German law". *Namibia Law Journal*, 1(2):3 at 4.

17 The conference was organised by the Namibian Ministry of Justice, its Law Reform and Development Commission, and the German Konrad Adenauer Foundation's Rule of Law Programme for Sub-Saharan Africa. The conference was held in Windhoek from 18 to 21 August 2008. Hinz, M. 2009 "More administrative justice in Namibia? A comment on the initiative to reform administrative law by statutory enactment". *Namibia Law Journal*, 1(1):81 at 84; see also Glintz (2009:4f, 16, 20f).

an administrative level. The furnishing of reasons is one of the fundamentals of good state administration. It encourages rational and structured decision-making, whilst minimising arbitrary and biased outcomes – thereby facilitating accountability and transparency on the part of the administration.[18] The reasons given also assist courts and tribunals to render a judgment on the legality and validity of administrative action.

Despite the drawback that fair administrative action is not statutorily regulated in a general sense, this affects taxation only marginally. Taxation, as a special field of administrative law, is regulated by the Income Tax Act.[19] It enables the levying of taxes to secure a financial basis for administering the state.[20] Tax authorities are required to ensure that taxation procedures comply with the constitutional requirements of just administrative action. They are also obliged to take care that property rights,[21] the right to privacy,[22] and the free choice to practise any profession, or carry on any occupation, trade, or business[23] are respected.

A number of judgments relating to fair administrative action offer a good departure point because such precedent is binding on taxation procedure and other fields of administrative law. In *Frank & Another v Chairperson of the Immigration Selection Board*,[24] the High Court confirmed that unfair or unreasonable decisions taken by executive organs when exercising their administrative discretion entitle aggrieved persons to redress by the courts. A court, however, cannot judge what is reasonable or unreasonable unless the administrative body gives reasons for arriving at a decision. Thus, the court ruled that such bodies are obliged to give reasons.[25] In the appeal to the Supreme Court, Strydom CJ stated that the requirements of reasonable and fair administrative decisions demanded transparency as an inherent condition of the prescribed fair procedure:[26]

> … an administrative organ exercising discretion is obliged to give reasons for its decision. There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The Article requires administrative bodies and officials to act fairly and reasonably.

18 Glintz (2009:4).
19 No. 24 of 1981.
20 Section 5, Income Tax Act.
21 Article 16, Namibian Constitution.
22 Article 13, Namibian Constitution.
23 Article 21(1)(j), Namibian Constitution.
24 1999 NR 257 (HC).
25 1999 NR 257 (HC) 265 A, D–E.
26 2001 NR 107 (SC) 158C–78B. O'Linn AJA (110A–C) emphasised that the reasons, "if not given prior to an application to a Court for a review of the administrative decision, must at least be given in the course of a review application" [Emphasis added].

> Whether these requirements were complied with can, more often than not, only be determined once reasons have been provided … .

In *Government of the Republic of Namibia v Sikunda* case, the High Court held that the Minister of Home Affairs was bound to communicate reasons for an administrative decision to the person concerned so as "to enable him to deal with the allegations or to rebut them where possible".[27] In the appeal to the Supreme Court, Strydom CJ held that an aggrieved person not only had the right to be heard (audi altaram partem) as part of the right to administrative justice under Article 18 of the Constitution,[28] but also had the right to be given reasons as a requirement of fair procedure. O'Linn AJA further elaborated on the right to be given reasons, and stated that the administrative body was required to state explicitly why it refused to give reasons, and that such reasons for the administrative decision had to be given "at least in substance".[29]

Efficient tax collection is intricately linked to fair procedures. This is decisive in fostering tax morality. If taxpayers are under the impression that authorities act fairly and not in an arbitrary manner, they are more likely to declare their taxable income scrupulously.

Legality and validity of administrative action

The administrative law relationship

There are different kinds of public law relationships that are regulated by different branches of public law. Depending on the applicable law, one can differentiate between the administrative law or criminal law relationship, respectively.[30] The public law relationship in criminal law is different from the one regulated by administrative law. The criminal law relationship is the domain of the administration of justice, where state power is wielded by state prosecutors and the courts vis-à-vis an accused. The criminal law relationship can be depicted as triangular, with judges holding the scales of justice at the pinnacle, and prosecutors facing the accused to ensure justice in the public interest. The administrative law relationship, on the other hand, concerns

27 *Government of the Republic of Namibia v Sikunda*, 2001 NR 181 (HC) 191 D–E.

28 The right to be heard as part of the right to fair administrative procedures has been confirmed in several cases, although a clear distinction between the right to be heard and the right to be given reasons was not always made; see e.g. *Kaulinge v Minister of Health and Social Services*, 2006 (1) NR 377 (HC); *Kessel v Ministry of Lands and Resettlement*, Case No.'s 27/2006 and 266/2006 (Glintz 2009:10).

29 *Government of the Republic of Namibia v Sikunda*, 2002 NR 203 (SC) 228.

30 On public law relationships in general, see Venter, F. 1985. *Die publiekregtelike verhouding*. Durban: Butterworths, pp 148ff. For more on the administrative law relationship, see Burns, Y & M Beukes. 2006. *Administrative law under the 1996 Constitution* (Third Revised Edition). Durban: LexisNexis Butterworths, pp 93ff.

executive power exercised by a state organ in relation to an individual or legal person.

Thus, administrative action is based upon public law powers exercised by a state organ that wields executive power.[31] Such powers can be conferred directly upon a state organ by the Constitution or indirectly by way of statute.[32] In taxation law, the administrative law relationship juxtaposes the Department of Inland Revenue vis-à-vis individuals or legal persons (e.g. companies and trusts). This relationship is of a vertical nature because it involves only two parties, i.e. the state organ (tax officials) and the addressee (the taxpayer), where the tax officials can execute and enforce statutory powers conferred upon them in a hierarchic power structure. The Income Tax Act, therefore, empowers the Department of Inland Revenue to take administrative action, but the Ministry of Finance has to remain within the confines of the constitutional norms defining how these powers should be exercised.[33] For purposes of

31 The first South African handbook on administrative law as a separate field of public law only saw the light in 1973, namely Wiechers, M. 1984. Administratiefreg. Durban: Butterworths. In contrast to Wiechers, who followed the continental European tradition that links administrative action specifically to the exercise of executive power, Baxter (Baxter, L. 1984. *Administrative law*. Cape Town: Juta, pp 343ff, 383ff), who was more influenced by English law, linked administrative action to the exercise of a public power. In the continental tradition, administrative action is contrasted with internal executive action, and refers to executive action with a direct external effect relating to individuals or legal persons. This distinction is not clearly made in English administrative law, which departs from the exercise of a public power in general. This extended concept of *administrative action* makes it possible to accommodate criminal justice as part of the executive's sphere of competence. In South Africa, difficulties are currently cropping up because the Promotion of Administrative Justice Act, 2000 (No. 3 of 2000) perpetuates the notion that administrative action is based on the exercise of a public power instead of restricting that to the exercise of executive power. For a discussion of the legal position, see Hoexter (2007:167–169); for a critical appraisal, see Wolf, L. 2011b. "Pre- and post-trial equality in criminal justice in context of the separation of powers". *Potchefstroom Electronic Law Journal*, 14(5):58 at 81; 115–118.

32 In Namibia, the Constitution confers executive powers directly upon the Cabinet (Chapters 6 and 15) and regional and local governments (Chapter 12). Executive powers can also be conferred by way of statute on institutions like the university, the national broadcaster, or parastatals. For an exposition on the sources of administrative action in Germany, see Maurer (2006:194f, 199–200). For more detail on administrative action based on executive power which has the Constitution as its direct source, see Maurer (ibid.:552–574); and on administrative power that is conferred indirectly by way of statute, see Maurer (ibid.:575–625).

33 The Minister may make executive regulations pertaining to functions exercised by tax officials in the Department of Finance or regulate taxation matters insofar as the enabling statute has conferred such powers upon him/her. The Act, however, conflates executive regulations in terms of the enabling statute with the legislation itself. Thus, section 1 specifies that "this Act", i.e. the Income Tax Act, "includes the regulations". This is obviously not the case. The executive power to make regulations in terms of Article 40(k) of the Constitution needs to be clearly

taxation, a reference in the statute to powers that could be exercised by the Minister departs from the precept that these powers could and, as a rule, will be delegated to tax officers to ensure effective tax administration.[34]

Characteristics of administrative action

Administrative action encompasses a collection of measures, all of which have specific characteristics and are subject to the same category of legal rules.[35] There are different categories of administrative action, namely –

- creating order, e.g. public safety, planning law
- clarifying a legal status, e.g. granting of citizenship, permanent residence
- imposing public dues, e.g. taxation, levies, customs
- granting state support, e.g. social security grants, subsidies
- state control measures, e.g. building law, environmental protection, consumer protection, and
- administrative action of a mixed nature.

The most common forms of administrative action are orders, instructions, notices, assessments, permits, and exemptions.[36]

There are many different kinds of administrative action that could be taken in the course of taxation. These include –

- reminders to submit a tax return
- assessments informing taxpayers about the outcome of their tax returns
- setting deadlines to pay taxes
- reminders to pay outstanding taxes
- the charging of interest when taxpayers fail to settle their tax debts by the specified deadlines, and
- notices to employers to withhold employees' taxes.37

distinguished from Parliament's legislative powers in terms of Article 44 therein.

34 Section 3(1), Income Tax Act.

35 Maurer (2006:187ff).

36 Maurer (2006:216–233); Ipsen, J. 2005. *Allgemeines Verwaltungsrecht* (Fourth Edition). Cologne: C Heymanns, pp 59–63; Schmidt, R. 2004. *Allgemeines Verwaltungsrecht* (Eighth Edition). Bremen: Rolf Schmid Verlag, pp 118–123; Hoffmann, H & J Gerke. 1998. *Allgemeines Verwaltungsrecht mit Bescheidtechnik, Verwaltungsvollstreckung und Rechtsschutz* (Seventh Edition), Cologne: Kohlhammer Deutscher Gemeindeverlag, pp 6–9.

37 These administrative acts are common to taxation procedure in most countries. For an exposition of administrative action in German taxation law, see Tipke, K & J Lang. 2010. *Steuerrecht – Ein systematischer Grundriß* (Twentieth Edition), Cologne: Verlag Dr. Otto Schmidt KG, pp 173ff.

In order to execute different kinds of administrative action, the Department of Inland Revenue has been empowered by different provisions in the enabling statute. These are distinct administrative powers, and each of them is to be exercised in its own right.

Thus, administrative action is based on the dual symbiosis of material law – i.e. the enabling statute – which empowers a state organ wielding executive power to take action to facilitate taxation; but it is simultaneously also an expression of the legally binding nature of such action through invoking the statutorily prescribed taxation procedure in the individual instance.[38]

An administrative act has a regulating character and contains a legally binding order or notice that has specific legal consequences. The legal consequences envisaged are that rights or duties are clarified or specified, confirmed, changed, suspended, or dissolved.[39] The administrative act therefore needs to contain legally relevant instructions or a declaration of intent in terms of statutory powers conferred upon the state organ. Administrative action could entail setting deadlines, granting extensions, assessing taxes, settling accounts, granting respite, suspending execution, or amending and revoking previous administrative acts.[40] The Department of Inland Revenue may issue different administrative acts separately, or bundle them in a single letter, depending on what is appropriate under the circumstances. For example, a reminder to pay assessed taxes if a taxpayer is in arrears obviously has to be issued separately, and cannot be bundled with the original notice of assessment.

Depending on the case, an administrative act can create benefits or liabilities.[41] Furthermore, an administrative act can be provisional or final in nature. Both provisional and final administrative acts qualify as legally binding, but only the former can later be amended or revoked.[42]

38 On the nature of administrative action, see Maurer (2006:212ff).

39 (ibid.:191).

40 (ibid.:193ff).

41 Benefits from an administrative action could include social welfare grants or a tax refund of overpaid taxes. Liabilities flowing from an administrative action could include noise reduction in industrial areas or the duty to install filters in smoke stacks to reduce air pollution. In both instances, the rights of a person could be adversely affected, e.g. when a tax refund is lower than it should be, or when the decibel level of noise is required to be lower or a smoke stack higher than it needs to be.

42 Typical instances of non-final administrative action are assessments on condition of verification or provisional assessments. For the difference between them, see Footnote 48 and the discussion under the subheading "Tax estimations, additional penalising taxes and additional assessments". See also Maurer (2006:192).

An administrative act is further characterised by the fact that it regulates the individual instance. It is important not to confuse the power to take administrative action in terms of a statutory provision that applies in general with invoking the power in the individual instance. Thus, the Department of Inland Revenue is obliged to inform a taxpayer that specific administrative action is to be taken, irrespective of whether the administrative act is of an obligatory or discretionary nature.

The written form for valid administrative action in taxation is normally prescribed to ensure legal certainty and to serve as evidence in case of disputes. It suffices if the addressee is informed by post, as long as the letter is sent to a valid and correct address in respect of the taxpayer in question.[43] The date on which the letter is received is usually regarded as the date on which the administrative act takes effect.[44] Other options are that the administrative organ could determine that the administrative act should take effect on a specified future date once certain conditions had been met, or that it lapses once certain conditions had been met. A retroactive date could be specified in respect of when the administrative act grants advantages such as subsidies. When the administrative act imposes a burden or liability, e.g. the payment of outstanding tax after assessment, the date specified has to be a future date to enable compliance.

There are four stages in the process of taking administrative action:

1. A decision is required to be taken by the tax authority.
2. The decision is required to be co-signed by the tax officer's supervisor and be prepared for dispatch to the taxpayer, i.e. the data needs to be fed into the computer system and then printed out.
3. Subsequently, the document containing the administrative act needs to be mailed to the addressee, and
4. The decision needs to be communicated personally to the addressee so as to establish the direct external effect of the administrative act.[45]

Thus, the administrative act only comes about once the fourth stage has been completed, i.e. when the addressee receives the document. Until the administrative act is officially communicated to the taxpayer, such a measure is of a purely internal executive nature: no administrative act has come into existence as yet.[46]

43 Maurer (2006:246–254; Tipke & Lang (2010:968, 973f).

44 See Tipke & Lang (2010:966–969). In Germany, the legislature created a legal fiction in terms of which three working days were added to the date on which the document was mailed. Hence, the administrative act became effective on the third day following the date of the postal stamp on the letter.

45 On the requirements and the effect of administrative acts in taxation procedure in German taxation law, see Tipke & Lang (2010:965–974).

46 In South Africa, the Constitutional Court held that the addressee of an

Administrative action is characterised by its regulating character in an individual instance, based on a decision with a direct external effect.[47] This refers to two aspects that are inherent to all administrative action. Firstly, it does not concern internal decisions or deliberations of the executive. Preparatory action taken by various tax officers in the Ministry of Finance and internal instructions to them has no *external* effect.[48] It is important, therefore, to distinguish between the different stages in the coming about of an administrative act, from the moment when it actually takes effect and becomes legally binding. Secondly, the external effect must be of a *direct* nature. Thus, the person at whom the administrative act is directed is required to be informed in a personal capacity.[49] Hence, the administrative act needs to be addressed properly to the person concerned: it cannot be addressed to third parties such as relatives or neighbours, or mailed to the legal counsel or the taxpayer's tax advisor

administrative act was required to be informed about it and had to be given a reasonable opportunity to make representations to the decision-maker; see *The Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-aided Schools, Eastern Transvaal*, 1999 (2) BCLR 151 (CC). In this case, the subsidies for free transport and accommodation for disadvantaged pupils were terminated without informing the recipients about it. In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*, 2005 (6) SA 313 (SCA) para. 22, Nugent JA defined administrative act as "action (a decision) of an administrative nature taken by a public body or functionary". In this context, the common law doctrine of ripeness was invoked in that, before an administrative act takes effect, no objection to it can be raised. See Hoexter (2007:518–520). The application of this doctrine is not restricted to the taking of administrative acts: it also finds application in respect of executive action, such as the making of regulations.

47 The meaning attached to this concept by Hoexter (Hoexter, C. 2002. *The new constitutional and administrative law*, Vol. II. Cape Town: Juta, pp 107ff), Hoexter (2007:204–209) and De Ville (2005: 54–58), with reference to Pfaff and Schneider (Pfaff, R & H Schneider. 2001. "The Promotion of Administrative Justice Act from a German perspective". *South African Journal on Human Rights*, 17:59) does not correspond with the manner in which it is actually applied. The direct element refers to the addressee that needs to be informed in a personal capacity before the legal effect attaching to the administrative act can become binding. The 'immediate legal effect' also does not depict the 'finality' of an administrative act, but merely refers to a specific decision that was taken. An administrative act can be provisional or final, depending on the case. Both are legally binding, but whereas the latter can no longer be revised, provisional administrative acts can still be changed at a later stage.

48 Interest on outstanding taxes that is calculated by a computer, for example, does not constitute a legally binding administrative act until the taxpayer has been informed of the interest being charged.

49 In terms of tax law, administrative acts can also be addressed to a representative taxpayer of a person who does not have the capacity to act (e.g. a minor or a mentally retarded person), or one who acts for an institution (e.g. a trustee) or on behalf of a liquidated or deceased person's estate. Sections 87 to 93 of the Income Tax Act explicitly provide for these instances. See also Maurer (2006:195–199).

in the hope that the latter will pass the administrative act on to the person concerned.[50] Such indirect communication of an administrative act does not fulfil the requirement of being "direct".[51] The *direct effect* of an administrative act signals that it creates legal consequences attaching to the individual(s) concerned. Also, an administrative act is not numerically restricted to a single person. Thus, if more than one taxpayer is concerned, e.g. various directors of a company, then each of them is obliged to be informed.[52]

Distinction between the legality and validity of administrative action

The *legality* of administrative action should be distinguished from its *validity*.[53] The *legality* of administrative action depends on whether such action is permissible in terms of the applicable law and conforms to all the statutory specifications relating to a specific administrative act.[54] The *validity* of administrative action, in turn, presupposes its legality. The next step, therefore, concerns the validity of the legal consequences of the administrative act for the addressee. In other words, if the administrative act falls short of the requirement of legality, no legally binding administrative act has come into existence. This would be the case, for example, when an assessment does not meet the formal requirements for its legality because it has not been properly communicated to the taxpayer.[55] The assessment could be issued anew in conformity with the statutory requirements. A defective administrative act which is reissued to correct a defect relating to its formal legality is treated as an administrative act de novo.

If a tax assessment is formally correct, but it contains errors, e.g. if the amount of taxable income that has been determined is incorrect because legitimate expenses were not allowed to be deducted or a tax break was mistakenly not granted, the assessment will pass the formal statutory requirements of legality, but its validity can be contested. When the taxpayer lodges an

50 The legal representative or tax consultant may obviously get copies of such administrative documents, based on professional privilege. The original document, however, is required to be mailed directly to the addressee, otherwise the administrative act will not be legally binding.

51 Maurer (2006:200).

52 (ibid.:233–234). When the written form is prescribed for an administrative act, it is obligatory. Mere oral communication would be insufficient.

53 On the principle of legality in taxation, see Tipke & Lang (2010:107ff).

54 The executive department needs to have authority to act, and it has to do so in accordance with the rules and procedures laid down for such purposes. It is also required to observe other formal requirements.

55 German administrative law provides that a defective administrative act may, under specific circumstances, be converted (see section 47, *Verwaltungsverfahrensgesetz*/Administrative Procedure Act). However, an obligatory administrative power is not permitted to be converted into one based on the exercise of a discretionary power.

objection before the set deadline, it has the effect of stalling the validity of the administrative act until the matter has been clarified. Such a defect could be rectified by issuing a revised assessment to reflect the correct amount of taxable income and the tax assessed on such income.

Statutory obligations distinguished from administrative action

A statute often contains generally applicable obligations with which an individual is required to comply. Examples of such statutory obligations include the duty to submit an annual tax return before the specified deadline and to declare all taxable income honestly by way of self-assessment.

These statutory obligations should be distinguished from the powers conferred on an executive organ to take administrative action. Such powers include –

- issuing the taxpayer with a reminder to submit a tax return if s/he has not done so on time
- granting an extension to submit a tax return or to pay taxes
- issuing an assessment
- imposing penalties on overdue taxes, and
- charging interest on overdue taxes.

These powers can be of an obligatory or discretionary nature. An obligatory function is usually signalled by words such as *shall* or *must* in a statutory provision, whereas a discretionary power is cast in the form of a *may* function. Both types of administrative action are subject to the principle of legality, but discretionary measures are also required to be in proportion to the object pursued.[56] If the right to just administrative action under Article 18 of the Constitution is adversely affected, the measures taken can be contested.[57]

Taxes become due because taxable income has been earned.[58] In this context, one should differentiate between the statutory obligation that taxpayers are

56 Legislative measures granting administrative powers to executive bodies obviously need to check that such powers are not excessive: this would constitute a legislative infringement of the right to just administrative action, which could in turn be subjected to a constitutional review of the manner in which the legislature has exercised its lawmaking powers.

57 One should be careful not to confuse liabilities flowing from an administrative act with the adverse effect of administrative action that infringes on the constitutional norm of just administrative action; see Footnote 42. In South African law, the adverse effect of administrative action that can be contested has been conflated with administrative action itself. Section 1(i) of the Promotion of Administrative Justice Act, 2000 (No. 3 of 2000) defines *administrative action* as "any decision taken, or any failure to take a decision … which adversely affects the rights of any person and which has a direct, external legal effect …".

58 The obligation to pay taxes is based on a statute (the Income Tax Act) and ensures equality in taxation. In German taxation law, this obligation is regulated explicitly by section 38 of the *Abgabenordnung* (AO, "Tax Code").

required to submit tax returns based on self-assessment on the one hand, and enforcing payment of taxes once such taxes have been assessed, on the other. Self-assessment is merely a practical arrangement aimed at streamlining taxation and alleviating the administrative burden of taxation. Therefore, it is not expected of the tax authorities that they find out what income specific taxpayers should declare. Self-assessment is not an administrative act, though. It does not involve administrative action taken by the tax authority with a direct external effect. Rather, a tax return could be compared with a claim for a refund of overpaid taxes, or a clarification whether underpaid taxes were still due. This claim is finalised during the assessment procedure, at which point the prepaid taxes are deducted from the assessed tax in order to determine the amount owing or to be refunded. The furnishing of a tax return is, therefore, a legal obligation and, as such, enforceable. However, only once the return has been examined by the authorities and an assessment has been issued to the taxpayer will payment of such an assessed tax become enforceable – as a result of the binding nature of the administrative act.

Proportionality of administrative action

Apart from the material and procedural requirements for administrative action, it must pass the three-pronged test of proportionality, namely that the measure taken has to be suitable, necessary and reasonable in order to attain the objectives pursued.

- Firstly, the measure taken has to be suitable to achieve the intended objective.
- Secondly, consideration has to be given as to which of the suitable measures is/are appropriate to achieve the intended goals under the given circumstances. This criterion sets a standard to confine all the suitable measures to those that are necessary to safeguard justice and legal certainty. In other words, the measure envisaged has to be legitimately within the ambit of constitutional norms.
- Thirdly, consideration has to be given as to whether the measure is reasonable and if the intended goal could not be achieved by a less far-reaching measure that would not infringe upon the rights of the individual/legal person (taxpayer). Even if a measure is suitable and necessary, it would be disproportional if it causes hardship which is not in proportion to the objective pursued and, thus, not reasonable. This requirement is often referred to as proportionality in the narrower sense.

These three requirements are empirical criteria that need to be fulfilled.[59]

59 Blaauw-Wolf (1999:194–197). See also Maurer (2006:248–251); and De Ville (2005:203–209). On proportionality requirements in taxation law, see Tipke & Lang (2010:127f).

Different phases of taxation procedure

Chapter III of the Income Tax Act draws a distinction between five different phases of taxation, as follows:

- Phase I: Prepayment of tax in the form of employees' tax or provisional tax during the tax year (Part IV, section 80)
- Phase II: Submitting a tax return by the statutorily determined deadlines (Part I, sections 55–66); penalties may be charged for submitting a late tax return
- Phase III: Examination of tax returns and issuing tax assessments (Part II, sections 67–70)
- Phase IV: The lodging of objections to an assessment and, if not resolved at an administrative level, taking the matter on appeal to the tax tribunal or a competent court (Part III, sections 71–78), and
- Phase V: Payment of outstanding taxes or tax refunds is due by the statutorily prescribed deadlines (Part IV, sections 79 and 82; Part VI, section 94). If the deadline for payment is missed, penalties and interest may be charged. If the taxpayer continues to be in arrears to settle a tax debt, recovery procedures may be instituted in a court for a judgment to settle a liquid debt. The outstanding amounts can then be recovered from the taxpayer's assets (Part IV, sections 83, 83A).

Each of these phases involves different administrative acts which are regulated in their own right. The tax authorities are obliged to follow the correct procedures that have been prescribed for each phase of taxation. The different stages will be discussed in more detail in the following sections.

The prepayment of tax

Section 80 regulates the prepayment of tax. The rationale behind this measure is to ensure a constant flow of income for the State Revenue Fund. Section 80(1) determines that employees and taxpayers earning income from other sources should pay provisional income tax throughout the year. An employee is required to register as a taxpayer with the Inland Revenue Directorate and furnish his/her employer with a copy of the registration certificate.[60] Employers are obliged to withhold employees' tax on behalf of their employees and to transfer such amounts to the Department of Inland Revenue within 20 days after the end of a month.[61] The amount of prepaid employees' tax to be deducted depends on tables published by the Minister of Finance in the *Government Gazette*.[62]

60 Paragraph 12, Schedule 2.
61 Section 80(1) and (2), read with paragraphs 2(1), 3 and 5, Schedule 2.
62 Paragraph 9(1), Schedule 2.

Other taxpayers are also obliged to pay provisional taxes. These prepayments are based on estimations.[63] The taxpayer needs to be informed, by way of an administrative act, of the amount and the dates on which such prepayments are due. Such an administrative act should, for example, state that Mr X has to make prepayments of income tax to the amount of N$15,000 on 31 August and 28 February, respectively. If the previous year's tax assessment shows that the taxpayer's income has been dropping, such an administrative act could be revised to adjust the prepayments during the course of the tax year. The existing practice requires two prepayments by taxpayers who are not employees. A more constant flow of provisional tax could be ensured if the legislature would determine that prepayments should be made four times a year instead of twice, because the last payment is very close to – and in some cases coincides with – the date on which a full tax return has to be furnished in terms of the current regulation in section 56(1)(b), which causes so many difficulties in other respects.

Tax returns

Section 56 of the Income Tax Act regulates the obligation to submit an annual tax return and follows the taxation practice in most countries that a taxpayer has to furnish a tax return based on self-assessment. Section 1 defines year of *assessment* as "any year or other period in respect of which any tax or duty leviable under this Act is chargeable".

The predecessor of section 56 was substituted by a new section 56 in September 1997 by way of the 1997 Income Tax Amendment Act.[64] The Amendment Act is problematic for a number of reasons which will be canvassed in the course of this exposition. Suffice it to say that section 12 of the Amendment Act, which regulates the commencement of various provisions, creates legal burdens that were expected to be complied with on a retroactive basis.[65] As a general rule, administrative justice requires that a person has to be able to rely on the statutory position as it was at the time when undertaking something or planning the future. Legislative measures which implement burdens retroactively or

63 Section 80(1), read with paragraph 17, Schedule 2. Paragraph 22 determines that two payments should be made for half a year each.

64 No. 5 of 1997, promulgated on 15 September 1997 (GG No. 1680).

65 Section 12(a) of the Amendment Act determined, inter alia, that section 5 therein should be invoked retroactively, i.e. for companies this was from 1 January 1997, and for other taxpayers from 1 March 1997. This provision created the new section 56, which stated that taxpayers should settle their tax debts at the same time as they submitted their tax returns on the basis of their own calculations. The deadlines to submit tax returns had already expired by the time the Amendment Act was promulgated, however. In contrast, section 7 of the Amendment Act, which extended the time to raise objections to an assessment under section 71 of the principal Act from 21 days to 90 days, created an advantage for taxpayers, and such a provision can obviously apply retroactively.

restrict previous advantages (e.g. advantageous tax levels) or benefits (e.g. tax breaks) are, therefore, not allowed. Conversely, obviously, retroactivity of legislation that creates advantages or benefits is not forbidden.[66]

Section 56(1) in its current form regulates the furnishing of tax returns in the following terms:

> Subject to subsections (4), (5) and (16), every person who is personally or in a representative capacity liable to taxation under this Act in respect of a year of assessment, shall not later than the last day fixed by subsection (1A) –
> (a) furnish a return of income in the prescribed form, which shall –
> (i) be *signed* by the person or the duly authorised agent of the person; and
> (ii) include a *computation of the taxable* income of the person and of the amount of tax payable on that income, calculated in accordance with the rates of normal tax set out in Schedule 4; and
> (b) subject to subsection (3), *pay* the amount of the tax due in accordance with that computation.
> [Emphases added]

Sign return personally

A taxpayer is obliged to furnish an annual tax return and sign that the content of the tax return is correct to the best of his/her knowledge. This has evidential value: if a taxpayer intentionally omits to declare certain income, s/he could be charged with tax evasion.[67] Tax consultants are not allowed to sign tax returns on behalf of their clients. Section 63, which deals with the duties of tax consultants or bookkeepers preparing the accounts of taxpayers in support of a tax return, makes clear that they do not qualify as agents acting on behalf of a taxpayer; neither do they qualify as representative taxpayers. Thus, they cannot be held responsible to pay the taxes of their clients or to police their

66 In criminal law, the maxim *Nulla poena sine lege* (No penalty without a law) strictly proscribes retroactivity of criminal law. This prohibition found its way into Article 12(3) of the Namibian Constitution. The rule against retroactivity is less strict in regard to administrative law, however. For a discussion of similar German constitutional law on the topic, see Sachs, M. 2003. *Grundgesetz Kommentar* (Third Edition). Munich: CH Beck, pp 2038– 2049; Maurer, H. 2007. *Staatsrecht* (Fifth Edition). Munich: CH Beck, pp 562–575; Götz, V. 1976. "Bundesverfassungsgericht und Vertrauensschutz". In Starck, C (Ed.). *Bundesverfassungsgericht und Grundgesetz. Festgabe aus Anlaß des 25jährigen Bestehens des BVerfG*, Vol. 2. Tübingen: Mohr-Siebeck, pp 421–452; and Stern, K. 1981. "Zur Problematik rückwirkende Gesetze". In Lerche, P, H Zacher & P Badura (Eds). 1981. *Festschrift für Theodor Maunz zum 80. Geburtstag am 1. September.* Munich: CH Beck, pp 381–393. Statutes which simply enact the common law position are not regarded as being retroactive in creating new burdens.

67 Section 96(1) and (2), Income Tax Act.

clients to pay their taxes.[68] They are also not liable for any tax evasion by their clients of which they were unaware.

Currently, tax consultants often substitute their client's address with their own postal addresses when they prepare tax returns on behalf of a client. Apart from the fact that all administrative acts sent to the wrong address would lead to the Department of Inland Revenue not being able to issue legally binding administrative acts, this could have serious consequences for the tax consultant as well. If a tax consultant employs this substitution, s/he runs the risk of being reprimanded for unprofessional behaviour because s/he is obliged to respect the law and to act in accordance with the ethical standards laid down for tax consultants.[69]

In addition, such a tax consultant may face criminal liability. The common law crime of fraud consists of an intentional misrepresentation. All that would be required is to prove that the tax consultant intentionally made an unlawful misrepresentation which caused actual prejudice or potential prejudice to another.[70] If a tax consultant were to change his/her client's address so that

68 In terms of section 1 of the Income Tax Act, an agent includes "any partnership or company or any other body of persons corporate or unincorporate acting as an agent". This is regulated in more detail under sections 90–93 of the Act. A representative taxpayer includes public representatives of companies, and persons acting on behalf of minors, mentally handicapped persons, a trust, etc.; see Footnote 117. In terms of section 26(1)(d)–(f) of the Public Accountants' and Auditors' Act, 1951 (No. 51 of 1951), tax consultants are obliged to comply with all statutory requirements relating to the preparation of tax returns, audits and financial statements on behalf of their clients. Therefore, when the Income Tax Act requires the taxpayer to sign his/her return, the tax consultant is obliged to respect the law.

69 Section 26(4)(a) and (b) of the Public Accountants' and Auditors' Act requires that tax consultants perform their functions with the "degree of skill and care that could be expected", and that they should avoid negligence in performing their duties. The examining Accountants' Board is obliged to inform the Attorney-General or members of the Public Service – which would include the tax authorities – of such irregularities in terms of section 23(3) of the said Act. If an accountant fails to perform his/her duties with "such a degree of care and skill as in the opinion of the board may reasonably be expected", or acted "negligently in the performance of such duties", the board may launch an inquiry into such circumstances; see section 23(4)(a) and (b) of the Act. Furthermore, the board may impose punishments on such an accountant, which could include a fine, his/her removal from the Register of Accountants, suspension from practice for a specific period or permanent disqualification, a caution, or a reprimand; see section 21(1)(g) of the Act.

70 Burchell, J. 2005. *Principles of criminal law*. Cape Town: Juta, pp 833–844. The four essential elements required to prove fraud are that (1) an unlawful (2) misrepresentation was made (3) intentionally and that it (4) caused prejudice or potential prejudice. Intention has two principal aspects: an intention to deceive, and an intention to defraud. When a tax consultant changes a client's mailing address and substitutes that with his/her own address, the consultant expects the Receiver to act on it. The representation is thus made knowingly, and the tax

the client's assessments or other mail from the Receiver intended for that client is addressed to the taxpayer but mailed to the tax consultant's address, this constitutes an intentional misrepresentation which might cause actual prejudice to the client. This may lead to the taxpayer not being informed that a tax debt is due by a certain deadline, with the effect that penalties and interest could be charged. Thus, the tax consultant risks having the client laying criminal charges against him/her for fraud due to a misrepresentation of the client's address. Civil liability for compensation could also arise, for example, if the taxpayer needs to engage a lawyer to contest the legally binding nature of administrative acts that were sent to the tax consultant.

The taxpayer is not the only one that might suffer prejudice if his/her address is misrepresented: non-proprietary prejudice can also take the form of inconveniencing the public administration.[71] Yet, if the Receiver is fully aware of and condones the practice that tax consultants change their client's postal addresses as described above, the Receiver might be blocked from laying criminal charges for fraud against such consultants because the Ministry would not have been misled by the misrepresentation.[72] In fact, if the Receiver consents to the misrepresentation, knowing full well that the address is that of the tax consultant, the latter would be able to use the defence that such consent excludes unlawfulness.[73] This would block criminal liability in respect of the tax consultant insofar as the Department of Inland Revenue might consider pressing criminal charges.

This is only one side of the coin, though. The Receiver does not have the statutory competency to accept such a change of address because administrative acts have to be directed at the person to whom the legal consequences of the administrative act attach. If the Receiver sends mail to the wrong address, therefore, the taxpayer might suffer prejudice in the form of penalties or interest charged on overdue taxes. If the Receiver has condoned the wrongful change of address, a taxpayer might press criminal charges against the Receiver – holding the Ministry liable as an accomplice because there is a direct causal relationship between the misrepresented address, condoning such misrepresentation, and the prejudice or potential prejudice caused to the taxpayer.[74]

According to criminal law specialist Jonathan Burchell, a person (here, the Inland Revenue) is an accomplice to a fraudulent misrepresentation by the principal offender (here, the relevant tax consultant) when there is a causal relationship between such misrepresentation and the unlawful consequences,

consultant can foresee that the assessment will be sent to the wrong address.

71 Burchell (2005:841).

72 (ibid.:842).

73 (ibid:324ff).

74 For a discussion of accomplice criminal liability, see (ibid.:599–610).

i.e. the prejudice suffered as a result of the misrepresentation.[75] Accomplice liability is distinct from that pertaining to the perpetrator, being based on the accomplice's own unlawful conduct and fault (mens rea).[76] Dolus eventualis[77] would be sufficient, though.[78] The accomplice is not a perpetrator or co-perpetrator, since s/he lacks the actus reus (unlawful conduct) of the perpetrator. However, an accomplice –[79]

> … associates himself wittingly with the commission of the crime by the perpetrator or co-perpetrator in that he knowingly affords the perpetrator or co-perpetrator the opportunity, the means or the information which furthers the crime.

Thus, liability of the accomplice could result if the person foresaw the possibility that the principal offender's offence was being or was about to be committed, and accepting this risk, went ahead and furthered or assisted in the commission of that crime.[80]

Taxpayers that are exempted from furnishing tax returns

In terms of section 56(4), one category of taxpayers has been exempted from furnishing tax returns, namely employees who only earn a salary, have no other income and are employed by the same employer throughout the tax year, and who are not entitled to any deductions.[81] These taxpayers are assessed based on a copy of their employee's tax certificate, which is submitted to the Receiver by their employers. The tax that is due is calculated,

75 (ibid:600–601).

76 (ibid:599); see also *S v Williams*, 1980 (1) SA 60 (A) 159.

77 *Dolus eventualis* is a form of criminal intention and is present where a perpetrator or accomplice foresaw the unlawful conduct or consequences as certain or substantially certain to occur. This form of intention exists where the perpetrator or accomplice does not 'mean' to bring about the unlawful circumstances or to cause the unlawful consequence which follows from his/her conduct, but foresees the possibility of the circumstance existing or the consequence ensuing and nonetheless proceeds with his/her conduct. *Intention* in this sense is sometimes called *legal intention*. See Burchell (2005:152, 462–486).

78 (ibid.:604).

79 *S v Williams*, 1980 (1) SA 60 (A) 159 at 63, per Joubert JA. See also *S v Maxaba*, 1981(1) SA 1148 (A) at 1156f.

80 Burchell (2005:604–605). Since the address changes are accepted by individual tax officials and their names are usually entered in the computer system, it would be easy to identify the relevant tax official and their superiors who should have supervised the correct application of the law. It would be possible to hold them criminally liable, because indemnity clauses do not cover criminal acts of state officials in the exercise of their duties. The criminal punishment of accomplices usually depends on the extent of the accomplice's participation in the misdemeanour.

81 Sections 56(4) and (5)(a), Income Tax Act.

deducted and transferred to the Receiver by their employers.[82] The Minister still has the discretionary power though, to instruct individual taxpayers falling in this category in writing to submit a tax return.[83]

Deadlines to furnish a tax return

Other taxpayers – such as companies, businesspeople, professionals, farmers and employees who also have other sources of income or who have worked for different employers during a tax year – are obliged to furnish tax returns by the deadline specified in section 56(1A) of the Income Tax Act.[84] Before subsection (1A) was inserted by the 2002 Income Tax Amendment Act,[85] all taxpayers had to furnish their tax returns within four months after the end of the tax year.[86] Section 56(1A) now differentiates between two groups of taxpayers, with different deadlines applying to them:

- Companies, business enterprises, professionals (e.g. legal or medical practitioners) and farmers are required to submit their tax returns by the last day of the seventh month after the end of the tax year, and
- All other taxpayers (i.e. employees who are obliged to furnish tax returns) are required to submit their tax returns by 30 June.

Apparently, the concept of *tax year* coincides with that of *financial year* in terms of the Income Tax Act.[87] In terms of the definition in section 1 therein, a *financial year* ends on the last day of February. This means that the first group of taxpayers are obliged to furnish their tax returns at the latest by the end of September.

Calculate and pay taxes

Section 56(1)(a)(ii) requires that a tax return should include a "computation of the taxable income" and of "the amount of tax payable on that income". It is open to question whether it is realistic to expect that taxpayers should calculate the tax which they are due to pay. Tax law is highly specialised and even lawyers who are not specialists in the field will have difficulty complying with this requirement. Whether it is fair to demand this statutorily in a country

82 Section 56(5)(a), read with section 59.
83 Section 56(4).
84 Section 56(1), (5), (10), (13), (15), and sections 58–62.
85 By section 9(1)(b), Income Tax Amendment Act, 2002 (No. 7 of 2002).
86 Section 56(1), as newly conceptualised by section 5 of the 1997 Income Tax Amendment Act, stipulated that tax returns were to be submitted "within 120 days" after the end of the tax year. This was amended two years later to read "4 months" by section 9(1) of the Income Tax Amendment Act, 1999 (No. 21 of 1999).
87 *Tax year* has not been defined by the Income Tax Act, but section 1 therein specifies that year of assessment means "any year or other period in respect of which any tax or duty leviable under this Act is chargeable".

where a substantial number of the population is semi-literate is, therefore, open to question.[88]

One also needs to consider that, with modern technology, computer programs are available to enable the Receiver to calculate taxes that are due. Hence, in this respect, a critical reappraisal of the fairness and suitability of section 56(1)(a)(ii) is overdue.

Section 56(1)(b), which links the furnishing of a tax return to the obligation to pay the amount of self-assessed tax in lieu of the actual assessment, is ambivalent. On the one hand, it creates the impression that the payment of self-assessed taxes in lieu of the actual assessment is another preliminary tax payment. On the other hand, self-assessment is construed as an "administrative act". The actual assessment is then cast in the form of 'revising' the self-assessment. Little calculation mistakes in the tax return or the legitimacy of expenses that were deducted from income that are subsequently disputed by the Receiver are, thus, construed as an 'incorrect statement' in the 'assessment' which should be 'revised' by the Receiver. This then empowers the Receiver to levy additional taxes on the presumption that all such instances could automatically be equated with tax evasion, even if no criminal intent was proved.[89] None of the two options is satisfactory.

In fact, the tax return finalises the declaration of taxable income at the end of a tax year. Apart from steady income, all other sources of taxable income such as dividends and capital gains should be declared.[90] Thus, self-assessment is based on the legal obligation to furnish a tax return and does not constitute administrative action. The amount of tax calculated by a taxpayer has no binding force. Administrative action can only be taken by the Department of Inland Revenue when the return is assessed. Once the return has been examined, a residual tax debt or refund of overpaid taxes becomes liable on the date specified in the notice of assessment. This constitutes administrative action, which has legal consequences. The Department of Inland Revenue may, for example, refuse to recognise certain expenses as business-related, but is then obliged tp give the taxpayer the opportunity to make representations to the contrary.

The following objections can, therefore, be raised in respect of section 56(1)(a)(ii) and section 56(1)(b). Firstly, all taxpayers are already required to make

88 A daily newspaper accurately summed up the position of having to pay self-assessed taxes as "far too complicated for the average taxpayer in Namibia … to at least know what is expected of them". See "Self-assessment – what are our obligations?", *The Namibian*, 1 August 2006.

89 Section 66(1)(c), Income Tax Act.

90 Section 56(10), as inserted by section 5 of the 1997 Income Tax Amendment Act.

prepayments of taxes throughout the year in terms of section 80 of the Income Tax Act. Hence, another prepayment is not necessary. The tax return merely finalises the taxation for a specific tax year.

Secondly, section 56(1) is unfair insofar as it does not require that the Receiver should also immediately refund overpaid taxes once a tax return has been submitted and before it is assessed. Thus, the state has the benefit of earning interest on underpaid taxes, whereas taxpayers entitled to refunds are expected to wait for their refunds until an assessment has been issued. Even then, section 94 offers loopholes that can be used to delay refunds. Such a lack of equal treatment might result in the state's enrichment at the taxpayer's expense.

The third objection is more serious because it goes to the heart of administrative action. The *payment* of tax on the basis of self-assessment is not enforceable: it does not involve an executive state organ, and does not constitute binding administrative action. The amount of tax that is due in an individual case depends on a valid assessment by the tax authorities. Only once an assessment has been issued in terms of section 67(2) does the assessed tax become due by the specified deadline, and only then can it be enforced accordingly. Section 56(1)(b) is, therefore, redundant insofar as the legislature has duplicated procedures: it requires that taxes which originate from taxable income should be paid twice. The payment of assessed taxes as foreseen by section 67(2)(b) suffices.

Section 56(1) has serious legal repercussions in practice. Due to the confusion it creates, the due date for the payment of assessed taxes has been construed to be the same as the deadline for submitting tax returns, with the effect that interest is charged retrospectively from that date – even before a taxpayer has had the slightest opportunity to settle an assessed tax debt.

The enabling statute, however, cannot simply bypass proper procedures of just administrative action as required by Article 18 of the Constitution. Before the adoption of the Constitution in 1990, the courts would not have been able to strike down such a provision: they could only prefer the most just and equitable provision. This had the effect that one of the provisions was ousted, de facto, but remained on the statute book. Under Namibia's Constitution, however, courts are now in a much stronger position. Article 5 of the Constitution stipulates that all state organs are bound by the fundamental rights and freedoms enshrined in Chapter III. Therefore, Parliament is obliged to adopt legislation that does not conflict with the norms of administrative justice. The legislature needs to take due care to avoid internal conflicts in a statute because such conflict hampers legal certainty. The constitutionality of section 56(1) of the Income Tax Act can obviously be contested.

Extensions to submit a tax return

The deadline to furnish a tax return can be extended provided that an individual requests it.[91] Nonetheless, even after a reminder has been issued to submit a tax return, an extension could still be granted on good cause to submit the return by a later date than the deadline specified in the reminder. Such an extension is an administrative act in its own right. If a tax consultant requests an extension on behalf of a client, this can be done orally (by telephone), but it is best to confirm it in writing or at least to make a note to this effect in the client's tax file, specifying the date on which the extension was granted, by whom it was granted, and until when the deadline was extended. It also makes internal executive taxation management more efficient if extensions that were granted are on record in the relevant taxpayer's tax file. The written form has the advantage of being easy to use as proof in case a penalty for late submission should unexpectedly be charged.

Reminders and penalties on default

If a taxpayer does not submit a tax return on time and fails to arrange for an extension, a penalty may be levied.[92] Fair administrative procedures require that such action should be in proportion to the object pursued. It would be fair just to remind a taxpayer at first to submit the tax return, setting a deadline by when this should be done. This ought to happen relatively soon to ensure efficient tax collection. Such a first reminder need not be accompanied by a penalty yet. The tax authorities, however, should warn the taxpayer that, in case of non-compliance, a penalty would be charged from the date after the extended deadline expired. The reminder and the charging of a penalty are separate administrative acts. In a second reminder, when the charging of the penalty sets in, these administrative acts could be bundled in one letter informing the taxpayer that a penalty has been charged. The second reminder would usually stipulate a final deadline for submitting the tax return as well as a deadline for paying the penalty. This ought to be accompanied by a warning that the taxpayer's taxable income would be estimated if the taxpayer fails to submit a tax return by that deadline.[93]

In *Esselmann v Secretary of Finance*,[94] such reminders received attention. The court found that the executrix of a deceased estate was obliged to submit tax returns as requested by the Secretary of Finance and to settle the assessed taxes in her capacity as the estate's representative taxpayer. The Secretary of Finance proved that a reminder had been sent to the representative taxpayer

91 Section 56(3)(b)(i)(aa).
92 Section 65(1)(a).
93 The estimation of taxable income is possible under specific conditions, and is regulated by section 68 of the Income Tax Act.
94 1990 NASC 5 (13 November 1990).

by registered mail to her correct postal address, requiring her to pay the outstanding amount of taxes, failing which legal steps were to be taken.

The failure to take proper administrative action to secure that tax returns are furnished relatively close to the year of assessment is important for another reason: it may impact on the capacity to take action insofar as prescription of assessment might prevent the authorities from levying taxes after the lapse of a specific period of time.[95]

Section 65 regulates penalties upon default. One would have expected the focus of section 65, which falls under Part I of Chapter III, to be on tax returns.[96] Yet it also contains a number of provisions that would have been more appropriately classified under Part II, which deals with assessment procedures, or under Part VI, which deals with tax-related offences.[97] Section 65 partly duplicates offences which are also specified under section 96 of the Act, with the effect that different penalties are prescribed for the same offences.

Section 65(1) prescribes a "fine" of N$300 or up to three months' imprisonment "on conviction" for non-compliance to submit a tax return. Subsection (3) prescribes a further "fine" of N$30 for each day during which the default continues if a person who has been "convicted" in terms of subsection (1) fails to submit a tax return "within any period deemed by the Minister to be reasonable". A simple administrative act to remind a taxpayer to submit a tax return by a specified deadline, or to charge a penalty upon non-compliance with the reminder, is thus regulated rather heavy-handedly in terms of criminal law.

In other words, ordinary administrative measures have been cast in the form of criminal sanctions before the full scope of administrative procedures – where penalties could have been charged – has been exhausted. The legislation

95 See text around Footnote 144.

96 This provision was originally taken over from section 79 of South Africa's 1962 Income Tax Act. There, too, this provision falls under the rubric of 'Returns' (Chapter III, Part I).

97 The only provision of section 65 which actually deals with ensuring that tax returns are furnished is subsection (a). Subsection (b) deals with clarifying matters during assessment. Subsections (c) and (d) have to do with tax evasion, which is already dealt with under section 96(1)(a) of the Act. Subsection (g), which relates to false certificates that are issued by bookkeepers, similarly ought to have been dealt with under section 96 instead of section 65. Subsection (e) relates to obstructing or hindering tax officers in the discharge of their duties, and also has nothing to do with penalties upon defaulting to submit a tax return. The failure to keep tax-related documents for five years is penalised in subsection (f). This might be relevant for finalising assessments during a five-year audit, but it has nothing to do with securing that tax returns are filed on time.

ought to distinguish clearly between *administrative penalties* enforcing statutory duties in terms of tax law (e.g. the duty to submit a tax return) or obligations in terms of an administrative act (e.g. a reminder to submit the tax return by a final deadline), on the one hand, and *criminal fines* upon conviction of tax-related criminal offences on the other. Unfortunately, section 65 does not make this distinction clear at all.[98] There is no rational basis for putting the mere failure to submit a tax return on time on a par with more serious offences such as tax evasion. This is obviously not the intent of Article 18 of the Constitution, which prescribes that administrative procedures should be fair and just.

Furthermore, the statutorily prescribed measure foreseeing a prison sentence for not submitting a tax return on time is out of proportion with the object pursued. The measure constitutes a serious infringement on the right to personal freedom, since it transgresses the scope of powers that could legitimately be conferred on state organs in terms of the limitation clause.[99] Sufficient reminder procedures and a penalty on default to submit a tax return are appropriate measures that would fall within the constitutional limits of the powers of the tax authorities.

This is not the only point of critique though. Section 66(1)(a) further empowers the tax authorities to levy an amount of additional taxes equal to twice the tax chargeable if a taxpayer fails to submit a tax return. Here, too, the discretionary power conferred on the executive organ envisages an extreme penalising measure, which stands in no proportion to the default to submit a tax return on time.[100] The levying of additional taxes as a penalising measure is usually reserved for instances where a taxpayer has been found guilty of tax evasion.[101] A precondition for being penalised for tax evasion is that criminal intent to evade taxation first has be proved to the satisfaction of a court before such penalising additional taxes can be levied, otherwise the provision might be exploited in an arbitrary manner.[102] In other words, a distinction should be

98 This provision was taken over from pre-Independence South African tax law. Section 65(1) largely corresponds with section 75(1) of South Africa's 1962 Income Tax Act, which also criminalises transgressions that should be regulated by administrative procedure.

99 Article 7, read with Article 22, Namibian Constitution.

100 The discretionary nature of the power is established by section 66(2) of the Income Tax Act. The provision is formulated in a strange way, though. It departs from the premises that the power under section 66(1) is an obligatory one which the Minister may later revise. In other words, the same power is construed to be both obligatory and discretionary. It is suggested, therefore, that the power was intended to be discretionary right from the start, and that the administrative act is subject to objection as foreseen by section 66(2)(b).

101 Section 96, read with section 66(6), Income Tax Act.

102 Section 66(2)(a) and (6) puts a non-serious failure to submit a tax return on time on a par with a serious criminal offence such as tax evasion.

made between the *unintentional missing* of a deadline to submit a tax return and the *prolonged intentional refusal* to submit a tax return, with the intention of evading having to pay tax. The whole spectrum of administrative action that can be taken first needs to be invoked in order to make out a clear case that a specific taxpayer indeed intended to evade taxation. To prove such a case, it will be necessary to demonstrate that a taxpayer has ignored reminders to submit a tax return and/or did not pay the penalties that were levied.

Like section 56, section 66 has not been drafted well in that, as shown above, certain provisions do not focus on the furnishing of tax returns, but deal with tax assessment.[103]

Tax assessment

In 1997, the legislature substituted the legal concept defining *assessment*.[104] The definition states that when the Act refers to an *assessment*, it means –[105]

> … the determination by the Minister [of Finance], by way of a notice of assessment served in a manner contemplated in section 98(2) –
> (a) of an amount upon which any tax leviable under this Act is chargeable; or
> (b) of the amount of any such tax; or
> (c) of the amount of any loss ranking for set-off,
> and for the purposes of Part III of Chapter III includes any determination by the Minister which is in terms of this Act subject to objection and appeal.

The definition thus delineates administrative action from the self-assessment by a taxpayer in a tax return: it makes clear that a notice of assessment is to be issued officially by the Department of Inland Revenue in order to qualify as an administrative act and to become legally binding. In addition, section 1 of the Income Tax Act defines *notice of assessment* as "a notice of assessment in terms of section 67(2)". Section 67, in its current form, sets out the statutory requirements for a binding assessment in the following terms:

> (1) A return of income and computation of a taxpayer's liability for tax furnished in accordance with section 56 *shall be subject to examination* by the Minister.
> (2) Upon examination of a taxpayer's return and computation of liability for tax the Minister shall issue *to the taxpayer* a notice of assessment stating –
> (a) the *particulars of the assessment* and the *amount* of tax payable thereon;

103 Section 66(1)(b)–(c), and 66(3).
104 Definition of *assessment* substituted by section 1(a) of the 1997 Income Tax Amendment Act.
105 Section 1, Income Tax Act.

(b) the *date* before which any amount of tax determined to be due shall be *paid*;
(c) that any *objection* to the assessment must be lodged in writing within a period of *90 days* of the date of issue of the notice of assessment;
(d) the place where an objection to an assessment must be lodged.

(3) A notice of assessment to be issued in terms of subsection (2) to a taxpayer, other than a company, shall not be issued before expiry of the last date for the filing of an income return as fixed by section 56(1A), irrespective of the date on which the return was actually furnished by the taxpayer.

(4) Every return of income furnished by a taxpayer and the assessment made under subsection (2) shall be filed and be retained by the Minister for such period as the Minister may determine, after consultation with the Auditor-General.

[Emphases added]

By using the word *shall*, subsection 67(1) obliges the tax authorities to examine all tax returns furnished by taxpayers in terms of section 56. The rationale behind this provision is equal treatment in taxation: the Minister is required to examine all tax returns and issue tax assessments to everybody who has completed a tax return.

As set out earlier herein, the legality of administrative action and the enforceability of legal consequences flowing from such action depend on formal compliance with the Income Tax Act.[106] A notice of assessment needs to be correctly addressed to the taxpayer; the date of the notice of assessment is also not permitted to precede the relevant deadline for furnishing a tax return in terms of section 56(1A), and such notice has to contain all the relevant particulars of assessment. It also needs to specify a future date by when the outstanding tax should be paid, and has to inform the taxpayer that an objection could be lodged within 90 days of the date on which the notice of assessment was issued. These formal requirements for the legality of a tax assessment, which have to be met, are discussed in more detail below.

The assessment has to have a direct external effect

The assessment is required to be "issued to the taxpayer".[107] The wording of that section entails a statutory obligation (by the use of the word *shall*), and makes clear that the addressee of an assessment is "the taxpayer". The administrative act, therefore, has to be directed at the taxpayer in his/

106 See the discussion under the subheading "Distinction between the legality and validity of administrative action" earlier herein.
107 Section 67(2), Income Tax Act.

her personal capacity and mailed to his/her address.[108] This ties in closely with section 56, which stresses personal liability for taxes by the taxpayer or representative taxpayer.[109]

The right to just administrative action requires at the very least that a taxpayer is properly informed about such action being directed at him/her. The direct external effect of an administrative act is an intrinsic part of the administrative act itself. To inform the addressee is, therefore, an important hurdle to be overcome in order to establish the legality of the administrative act and to ensure that its consequences are legally binding. This requirement is not met by simply creating a legal presumption which shifts the burden of proof to the taxpayer that s/he was not properly informed.[110] In the light thereof, one should consider the presumption in section 98 of the Act, in terms of which it is "deemed" that an assessment was properly communicated to a taxpayer if it is –[111]

> … left with some adult person *apparently* residing at or occupying or employed at his last known abode or office or place of business. [Emphasis added]

To leave it with such a person is no guarantee that the administrative act would in fact be communicated to the taxpayer. There is no duty upon any third party to inform a taxpayer about an assessment that was sent or left at the "last known abode or office or place of business". This may, in fact, be a transgression of another fundamental right. Article 13(1) of the Constitution explicitly protects the privacy of correspondence. When the private mail of a taxpayer is left with another person, there is a high risk that his/her mail will be opened. It could also amount to an infringement of data protection, which is explicitly guaranteed by the tax confidentiality clause of the Income Tax Act.[112]

The statutory obligation of the Receiver to inform the taxpayer of an assessment includes the duty of care to follow up a matter if it becomes clear that mail intended for the taxpayer might not have reached him/her. A

108 In German taxation law, for example, section 33(1) of the AO explicitly states that the taxpayer is the person who is personally liable to pay the tax or the person paying taxes on behalf of another in the capacity as representative taxpayer. Section 33(2) of the AO makes clear that "the taxpayer" does not include a third party who assists in clarifying the taxable income, e.g. a tax consultant or chartered accountant, or a person who has to withhold taxes on behalf of the Receiver, e.g. an employer who has the duty to transfer provisional tax to the tax authorities on salaries earned by his/her employees. In terms of section 43 of the AO, the taxpayer is the person who is liable for paying the taxes.

109 Section 56(1), (2) and (9), Income Tax Act. See also sections 43 and 47 dealing with a special regulation relating to non-resident shareholding.

110 Section 98(2), read with subsection (3).

111 See section 98(2)(b)–(d).

112 Section 4, Income Tax Act.

better monitoring of the taxpayer's address could easily be achieved when tax forms are designed in a way that enables a taxpayer to insert his/her current and previous address if s/he has moved. Another option would be to oblige taxpayers statutorily to inform the Receiver promptly about any change of address.[113] Employers could also be obliged to inform the authorities about the correct personal postal addresses of their employees in their capacity as representative taxpayers. This would make such a constitutionally dubious legal fiction as that of section 98 redundant.

As mentioned earlier, tax consultants in Namibia often change their client's postal address to their own. If the tax form requires the address of the taxpayer to be filled in, the correct address, i.e. the taxpayer's own actual address, needs to be stated. A tax consultant needs to comply with the law; thus, a misrepresentation of the taxpayer's true address is not allowed.[114] If the Receiver, on its part, condones the changing of a taxpayer's correct address, whether that be a post office box or street address, to that of the consultant, with the result that the assessment does not reach the taxpayer him-/herself, the Receiver would not be able to claim that the assessment was properly communicated to the taxpayer.[115] Apart from that, the statutory definition of *representative taxpayer* does not include a taxpayer's legal counsel or tax advisor.[116]

There are manifold important reasons why a taxpayer should be informed personally and not via his/her tax consultant:

- A taxpayer may not regularly mandate a specific tax consultant to complete his/her tax return or may do so only on a once-off basis.117
- A tax consultant may move his/her business, sell it, dissolve it, or die. The assessments of his/her clients may, thus, never reach them or may not reach them in good time for them to meet the specified deadlines for payment of taxes or to lodge an objection.

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113 In Germany, a tax deduction card (*Lohnsteuerkarte*) is issued to all taxpayers by their local government every year. The card has to be presented to the taxpayer's employer to complete, and has to be included with the tax return. The card needs to be returned to the tax authorities even if it is blank, e.g. where the taxpayer is self-employed. Since all inhabitants are statutorily required to be registered where they live and cannot move without changing their address with the relevant local authority, the authorities can easily keep abreast of people's whereabouts. This makes state administration such as tax collection easier.

114 See the text above around Footnotes 69 and 70.

115 See discussion in the text around Footnote 75.

116 The various categories of representative taxpayers are listed in section 1 and are further set out in Part V of the Income Tax Act. A *representative taxpayer* is defined as (i) the partners of a company, (ii) an employer who has to withhold income tax on behalf of his/her employees, (iii) the guardian of a minor or mentally disordered person, (iv) the curator of a trust, (v) the liquidator of a sequestrated estate, or (vi) the executor of a deceased person's estate.

117 For injustices that could occur as a result, see Footnote 217.

- Tax consultants usually have a heavy workload, and under these circumstances an assessment of a client's taxes could easily be passed on too late; furthermore, the legal consequences attaching to such assessments are not binding on the tax advisor.
- The taxpayer might move house and, thus, his/her address might change. If a previous tax consultant is not aware of the move, or is no longer engaged or has not been informed of the change of address, the mail may never reach the intended person. Yet, if the taxpayer's address had not been changed by the tax consultant, the chances are quite good that the tax assessment would still reach the taxpayer. People usually make an arrangement with the post office to forward their mail to a new address, and
- The taxpayer might have died. If mail intended for him/her is sent to the tax consultant, the executor of the deceased estate or its heirs may not be aware of assessments issued posthumously or taxes that might still be outstanding.

These are all factors that could contribute to mail getting lost or reaching a taxpayer too late if the statutory obligation to mail an assessment to the taxpayer's personal address is not adhered to strictly.

A practical solution, though, would be for the tax consultant to receive a copy of the assessment. To enable this, the taxpayer should explicitly authorise the tax authorities to do so on the tax return for a specific tax year. If the tax return forms are designed to provide for a box to check to activate such authorisation, and for a space to specify the tax consultant's name and address, this should suffice. The form could also provide space for the tax consultant to certify that the return was prepared in accordance with legal requirements. Such an arrangement would serve a twofold purpose. Firstly, it enables the taxpayer to select, on a yearly basis, whether a specific tax consultant should get a copy of an assessment, which would minimise the risk that such copy is mailed to a tax consultant who was consulted on a once-off basis or to a consultant who no longer has a mandate from the taxpayer. Secondly, the tax consultant would be able to advise his/her client immediately on receiving the copy of an assessment whether an objection is advisable.

To summarise, the statutory obligation rests solely with the Receiver to inform the taxpayer of his/her tax liabilities. Executing that obligation is a prerequisite for the legality of the assessment. If an assessment is sent to the wrong address, the administrative act is null and void.

Prescribed contents of an assessment

The particulars of assessment to be set out are listed in section 67(2) of the Income Tax Act and in the definition of *assessment*. These particulars include the obligation that a taxpayer should be informed about the outcome of a

tax return, stating the amount of underpaid or overpaid tax. The particulars of assessment further include a statement of the amount of taxable income. To arrive at this figure, it is necessary to list the different sources of gross income, as well as the total amount of expenses and tax breaks that could be deducted from it to arrive at the amount of taxable income. If certain expenses or deductions were not recognised as legitimate, this should be stated clearly, giving reasons why they were not accepted. The reasons given need to refer to the relevant legislative provision or administrative regulation supporting the decision. As a next step, the assessment needs to state the applicable tax rate and calculate the amount of tax due on the taxable income. After that, the sum of prepaid tax is to be deducted from the assessed tax debt to determine the residual tax that is due, or the tax refund that could be claimed. Apart from these requirements, an assessment also needs to specify the deadline for lodging objections, and a deadline by when underpaid taxes should be settled.

A number of issues deserve attention here. The scope of powers in terms of section 66(1) – which empowers the tax authorities to levy additional taxes – is so wide that additional taxes can practically be levied under all circumstances. Subsection (1)(b) refers to the omission from a tax return of "any amount which ought to have been included therein", whereas subsection 1(c) goes even further to include any "incorrect statement" in a return. However, the unintentional oversight of income[118] or the 'incorrectness' of a statement in a tax return, which comes about as a result of the tax authorities having disputed the deductibility of certain expenses or not having recognised tax breaks, cannot be construed as a legitimate ground to levy additional taxes. It is part of ordinary assessment procedures, and such administrative action is subject to objection. A taxpayer then needs to be afforded the opportunity to make representations or provide evidence to the contrary. During assessment, the authorities can request further information to be furnished in respect of specific queries before an assessment is issued. This is implicit from section 65(1)(b). Alternatively, the tax authorities can issue an assessment on condition that specific income or expenses are verified. These instances offer no legitimate basis for levying additional taxes, and would boil down to an arbitrary exercise of powers. The levying of additional taxes may indeed be appropriate, however, if a taxpayer has been convicted of tax evasion. In its current form, it is doubtful whether section 66 would survive a constitutional scrutiny of the justness of these provisions.

Section 95 has been classified under the miscellaneous matters listed under Part VI of Chapter III of the Income Tax Act, but it also concerns assessment procedures. This provision deals with tax avoidance and confers very wide

118 This can happen where a statement for tax purposes that confirms additional income earned during a tax year is issued after the tax return has been submitted. A taxpayer should then still be able to declare such additional income at a later stage.

discretionary powers on the Minister to classify transactions, operations or schemes for avoiding or reducing tax liability as illegitimate. The Minister may do so whenever he "is satisfied" that it is a tax avoidance scheme. In reality, however, tax avoidance is perfectly legitimate: such constructs are the bread and butter of tax consultants all over the world. By contrast, tax evasion is illegal and a criminal offence. Many provisions in section 95 actually try to define *tax evasion* and conflate *tax avoidance* with it. This provision, therefore, ought to be put on a more solid footing. If the Minister wishes to classify certain types of transactions, operations or schemes as non-legitimate expenses for tax purposes, it would be best if s/he makes a regulation listing all such instances precisely in order to create legal certainty about exactly what is allowed and what is not. Such a tax regulation should obviously conform to the statutory powers conferred on him/her and has to apply to all taxpayers. It would then be up to the taxpayer to contest the constitutionality of the regulation listing specific transactions, operations or schemes as tax evasion schemes by submitting such regulation for judicial review. In its current form, section 95 allows practically anything to be declared as 'illegitimate tax avoidance'.

The date of assessment

Clarity about the date of assessment is of cardinal importance to ensure the justness of subsequent taxation procedures. The date of assessment is the starting point from which three further deadlines are determined:

- The deadline for lodging an objection
- The deadline for paying assessed tax, and
- The date after which the Receiver may start to charge interest if a taxpayer fails to pay his/her tax on time.

Section 1 of the Income Tax Act defines *date of assessment* as –

> … the date specified in the notice of such assessment *as the due date* or, where a due date is not so specified, the date of such notice.
> [Emphasis added]

This definition illustrates a legislative lack of skill. It conflates the administrative act (i.e. the issuing of the notice of assessment) with legal consequences attaching to the notice of assessment (i.e. the due date to pay assessed taxes or lodge an objection).

The source of this confusion could probably be traced to the controversial provisions in section 56(1) that a taxpayer should assess his/her own taxes, determine how much they would be, and pay them when the tax return is submitted. The notice of assessment is then somehow construed to 'coincide' with the self-assessment.[119] The matter is further complicated because section

119 See the critical appraisal in the subheading entitled "Calculate and pay taxes",

67(3) of the Act specifies that a notice of assessment is not permitted to be issued before the expiry of the last date for filing tax returns in terms of section 56(1A).[120] This would imply that the 'due date' anticipated by the definition of *date of assessment* automatically precludes the deadline for self-assessment as foreseen by section 56(1)(b) and, thus, ends in limbo. The definition of *date of assessment* is clearly in need of revision, therefore, in order to secure legal certainty. The definition simply ought to state that such date is the date on which the notice of assessment is actually issued.

Deadline to lodge an objection to be specified

Section 67(2)(c) determines that the taxpayer needs to be informed that s/he can lodge an objection within 90 days of the date of assessment. The place where such an objection can be lodged also has to be mentioned.[121] The information contained in the assessment has to enable the taxpayer to substantiate an objection. If the Receiver does not recognise certain deductions or expenses, the taxpayer needs to be informed about such non-recognition, with reasons that would clarify the issue and make it possible for the taxpayer to either concede that the decision was correct, or otherwise enable him/her to raise an objection. The mere rejection of expenses without any reason for doing so constitutes arbitrary administrative action.[122]

The lodging of an objection presupposes the legality of the assessment. If an assessment lacks legality, it is not legally binding. From a constitutional and administrative law perspective, it has never come into existence. The deadlines specified by sections 67(2)(c) and 71(1) would not apply, therefore, because a legally non-existent administrative act cannot be contested. Hence, it is of great importance to make sure that all the statutory requirements for a valid assessment specified by section 67(2) are indeed met.

Deadline for payment of assessed taxes to be specified

The claim for the outstanding tax debt or refund is established by the notice of assessment, and the enforcement of payment depends on the legally binding effect of this administrative act. Unlike section 67(2)(c), which states that a

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under "Tax returns" in the discussion above of different phases of taxation procedure.

120 Section 67(3) does not refer to companies. With regard to employees that fall in the category of section 56(4), the Act specifies that the Receiver is required to assess employees' taxes based on tax certificates to be submitted on their behalf by their employers as representative taxpayers. The deadline for doing so is the same as that of employees envisaged by section 56(1A)(a) of the Act, namely the last day of June.

121 Section 67(2)(c), read with section 71, Income Tax Act.

122 The Namibian Supreme Court held that transparency was an inherent condition of fair administrative action; see Footnote 27.

taxpayer should be given 90 days to lodge an objection, section 67(2)(b) does not explicitly mention a specific period that should be afforded to the taxpayer to settle an assessed outstanding tax. Section 67(3), however, states that the notice of assessment is not permitted to precede the deadline for submitting tax returns. Section 67(3) thus excludes any deadline for paying the taxes if it is earlier than the deadline for submitting a tax return. Therefore, it excludes the due date meant in section 56(1)(b) because such payments are required to be done before or on the section 56(1A) deadline for submitting tax returns.

Fair administrative procedures would require that a deadline in terms of section 67(2)(b) should be a *future* date, i.e. a date later than that on which the notice of assessment was issued, and that a *reasonable time* should be afforded to a taxpayer to settle the outstanding tax. According to the rules of interpretation, there appear to be two options to fill the statutory gap:

- Firstly, one could argue by way of analogy that, if section 67(2)(c) determines that a taxpayer should be afforded 90 days to lodge an objection to an assessment, one could presume that the same period should be afforded to pay the outstanding tax in terms of the assessment. There are good reasons for these deadlines to coincide. If a taxpayer wishes to lodge an objection, s/he would usually also apply for suspension of execution to stall the payment of taxes until the matter can be clarified.[123] In such a case, it would make sense to pay the tax or lodge an objection by the same deadline. This is the way it is regulated in Germany, for instance.[124]
- Secondly, one could look at section 56(5)(c) for assistance in order to determine the due date by which to settle outstanding taxes in terms of a notice of assessment. Like other taxpayers who are obliged to submit tax returns, section 56(5)(b) taxpayers, i.e. employees, are also required to do so by the deadline specified in section 56(1A). Section 56(5)(c) requires these taxpayers to pay their assessed taxes "before or on the due date, which is … the last day of a period of 60 days after the date of the notice of assessment". It would be logical to presume that this due date for the payment of taxes should also apply to other categories of taxpayers listed under section 56(1A)(b), i.e. professionals, farmers, businesspeople and companies. This assumption is based on a 'for the same reason' logic, which is regularly invoked by the courts.[125]

123 Section 78, Income Tax Act.

124 In Germany, assessed income tax is required to be paid within 30 days (section 220, AO) and objections have to be lodged within the same period (section 355, AO); see also Tipke & Lang (2010:1071–1082). The suspension of execution pending an objection does not happen automatically. Like in Namibia, a taxpayer needs to request that the payment of taxes be stalled until the dispute is settled. In Germany, this is regulated by section 361 of the AO.

125 Analogical interpretation is invoked if the abstracted provisions of an Act say too

The rules of administrative justice further require that taxpayers should be subject to equal treatment. It would be difficult to substantiate why section 56(1A)(b) taxpayers should be allowed more time to settle their tax debts if they have already been granted 90 days to do so. One could justify allowing a taxpayer more time to submit his/her tax return if they are obliged to prepare extensive bookkeeping and balance sheets in support of a tax return, compared with the relatively simple tax return of an ordinary employee; but there is no reason why such taxpayers should be given more time to settle a tax debt once their tax position has been assessed. These considerations seem to tip the scales in favour of a period of 60 days to be afforded to taxpayers in terms of section 67(2)(b) to settle their assessed taxes. This was also the system that prevailed in practice until 1997, i.e. before the Income Tax Act was amended.

It seems that the 1997 amendments of sections 56(1) and 67 prompted a different practice, however.[126] Since 1997, the Department of Inland Revenue has implemented the payment of assessed taxes as follows: it issues a notice of assessment on a specific day, but backdates the 'due date' for paying the assessed taxes to the date on which the tax return was due.[127] Thus, taxpayers are expected to settle assessed taxes on a retroactive date. To expect of a taxpayer be able to do time travel in order to settle outstanding taxes on a date preceding that of the notice of assessment is to expect the impossible of ordinary mortals, and boils down to arbitrary administrative action. This does not comply with the rules of administrative fairness. It fails to do justice to the principle of proportionality: the measure is not suitable, necessary or reasonable because the laws of physics cannot be transcended to achieve this feat.

Tax estimations, additional penalising taxes and additional assessments

An estimation of taxable income in terms of section 68 is the last option left to the tax authorities when a taxpayer does not furnish a tax return or when

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little but can be based on a 'for the same reason' logic. The courts held that, if two reasonable constructions of an enactment are equally possible, the one avoiding a casus omissus is to be preferred. See C*ommissioner for Inland Revenue v Louis Zinn Organisation (Pty) Ltd*, 1958 (4) SA 477 (AD); *Koller v Steyn*, 1961(1) SA 422 (AD) 429; *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd*, 1977(2) SA 221 (C) 240. See also Du Plessis, LM. 1986. *The interpretation of statutes*. Durban: Butterworths, pp 155f.

126 These amendments are set out in detail subsequently under the heading "Overview of amendments and the dilemma created by section 79(1)". The author has compiled two legal opinions for taxpayers whose tax assessments bore evidence of the change in the practice of the tax authorities around that time.

127 See the discussion under "Payment of outstanding assessed taxes", under the subheading "Payment of taxes or refunds, and recovery procedures" and main heading "Different phases of taxation procedure".

a taxpayer's exact income cannot be clarified either because the taxpayer refuses to cooperate with the tax authorities, or when the evidence has been ruined. The taxable income may be estimated in whole or in part.[128] Such estimations are usually of quantities such as profits or turnover. Circumstantial evidence and all other relevant factors form the basis for such estimated taxable income. An assessment based on an estimation of the taxable income is subject to objection and appeal. If it is clear to the Minister that a taxpayer is not able to furnish an accurate return of his/her income, the Minister may agree with such a person on a specific amount of taxable income and, in such an instance, the amount so agreed is not subject to an objection or appeal.[129]

The above discussion illustrates clear that an estimation of taxable income could derive from failure by a taxpayer to submit a tax return despite reminders, or his/her refusal to cooperate with the tax authorities. However, such estimations could also offer a solution when a taxpayer is unable to furnish an accurate tax return due to force majeure. If all of a taxpayer's bookkeeping records were destroyed by a fire or a flood, the estimation of taxable income with the aid of the taxpayer might be a solution. It might also offer a solution where a taxpayer takes over a business where no proper bookkeeping system existed. In other words, the estimation of taxable income cannot under all circumstances be linked to a taxpayer's lack of cooperation. Yet section 66(3) obliges the Minister to levy additional taxes as a penalising measure in all instances where taxable income has been estimated.

It has already been mentioned herein that sections 65 and 66 fall under the heading of *Tax returns* although the majority of the provisions actually concern the assessment of taxes.[130] Sections 65, 66 and 68 have their origins in South African taxation.[131] These provisions all predate the era of constitutionalism that came about during the 1990s. The same acts of non-compliance have been subjected to several penalising measures that could all be invoked

128 Section 68(1), Income Tax Act.

129 Section 68(2), Income Tax Act.

130 Whereas section 65(1)(a) regulates penalties for not submitting a tax return on time, the focus of section 65(1)(b)–(d) is on assessment-related penalties.

131 Section 65 of Namibia's Income Tax Act still largely corresponds with section 75 of South Africa's 1962 Income Tax Act, with subsections (1)(a), (1)(c)–(e), and (3) being identical. In 2004, section 75 of South Africa's 1962 Income Tax Act underwent a number of amendments, while subsection (2) was deleted by the Taxation Laws Amendment Act, 2004 (No. 16 of 2004). Sections 66 and 68 of Namibia's Income Tax Act were taken over from sections 76 and 78, respectively, of South Africa's 1962 Income Tax Act. Apart from subsection (1)(a), which was subsequently deleted from the South African provision by way of the Taxation Laws Second Amendment Act, 2008 (No. 4 of 2008), section 66 is identical to section 76 of South Africa's 1962 Income Tax Act. Section 68(1) of Namibia's Act is still identical with section 78(1) of South Africa's 1962 Act, whereas section 68(2) of the Namibian legislation represents a former version of section 78(2) of South Africa's 1962 Act.

concurrently. When the tax authorities come across calculation errors or have queries about specific expenses that have been deducted in a tax return, this can easily be clarified at an administrative level. Unfortunately, no distinction is made between penalising measures that would be warranted in cases of tax evasion and simple transgressions such as missing a deadline to submit a tax return.[132] Also, the penalising measures are in many respects completely disproportional. These provisions are, therefore, in dire need of revision in order to ensure they comply with proper administrative procedures as required under Article 18 of the Constitution.

Another aspect in the assessment procedure that needs attention is the issuing of additional assessments. Section 71(5) of the Income Tax Act specifies that, if no objection to an assessment has been raised or if one was raised but was subsequently withdrawn, or where an objection was allowed and the assessment was altered or reduced, the assessment becomes "final and conclusive". This implies that all assessments where no objection has been raised become final once the 90 days to raise an objection has transpired. If an objection is successfully lodged and the assessment is amended, it becomes final unless it is appealed. Yet, in terms of section 69, the finality of such assessments can simply be overturned "notwithstanding the provisions of section 71(5)" if the Minister "is satisfied" that some income was overseen or not properly declared by issuing an "additional assessment".[133]

Ouster clauses were the order of the day under the former Westminster constitutions. Such legislative provisions were intended to prevent the courts from reviewing administrative action. They purported to give the administration carte blanche to act as it pleased, with no regard to the standards of lawfulness, reasonableness or procedural fairness.[134] Ouster clauses of this kind are not satisfactory in a constitutional state, however. If an administrative act has become final, the taxpayer should be able to rely on that.[135] Thus, an assessment is either *final* – in which case it cannot be altered, or it is *provisional* – meaning it may still be revised. In practice, tax authorities usually assess the taxes of businesspeople or enterprises on the basis of the balance sheets prepared by their chartered accountants. The provisional assessment is later verified during an audit when the bookkeeping and all accompanying

132 Given that the tax authorities willingly accept address changes by tax consultants, there is an additional risk that the instances listed under section 65(1) might actually come about as a result of having changed the taxpayer's actual contact address.

133 This provision is similar to section 79 in South Africa's 1962 Income Tax Act. The latter provision underwent several additions, though, and subsection (2) of Namibia's Income Tax Act now coincides with subsection (3) in the South African version.

134 See Hoexter (2007:522–525).

135 A taxpayer has a legitimate expectation that, when an assessment purports to be final, it is indeed so. See Footnote 16 on the doctrine of legitimate expectation.

documents are checked by tax officials to see if they correlate with the submitted tax returns. It may also happen that some statements of income are issued too late or have accidentally been overlooked. In such cases, a taxpayer needs to be able to declare his/her income late, without having to fear a whole range of sanctions.

The tax authorities obviously need some statutory scope to clarify certain issues and to conduct audits before assessments become final. The manner in which section 69 is currently formulated does not comply with the norms of administrative justice, however. The prescribed assessment procedure lacks a proper regulation of conditions for the finality of tax assessments and rules of prescription, which blocks the altering of assessments after a statutory cut-off date. It may be worthwhile, therefore, to have a look at German taxation procedure, which has regulated this well.

A distinction is made between tax assessments *on condition of verification*, and those that are *provisional*. An assessment on condition of verification has the effect that it can later be changed on the grounds of any factual incorrectness that comes to light. Assessments subject to verification are usually issued where a final audit is still pending,[136] or where the assessment has been based on estimated taxable income. The condition under which the assessment is issued needs to be mentioned explicitly in the original notice of assessment. The only legal requirement is for the matter not to have been finally examined as yet. An assessment that diverges from the tax return, therefore, does not qualify as a final examination. A re-examination of the assessment in the course of an objection also does not qualify as a final examination. Thus, it is possible to alter the assessment until the condition expires, which will occur once a final audit has been conducted.[137] The condition expires when it is revoked by declaring the assessment final after the audit; otherwise, the condition lapses automatically once prescription sets in.[138]

By contrast, a *provisional* tax assessment relates to a part of the notice of assessment only.[139] Once the facts in question have been clarified, the provisionality of the assessment ceases to exist. Such a provisional notice of assessment concerns a specific issue which is temporarily unclear to the authorities, such as the extent to which the expenses of a car used for both business and private errands can be deducted as business expenditure. The tax authorities can also issue provisional assessments if the German Constitutional Court has declared certain provisions of an Act unconstitutional and obliged Parliament to regulate the matter anew.[140] The extent of the

136 Section 164(1), AO.
137 Sections 193ff, AO.
138 Sections 164(3) (revocation of a condition) and 164(4) (prescription) AO.
139 First sentence, section 165(1), AO.
140 (ibid.:second sentence).

provisionality is at the discretion of the tax authorities, but the amount concerned is required to be mentioned explicitly in the assessment.[141] The provisionality concerns only the specified issue, and not the whole tax assessment.

An assessment issued on condition of verification and one that is provisional do not necessarily exclude each other: they can be invoked concurrently.[142] Assessments can be changed only until prescription of assessment sets in.[143] The period for assessing customs and excise is one year,[144] and for all other taxes, four.[145] However, where taxes have been evaded, the period for assessing taxes only lapses after ten years.[146] In the case of grossly negligent curtailment of taxes, taxes are required to be assessed within five years.[147] The period of prescription of assessment commences at the end of the calendar year in which the taxes became due for assessment.[148] Prescription to assess taxes can be interrupted, for example, by objections to the legality or correctness of an assessment, or as a result of force majeure during the last six months before prescription starts.[149] After the interruption, the period until prescription again continues to run.

South African taxation procedure also provides for prescription that bars the issuing of an "additional" (i.e. revised) assessment "after the expiration of three years from the date of the assessment" unless the reason for the amount of taxable income that was not assessed was due to fraud, or the misrepresentation or non-disclosure of material facts.[150]

Keeping of records for purposes of an audit

Bookkeeping records have to be kept for a period of five years for the purposes of an audit, since tax assessments are often issued to business enterprises on the basis of the balance sheets that are prepared by chartered accountants. Whether the balance sheets correspond with the cash books, journals, bank statements, deposit slips, paid cheques or money transfers, invoices and stock lists is only controlled during an audit. Section 65(2) of

141 (ibid.:third sentence).
142 Section 165(3), AO. This is sensible since the conditions under which the tax authorities are obliged to revoke the condition or provisionality of an assessment are different.
143 In Germany, prescription to assess income tax is regulated by sections 169–171, AO.
144 Section 169(2), No. 1, AO.
145 (ibid.:No. 2).
146 (ibid.:second sentence).
147 (ibid.).
148 Section 170(1), AO. In Germany, the tax year corresponds with the calendar year and ends on 31 December.
149 Section 171, AO.
150 Section 79(1)(c)(i), South Africa's 1962 Income Tax Act.

Namibia's Income Tax Act states that the Minister may allow a taxpayer to retain such records on microfilm instead of keeping the files with all the relevant taxation documentation. Section 65(1)(f) criminalises the failure to preserve bookkeeping records for this period and makes such failure subject to a fine of N$300 or a period of imprisonment not exceeding three months "on conviction". Whether this warrants criminal prosecution is open to question. An ordinary administrative penalty would suffice unless tax evasion is suspected.

Two further comments are warranted in this regard. Firstly, section 65 attempts to regulate penalties levied for failing to submit tax returns. The preservation of records, however, concerns assessment procedures. Consequently, section 65(2) ought to fall under Part II of Chapter III of the Income Tax Act and not Part I. Thus, the structure of the Act can be improved. Secondly, one should perhaps consider updating section 65(2) to refer to more modern forms of technology such as scanning or saving them in portable document format (pdf). Hardly anybody uses microfilm today.

Objections: Administrative and judicial remedies

Objections and appeals are regulated in Part III of Chapter III of the Act. Section 71 sets out the time and manner of lodging objections to a notice of assessment. It requires that the objection be in writing.[151] On receipt of a notice of objection, the tax authorities may revise the assessment by reducing or altering the assessed tax. They may also reject the objection.[152] Where no objections are raised to an assessment or where objections have been allowed or withdrawn, such an assessment or altered or reduced assessment, as the case may be, is final and conclusive.[153]

An appeal needs to be lodged within 30 days after the objection was rejected.[154] The court of first instance is the Tax Tribunal. The decisions of the latter can be appealed to a Special Tax Court.[155] A Tax Court judgment can be appealed to the Supreme Court.[156] The disputed tax pending an appeal has to be paid unless a suspension of execution has been granted.[157] Usually, this would be granted on the basis of equity.

151 Section 71(3), Income Tax Act, 1981 (No. 24 of 1981).
152 Section 71(4), 1981 Income Tax Act.
153 Section 71(5), 1981 Income Tax Act.
154 Section 73(7)(a), 1981 Income Tax Act.
155 Section 73(1), read with section 73A, 1981 Income Tax Act.
156 Section 76(2), 1981 Income Tax Act.
157 Section 78, 1981 Income Tax Act. See the discussion under the subheading "Suspension of execution" below in this section.

There are complaints that taxpayers sometimes have to wait for years before heir cases are put on the court roll.[158] This might have to do with the manner in which sections 73 to 76 regulate the constitution of tax courts and court procedures, which are in the hands of the executive.[159] Due process could, thus, be manipulated along this route. The provisions do not reflect a clear separation of powers between the executive and the judiciary, and it is doubtful whether access to the courts and fair trials could be guaranteed under these circumstances.

Payment of taxes or refunds, and recovery procedures

Overview of amendments and the dilemma created by section 79(1)

Part IV of Chapter III of the 1981 Income Tax Act deals with the payment and recovery of taxes. The key provision regulating payment of taxes is section 79(1). Unfortunately, this provision does not link the payment of taxes to the deadline specified in the notice of assessment in terms of section 67(2)(b), but to taxes that are due in terms of section 56. Section 79(1) is ambivalent insofar as it could also be interpreted to refer to the controversial provision in section 56(1)(b) that taxpayers are obliged to pay their taxes based on self-assessment when they furnish their tax returns. One should bear in mind that the purpose of a tax return is to finalise taxation for a specific tax year by deducting the prepaid tax from the assessed tax to determine whether a taxpayer is entitled to a refund of overpaid tax, or still has to settle an amount of underpaid tax. In the light thereof, it seems sensible to start by presenting a brief overview of the relevant amendments to illustrate how a relatively well-conceived system was turned into dysfunctional one as a result of successive ill-conceived amendments.

1981 Income Tax Act

At Namibia's Independence in 1990, the prevailing law stated that income tax had to be paid on assessment by the deadline specified in the notice of

158 During the August 2011 ICAN seminar, a chartered accountant recorded that a client of his had been waiting for six years for his case to be put on the court roll, and was still waiting at at the time of the seminar. Another taxpayer was told in 1999 by his advocates that his case would soon be put on the court roll. It apparently never happened.

159 Section 73(3) of Namibia's 1981 Income Tax Act empowers the Minister of Finance to constitute tax courts or to abolish them. He may also appoint the lay members of such courts in terms of section 73(5)(a). A notice of appeal should be directed at the Minister instead of the court (section 73(7)(a)). The Minister also has the power to determine when a case is put on the court role and is obliged to inform the taxpayer accordingly (section 73(9)). Furthermore, the Minister appoints members of the Tax Tribunal (section 73A(4)), while Ministry of Finance staff act as Clerks of the Tax Tribunal as well (section 73A(5)).

assessment. It was not linked to any payments based on self-assessment at the point of submitting a tax return.[160]

1995 Income Tax Amendment Act

The 1995 Amendment Act substituted section 79(2) to regulate the charging of interest when a taxpayer failed to pay his/her tax on time, and increased the interest rate on outstanding assessed tax debts to 20%.[161] If the taxpayer failed to pay the balance on time, interest could be charged from the day following the specified deadline for payment in the assessment.

1997 Income Tax Amendment Act

In 1997, the previous sections 56 and 67 were substituted by new provisions.[162] Section 56(1)(b) now stipulates that, unless an extension is granted under subsection (3), the taxpayer has to –

> … *pay, simultaneous with the furnishing of the return of income* contemplated in paragraph (a), the amount of the tax due in accordance with the computation contemplated in that paragraph. [Emphasis added]

Section 67(1) was aligned to this statutory construct envisaged by the new section 56(1)(b) and determines the following:

> A computation of the taxable income and of the amount of tax payable which a taxpayer is required to furnish and to pay in terms of section 56(1)(a) shall be subject to examination by the Minister.

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160 The original text of section 79(1), before it was amended in 1999, can be gleaned from the Income Tax Amendment Act, 1999 (No. 21 of 1999). It read as follows: "Subject to the provisions of section 80 any tax chargeable shall be paid on such days and at such places as may be notified by the Minister or as specified in this Act and may be paid in one sum or in instalments of equal or varying amounts as may be determined by the Minister having regard to the circumstances of the case".

161 Section 9(a)–(b) of the Income Tax Amendment Act, 1995 (No. 22 of 1995) substituted section 79(2)–(3). The Amendment Act was promulgated on 27 December 1995 (GG No. 1225), but, in terms of section 14 therein, took effect retroactively, i.e. on 1 January 1995 for companies, and on 1 March for other categories of taxpayers. The new section 79(2) reads as follows: "If the taxpayer fails to pay any tax in full on or before the date of payment notified by the Permanent Secretary in the notice of assessment, or any extension of such date which the Permanent Secretary may grant having regard to the circumstances of the case, or on or before the period for payment prescribed by this Act, as the case may be, interest shall be paid by the taxpayer on the outstanding balance of such tax at the rate of 20 per cent per annum calculated daily as from the date for payment and compounded monthly during the period which any portion of the tax remains unpaid".

162 Substituted by sections 5 and 6, 1997 Income Tax Amendment Act.

Section 56(1)(a), however, only required the taxpayer to furnish a tax return based on self-assessment, and not to pay the taxes.[163] The stipulations regarding payment were dealt with in subsection (b). In addition, section 67(2) stated the following:

> *If* upon the examination of a computation by a taxpayer referred to in subsection (1), *such computation is found to be incorrect*, the Minister shall assess the return of income furnished by the taxpayer in order to determine the taxable income of, and the amount payable by, such taxpayer, and shall, in the prescribed form and manner, cause a notice of assessment to be made and issued to a taxpayer … . [Emphases added]

This provision creates the impression that the Minister need only issue an assessment if the tax calculated in a tax return is incorrect. This would imply that tax returns furnished by taxpayers had been elevated to the status of 'administrative action', which should be 'revised' in an assessment if it was incorrect.

Section 79, which regulates the charging of interest when a taxpayer defaults on paying assessed taxes by the specified deadline, was not amended in the fateful year concerned. The charging of interest, thus, still required that an assessment be issued, specifying a deadline; and only once this deadline has been missed could the Receiver charge interest on the outstanding tax by issuing an administrative act to inform the taxpayer about it.

1999 Income Tax Amendment Act

In 1999, section 79(1) was amended to align it with the notion that a taxpayer's self-assessment constituted administrative action in the manner envisaged by section 56(1)(b).[164] The current form of the provision reads as follows:

> Subject to the provisions of section 80 any tax chargeable shall be paid on *the due date for such payment* as specified in *section 56 of this Act*.[165] [Emphases added]

2002 Income Tax Amendment Act

In 2002, section 67 was again amended.[166] Subsection (1) no longer explicitly determined that the tax be calculated based on self-assessment and paid when the return was submitted. Section 67 now merely states that a tax

163 Section 56(1)(a) stipulated that any person liable to taxation is required to submit a tax return "within 120 days after the end of such a year of assessment".

164 The previous section 79(1) of the Income Tax Act (see Footnote 161) was substituted by section 12(1)(a), 1999 Income Tax Amendment Act.

165 The payment of employees' tax or provisional taxes is regulated in section 80.

166 Section 10, 2002 Income Tax Amendment Act.

return furnished under section 56 is subject to examination by the Minister.[167] Subsection (2) also dropped the idea that a tax assessment should only be issued in instances where a taxpayer had not calculated his/her tax correctly. Instead, it now obliges the Minister to issue tax assessments for all tax returns that have been furnished.

The above overview succinctly illustrates the point that administrative procedures that were properly structured could be substantially distorted by tampering with provisions on a piecemeal basis. The effect is that the legally binding nature of an administrative act is undermined and that procedures become unfair. How these amendments affected taxation procedure in practice will be set out below.

Payment and refunds of outstanding assessed taxes

Payment of assessed taxes

As we have seen above, section 79(1) states that, with the exception of prepaid taxes –[168]

> … any tax chargeable shall be paid on the due date for such payment as specified in section 56 of the Act.

Three provisions in section 56 mention a date for the payment of taxes:

- Section 56(1)(b) states that, unless a taxpayer is granted an extension, s/he has "to pay the amount of the tax due in accordance with that computation", i.e. in terms of self-assessment
- Employers of section 56(4) taxpayers are required to withhold and pay their taxes by the deadline specified in section 56(5)(c), which coincides with the date specified in section 56(1A)(a), namely 30 June, and
- Employees who are instructed by the Minister in terms of section 56(5)(b) to submit a tax return are required to pay the assessed tax –

> … before or on the due date, which due date is the later of the last day of the period of four months after the end of such year of assessment [i.e. the deadline to submit a tax return[169]] or the last day of a period of 60 days after the date of the notice of assessment concerned.

167 The new section 67(1) specifies the following: "A return of income and computation of a taxpayer's liability for tax furnished in accordance with section 56 shall be subject to examination by the Minister".

168 Apart from section 79(1), the payment of taxes is also regulated by section 56(2) under the rubric of tax returns (Part I, Chapter II, 1981 Income Tax Act).

169 As specified by section 56(1A)(a), Income Tax Act.

The applicability of these three options in the context of section 79(1) will be considered consecutively below.

In the first option, if the "due date" for payment of taxes to which section 79(1) refers is interpreted to refer to the "due date" specified in section 56(1)(b), this would imply that assessed tax which diverges from the amount of tax calculated by the taxpayer on the basis of self-assessment for the tax return would not be enforceable. This in turn implies that all claims of underpaid taxes would be lost. This outcome could not have been the intention of the legislature, and indicates that section 79(1) was drafted with insufficient care insofar as it does not explicitly exclude this option.

The second option refers to employees whose employers are obliged to withhold and transfer the correct amount of tax to the authorities. Such taxes are to be paid by the deadline for furnishing tax returns, i.e. 30 June.[170] This provision obviously falls within the scope of section 79(1), insofar as it refers to taxes that are due in terms of section 56.

In the third option, section 56(5)(c) refers to the taxes of employees who are required to submit tax returns under section 56(5)(b), and whose tax returns also need to be assessed in terms of section 67. Subsection (c) specifies that the deadline for payment in terms of section 67(2)(b) for this category of taxpayers is 60 days from the date of issuing the assessment.

In other words, the category of taxpayers whose section 67 assessments are not covered by section 79(1) are all those contemplated by section 56(1A)(b), namely companies, professionals, businesspeople and farmers. The actual dilemma of this oversight is that self-assessed taxes – which this category of taxpayers are supposed to pay in terms of section 56(1)(b) – are not enforceable as administrative action. Since section 79(1) does not link the payment of assessed taxes to a deadline specified in terms of section 67(2)(b), there is a statutory vacuum to enforce such a payment. The payment of assessed taxes of the taxpayer category envisaged by section 56(1A)(b) depends on the correctness of the deadline for payment in terms of section 67(2)(b). If that deadline has incorrectly been specified as a date preceding the actual date of assessment, for example, to coincide with the deadline to submit the tax return, it is hard to see on what legal basis the tax authorities want to enforce the payment of such assessed taxes.[171] The main problem is that Part I of Chapter III of the Income Tax Act does not stick to tax returns, but tries to regulate the payment of taxes (Part VI) in this part as well.

170 Section 56(5)(a).

171 See the discussion later in this section under the subheading "The charging of interest on outstanding taxes".

Refund of assessed taxes

It is not clear why tax refunds are not dealt with in section 79(1), but rather in section 94 under Part VI of Chapter III of the 1981 Income Tax Act, which deals "miscellaneous" matters.[172] A tax refund does not depend on the generosity of the tax authorities. It is an ordinary part of taxation procedure and speedy tax refunds are part of fair taxation procedures. Despite the provision being silent on a deadline to refund or set off tax credits, the rules of interpretation could be used to fill this statutory gap in a similar manner as that employed for the case of section 67(2)(b). In this instance, one could argue that the same deadline for payment of outstanding taxes should apply to tax refunds. A taxpayer has a legitimate expectation that a tax refund will be paid out by the same deadline as that by which s/he would be expected to settle underpaid taxes.[173] Just administrative procedures should enable taxpayers to do business planning and to budget for other prepaid taxes that might become due.

Section 94(1) states that, if "'it is proved to the satisfaction of the Minister", s/he "may at [his/her] discretion" set off the overpaid tax against other tax-related debts or refund the balance of the overpaid tax once all other tax-related debts, if any, have been set off against it. The setting off of tax refunds against tax-related debts is not limited to income-tax-related matters. The Act specifies that an income tax refund can be set off against "any other tax, levy, interest or penalty due by such taxpayer".[174] Thus, the provision includes setting off value added tax debts or "any other law administered by the Minister" against income tax refunds.[175] In other words, the legislature created a carte blanche for the tax authorities to withhold income tax refunds to settle tax debts of unrelated categories of tax.

172 Section 9 of the 1997 Income Tax Amendment Act inserted section 94 in the principal Act and repealed section 94A of the 1981 Act, which had been inserted by section 14 of Proclamation AG 10 of 1985.

173 On the doctrine of legitimate expectation, see Footnote 16.

174 Section 94(1)(a), Income Tax Act.

175 Section 94(1)(a) of the Income Tax Act includes tax debts in terms of the Sales Tax Act, 1992 (No. 5 of 1992) and the Additional Sales Levy Act, 1993 (No. 11 of 1993). These taxes, however, were abolished and replaced by value added tax in 2000. Both statutes were repealed in terms of section 86(1) in conjunction with Schedule VII of the Value-Added Tax Act, 2000 (No. 10 of 2000). The reference to these Acts in section 94 of the Income Tax Act, however, was never scrapped by subsequent Income Tax Amendment Acts. Furthermore, section 86(2) of the Value-Added Tax Act ambivalently states that "[n]o reference in any other law to sales tax or to additional sales levy shall be construed as a reference to tax under this Act". Consequently, one could argue that the tax authorities may not set off any value added tax debts against income tax refunds. However, the transitional arrangements under section 87(3) of the Value-Added Tax Act seem to indicate otherwise: it states that "all forms and documents used in relation to the repealed laws may be continued to be used under this Act". This ambivalent regulation does not satisfactorily ensure legal certainty.

Moreover, a precondition for the Minister to consider paying out any refund is that "no returns due by such taxpayer are outstanding".[176] It is not clear whether such returns are restricted to income tax returns or whether it extends to value added tax returns, other kinds of tax returns or levies. Since no explicit statutory limits have been set in respect of a deadline by which refunds are to be paid, it is easy to withhold a tax refund indefinitely. Indeed, if the Receiver postpones the refund for long enough, the due date for the next tax return will soon arrive. Therefore, this provision might give rise to an unconstitutional limitation on the right to fair administrative procedures. With modern computer systems, it is possible to get an immediate overview of a specific taxpayer's tax-related liabilities when an assessment is issued. It should, therefore, be easy to inform the taxpayer when the assessment is issued whether such a refund will be set off against open tax debts, or if it is due to be paid out imminently.

A further deficit of section 94 is that it specifies no order of priority in which tax-related debts should be settled. A fair regulation would be to determine that the principal amount of an income tax debt should always enjoy priority over penalties or interest, otherwise a taxpayer could get caught in a debt trap. Furthermore, the setting-off of tax debts against income tax refunds ought to be restricted to income-tax-related debts. Also, each statute should provide for its own enforcement procedures. If the taxpayer is in arrears to settle such amounts despite administrative procedures for recovery having been invoked, the proper procedure is to get a court order to settle a liquid debt in those instances.

It is a separate administrative act to set a refund off against an open tax debt. Even though it may be bundled with the notice of assessment, the tax authorities are required to inform the taxpayer against which tax, penalty or interest the refund has been set off. For example, if A has an unsettled tax debt for 2009 amounting to N$35,000, with a N$2,000 interest charge and a penalty of N$200 for having defaulted to settle the amount on time, the total amount due would be N$37,200. If the tax refund for 2010 amounts to N$29,500, then the principal tax debt of 2009 enjoys priority. The taxpayer needs to be informed that the tax refund of 2010 is to be set off against the tax debt of 2009 in the following manner:

Tax debt, 2009	N$	35,000
Tax refund, 2010	N$	-29,500
Residual tax debt, 2009	N$	5,500
Interest charged on 2009 tax debt	N$	2,000
Penalty on default to pay 2009 tax debt	N$	200
Total amount still due	N$	7,700

176 Section 94(1)(b), Income Tax Act.

This has the effect that interest can now only be charged on the residual tax debt of N$5,500. If the interest and penalty were first set off against the refund, then the position would be as follows:

Tax refund, 2010	N$	29,500
Interest on 2009 tax debt	N$	-2,000
Penalty	N$	-200
Residual refund of 2010	N$	27,300
Tax debt 2009	N$	-35,000
Residual 2009 tax debt	N$	-7,700

The residual 2009 tax debt would be much higher than in the prioritised setting off of tax debts and, consequently, more interest could be charged. However, in terms of the principle of proportionality the least infringing measure or the one which is most advantageous to the taxpayer is required to be selected. If more than one tax debt is open, all tax debts first need to be serviced before amounts charged as interest or penalties can be set off against a refund due to the taxpayer.

The statement of account issued to a taxpayer clearly needs to show such deductions as a result of a payment or set-off due to a refund, and should list the individual posts properly. Interest charged in respect of tax of specific tax years are also to be specified as such. If interest is further charged in respect of a residual amount of tax, such interest is to be discernible in order to allow the taxpayer to determine whether continued interest is not mistakenly charged on the whole amount of the original tax. The practice of merely stating the lump sum that is still due is not satisfactory.

The manner in which the Department of Inland Revenue currently makes bookkeeping entries in relation to taxpayers' accounts is not satisfactory either. These entries merely reflect that a payment has lowered the running balance, but it does not state the overall picture in relation to individual taxes that are due, or what interest has been charged in relation to each of them. Hence, one cannot see which tax or what part of it has been settled when a tax refund is set off against unpaid tax.

Section 81(1) of the Income Tax Act regulates accounts and recovery proceedings in respect of taxes. This provision is a prime example of bad legislative drafting: it presses 239 words into a single sentence. This kind of drafting lacks clarity and elegance, and makes life difficult for legal practitioners. Furthermore, it contains a typical catch-all ouster clause which undermines proper administrative procedures.

Section 81(1) determines that "the Minister shall not be required to maintain a separate account in respect of each year of assessment", but may "maintain one tax account for the taxpayer recording details of the assessed amounts".

Any payments or credit or interest and penalties charged in relation to taxes "shall be deemed to have been made or to have accrued in *respect of the total amount* reflected in such tax account" [Emphasis added]. In other words, there is no record how much of a tax of a specific year has been settled, and there is no way to check whether the charging of interest on residual amounts has been done properly. This obviously gives rise to bookkeeping chaos since it is not based on generally accepted accounting principles. The powers conferred on the tax authorities by this provision are flagrantly arbitrary, to say the least.[177]

Extension of the deadline to pay taxes

The enforceability of the payment of taxes can be stalled under certain circumstances, such as when respite or suspension of execution has been granted. Both respite and suspension of execution have the effect that the charging of interest and penalties is stalled, and that such penalties and interest is not permitted to be charged for the duration of the respite or suspension of execution.[178]

Respite

Respite, which refers to a deferment of payment, depends on the discretion of the tax authorities, who are required to balance the justifiable interests of the taxpayer and the right of the state to enforce effective taxation. The granting of respite is not regulated in Part IV of Chapter III of the Act, as one would have expected, but under the rubric of tax returns in Part I.

Section 56(3)(b) determines that the Minister may, "on good cause shown", grant an extension to pay taxes that are due in terms of section 79. If payment at the due date will cause substantial hardship for the taxpayer, the granting of respite is justifiable. All temporary problems of liquidity are usually accepted as substantial hardships, e.g. the bankruptcy of an important creditor or huge outstanding creditor amounts which seriously hamper the taxpayer's cash flow capacity. The Department of Inland Revenue can allow the taxpayer to pay the due taxes in instalments[179] or defer payment to a more suitable date.[180]

177 See also "The charging of interest on outstanding taxes" as well as the subsections entitled "'Due date' for purposes of calculating interest" and "Calculating interest on overdue taxes" that follow it in the discussion.

178 For a discussion of German taxation procedure in this regard, see Tipke & Lang (2010:1028ff).

179 Section 56(3)(b)(i), Income Tax Act.

180 Section 56(3)(b)(ii), Income Tax Act.

Suspension of execution

Suspension of execution comes into play when the tax authorities have serious misgivings as to the legal correctness of an assessment or when an assessment is disputed. Payment can be suspended until the matter has been clarified or, if an objection has been raised, for the duration of the dispute. An objection to an assessment and/or legal proceedings relating to such an objection does not automatically translate into a suspension of execution. The taxpayer needs to apply for the suspension specifically, because it relates to another kind of administrative act.[181] If suspension of execution is refused, the refusal can be appealed on the basis of fairness.

Enforcing payment (execution of an assessment)

Proportionality of procedures

The statutory procedures to enforce payment of taxes are an important part of tax collection. Effective tax collection requires the Receiver to take appropriate steps during each of the stages of tax collection to ensure that public funds do not run dry.[182] These procedures should do justice to the Constitution. This entails that the Ministry of Finance has to make sure that any administrative measure taken is in proportion to the object pursued. The tax authorities should invoke a spectrum of administrative procedures that would be suitable, necessary and reasonable to ensure effective tax collection. The implication in practice is that a taxpayer could expect proper and just administrative procedures to be followed in the process of tax collection. Thus, if a taxpayer fails to settle a due tax on time, the Receiver cannot immediately invoke the most radical measures. For example, obtaining a civil judgment for attaching assets to enforce payment as a first step would be disproportionate.

In other words, for measures to be deemed proportionate, they need to correspond to the relevant stage of the collection procedure. A proper structuring of procedures will undeniably benefit both the Receiver and the taxpayer. Section 65 provides for penalties upon default to submit a tax return, but does not explicitly prescribe penalties upon default to pay taxes.[183] There is nevertheless enough scope for the Minister to make regulations in terms of the powers conferred on him/her by the Act to structure tax collection procedures and, in so doing, to do justice to Article 18 of the Constitution. Indeed, sections 2 and 3 of the Income Tax Act confer the power on the Minister to carry out

181 Section 78, Income Tax Act.
182 Section 5(1), 1981 Income Tax Act, in conjunction with Articles 40(d), 40(k), 41, 126 and 127, Namibian Constitution.
183 Section 65 does not explicitly list penalties upon default of payment of tax debts.

the provisions of the Act, which includes the power to make administrative regulations in terms of section 99 therein.[184]

Tax collection can be divided into self-administered measures and judicial proceedings. Self-administered measures entail the authorities enforcing payment though administrative action; if such action fails, judicial proceedings can be invoked.[185] Thus, enforcement measures become more stringent at different stages.

Administrative measures to enforce payment

Administrative measures to enforce payment should start off rather mildly in order to permit the taxpayer to comply. However, if a taxpayer continues to avoid his/her responsibilities, tougher measures should be available. These measures are justifiable because they serve equality of taxation. They also serve as a means of blocking tax evasion by procrastinating the settlement of tax debts.

In practical terms, the measures should be conceptualised in a manner that would be suitable under the circumstances, and could be structured in the following manner:

- As a first step, it would be appropriate to remind the taxpayer that s/he has missed the deadline specified in the notice of assessment to pay the outstanding balance of a tax debt. Such a reminder should specify a second deadline by which to pay the outstanding tax, giving the taxpayer a fair chance to comply with the reminder. This first reminder could involve the discretion to charge a modest penalty for defaulting to pay the outstanding tax on time. However, it is more common that such a penalty is charged only if the taxpayer has not complied with the first reminder.
- If the taxpayer still fails to pay the tax debt, the next stage would entail a second reminder. As in the first stage, an administrative act needs to be executed to direct the taxpayer to settle the tax debt without delay, and set a final deadline for such settlement. Generally, a second reminder includes a penalty on default. The amount of such a penalty is normally laid down in administrative regulations by the Minister to ensure equal treatment of all taxpayers defaulting on payment. When a penalty is charged, the reminder notice needs to specify the administrative regulation in terms of which the penalty is being charged. Nonetheless, it would not necessarily be fair to charge

184 Section 99(1)(a)–(b) determines that s/he may make regulations on how tax officers are required to perform their duties, and to stipulate limits to their powers. In terms of section 99(2), the Minister is also empowered to prescribe penalties.

185 For a discussion of such proceedings in German taxation law, see Tipke & Lang (2010:1043ff).

fixed penalties which stand in no relation to the tax debt.[186] For this reason, a penalty which is calculated as a certain percentage of the outstanding tax might serve justice better. In Germany, for instance, such a penalty amounts to 1% of the outstanding tax per month.[187]

- If the taxpayer still does not comply, the third stage would involve more stringent measures to enforce payment. Unlike the above proceedings, these measures cannot be invoked and executed by the tax authorities alone, but need a court order to enforce execution of the liquid debt. The decision to apply for a court order is in itself administrative in character; thus, the taxpayer has to be informed of the Receiver's intention to apply for a court order to get a civil judgement for settling the liquid debt. In terms of fair administrative procedures, the taxpayer has the right to lodge an objection or to ask for a suspension of the decision. In other words, the taxpayer can still offer to comply by settling the outstanding balance in order to avoid a civil judgment. Therefore, the threat of attachment of income or assets, which may not be in the taxpayer's interest, could serve as leverage in getting the taxpayer to comply with administrative measures before a matter is taken to court.

Judicial and other external measures to enforce payment

External measures to enforce payment are regulated by section 83. Such measures include judicial proceedings, which the tax authorities may initiate in a court of law, or sequestration procedures, which may involve a liquidator.[188]

Civil proceedings to enforce a liquid debt usually involve the attachment of part of the income of such a tax debtor or attachment (seizure) of the person's assets. As ultima ratio, the tax authorities can institute sequestration proceedings.

The Minister could also apply for an execution order in terms of the procedures set out in section 83(1)(b). If a taxpayer has not settled a tax debt despite reminders to do so, the next step in recovery procedures entails that the Minister files a statement with the clerk or registrar of a competent court, including a magistrate's court,[189] setting forth the amount of the tax or interest due on that amount. The same rules as for enforcing a liquid debt in civil law apply.[190] The Minister may also at any time withdraw the statement, which

186 For example, it would be unfair to charge a fixed penalty of N$500 if the outstanding tax only amounts N$300.
187 Section 240(1), AO.
188 This provision still dates back to South Africa's 1962 Income Tax Act and is partly a verbatim copy of section 91 of that Act.
189 Section 83(2), 1981 Income Tax Act.
190 Section 83(1)(b), 1981 Income Tax Act.

thereupon immediately ceases to have effect. Such withdrawal does not bar the Minister to institute fresh proceedings at a later stage, however.[191]

Section 81(2) specifies that, for the application of such a court order, it suffices that the Receiver claims the amount which is due, i.e. the Receiver need not furnish particulars of the amount claimed. This does not mean the taxpayer has no right to demand that the Receiver transparently set out how it arrived at the total due. The rationale behind this provision is simply that the taxpayer should be afforded the opportunity to object to the Receiver's decision to institute these proceedings at the stage when the authorities inform the taxpayer of their intention to institute section 83(1)(b) proceedings. Any objections to the amount claimed in legal proceedings to settle a liquid debt should have been clarified before such proceedings are actually instituted. This is regulated in section 84 of the 1981 Income Tax Act.

In *Hindjou v Government of the Republic of Namibia*,[192] the constitutionality of section 83(1)(b), in combination with section 84, was contested on the basis that it would infringe on the right to a fair trial guaranteed under Article 12(1)(a) of the Constitution. However, the Supreme Court upheld the procedures as constitutional because a civil judgment was part of court procedures. In *Esselmann v Secretary of Finance*,[193] the correct proceedings to be followed before a civil judgment could be granted were set out in detail.

Once the proceedings have been instituted, the court is able to grant an order to settle the liquid debt.[194] Such an order usually entails the seizure of assets or the attachment of part of a person's income until the debt has been paid. Since these proceedings entail a serious limitation of property rights, such an order is required to be fair. The measures are to be reasonable and proportional to the outstanding debt. Measures that would entail the least infringement on the taxpayer's income and property rights are preferable, therefore. A court also needs to make sure that, following the execution of such an order, a taxpayer would retain enough income to enable him to meet his/her normal obligations and enjoy a modest living.

Section 83A, which was inserted by the 2007 Income Tax Amendment Act,[195] provides that, if a court order to enforce payment of a liquid debt

191 Section 83(1)(c), 1981 Income Tax Act.

192 1997 NASC 1 (10 June 1997).

193 1990 NASC 5 (13 November 1990).

194 Section 83(4) also allows the Minister to lay claim on income which is deemed to have been received by a minor or to be his/her income in the instances specified in section 12(3)–(6) of the Act. Such income includes donations, settlements or dispositions.

195 Section 9, 2007 Income Tax Amendment Act. Section 83A of the 1981 Income Tax Act now reads as follows:
"Despite anything to the contrary in this Act, but subject to subsection 4 [of section

has been granted, the Minister of Finance may make arrangements with any person to recover the amount on the Ministry's behalf. However, the Minister is not permitted to bypass the courts to attach a taxpayer's income or assets administratively without the required court. This would constitute an infringement of property rights under Article 16 of the Constitution.

In other words, if the Minister simply attaches assets by way of an ordinary administrative act, it would undercut section 83(1)(b). Yet this is exactly what is happening in practice. Tax authorities often invoke Schedule 2 of the Act to construe a pension fund scheme as the fictitious employer of a taxpayer in order to lay claim on that person's accumulated pension to settle tax debts as if it were income earned from the pension fund scheme in an employment relationship. The Act obviously does not construe the attachment of assets to settle a liquid assessed tax debt as a prepayment of taxes. Moreover, a pension fund scheme manages the old age pensions of employees of diverse employers, and cannot be construed as itself being the employer – who would be obliged to withhold employees' income tax. The recovery of outstanding preliminary taxes is equally subject to the rules of section 83: if such a provisional tax payment is not made despite reminders to do so, the Minister should apply for a court order to settle the liquid tax debt.[196]

This practice by the Minister of attaching assets without a prior court order to legitimise such attachment is unconstitutional for a number of reasons. It infringes on the right to just administrative action as well as on property rights. Section 83(1) lays down specific procedures that are to be followed, which justify a limitation of property rights on narrowly defined conditions.[197] The

83], the Minister, if he or she considers it necessary, may make arrangements with any person to recover outstanding tax, penalty or interest on behalf of the Minister on such terms and conditions as agreed upon between the Minister and such person".

196 Paragraphs 29 and 32, Schedule 2, Income Tax Act. Paragraph 32 deals with the recovery of employees' or provisional tax payable under section 80, and states that, "when it becomes due or is payable … [it] may be recovered by the Minister in the manner prescribed in section 83 for the recovery of tax and interest due or payable under this Act" [Emphasis added]. There is no statutory mandate to invoke section 83A without a prior court decision granting the order to settle a liquid debt.

197 Fundamental rights can only be restricted by the immanent limits of a right, by other rights, or in terms of Article 22 of the Constitution, but they are not permitted to be ousted completely. In this instance, the essential content of property rights vesting in a taxpayer's old age pension is completely hollowed out. The attachment of a person's pension is very different from attaching part of his/her salary or income: the former is a far-reaching measure which could have serious detrimental effects if the basis of a person's later livelihood is destroyed in this way. For this reason, it is even more important that the correct procedures laid down by section 83(1)(b) should be followed so that a court is able to determine whether there are not perhaps less infringing measures available.

arbitrary confiscation of a taxpayer's old age pension was clearly not foreseen. The legal construct which is employed also impinges on the fundamental right guaranteeing a free choice of occupation because the tax authorities construe an employment relationship where the parties concerned have not entered into any employment contract.[198] In addition, this practice is in breach of tax confidentiality, since the tax authorities divulge information about the personal tax matters of a taxpayer to a third party.[199] Such a breach of tax confidentiality by officials constitutes a criminal offence subject to a prison sentence.[200] Apart from that, the misrepresentation relating to the putative employment relationship between the pension fund scheme and the taxpayer, where no employment contract exists, could be prosecuted as fraud in terms of criminal law. If a pension fund willingly participates in this ruse, it runs the risk of being prosecuted as an accomplice to a fraudulent misrepresentation by the principal offender.[201]

If a taxpayer is bankrupt, the Minister may institute proceedings for the sequestration of the taxpayer's estate. For the purposes of such proceedings, the Minister is deemed the creditor in respect of any tax due or interest payable by the taxpayer.[202] As a rule, the Receiver is on a par with other creditors.[203]

Any of the above-mentioned enforcement proceedings could be stalled if the Receiver grants a taxpayer suspension of execution or an extension to settle the tax debt in terms of section 56(3). Once the proceedings for the execution of a tax debt have been instituted, it is still possible for the taxpayer to volunteer payment of his/her tax debt and/or penalties and interest in order to avert seizure of his/her income or assets.

Prescription to enforce payment

Taxation procedure in Namibia currently contains no regulation with regard to prescription of payment of assessed income tax.[204] Prescription is a

198 Article 21(1)(j), Namibian Constitution.

199 Tax confidentiality is guaranteed by section 4 of the 1981 Income Tax Act.

200 Section 4(3) determines that a tax officer "who in contravention of the provisions of this section … reveals any matter or thing which has come to his knowledge in the course of his official duties to any person whatsoever … shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years".

201 See Footnote 76 and the text associated with it.

202 Section 83(1)(d), 1981 Income Tax Act.

203 For the position in German taxation procedure, see Tipke & Lang (2010:1045).

204 Namibian taxation law does not explicitly regulate prescription relating to the levying of income tax. There is also no clear regulation when prescription starts if assessed taxes are not paid within a certain period. The legislature has regulated this with regard to value added tax, however. Since VAT is one of the posts in a balance sheet for purposes of taxation when it comes to the income tax payable

useful mechanism in enhancing effective tax collection and preventing other measures such as the charging of interest on outstanding taxes from being abused to enrich the fiscus.

In Germany, the prescription to pay taxes is regulated in detail.[205] Such prescription takes effect after five years, beginning at the end of the year that the tax debt was first due.[206] For example, if the payment of income tax in terms of the 2010 tax assessment was due on 15 August 2011, the time for prescription commences on 31 December 2011 and ends five years later on 31 December 2016. As mentioned elsewhere herein, in Germany, the tax year coincides with the calendar year. The expiry of the period when prescription would set in is stalled if payment cannot be enforced during the six months leading up to prescription due to force majeure – such as a fire, flood or earthquake. The period of five years during which payment is to be enforced is, thus, interrupted for the time of the duration of the force majeure.[207] The period before prescription would prevent further enforcing of payment can also be interrupted –[208]

- by a written reminder that an outstanding assessed tax is still due
- when respite or suspension of execution is granted, or
- when the authorities have to launch an investigation into a taxpayer's new address.

The result of prescription is that the tax debt and interest charged thereon extinguishes.[209]

The charging of interest on outstanding taxes

Section 79(2)–(5) sets out the parameters to charge interest on overdue taxes. Subsections (2) and (4) were amended in 2007 and subsection (5) added. The relevant provisions now read as follows:

> (2) If the taxpayer fails to pay any tax in full on or before the due date for payment of such tax … interest shall be paid by the taxpayer on the outstanding balance of such tax at the rate of 20 per cent per

by businesspeople, there might be leeway to argue that a similar prescription rule should apply in respect of levying income tax.

205 Sections 228–232, AO.

206 First sentence, section 229(1), AO.

207 Section 230, AO. If the offices of the tax authorities are flooded, for instance, and tax officials have no access to their files for a period of 20 days in order to control payment and prescription, the end of the period before prescription would block enforcement to pay taxes is prolonged by 20 days.

208 Section 231, AO.

209 Section 232, AO.

annum calculated as from the day immediately following such date for payment until the day of payment.[210]

(3) Any amount which on 1 February 1996 is owing by any taxpayer in respect of any tax, penalties or interest levied or accrued in terms of this Act before such date, shall with effect from that date bear interest at the rate of 20 per cent per annum, calculated daily and compounded monthly.[211]

(4) The amount that may be accumulated and may be recovered in respect of interest levied in accordance with this subsection may not exceed the amount of the original tax.[212]

(5) For the purposes of this section "tax" does not include the additional tax levied in terms of section 66.[213]

The gist of the above provisions is that the charging of interest is a penalising measure when a taxpayer fails to pay assessed taxes on time. The subsequent discussion will focus on the nature of the power to charge interest and the statutory scope of this power. In conclusion, the legal foundations of interest will be contrasted to penalties. This raises the question whether the current provisions which empower the tax authorities to charge interest as if it were a penalty are constitutional.

Preceding administrative action being a prerequisite to charge interest

A precondition for charging of interest in terms of section 79(2) is the *failure* "to pay any tax in full on or before the due date for payment as specified in the Act or any extension of such due date". With regard to prepaid taxes, section 80(2) specifies that interest could be charged if the taxpayer failed to pay such taxes on time.

From the wording of sections 79 and 80, it would seem that the power to charge interest is discretionary in nature. Section 79(4) refers to the amount "that *may* be accumulated and *may* be recovered in respect of interest levied" [Emphases added]. If the taxpayer was granted an extension for payment, interest is not permitted to be charged for that period. Similarly, section 80(2) states that interest could be charged "unless the Minister having regard to the circumstances of the case otherwise directs". Section 80(5) also refers to the amount that "*may* be accumulated and [may] be recovered in respect of interest" [Emphasis added].

210 As amended by section 7(a), 2007 Income Tax Amendment Act.

211 The predecessor of this provision was added by section 9(b), 1995 Income Tax Amendment Act, and substituted by section 23(a), Income Tax Amendment Act, 1996 (No. 12 of 1996).

212 As amended by section 7(b), 2007 Income Tax Amendment Act.

213 As amended by section 7(c), 2007 Income Tax Amendment Act.

The power to charge interest needs to be distinguished from the legal obligation to pay the interest once the discretionary power has been exercised. This is signalled by the wording of section 79(2) that, if interest is charged, it "*shall* be paid" [Emphasis added] by the taxpayer.

Irrespective of whether an administrative power is obligatory or discretionary in nature, the authorities nevertheless first need to decide to exercise such power. When interest is charged, the taxpayer first needs to be informed about such a decision before the administrative act can take effect. The mere fact that a computer has started to calculate interest on a taxpayer's outstanding taxes is not sufficient to qualify as administrative action. This is part of the internal departmental preparatory action before the actual administrative act comes about. Put differently, a proper administrative act is required to legally establish the claim to interest charged. The administrative act of charging interest has to specify from which date interest has been charged in relation to outstanding or relevant residual amount of tax. Furthermore, the taxpayer is required to be alerted to the fact that, unless the principal tax debt and interest are settled without delay, further interest will be charged. If a taxpayer should fail to settle the amount of interest by the specified deadline, proper reminder procedures should be taken to ensure this.

Bearing in mind the practice that tax consultants often change a client's addresses to the consultant's own address, the risk is particularly high that a taxpayer might never be informed about outstanding taxes or the interest being charged thereon.[214] This can lead to substantial injustice if administrative procedures are not properly executed, therefore.

"Due date" for purposes of calculating interest

In terms of section 79(2), interest may be charged if a taxpayer fails to pay a tax in full "on or before the due date for payment". Interest may be charged "as from the day immediately following such date for payment until the day of payment". The "due date" for payment of outstanding taxes is important, therefore: it is the starting point for the calculation of interest.

As set out earlier herein, in terms of section 67(2)(b), a deadline for payment has to be specified in the notice of assessment. Since the provision does not explicitly specify how much time a taxpayer should be afforded to settle such a tax debt, the rules of interpretation have to be invoked to fill the statutory gap. In this instance, it appears that the legislature intended that taxpayers should have a period of 60 days to settle their tax debts.[215] This would imply

214 If the notice of assessment was mailed to a tax consultant instead of the taxpayer personally, the administrative act charging interest would be ineffective because no valid assessment came about.

215 See the discussion under the subheading "Deadline for payment of assessed taxes

that interest under section 79 could only be charged as from the 61st day after the date of assessment. Section 80(2) has been formulated with greater clarity and specifies that interest could be charged as from the 21st day after the date the prepayment of the tax was due.

The tax authorities, however, have interpreted the "due date" for payment to be the deadline by which the tax return is to be submitted in terms of section 56(1A). Thus, the authorities charge interest retrospectively from that date. This practice is questionable from a statutory as well as a constitutional point of view. One of the core rules of administrative justice is the prohibition of retroactive administrative action when such action affects the addressee negatively, or creates burdens with which it is unrealistic to comply.[216] In this instance, the "due date" for payment obviously needs to be the date specified in terms of section 67(2)(b), namely 60 days after the date of assessment – and not the deadline for submitting the tax return.

The retrospective charging of interest which precedes the date of assessment is highly problematic for the following reasons:

- Interest will be charged for a 'failure' to settle outstanding taxes in terms of an assessment, i.e. even before the taxpayer has had the slightest opportunity to settle the tax debt in question[217]
- Given the exorbitant interest rate, the retrospective charging of interest can lead to great injustices if the tax authorities should take their time to do the assessment, and
- Such interest charges distort the running balances of bookkeeping records on an ex post facto basis and, thus, destroy crucial evidence. How any court of law should still be able to disentangle the exact facts pertaining to a dispute of this nature is unclear.

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must be specified", under the heading "Different phases of taxation procedure".

216 This principle is central to constitutionalism. In Germany, the Constitutional Court confirmed this in a number of cases relating to taxation; see e.g. BVerfGE 110, 94. This position was also underscored by the German *Bundesfinanzhof* (BFH, Federal Finance Court) in their 16 December 2004 decision (BStBl 2004, 284).

217 Such retroactive charging of interest can obviously be abused to function as a second source of raising revenue. In one instance, the tax authorities charged interest amounting to N$160,000 on outstanding taxes of N$27,000 by the date the tax would have been due (i.e. 60 days after assessment). On the date of assessment, the retroactive interest on the N$27,000 had already amounted to N$154,500. Interest for 'failure' to pay the assessed tax was therefore 'due' even before the assessment had been mailed. Needless to say, the assessment was also not mailed to the taxpayer personally but to a tax consultant, whose mandate to handle the taxpayer's affairs had expired several years before. In this specific case, two further tax consultants had meanwhile consecutively changed the address of the taxpayer to theirs. Thus, the charging of even more interest was predestined, because the tax consultant who had originally prepared the tax return never forwarded the assessment to his former client.

The latter point of critique impacts on cardinal principles of accountancy, which affect commercial and taxation law. A crucial aspect of a proper accounting system, be it in terms of commercial or administrative law, is that a transaction has to be booked to reflect the date when it actually took place. The date when assessed tax is booked, therefore, has to correspond with date of the notice of assessment when the administrative act established the claim in legal terms. When the tax authorities charge interest, the amount of interest due has to be booked to reflect the date on which the administrative act was actually executed.

If the notice of assessment of a specific tax year stated a running balance of the taxpayer's account on the date the assessment was issued, it would serve as legal evidence of the amount owed on that specific date. If the tax authorities were to then book interest charged retrospectively as if it had already been charged on a monthly basis long before the assessment was actually issued, it obviously distorts the original running balances. Therefore, one can no longer use an assessment that specifies an outstanding amount (a running balance) as reliable evidence.

The degree to which the Department of Inland Revenue is distorting the bookkeeping of taxpayer accounts is a serious cause of concern. In practice, the tax authorities not only charge backdated interest, but also backdate the actual payment of tax debts or refunds for a specific tax year to correspond with the date on which the tax *return* for that year was due. In other words, such payments are not booked to reflect the date when the money was received and when the *cash flow* took place. This implies that such a backdated payment would always coincide with the section 56 deadlines. In that case, however, there is no logical reason to ever charge any interest because such backdated payments would always have been 'paid on time'. It is suggested, therefore, that bookkeeping entries relating to individual taxpayer accounts should be realigned to fit in with generally accepted accounting practice. In fact, if taxpayers themselves were to dare to make such false bookkeeping entries, the authorities would not hesitate to lay charges against them for tax evasion due to fraudulent bookkeeping.[218] The backdating of payments and retroactive charging of interest for a 'failure to pay taxes on time' before a taxpayer has even had a fair chance to do so is also a form of bookkeeping fraud because it distorts accounts.

Calculating interest on overdue taxes

Section 79(2) states that interest could be charged as from the day after the date when the tax should have been paid.[219] The due date for payment, as

218 In terms of section 96(1)(c), 1981 Income Tax Act.

219 Section 80(2), 1981 Income Tax Act, similarly specifies that interest is "calculated as from the day immediately following the expiry of the period for payment so

clarified earlier herein, is 60 days after the date of assessment. To calculate the interest, one also needs to know the prescribed formula for doing so as well as the applicable interest rate. In 1995, the interest rate was increased from 15% to 20%.[220] Thus, interest should be charged –

> … at a rate of 20 per cent per annum calculated daily … and compounded monthly during the period which any portion of the tax remains unpaid.

The 1996 Amendment Act clarified when the new interest rates should commence in relation to tax that is assessed in the future.[221] The new tax rate was also made applicable to all tax debts that already existed on 1 February 1996.[222] One of the core rules of administrative justice is, however, that retroactive administrative action is prohibited when such action affects a person negatively.[223] Consequently, if the interest rate is increased, this could only apply pro future; when it is lowered, it is obviously to the taxpayer's advantage, and is then permitted to apply retroactively.

Of further concern is that subsection (3) stipulates such interest not being limited to the principal amount (the assessed tax debt): it could be charged "in respect of any tax, penalties or interest levied or accrued … before".[224] Two objections can be raised against this provision:

- If interest could be charged on interest, this would legitimise the charging of interest at a far higher rate than the one statutorily specified, and
- The charging of interest is already conceived as a penalising measure, which means that interest on interest or penalties charged before

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prescribed until the day of payment".

220 Section 9, 1995 Income Tax Amendment Act.

221 Section 23(1)(a) of the 1996 Income Tax Amendment Act. The Act was adopted on 8 August 1996. In terms of section 31, the new tax rate was to be applied retroactively: for companies from 1 January 1996 and all other taxpayers from 31 March 1996.

222 The phrase "on the promulgation of the Income Tax Amendment Act, 1995" was substituted by section 23(1)(a) of the 1996 Income Tax Amendment Act with the words "on 1 February 1996".

223 Legislative measures which implement burdens retroactively, or restrict previous advantages (e.g. the scrapping of certain categories of business expenses or a higher rate of depreciation) or benefits (e.g. subsidies) are, therefore, not allowed. However, statutes which simply enact the common law position are not regarded as being retroactive in creating new burdens. Retroactivity with regard to statutes that create advantages or benefit people are not forbidden (e.g. a statute that would suspend penalties for not having declared interest on foreign investments in the past during a window of opportunity where this could still be done). See Tipke & Lang (2010:114ff, 378–380).

224 Subsection (3) was added to section 79 by section 9(b), 1995 Income Tax Amendment Act.

> leads to a double penalising effect – which contravenes the norms of administrative justice.

Subsection (4), which was introduced in 1996, added fuel to the flames.[225] It states that the amount of interest that could be charged –

> … shall not be limited to, and may exceed, the amount of the principal debt due, whether such principal debt presents tax, penalties or interest, or a combination thereof.

This implies that there were no limits to the amount of interest that could be charged. Initially, interest could even be charged on additional taxes that were levied as a penalising measure in terms of section 66. This, in fact, implied a threefold penalty. Fortunately, in 2007, this injustice was stopped. Subsection (5) was added to section 79 and now precludes the charging of interest on additional taxes.[226]

That these measures stand in no relation to the objective pursued, namely that taxpayers should pay their taxes on time, needs little elaboration.

Until the 2007 amendment of section 79, it was prescribed that interest should be "calculated daily and compounded monthly".[227] Section 79(2) in its current form merely states that interest could be charged "at a rate of 20 per cent per annum". The amendment of the calculation method took effect on 1 April 2009.[228] Interest is now calculated according to the formula for simple interest.

Simple interest is calculated on the basis that the percentage of interest for a whole year is divided into twelve equal shares. Therefore, the amount of interest that can be charged for every month that the taxpayer is in arrears to settle the tax debt remains the same. The mathematical formula used to calculate compound interest is more complex. The disadvantage of compound interest is that one has to use a difficult mathematical formula, and mistakes can easily occur as a result.[229] In the case of compound interest, interest is added to the principal amount. From that moment on, the interest that has

225 Section 79(4) was added to the principal Act by section 23(1)(b) of the 1996 Income Tax Amendment Act.

226 Section 7(c), 2007 Income Tax Amendment Act.

227 Sections 7(a) and 8(b), 2007 Income Tax Amendment Act amended subsections 79(2) and 80(2) of the principal Act respectively. See Government Notice 230, GG 3964 of 27 December 2007.

228 Government Notice 118, GG 4270 of 1 June 2009.

229 The author tested samples of interest that the tax authorities had charged to taxpayers. The results showed that, invariably, too much interest had been charged. The author double-checked the results by using an Excel spreadsheet programmed for these purposes by a well-known international firm of chartered accountants in Windhoek.

been added also earns interest.[230] In contrast to compound interest, the simple interest formula does not add interest to the principal amount, i.e. there is no compounding. Whereas the curve of simple interest has a constant slope (like a straight line), the slope of compound interest is concave. The sum total of compound interest by the end of the first year is the same as that calculated in terms of the simple interest formula, but after that, the curve of compounded interest rises sharply.

The following example illustrates the difference between simple and compound interest charges. If the assessed outstanding tax of A is N$50,000, the simple interest of 20% per month would amount to N$833.33; the compound interest for the first month would be N$821.91, based on a month with 30 days. By the end of the first year, both simple and compound interest would amount to N$10,000, but after that, the curve of compound interest escalates sharply, as illustrated in Table 1:

Table 1: Comparison of the effects of applying simple and compound interest charges

Principal amount: N$50,000	**Simple interest at 20% (N$)**	**Compound interest at 20% (N$)**
Year 1	10,000	10,000
Year 2	10,000	12,000
Year 3	10,000	14,400
Year 4	10,000	17,280
Total amount of interest	**40,000**	**53,368**

One should also consider whether the compound formula is an appropriate method for calculating interest on outstanding taxes. Unlike simple interest, where the monthly payment of interest is the same every month, interest

230 The interest compounded on a monthly basis stems from the equation:
Total amount (A) = Principal amount (tax debt) (P) + Compounded interest (CI)
A = P + CI
This translates into the following calculating formula:
A = P(1 + r)n, where *A* is the amount of money accumulated after *n* years, including interest; *P* is the principal amount of the outstanding tax debt; and *r* is the annual interest rate (20%).
To compound interest on a monthly basis, the following formula is used:
A = P(1 + r/q)nq or A = P(1 + r/12)12
where *A* is the amount of money accumulated after *n* years; *P* is the principal amount of the outstanding tax debt; *r* is the annual interest rate (20%), and *q* is the number of months for which interest is calculated.

charges increase dramatically due to the curve of compound interest the longer the tax remains unpaid. Compound interest was created by credit providers to maximise their profits. However, the maximising of profit is not the primary state goal of taxation. The move away from compound interest is, therefore, definitely commendable, but the question is whether this is enough to guarantee the constitutionality of section 79(2).

Interest on refunds

Neither section 79 nor section 94 of the 1981 Income Tax Act provides for interest that should be paid to the taxpayer when the Receiver drags its feet to pay out refunds after the 60-day deadline has expired. Thus, the current legislative regulation benefits the Receiver in a one-sided way, and infringes on the property rights of the taxpayer, who is equally entitled to interest on refunds if these are delayed beyond the deadline for payment. There is no reason why the charging of interest should be regulated to benefit the Namibian Receiver in this way. Indeed, both South Africa and Germany oblige the tax authorities to pay interest on tax refunds. The legal foundation for such an approach will be set out below.

The only exception which is currently made in Namibian taxation procedure is contained in section 78 of the 1981 Income Tax Act. This provision determines that, where a taxpayer has paid the assessed taxes but has successfully challenged the amount of assessed tax in court, the Receiver is obliged to pay 15% interest on the amount that was charged in excess when that amount is refunded. The interest is calculated –

> … from the date proved to the satisfaction of the Minister to be the date on which such excess was received and amounts short-paid being recoverable with interest calculated as provided in section 79.

Statutory ceiling on interest that may be charged

Section 79(4) was amended in 2007 and now establishes a ceiling for the amount of interest that might be charged. The provision states that the amount of interest "may not exceed the amount of the original tax".[231] It basically enacts the common law in duplum rule as a yardstick for the amount of interest that could be charged on outstanding taxes. The in duplum rule applies to credit providers in consumer protection law. Whether this rule can be invoked in taxation procedure will be considered, but first, two other issues need to be addressed:

- Does the 2007 amendment of section 79 qualify as valid legislation?
- If it does, can the more advantageous provisions be invoked

231 Section 7(b), 2007 Income Tax Amendment Act, published on 27 December 2007 (GG 3964).

retroactively in relation to all non-concluded tax matters where interest was charged in terms of the previous regulation?

a) *Legality of the 2007 amendment of section 79*

In terms of Article 63(1) of the Constitution, the power "to make and repeal laws" vests in the National Assembly. Article 56 further specifies that every bill passed by Parliament requires the assent of the President, and publication of the Act in the *Government Gazette*. In other words, only once the Act has been published does it acquire status as an Act of Parliament. Unlike the South African and German Constitutions, which specify that, if an Act does not specify a date on which it enters into force, it does so on the date of its publication,[232] Article 56 of the Namibian Constitution seems to reduce the options for entering into force to the date on which the Act is published. The commencement date of the Act is part of material law (i.e. the content of the Act) and not merely legislative procedure. Whereas the executive participates in legislative procedures insofar as it may draft bills to be considered by Parliament for adoption, and the President has to sign such bills to officially become part of the statute book, Parliament cannot delegate its legislative powers to these executive bodies when it comes to determining the commencement date of an Act.

Section 12(1) of the 2007 Income Tax Amendment Act states that, "subject to subsections (2) to (8), [the Act] commences on the date of its publication in the Gazette". With the exception of some provisions, therefore, the Act commenced on 27 December 2007, i.e. when it was published.[233] The section 79 amendment was contained in section 7 of the Amendment Act. This provision was earmarked to "commence on a date determined by the Minister by notice in the Gazette".[234] The Minister determined that the amendment of section 79 should enter into force on 1 April 2009.[235]

The dilemma, therefore, is that the bulk of the 2007 Amendment Act commenced in the manner prescribed in Article 56 of the Constitution. With regard to other provisions listed by section 12 of the 2007 Amendment Act, which stipulates precise dates on which each of the listed sections of the Act should commence,[236] one could argue that there is clarity exactly when the specified amended provision should take effect so that the individual commencement date of each amended provision would be secured as material law. This might be an ingenuous way of determining different dates

232 Section 81, Constitution of the Republic of South Africa, 1996, and Article 82(2), *Grundgesetz* 1949 (German Constitution).
233 Government Notice 230, GG 3964.
234 Section 12(8), 2007 Income Tax Amendment Act.
235 Government Notice 118 of 30 April 2009, GG. 4270 of 1 June 2009.
236 Section 12(2)–(7), 2007 Income Tax Amendment Act.

on which certain parts of such an Act should commence, which would still fall within the scope of Article 56 of the Constitution. However, it is doubtful whether section 12(8) overcomes the hurdle to qualify as valid law because legislative powers were delegated to the Minister of Finance to put legislation into effect by way of an executive regulation. The legislature is not permitted to leave it to the executive to put parliamentary statutes into force. This would leave the executive scope to indefinitely postpone putting legislation into force or even veto it along this route.[237] It is doubtful, therefore, whether the 2007 amendment of section 79 actually qualifies as valid law: one will need a Supreme Court ruling on this.

b) Retroactivity of more advantageous provisions in non-concluded tax matters

If the Supreme Court should rule that the amended section 79 is indeed constitutional, which is doubtful, the next question would be whether the provision should apply retroactively to all matters where compound interest was charged and where interest so charged has not yet been settled.

It might be helpful to look at comparative law here in order to clarify whether a more advantageous statutory provision which comes into force could be applied retroactively in relation to matters that have not yet been concluded. The German Constitutional Court makes a distinction between *genuine* and *ostensible* retroactivity. *Genuine* retroactivity is presumed when the statute would change a person's position in a legal situation that has already been concluded and finalised. An example would be where a statute allowed an increased rate of depreciation of certain goods, e.g. solar energy plants, which could be deducted as business expenses and later abolished this privilege. The retraction of the privilege will not affect the position of a taxpayer who has already written off such a solar plant at a higher than normal depreciation rate. With regard to the prohibition of retroactivity in this category, the Constitutional Court stipulates a number of exceptions:[238]

- When a person could have expected such a regulation in terms of the legal situation at the time when the bill was considered and adopted
- When the applicable law is confusing and unclear
- When a person should be allowed to rely on an invalid legal norm which created a specific legal illusion, and
- When there are compelling reasons to allow it in the public interest or to create legal certainty.

237 In South Africa, a similar problem has arisen because the legislature unconstitutionally delegated this power to the executive. See the discussion by Wolf (2011b:159–164).

238 BVerfGE 13, 261 at 271f.

Ostensible retroactivity refers to an incomplete process or legal position which is still ongoing.[239] In principle, all cases of ostensible retroactivity are allowed, unless it changes the addressee's position for the worse. In the case of less advantageous statutory provisions, they are not permitted to be applied retroactively. More advantageous provisions, however, may be applied retroactively. The rationale behind this rule is to allow retroactivity insofar as it is in the public interest and boosts confidence in the justness of the legal system.[240] The German Constitutional Court has, to date, not declared any taxation provision which has created advantages or privileges with retroactive effect unconstitutional.

In 1983, the Constitutional Court changed the terminology which it used in relation to the concepts of *genuine* and *ostensible retroactivity*. Instead of referring to *genuine retroactivity*, the said Court now prefers to refer to *retroactivity of legal consequences* (*Rückbewirkung von Rechtsfolgen*); and instead of *ostensible retroactivity* it now prefers to refer to a flash-back for re-establishing the factual position (*tatbeständliche Rückanknüpfung*).[241]

Although these decisions of the German courts do not apply to Namibia per se, local courts have been open to legal comparison in constitutional matters. Similarly, therefore, they would be able to invoke the rules pertaining to retroactivity. In other words, insofar as the 2007 Income Tax Amendment Act has been adopted in conformity with the constitutional principles laid down by Article 56 of the Namibian Constitution, and creates a more favourable legislative position in terms of the formula for calculating interest and the ceiling on how much interest is permitted to be charged, the courts might rule that it should apply retroactively to all tax matters that have not yet been concluded.

In the current situation, however, it is more likely that the status quo – namely charging compound interest at 20% per annum with no legal limits to such charges – will continue to prevail. Section 7 of the 2007 Income Tax Amendment Act amended section 79 of the principal Act, but section 12(8) of the Amendment Act determined that section 7 would take effect on a date determined by the Minister of Finance. As it was pointed out earlier herein, the legislature is not permitted to delegate its legislative powers to the executive; thus, the amended provision has not been adopted in conformity with Article 56 of the Constitution. Therefore, the amendment does not have the constitutional status of binding law.

The 20% compound interest rate as well as the lack of any statutory ceiling for charging interest is, therefore, de facto still in force – and subject to

239 BVerfGE 11,139 at 146 and all other cases cited by Tipke & Lang (2010:115, Footnote 52).

240 BVerfGE 30, 392 at 404; BVerfGE 75, 246 at 280.

241 BVerfGE 63, 343 tat 353; for a discussion, see Tipke & Lang (2010:116).

constitutional scrutiny as to whether the associated provisions do justice to the norms of the Bill of Rights. The powers under section 79(2)–(4) of the Income Tax Act are obliged to comply with the requirement that they do not adversely affect the norms of administrative justice and property rights enshrined in Articles 18 and 16 of the Constitution, respectively. The question is, therefore, whether the power to charge unlimited compound interest at 20% goes beyond the valid scope of powers spelt out in the limitation clause (section 22 of the Constitution). If the Supreme Court should rule that these statutory powers infringe on the right to administrative justice and property rights, then the court could make a ruling that suspends these provisions and obliges the legislature to regulate the charging of interest properly, and to make such revision retroactively applicable to all pending tax matters. This option will be explored later herein, under the subheading "A critical appraisal of the current charging of interest under section 79".

c) *The common law in duplum rule as an administrative law yardstick for fairness?*

The next inquiry is whether the 'unsuccessful 2007 amendment' of section 79(4) – which enacted the common law in duplum rule to function as a ceiling on the amount of interest that could be charged – can serve as an administrative law yardstick for the fairness of taxation procedure.

The in duplum rule, which has its origins in common law, is designed to protect consumers from exploitation by providers of credit. In other words, the rule applies to private law commercial transactions with the aim of limiting the unrestrained accumulation of interest on outstanding debts. In essence, the common law rule provides that the unpaid interest on a debt which is due, but has not yet been paid, is not permitted to exceed the outstanding capital. The purpose of this rule is to ensure that consumers do not find themselves in a debt trap. As soon as the unpaid capital equals the outstanding capital, interest ceases to run.[242]

Therefore, one needs to consider whether the in duplum rule, conceived as a ceiling on the amount of interest that could legitimately be charged by private law credit providers, could serve as an appropriate yardstick for administrative

242 In South Africa, the in duplum rule was concisely codified by section 103(5) of the National Credit Act, 2005 (No. 34 of 2005). The Act sets clear limits to the interest that can be charged, including related costs. Furthermore, in *National Credit Regulator v Nedbank Ltd & Others*, 2009 (6) SA 295 (GNP), the court held that no further interest was permitted to accrue once the limit had been reached, and that payments should first serve the principal debt. For a discussion, see De Villiers, DW. 2010. "*National Credit Regulator v Nedbank Ltd* and the practice of debt counselling in South Africa". *Potchefstroom Electronic Law Journal*, 13(2):128, at 149f.

law functions in the field of tax collection.[243] It has already been pointed out earlier herein that the amendment of section 79(4) in 2007 did not successfully jump over the constitutional hurdle of qualifying as valid law. The question, therefore, is whether it makes sense to 're-enact' the in duplum rule according to the correct procedures for adopting legislation, or rather steer clear of it in future.

To start with, the legal title which the Department of Inland Revenue can exert in relation to outstanding taxes is not based on a loan or credit agreement in terms of commercial law. The purpose of taxation is to raise revenue. Section 5(1) of the Income Tax Act mandates the levying of taxes as a source of revenue for the state. The Act does not mandate the executive to slip into the role of credit provider. In practice, however, it often happens that the Department of Inland Revenue does not invoke ordinary administrative measures such as reminders or penalties to enforce prompt payment of outstanding taxes, but simply lets the interest on due taxes run up, often accumulating amounts that are three or four times the amount of the original tax payment that was due. If payments are made, they are often deducted from the total amount due instead of the principal tax debt, with the effect that taxpayers are invariably caught in a permanent debt trap.

Apparently, the legislature intended to alleviate this type of hardship with the amendment of section 79(4), which creates a statutory ceiling on the amount of interest that could be charged by invoking the in duplum rule. The problem is that the in duplum rule relates to private-law credit agreements. In taxation, the authorities need to invoke suitable administrative measures such as reminders and penalties to enforce payment of assessed taxes; and if those measures fail, the authorities have to apply for a court order to settle a liquid debt. Thus, the lax tax collection practice gives rise to a second source of revenue, where interest charged on overdue taxes equals or eclipses taxes that could legitimately be raised on taxable income. This is not only in conflict with section 5(1) of the Act, but might be construed as an unconstitutional infringement of property rights.

A CRITICAL APPRAISAL OF THE CURRENT CHARGING OF INTEREST UNDER SECTION 79

Three issues need to be clarified here:

243 In *Commissioner for South African Revenue Service v Woulidge*, 2000 (1) SA 600 (C), the Cape High Court considered the in duplum rule, but not in the context of charging interest on outstanding tax. The case was about commercial transactions that were subject to taxation because disproportionate interest on a loan had been used to reduce a taxpayer's amount of taxable income. The in duplum rule, therefore, still related to private-law credit agreements, and was not invoked in the context of administrative law.

- Does the retroactive charging of interest in terms of a notice of assessment issued under section 67(2) as from the date the tax return was due instead of the 61st day after the date of assessment constitute a form of undue enrichment, in which case such interest, if paid under the impression that it was charged legitimately, could be recovered with unjustified enrichment remedies, and if not, what remedies for restitution would be available to the taxpayer?
- What is the legal basis for the charging of interest in terms of taxation procedure: can interest be charged like penalties?, and
- Does the charging of interest at usurious interest rates constitute an infringement of property rights in that the limits for valid taxation are unconstitutionally transgressed?

d) Undue enrichment in terms of public law?

Unjust enrichment denotes a causal incident in which one party is enriched unjustly or without a legal ground at the expense of another.[244] If unjust enrichment is proved, the person who has gained the undue benefits can be obliged to make restitution. One of the major differences between the English and Continental European law of unjust enrichment is the justification for the claim in restitution.[245]

Traditionally, common law systems such as those of England and the United States of America have proceeded on the basis of what may be termed the 'unjust factor' approach. This approach requires the claimant to point to one of a number of factors recognised by the law as rendering the defendant's enrichment unjust. English law recognises at least the following unjust factors: mistake of fact,[246] mistake of law,[247] duress or undue influence, [248] total failure of consideration,[249] and miscellaneous policy-based unjust factors such as

244 The generic elements of unjust enrichment are discussed by Sonnekus, JC. 2007. *Ongegronde verryking in die Suid-Afrikanse reg*. Durban: LexisNexis, pp 76–93). The sine causa requirement is discussed on pages 85ff (ibid.).

245 For a succinct discussion of the differences between these approaches, see Meier, S. 2002. "Unjust factors and legal grounds". In Johnston, D & R Zimmermann (Eds). *Unjustified enrichment: Key issues in comparative perspective*. Cambridge: Cambridge University Press pp 37–75; see also Krebs, T. 2002. "In defence of unjust factors". In Johnston & Zimmermann (ibid.:76–100).

246 For example, where a bank honours a cheque that has been countermanded, or where a payment is made twice by mistake. In *Barclays Bank v Simms*, [1980] QB 677 at 695, Goff J held that, if a person "pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact".

247 This refers to the rule against recovery of payments made under an error of law, i.e. illegal contracts.

248 For example, where a claimant is forced to part with his/her money because of the defendant's illegitimate pressure.

249 For example, where payment is made on a certain condition, normally that the

"withdrawal within the *locus poenitentiae*".[250] Whereas other instances of mistake liability could give rise to a restitution remedy, this was denied in relation to a mistake of law.[251]

Without going into all the intricacies of legal developments in unjust enrichment law in England, one could briefly say that, ultimately, the view gained ground that every mistake that caused a transfer should lead to restitution if it would otherwise lead to unjustified enrichment. This 'causal mistake approach' has found increasingly more supporters.[252] Not every mistake causing the payment leads to restitution, however; thus, it is necessary to find criteria for distinguishing between relevant and irrelevant mistakes. As Meier has pointed out, it is not possible to differentiate mistakes in restitution without resorting to an analysis of the legal grounds of such mistakes.[253] The claimant's mistake is only one of several criteria for determining whether an enrichment has to be returned.[254] In England, the old law barring restitution if the claimant's mistake was merely one of law was recently abolished.[255] It had been increasingly criticised since there seemed to be no difference in principle between mistakes of fact and mistakes of law: since both mistakes vitiated the claimant's intention to give, both mistakes, it was thought, should trigger a right to recover.[256] The 'mistake of law' rule was not based on the nature of this type of mistake, however, but on a number of policy reasons.

Traditionally, European legal systems such as those in France and Germany have proceeded on the basis of what may be termed the *lack of a legal*

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defendant will counter-perform.

250 Davenport, P & C Harris. 1997. *Unjust enrichment*. Sydney: Federation Press, pp 33–35, point out the following elements:
- A benefit or enrichment
- at the plaintiff's expense in combination with the
- 'unjust' factor, and
- that there are no bars to the restitutionary claim.

See also Birks, P. 1992. "The condition of the English law of unjust enrichment". In Bennett, TW & DP Visser (Eds). *Unjustified enrichment: Essays in honour of Wouter de Vos*. Cape Town: Juta, pp 1–22.

251 Birks, P. 1989. *Introduction to the law of restitution* (Revised Edition). Oxford: Oxford University Press, pp 148ff; Williams, R. 2010. *Unjust enrichment and public law – A comparative study of England, France and the EU*. Oxford: Hart Publishing, pp 26–27.

252 For the intricacies of these legal developments, see Meier (2002:49ff).

253 (ibid.:53f). On the future of unjust factors, see McKendrick, E. 2002. "Taxonomy: Does it matter?". In Johnston & Zimmermann (2002:627, at 649ff).

254 Meier (2002).

255 This rule, which was established in *Bilbie v Lumly*, (1802) 2 East 469 102 ER 448, was abolished by *Kleinwort Benson Ltd v Lincoln City Council*, [1999] 2 AC 349. See Meier (2002:53).

256 Goff, Lord of Chieveley & G Jones. 1998. *The law of restitution* (Fifth Edition). London: Sweet & Maxwell, pp 214f.

ground (or *absence of basis*) approach to determine unjust enrichment.[257] The German Civil Code dispensed with the requirement of a mistake for the conditio indebiti, and thereby also jettisoned the old problem of how to deal with mistakes of law.[258] The right to recover is only barred by positive knowledge that the liability does not exist; a mistake of law, however, excludes such knowledge. In other words, unlike English law, the 'absence of basis' approach does not deal with a list of individual unjust factors; instead, it seeks to identify enrichments with no legitimate explanatory basis.

Zimmermann has argued that English law's insistence on the identification of a specific 'unjust factor' is inelegant, uncertain and fragmentary, and leads to an unnecessary duplication of problems.[259] In his view, the Continental focus on the single issue of *transfer without a legal ground* is preferable to the English approach.[260] In the light of the judgment of the Law Lords in *Kleinwort Benson Ltd v Lincoln City Council*[261] and the breadth of the notion of *mistake of law* employed therein by the court, it may be said that English law is beginning to move in the direction of German law.[262] McKendrick surmised that it is possible that the broad notion of *mistake* embraced by the Law Lords in this case will, in time, become the functional equivalent of the 'without legal ground' premise in German law.[263]

In Roman–Dutch law that was received in South Africa, claims for unjust enrichment date back to the 18th century.[264] Unjust enrichment law in South Africa was also later influenced by English law. Since Namibia's independence in 1990, it basically continued to follow the same precedent. In *Ferrari v Ruch*, Mahomed CJ expressed some reservation in respect of following English precedent since the South African precedent – which also applied to Namibia

257 Section 812(1) of the *Bürgerliches Gesetzbuch* (BGB, German Civil Code) determines that a person who obtains something through another's performance or in any way at his expense without a legal cause is obliged to make restitution to the other. For a discussion of German unjustified enrichment, see Zimmermann, R & J du Plessis. "Grondtrekke en kernprobleme van die Duitse verrykingsreg". In Bennett & Visser (1992:57–103); Visser, DH. 1992. "Responsibility to return lost enrichment". In Bennett & Visser (1992:175, at 186); Krebs (2002:79ff).

258 Meier (2002:55).

259 Zimmermann, R. 1995. "Unjustified enrichment: The modern civilian approach". *Oxford Journal of Legal Studies*, 15:403, at 416.

260 (ibid.).

261 [1999] 2 AC 349 at 455.

262 Meier, S & R Zimmermann. 1999. "Judicial development of the law, error iuris and the law of unjustified enrichment". *Law Quarterly Review*, 115:556.

263 McKendrick (2002:650). Sonnekus (2007:88) makes a similar observation.

264 See Van Zyl, DH. 1992. "The general enrichment action is alive and well". In Bennett & Visser (ibid.:115–130). Van Zyl also sets out developments in France and Germany. On the Roman–Dutch law position, see also Visser, DH. 1992. "Responsibility to return lost enrichment". In Bennett & Visser (ibid.:175, at 176ff).

in the pre-Independence era – had developed in a different direction.[265] As far as this author could determine, there is no precedent in Namibia which has considered whether the rules of undue enrichment should also apply to state organs, e.g. in the case where the fiscus has unduly enriched itself at the taxpayer's expense. It may, therefore, be worth looking at English precedents, which have lately confirmed that it is possible to assert such claims against state organs. Of course, one should also consider whether the application of undue enrichment law in an administrative context would not lead to blurring the boundaries between private and public law.

Unjust enrichment is usually applied in relation to private law relations, but there are an increasing number of instances where it has been invoked in relation to state institutions under English law.[266] The well-known case of *Woolwich Equitable Building Society v Inland Revenue Commissioner* was a watershed in English law.[267] The building society had been assessed for taxes, which, in its view, the Inland Revenue Commissioner had no power to raise. It nevertheless paid under protest. It then successfully challenged the tax, showing that the assessment had been ultra vires and void. The tax authorities repaid the illegally levied tax, but refused to pay interest on it. Woolwich then had to show that, as soon as it had paid the money, it had a restitutionary claim against Inland Revenue, which would establish a legal right to interest on such money. The difficulty was that it did not qualify as a 'mistake of law' because Woolwich had known the assessment was ultra vires from the start, and said so. Nor could it be seriously contended that the payment was made under duress: any pressure exerted was the pressure of due legal process and, as such, it was not 'illegitimate'. The building society nevertheless succeeded in its claims. The principle of *No taxation without Parliament* – the policy in favour of the legality of executive action and the rule of law – strongly favoured restitution. The court held that it was also entitled to recover interest on the money from the moment that it had been paid to the Revenue Service.[268]

Meier has justly cautioned against following this English precedent in states which have been modelled on the constitutional state paradigm.[269] Whereas, in the Continental legal systems, which clearly separate public law from private

265 [1993] AC 70.

266 *State Bank of New South Wales Ltd v Federal Commissioner of Taxation*, (1995) 132 ALR 653; *Marks and Spencer plc v Customs & Excise Commissioners*, [2000] STC 16.

267 *Woolwich Equitable Building Society v Inland Revenue Commissioners*, [1993] AC 70.

268 For a discussion of the *Woolwich* case, see Krebs (2002:78) and Williams (2010:20–39). See also Westcott, RH. 2009. "Restitution and unjust enrichment: Wider still and wider – Tax practitioners and legislative change". *Tax Advisor*, January:21–24.

269 Meier (2002:62ff).

law,[270] this problem is seen as one of administrative law, the English lawyer will ask whether the citizen has an action in the law of restitution. The older case law of the 20th century required the citizen to show an unjust factor that would have founded a claim to recover the payment – most notably a mistake or compulsion. As a result, the right to recover was gravely restricted: in order to show compulsion, the claimant had to show more than the mere threat by the authority to institute criminal proceedings; and if the claimant had paid because he believed the tax to be lawful, he stumbled over the 'mistake of law' rule which barred restitution.[271]

Behind this restrictive attitude lay the fear of a disruption of public finances that would ensue if it turned out that an authority had for a long time and in a vast number of cases misapplied the law to the extent that a multitude of litigants might now demand their money back – the so-called floodgates argument. The requirement of an unjust factor served to ward off this danger, for the traditional unjust factors giving a right to recovery were mistake of fact and compulsion (e.g. a threat to seize the claimant's property), which typically concerned individual cases where there was no danger of fiscal chaos.[272] The restrictive attitude towards recovery that appeared to reward public authorities for their unlawful behaviour attracted considerable criticism, emphasising the infringement of the principle *No taxation without Parliament* and of the rule of law.[273] If the public purse was to be protected at all, it was argued, this had to be done by special defences or time limits. Several approaches to deal with the dilemma were suggested, but none offered a satisfactory explanation of why unlawful demands by the state should be treated differently from unlawful demands by private individuals. Because of the deficiencies of the traditional unjust factors, it was proposed that the right to recover be based on the ultra vires demand as such.[274] This approach was finally endorsed by the Law Lords in the *Woolwich* case. Lord Goff concluded as follows:[275]

> In the end logic appears to demand that the right of recovery should require neither mistake nor compulsion, and that the single fact that a tax was exacted unlawfully should *prima facie* be enough to require its repayment.

270 One of the characteristics of the formal notion of the *Rechtsstaat* is a systematised public law order, which clearly delineates public law from private law, and properly distinguishes between powers exercised in terms of criminal and administrative law, respectively.

271 For a view of how French law deals with instances of public body enrichment claims, see Williams (2010:167–203).

272 Meier (2002:62).

273 Birks (1989:294ff); see also other sources cited by Meier (2002:63, Footnote 74).

274 Birks, P. 1980. "Restitution from public authorities". *Current Legal Problems*, 33:191.

275 [1993] AC 70 at 173.

In Germany, the 'floodgates' problem is catered for by rules of administrative law and tax law requiring individuals or legal persons to lodge objections against administrative acts within a prescribed time, usually one month. This can be done by a rather simple procedure, which finally ends before an administrative court. Valid administrative action is based on the legality of such action. Where payments lack a proper legal basis, the amount can be recovered. Although the legal rules which crystallised in private law find application, these rules have been incorporated into administrative law and the matter is, therefore, not regulated by private law.[276] For example, the German Federal Administrative Court ruled that the rules of unjust enrichment as incorporated into administrative law could be invoked with regard to an expropriation of land by a municipal council.[277] The principal safeguard for the public purse is that, if no objection has been lodged in time against an administrative act, such act is deemed lawful. The act could, however, still be revoked by the state organ, in which case, the amounts would have to be repaid. This safeguard also applies in terms of tax law.[278]

In the current discussion, the question is whether Namibian taxpayers could recover interest that was charged before the 61st day after the notice of assessment has been issued. One can proceed to consider the issue as follows: First it has to be clarified whether an administrative act was taken in terms of which the taxpayer was notified that interest had been charged. If interest was simply calculated by a computer without any accompanying administrative act informing the taxpayer about such a charge, it is hard to see how a non-existing administrative act can be revoked. In this case, there is no administrative act that legitimised such interest having been charged. If an administrative act was indeed taken, one needs to consider whether such act was ultra vires. If interest was charged retroactively before the due date on which the assessed tax had to be paid, one cannot link this to a 'failure' to pay the tax on time. One should, therefore, be able to argue that the charging of such retroactive interest has no legal basis and ought to be repaid.

276 Section 49a(2) of the *Verwaltungsverfahrensgesetz* (VwVfG, Administrative Procedure Act) specifies that the rules for recovery apply in case of unjustified enrichment. The interest to be paid on payments where such an administrative act has been revoked or retracted is regulated by section 49a(3) therein. The revoking (*Widerruf*) of legally valid administrative action is regulated by section 49, and the retracting (*Rücknahme*) of invalid administrative action by section 48. See also section 347 of the *Verwaltungsgerichtsordnung* (Administrative Courts Procedure Act) and section 79(2) of the *Bundesverfassungsgerichtsgesetz* (Constitutional Court Act). See, in general, Maurer (2006:794–795) and Meier (2002:62, Footnote 73).

277 BVerwGE (*Bundesverwaltungsgerichtsentscheidung* or decision of the Federal Administrative Court) of 1 February 1980, Case No. 4C 40.77, DVBl 15 August 1980.

278 Sections 172ff, section 347, AO.

The problem in Namibia is that the retroactive charging of interest was indeed practised for a long time and probably in a vast number of cases. To counter the 'floodgates' effect, the court could consider ruling that the reclaiming of unjustly charged interest in terms of the second scenario above (i.e. where a proper administrative act was issued) should apply only to pending tax matters and those which have been contested. This is not an optimal solution because, strictly speaking, all taxpayers actually should have the right to reclaim such unjustly charged interest, but it might cause enormous administrative chaos.

However, the issue is still not clarified from a legal systemic point of view as to whether interest instead of penalties could be charged as a punitive measure in order to enforce the prompt payment of taxes. This will be considered next.

e) Different legal foundations of penalties and interest

Instead of charging interest as a penalising measure to enforce payment of taxes, penalties ought to be invoked. Penalties constitute a sanction for non-compliance with statutory obligations (e.g. when a tax return has not been submitted by the statutory deadline) or administrative acts creating legal obligations (e.g. a notice of assessment specifying a deadline by when an assessed tax has to be paid). A reminder to submit a tax return or to pay outstanding taxes could, therefore, be accompanied by a penalty that is charged to sanction the non-compliance.

Interest should not be confused with a penalty. The charging of interest is based on the legal title a party has in the monetary value of overpaid taxes (refund) or underpaid taxes (a residual tax debt) and has its foundation in property law. By virtue of being associated with unpaid tax amounts, the charging of interest may obviously be regulated in terms of taxation law and can be enforced in terms of administrative action because the legal title of property rights relating to overpaid or underpaid tax is based on tax law: the recipient is either the fiscus or the taxpayer. However, unlike in private law, the charging of interest is not based on a contractual relationship. The date from which interest could be charged should, therefore, be linked to the time when legal title in the claim for underpaid taxes or a refund came into existence. This is obviously, as highlighted earlier herein, not the deadline when such outstanding amount becomes due for payment in terms of the notice of assessment. The legal title in a refund or claim for residual tax is established on the basis of a person's taxable income for a given tax year. The claim for overpaid or the liability for underpaid taxes is, therefore, established at the end of the tax year in question. The legal title in the underpaid or overpaid tax is the primary reason why interest can be recovered.

The current practice of invoking the charging of interest as a penalty when assessed taxes have not been paid on time clearly, as has been shown, lacks a proper legal foundation. Both Germany and South Africa have adapted their

taxation law in order to accommodate the legal title in terms of property law to claim interest on such amounts and to distinguish that from penalties that could be charged when assessed taxes are not paid on time. Unfortunately, Namibian taxation procedure has not yet followed suit. It might be useful, therefore, to see how taxation procedure in Germany and South Africa handles the charging of interest.

With its Tax Reform Act of 1990,[279] the German legislature introduced a measure that would ameliorate potentially unjust enrichment of certain taxpayers in relation to others due to the tax authorities' inability to assess all taxpayers' taxes simultaneously. As a result of the administrative process, the actual payment of final (i.e. residual) tax debts or refunds becomes liable at different times. This, so the legislature argued, could lead to advantages or disadvantages for taxpayers which affect their liquidity and competitiveness in commerce. Thus, this unavoidable 'inequality' of treatment due to the tax authorities' overburdened assessment loads is compensated for through interest being charged in the case of tax debts or paid in the case of tax refunds from a specific date where taxpayers could reasonably have expected their tax returns to be assessed. The interest debtor is the one who benefits from the late assessment.

Section 233a of the *Abgabenordnung* (Tax Code) regulates this so-called *Vollverzinsung* (unjust enrichment interest).[280] In principle, interest starts to accrue 15 months after the end of the tax year until the tax is due,[281] and accrues for a maximum period of four years.[282] However, criticism has been raised in respect of the interest only starting to accrue 15 months after the end of the tax year. From a property law perspective, this leaves money that belongs either to the taxpayer or the public hand free of interest for a substantial period.[283] The provision has also been criticised because the very modest statutorily determined interest rate of 0.5% is not market-related. The liquidity and fair competition disadvantages are, thus, only partially addressed.[284] The

279 *Steuerreformgesetz* 1990, BGBl I 88, 1093, 1127.

280 It applies only to taxes that became due after 31 December 1988. The first sentence of section 233a(1) of the AO lists the following taxes: income tax, taxes pertaining to companies and corporations, property tax, general sales tax, and trade tax. Only the final payments are to be considered. Prepayments of taxes, and payment of taxes that have to be withheld (*Steuerabzugsbeträge*) are excluded from earning interest: see the second sentence, section 233a(1), AO.

281 Section 233a(2) AO.

282 This turned out to be to the disadvantage of firms where the tax audit is very late.

283 For a discussion, see Tipke & Lang (2010:1038).

284 Interest is calculated for each full month at an interest rate of 0.5% of the tax debt or refund, which forms the basis for calculating the interest. (In Germany ,commercial interests are seldom higher than 6% and could currently be as low as 3.5%.) The taxpayer has to be notified in writing of the interest charged (*Zinsbescheid*). Interest less than a minimum amount of €10 is not paid out.

regulation, which is indeed commendable, could have been less complex and more fair.

The tax laws in South Africa were adapted in a similar way. There, interest charged in relation to individuals starts six months after the end of the tax year, and for companies, seven months after the end of the tax year.[285] At the time of writing, the interest rate was fixed at 5.5%. Thus, South African taxpayers are in a slightly better position, compared with their German counterparts; however, neither position is ideal because the date when the legal title comes about is the end of the tax year and not a later date. The South African regulation is currently under revision.

There are three serious objections that can be raised in respect of the charging of interest as foreseen by section 79 of the Income Tax Act:

- The charging of interest serves the purpose of a penalty and has not been cast in the form of an equitable claim based on the legal title vesting in the money that is due
- The charging of interest currently benefits the state in a one-sided manner, and
- As a 'penalty' option, the charging of interest at a rate of 20% is completely disproportionate as an administrative measure and stands in no relation to the object of enforcing payment of taxes when a taxpayer is in arrears. Payment should rather be enforced by invoking a spectrum of measures which would be appropriate under the circumstances (e.g. reminders and penalties), and which correspond to the particular stage of enforcing payment. In terms of the principle of proportionality, the least infringing measure is always to be preferred.

f) Constitutionality of usurious interest

The Ministry of Finance also needs to ensure that it remains within the statutory scope of its powers. Section 5(1) of the Income Tax Act mandates the levying of taxes as revenue for the state. This mandate does not include the power to create alternative sources of revenue that would eclipse taxation. Therefore, the Receiver is not permitted to manipulate taxation in such a manner that

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For reasons of equity the tax authorities may forego the charging of interest in instances where respite or suspension of execution was granted. It could also be waived for reasons of fairness envisaged by section 227 of the AO. In case of tax evasion the charging of interest if obligatory, and in that case the period for charging interest on the advantage (as a result of tax evasion) starts already from the moment when the tax evasion comes about up to the point that the evaded taxes have been paid (section 235(3) AO).

285 Sections 88, 89, 89bis, 89 quat and 89quin read with section 91 of South Africa's 1962 Income Tax Act.

revenue from charging interest, for example, would eclipse the taxes that can legitimately be raised in terms of the Act. Inaction to enforce payment may further compromise fair administrative procedures insofar as exorbitant amounts of interest could run up. When so much revenue is raised as a result of non-enforcement of payment that one can term it a second source, the constitutionality of taxation procedures is at stake.

Another controversial point relates to the usurious interest rate introduced by the legislature in 1995. Before 1 March 1985, the interest payable on overdue taxes was statutorily set at 7.5%. After that date, the interest rate increased sharply to 13%. In 1987, the interest rate on overdue taxes was again increased – this time to 15%.[286] In 1995, the interest rate took a further hike of 5% and is now statutorily fixed at 20%.[287]

Since the right to charge interest is based on a legal title in the money from outstanding taxes or tax refunds, the interest rate could be expected to have some market relation or, at the very least, to be fixed at a reasonable rate. In January 2011, the interest rate on short-term investments of 12 months was about 6%. This rate increased to 7.6% for a five-year investment, and went up to 8.2% for a ten-year investment. Therefore, if one assumes that the Receiver loses interest on taxes whose payment is overdue, a commercial bank would have paid the state interest of 6% on the same money that the state charges the taxpayer 20% interest.[288] Thus, the Receiver is getting over three times more interest on its money from taxpayers compared with the going market rate from a bank.

The taxpayer's property rights under Article 16 of the Constitution are, therefore, directly affected by the excessive interest rate prescribed by section 79 of the Income Tax Act. The constitutionality of the usurious interest rate of 20%, which is far above the interest rates charged by commercial banks, is clearly unconstitutional. Given the exclusive privilege of the Department of Inland Revenue to benefit from this high rate, the charging of interest has mutated into a second source of raising revenue. In terms of the Constitution and the limitation clause therein, the legislature is not permitted to adopt legislation that would hollow out the property rights of individuals or other legal entities in such a manner. The charging of a 'penalty interest' at such a usurious interest rate can be compared to a 'hidden tax' which has no relation to the taxable income that could legitimately be taxed.

In both instances, namely –

286 Section 28, Income Amendment Tax Act, 1987 (No. 85 of 1987).
287 See section 9(a), 1995 Income Tax Amendment Act, as well as section 23(1)(a) of the 1996 Income Tax Amendment Act.
288 Data presented by Nedbank, Windhoek, 24 January 2011.

- the manipulation of taxation procedure so that huge amounts of interest accumulate, and
- the sheer enormity of the usurious interest rate that finds application,

the legitimate boundaries of a valid limitation of property rights in terms of Article 22 of the Constitution are seriously under attack.

Once again, a comparative study might be helpful to consider the constitutional limits for charging usurious interest on overdue taxes. The German Constitutional Court considered two cases which concerned the limits of taxation to preclude an infringement on property rights. In 1995, the constitutionality of high property tax rates was at issue. In an obiter dictum, Kirchhof J, on behalf of the majority, argued that property tax (*Vermögensteuer*), together with other taxes, was not permitted to exceed 50% of a taxpayer's income. The Constitutional Court departed from the premise that property rights under Article 14(2) of the *Grundgesetz* (German Constitution) did not only benefit the taxpayer privately, but also served the common weal insofar as income could be generated with it.[289] Thus, a 50:50 relation was to underpin the split to secure a hard core of income that could not be claimed as taxes.[290]

In 2006, the Constitutional Court overruled this obiter dictum in another judgment.[291] In the latter case, the Constitutional Court held that, insofar as it concerned income tax and trade tax (*Gewerbesteuer*), there was no definite limit for these tax rates in the sense that they were not permitted to exceed 50% of the taxpayer's income. The Constitutional Court endorsed the judgment of the court a quo, where the *Bundesfinanzhof* (BFH, Federal Supreme Court for Financial Matters) rejected the 50% barrier, holding that a threshold of 60% for income tax and trade tax was still within bounds.[292]

Article 16 of the Namibian Constitution, which guarantees property rights, does not contain a provision similar to that in Article 14(2) in the German Constitution. It would be hard to justify a clear limit for all direct taxes in Namibia, i.e. that it is not permitted to exceed 50% of a taxpayer's taxable income, as the German Constitutional Court tentatively tried to do in 1995. A limit to the combined amount of taxes that could be raised is also not the primary issue in Namibia. Rather, the issue is whether the 20% interest rate foreseen by section 79(2) of the Income Tax Act and the manner in which it is invoked do not distort the actual tax rate in the sense that interest at such a high rate constitutes a 'hidden tax'. The interest charged also does not respect property rights because it unilaterally benefits the fiscus.

289 Under consideration were only the direct taxes and not indirect taxes such as general sales tax.

290 Article 14(2) of the *Grundgesetz* (Constitution) reads as follows: "Property entails obligations. *It should also serve the public interest*" [Emphasis added]. The court relied on the second sentence.

291 BVerfGE of 18.1.2006 (2 BvR 2194/99).

292 BFH NJW 1999, 3798,

Consider the following example: B's taxable income in the 2006/2007 tax year amounted to N$340,000. B's income exceeds N$200,000, which puts B in the highest income tax bracket. In terms of Schedule 4 to the Income Tax Act, the tax rate for taxpayers earning more than N$200,000 amounts to a flat rate of N$56,000 plus 35% of the amount by which the taxable amount exceeds N$200,000. In other words, B is liable to pay a flat rate of N$56,000 income tax on the first N$200,000 of his taxable income plus an additional amount of 35% on the remaining N$140,000. The additional 35% tax amounts to N$49,000. In total, B therefore needs to pay N$56,000 plus N$49,000, which amounts to N$105,000 in income tax payable on the taxable income of N$340,000. If broken down to a percentage of his taxable income, B's income tax amounted to a tax rate of 30.8% in real terms. This is still 19.2% below the benchmark of half of his income. Let us now assume that B's business did extremely well in the following tax year and he earned substantially more than before. His provisional taxes, however, were still calculated on the basis of the previous year's tax assessment, and thus he paid two instalments which totalled up to N$105,000. Owing to a huge administrative backlog, the tax authorities only assessed his taxes for 2007/8 in 2011. In that tax year, he earned N$500,000. His income tax thus amounted to the flat rate of N$56,000 on the first N$200,000, plus an additional 35% on the remaining N$300,000, i.e. a total of N$105,000. Therefore, he had to pay N$161,000 income tax in total, which translated into a tax rate of 32.2% in real terms. The notice of assessment was issued on 1 October 2011, stating that he owed a residual amount of N$56,000. The tax authorities simultaneously charged him interest for 'late payment' of the just-assessed tax as from the date when the return was due on 30 September 2007. Thus, the tax authorities charged 20% simple interest from 30 September 2007 until 1 October 2011 on N$56,000, i.e. for a term of four years. The retroactive interest amounted to an additional N$44,800. Hence, the retroactive interest functioned like a hidden tax that was levied at the time of assessment, because B had not been afforded a reasonable opportunity to settle the assessed tax after the assessment was issued. If one would add the N$44,800 to the N$161,000 of tax that was assessed, this would amount to a total of N$205,800. In real terms this translates into a much higher tax rate of 41.16%. In effect, therefore, B has been charged an additional hidden tax of almost 9%.

From the above example, one could say that the practice of charging interest retroactively benefits state coffers at the taxpayer's expense. This becomes a very serious problem when the interest charged on 'overdue' taxes is three or four times the amount of the assessed tax itself.[293] In such a case, all the taxpayer's income in a given tax year might find its way into state coffers. This would completely hollow out the essential content of taxpayer's property

293 For an example that actually happened, see Footnote 218.

rights in respect of such income.[294] The manner in which section 79 has been applied in practice is clearly against the spirit of the Constitution. Article 63(2)(b) of the Constitution only mandates the legislature to make laws in this category "to provide for revenue and taxation": it does not extend the power to allow tax authorities to 'optimise' state income by charging such exorbitant amounts of interest.

The question, therefore, is what a taxpayer could hope for, should the Supreme Court declare the charging of interest, as currently regulated, unconstitutional. The constitutional issues at stake primarily concern an application of Articles 5, 16, 18, 22 and 25 of the Constitution. Insofar as the tax authorities acted ultra vires in terms of the statute in force by charging interest retroactively before the tax was due, i.e. before the 60-day deadline after assessment had expired, it should be possible to recover all interest of this nature paid by taxpayers because taxpayers were under the impression that they should do so.

If the Supreme Court should further rule that the usurious interest rate of 20% is unconstitutional, it will depend on what the Court regards as a fair rate and whether taxpayers should, equally, benefit from interest on overpaid taxes. The Constitution leaves the Supreme Court leeway to direct Parliament to improve the infringing legislation, but it also obliges the Court to protect taxpayers by making a transitional ruling that would be in the interest of justice. This could entail a ruling that the charging of interest is not permitted to replace penalties to secure payment of taxes. It would also serve justice if interest rates were reduced to market-related equivalents, and that such interest were to benefit both the fiscus and the taxpayer. The court would further be required to decide where to draw the line in respect of such transitional measures because Namibian tax law does not regulate prescription relating to the payment of assessed taxes. A practical solution under the circumstances might be to restrict such ruling to incomplete tax matters.

Offences: Tax avoidance distinguished from tax evasion

Tax evasion is not merely directed at an anonymous 'state' or the 'Receiver of Revenue', but actually goes against the grain of the common good and is to the disadvantage of the honest taxpayer. Individual taxpayers and firms who are honest in declaring their taxes suffer disadvantages due to those who do not take the law seriously and do not care about fair trading. Of particular concern is the distortion of the market and of fair trading by shady or clearly

294 One could liken the process to an illegal expropriation, which is not covered by Article 16(2) of the Constitution. This provision only foresees expropriation in the public interest under narrowly defined conditions, which cannot be extended to legitimise the raising of revenue through taxation along this route.

illegal businesses practices.[295] Businesses operating in a legal manner may suffer such extreme disadvantages compared to their competitors that their existence may be jeopardised if they, too, do not try to evade taxes. If such a situation escalates, it is quite possible that the stability of the democratic state may be affected in the long term.

For this reason, it is of utmost importance to implement a fair tax system where the authorities instil trust.[296] A clear distinction should be drawn between serious tax crimes, which are penalised either with a fine or imprisonment, and summary offences of a less serious nature which are penalised with a fine only.[297] Furthermore, it is vital to clearly demarcate criminal offences from other offences for which administrative measures by way of penalties suffice to enforce taxation.

As already mentioned, sections 65 and 66 of the Income Tax Act partly duplicate the offences enumerated under section 96 therein. Sections 65 and 66 are problematic insofar as they blur the boundaries between administrative measures to enforce taxation law and tax offences that fall under criminal law. Section 96 deals with the criminal offence of tax evasion where it is a precondition to prove criminal intent before a person can be convicted of it.

Tax evasion should be distinguished from *tax avoidance*. Whereas tax evasion can be criminally prosecuted, tax avoidance is not illegal. Tax avoidance models are the bread and butter of tax consultants worldwide. Yet section 95 treats tax avoidance as if it were a category of tax evasion. Therefore, there is clearly a need to regulate tax evasion and other tax-related criminal offences more appropriately and to decriminalise tax avoidance.

The most serious tax crime is tax evasion, which is a special manifestation of fraud. To classify as actus reus of tax evasion, it is required that incorrect and incomplete facts have been presented to the tax authorities or that the tax authorities are not informed about important facts of taxation in breach or dereliction of a statutory duty.[298] The perpetrator need not necessarily be

295 People who would never deceive their fellow citizens or never break the law often have no scruples about tax evasion since their own material welfare is of utmost interest to them. See Kress, U. 1983. "Motive für die Begehung von Steuerhinterziehungen: Eine Aktenstudie". Unpublished doctoral thesis, University of Cologne.

296 A number of countries – Canada, France, Ireland, Israel, Italy, New Zealand, Norway and Switzerland – have attempted to stigmatise tax evasion by publishing the names of persons who have been found guilty of it.

297 In Germany, the reform of the *Abgabenordnung Strafänderungsgesetz* 1968 (AOStrafÄndG of 12 August 1968, BgBl 1968 I, 953) decriminalised tax offences to a large extent. Unfortunately, the Namibian taxation procedure often still criminalises matters that could easily be regulated by administrative procedures.

298 Section 96(1) of the Income Tax Act refers inter alia to the preparation and

the taxpayer: it can also be an employee, a representative or tax consultant, or even a tax official who abuses his/her powers.[299] There has to be a causal link between the actus reus and obtaining undue tax advantages or the curtailment of taxes. The degree of guilt required to prove tax evasion is intent, and this needs to be proved beyond reasonable doubt.[300] Whether the shift of the onus of proof from the tax authorities to the taxpayer in terms of section 96(2) is justifiable is questionable. This provision creates a presumption of criminal intent on the part of the taxpayer, which is in conflict with the Bill of Rights. Article 12(1)(d) of the Constitution guarantees that all persons charged with an offence are to be presumed innocent until proved guilty.[301] It is doubtful, therefore, whether such a presumption of criminal intent will survive constitutional scrutiny.

Compared with most countries, the criminal sanction in Namibia for tax evasion, as foreseen by section 96, is rather mild. A person convicted of tax evasion can be liable on conviction to a fine not exceeding N$2,000 or imprisonment for a period not exceeding two years, or both.[302] The N$2,000 fine has probably not been amended for several decades and stands in no relation to the alternative of two years' imprisonment. Income-related fines might be more appropriate than dictated fines: the latter can easily be paid by the rich, but could cause severe hardship to the poor.[303] Moreover, if one compares the fine for tax evasion with the penalising compound interest of 20% on default of payment, many a taxpayer might be tempted to endure a conviction for tax evasion instead of paying such exorbitant amounts of interest. This underscores that there is no parity between penalising measures executed in terms of administrative procedures and those that punish serious criminal offences. Indeed, these provisions are in need of revision to comply with the norms of constitutionalism.

Section 95 is a lengthy provision which deals with transactions, operations or schemes for purposes of avoiding or postponing liability for or reducing the amount of taxes on income. The section empowers the tax authorities to strike down expenses as legitimate if they are of the opinion that the expenses are a tax avoidance scheme. Such an administrative decision is subject to objection and appeal, but the onus of proof rests on the taxpayer to prove the contrary.[304] Apart from the objection that tax evasion is conflated with tax

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maintenance of false books of account.

299 Section 96(1) refers to "any person", which includes persons who "assist any person to evade assessment or taxation".

300 Section 96(1) refers to the "intent to evade assessment or taxation".

301 Section 96(2), Income Tax Act.

302 Section 96(1), Income Tax Act.

303 In German criminal law, the standard for sentencing is the "average daily net income" of the offender (see section 40(2) of the *Strafgesetzbuch*/Criminal Code). This ensures that the fine penalises offenders in a more equal way.

304 Section 95(4).

avoidance, two further objections can be raised against this provision in its current form:

- It invokes a shift of the onus of proof for allegations which should be based on empirical evidence, instead of vague suspicions where the taxpayer is required to prove the contrary, and
- Such ouster clauses pave the way for arbitrary administrative decisions.

Accounts and archive records

Keeping proper accounts

Section 81 deals with accounts which the tax authorities are required to keep to document tax collection proceedings. If a taxpayer has outstanding tax debts in respect of one or more assessment years, the Receiver may keep one tax account on such outstanding taxes and the interest due thereon. The account has to list all payments made in respect of such taxes or interest. In addition, the taxpayer's account has to list "other details as may be required to establish the total amount owing by the taxpayer". The problematic nature of section 81(1) has already discussed elsewhere herein.[305]

Keeping the records in the Receiver's archive

Tax returns as well as assessments are documents of evidence that have to be kept safely in the Receiver's archives. The notice of assessment itself is evidence that the prescribed administrative procedures were followed and, thus, is evidence of its legality. It is extremely important that such documents be properly kept in case the legality of an assessment is disputed. A notice of assessment is only legally binding and enforceable if it is in conformity with the statutory requirements for its legality and validity.

In terms of section 70, –

> … every taxpayer shall be entitled to copies certified by or on behalf of the Minister of such recorded particulars as relate to him.

In other words, the taxpayer has a right to get copies of his/her original assessments. The Receiver is obliged to hand out such copies to the taxpayer. This is not a discretionary power where the Receiver can decide whether or not it wants to hand out copies. Also, a handwritten copy made on an ex post facto basis where crucial evidence is missing does not qualify as a true copy of the original. Such copies do not qualify as reliable evidence because data

305 See the discussion under the subheading "Payment and refunds of outstanding assessed taxes" in the section titled "Different phases of taxation procedure".

could have been tampered with or could have been omitted on purpose to cover up irregularities on the part of the Receiver. The records of assessment are not open to the public due to tax confidentiality, however.

Tax returns, for example, can be used as evidence to prove tax evasion in a criminal trial and are, therefore, not permitted to be destroyed before the period that they are required to be kept has transpired, and not before such a possible trial has reached a close. Tax-related documents also need to be kept at least for as long as all matters relating to the taxation of a specific tax year have been settled.

Tax confidentiality

Section 4 of the Income Tax Act states that tax confidentiality is a primary concern in taxation, but it makes an exception with regard to the person's "lawful representative". This could be an agent or trustee or the parents of minor children.

A taxpayer may also permit a tax consultant to access his/her tax records due to professional privilege. If this is authorised explicitly by the taxpayer, it falls within the scope of the statutory exception to the rule of tax confidentiality.[306] Tax consultants are bound by the rules of professional discretion and, thus, the confidential nature of the relationship between a tax consultant and his/her client does not constitute a breach of tax confidentiality. Under these circumstances, the tax authorities may divulge protected data to a tax consultant in order to clarify issues pertaining to their client's taxation.[307]

Conclusions

Fair administrative practice depends on well-drafted legislation. One of the legacies of the former Westminster era during which large parts of the Income Tax Act were drafted is that the tax legislation lacks a proper distinction between enforcement measures applied in terms of administrative and criminal law. In tax law, this has resulted in the unnecessary criminalising of ordinary administrative procedures.

A further aspect that needs to be addressed is that there is no proper distinction between *executive* and *judicial* powers in relation to the tax courts.

306 Guaranteed by section 4(1) and (3) and section 70 of the 1981 Income Tax Act, concretising Article 13 of the Constitution, which guarantees privacy of correspondence and data protection.

307 In Germany, this is regulated in detail by section 57(1) of the *Steuerberatergesetz* (Tax Consultants' Act). This provision obliges them to act in a responsible, conscientious and discrete manner.

The most serious factor hampering taxation procedure in Namibia is that it lacks a proper structure for taking administrative action in practice. Administrative acts are often not properly communicated to taxpayers. Both obligatory and discretionary administrative powers first need to be exercised in relation to a taxpayer before an administrative act could become legally binding. The practice of computers charging interest on outstanding taxes without a taxpayer being properly informed about it is a case in point. The direct external effect which establishes an administrative act as legally binding therefore deserves attention.

Three provisions in particular seriously hamper taxation procedure in Namibia, namely sections 56(1), 67(2) and 79. Section 56(1)(b) requires taxpayers to settle taxes based on self-assessment when they submit their tax returns – as if that were a binding administrative act. The provision in fact duplicates the prepayment of taxes in terms of section 80, and is, therefore, redundant. Yet, it has created substantial confusion about the due date for payment of assessed taxes.

Section 67(2)(b) does not specify a deadline for the payment of taxes in terms of a notice of assessment. Hence, the tax authorities have argued that the taxes ought to be paid retroactively on the date when such a tax return was due under section 56(1A). This has the further consequence that interest chargeable in terms of section 79(2), i.e. when a taxpayer fails to settle such an assessed tax debt on time, is in fact charged retroactively from the date the tax return was due and not from the date of the notice of assessment.

Furthermore, section 67(2)(b) does not specify how much time a taxpayer should be afforded to settle a tax debt. In terms of the rules of analogical interpretation of statutes, the scales tip towards section 56(5)(c) as an aid to fill the statutory gap. There are strong arguments that taxpayers should be afforded 60 days to settle an assessed tax debt, because employees who have to submit tax returns are in fact given 60 days to settle their assessed taxes as from the date of the notice of assessment. In instances where the Department of Inland Revenue acted ultra vires by charging interest on outstanding assessed taxes retroactively as from the deadline for the tax return to be submitted, it is suggested that taxpayers would be able to reclaim such unduly charged interest because it lacks a legal foundation.

The 20% interest rate prescribed by section 79 is problematic insofar as it has not been conceptualised with reference to a legal title in terms of property rights, but as a penalty upon default to summarily settle tax debts. In effect, such interest functions like a hidden tax or a second source of revenue which, in certain cases, even eclipses the taxes levied on taxable income. The effect of usurious interest so charged is that it hollows out a taxpayer's property rights. This has not been mandated by the Constitution or by section 5(1) of the Income Tax Act.

The 2007 amendment of section 79 – which prescribes a statutory ceiling to the amount of the interest that can be charged, based on the common law in duplum rule, and which switched to the charging of simple instead of compound interest – does not have the status of valid law, however, since it was not adopted in the manner prescribed by Article 56 of the Constitution. Nonetheless, the tax authorities have tentatively implemented the new provisions as binding law. The word *tentatively* has been used because the more advantageous provisions have not been invoked retroactively to benefit all taxpayers in pending tax matters.

One can conclude that there are a fair number of provisions in the 1981 Income Tax Act that are not in conformity with constitutional norms and do not serve just administrative action. The Income Tax Act can, therefore, benefit from a general overhaul in order to structure taxation procedure better and regulate administrative action in conformity with the principles of constitutionalism.

NOTES AND COMMENTS

Water is life: Customary and statutory water law, a problematic relationship – Ongoing research in the Kavango River Basin

Manfred O Hinz* and C Mapaure**

Customary water law: A field neglected by politics and research

Water is central to survival and defines the nature and reality of being. This is true for each society, irrespective of the governmental system that applies to it. Therefore, in what we call *modern* societies, we find state laws that govern the use and management of a country's resources. In traditional societies, we find community-created local (customary) law, with rules for the use and management of a community's local resources. Customary law is very often complemented by religious commands and principles with normative value, and in most – if not all – cases, customary law rules predate the law created by states to which traditional communities now belong.

It is interesting to note that most modern states – and this is particularly true for Africa – have enacted statutory water law that basically ignores the local customary law of traditional communities and, moreover, establishes rules that are out of accord with those of customary law. Jurisprudentially speaking, the internationally accepted claim of sovereignty of a state over the natural resources within it led to an understanding according to which sovereignty over the natural resources in a country is meant to entail the state's right to dispose of its natural resources, thus ignoring the rights of the people for whose well-being the state was created.[1]

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1 Indeed, Article 100 of the Namibian Constitution reads as follows: "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". A careful reading of this Article will not lead to the conclusion that whatever is not under rules of "belonging" in terms of general law, but under customary law, is not "otherwise lawfully owned". Communal land, which is under customary law, is "otherwise lawfully owned" and, therefore, not owned by the state. Although there

The very obvious lack of research on customary water law corresponds to the deficient interest of the state. While research in customary law in general terms has increased over the years, even gaining the interest of international institutions – which, some years ago, would not have been expected to be involved in assessing the realities of legal pluralities[2] – not much research focus has been placed on customary water law. In comparison with mineral resources,[3] water appears to be a general good whose ownership – or, more generally speaking, whose right to regulate – can only vest in the state. A closer inspection, however, reveals that customary water law continues to offer an effective and relevant legal framework for water resource management and utilisation.[4] However, customary water law shows two important differences when compared with general statutory water law. Water does not belong to the state: it belongs to the community represented by its traditional leadership. Under customary law, there is the right to water without payment for it, while statutory laws require payment for water consumed.

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is no ownership of communal land under customary law in the sense of *ownership* defined in general law, communal land is subject to a network of customary rights and duties and, thus, not res nullius. Section 17(1) of the Communal Land Reform Act, 2002 (No. 5 of 2002) recognises this fact: on the one hand, the law "vests" all "communal land areas in the state", but on the other, limits this vesting to be in "trust" only. Uncertainties have, however, remained with respect to other natural resources under customary law. As to water, see Republic of Namibia. 2000. *National Water Policy White Paper.* Windhoek: Ministry of Agriculture, Water and Rural Development, pp 21ff; Republic of Namibia. 2008. *Water supply and sanitation*. Windhoek: Ministry of Agriculture, Water and Forestry.

2 Cf. Hinz, MO. 2011. "African customary law: Its place in law and legal education". *Namibia Scientific Society Journal*, 59:83ff.

3 Cf. Renckhoff, Natalie. [Forthcoming]. "Das Konzept der nachhaltigen Entwicklung im Bergbau auf kommunalem Land in Namibia". Doctoral thesis, University of Bremen.

4 There is work on customary water law in various African and other countries, but no generalising analysis. See e.g. Maganga, FP. 2010. "Customary systems and water governance: Insights from southern Africa". Available at http://www.splash.bradford.ac.uk/files/PDF%20Faustin%20Maganga%20seminar%205.pdf; last accessed 5 March 2012; Kapfudzaruwa, F & M Sowman. 2009. "Is there a role for traditional governance systems in South Africa's new water management regime?". Available at http://www.ajol.info/index.php/wsa/article/viewFile/49195/35538; last accessed 5 March 2012; Chikozho, C & J Latham. 2005. "Shona customary practices in the context of water sector reforms in Zimbabwe". Available at http://www.nri.org/projects/waterlaw/AWLworkshop/CHIKOZHO-C.pdf; last accessed 5 March 2012.

Building on work done on customary law and its role in protecting biodiversity,[5] the emphasis in this comment is to describe the framework for research on customary water law. The work in progress has been done within *The Future Kavango* (TFO) Project.[6] The TFO Project is the successor to the Biodiversity Monitoring Transect Analysis in Africa (BIOTA) Project, within which the above-mentioned work on customary law and biodiversity could be carried out and which came to an end in 2011.[7]

Like the BIOTA Project, the TFO Project is interdisciplinary, combining the expertise of natural scientists in all relevant orientations as well as social scientists, including lawyers and legal anthropologists. The aim of the TFO Project is to investigate the socio-ecological conditions of the Kavango River Basin, which begins in Angola and ends in Botswana. The Basin serves as the frontier region between Angola and Namibia. The TFO Project component administered by the University of Namibia's Faculty of Law entails analysing the legal regimes that regulate the Basin, and determining to what extent these regimes contribute to its maintenance and sustainability. One of the sub-projects focuses on the international and national statutory regimes,[8] while customary law regimes form the focus of a second sub-project, and are of particular interest to this comment.[9] The latter study looks at the internal

5 See Hinz, MO. 2003. *Without Chiefs there will be no game: Customary law and nature conservation*. Windhoek: Out of Africa Publishers; Hinz, MO & OC Ruppel (Eds). 2008. *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society; Hinz, MO, C Mapaure & OC Ruppel (Eds). [Forthcoming]. "Biodiversity and the ancestors, Volume II. 'Knowledge lives in the lake': Namibian case studies on environmental and customary law". Windhoek: Namibia Scientific Society.

6 The project title refers to the river as the *Okavango* (rather than *Kavango*, as Namibia officially has it), following usage in Angola and Botswana.

7 See Hinz, MO. 2011. "Customary law and the environment". In Ruppel, OC & K Ruppel-Schlichting (Eds). *Environmental law and policy in Namibia*. Windhoek/ Essen: Orumbonde Press/Welwitschia Verlag, pp 169ff; Hinz, MO, C Mapaure, EN Namwoonde & NP Anyolo. 2010. "The protection of natural resources and biodiversity: Work in progress in three Master's theses in the Faculty of Law of the University of Namibia". *Namibia Law Journal*, 2(1):103–110; Hinz & Ruppel (2008). From the papers assembled in Hinz et al. ([Forthcoming]), see especially Mapaure, C. ([Forthcoming]). "'Water Wars': Legal pluralism and hydropolitics in Namibian water law", which is based on the author's LLM thesis of 2010. The aim and some achievements of the Biodiversity Monitoring Transect Analysis in Africa (BIOTA) Project up to 2007 can be found in the introduction to Hinz & Ruppel (2008:59–62). Reference also has to be made to Falk, Thomas. 2008. *Communal farmers' natural resource use und biodiversity preservation: A new institutional economic analysis from case studies in Namibia and South Africa*. Göttingen: Cuvillier Verlag.

8 The subject of C Mapaure's doctoral thesis in progress.

9 Mapaure ([Forthcoming)] forms the basis of this point. Christian Thapa Mukuve,

mechanisms of customary rules that regulate the use of water in order to determine the extent to which they ensure water is used and managed sustainably.

Customary water law: Water ownership and management

Comparable with the customary concept of *land* are the concepts people have about water – especially about rivers linked to the spiritual world.[10] Rivers are not 'owned' by anybody in the sense of *ownership* under general law. Instead, many rivers are associated with myth and legend. A river is where a traditional community's ancestors, gods and other supernatural creatures live, and these beings provide the communities in question with the resources found in the river.

Research[11] among the Mbunza in the Kavango Region has shown that this community views the Kavango Rover where they live as a god-given reservoir of resources which they have to use wisely. Similarly, research among the Topnaar in the Kuiseb Valley close to Namibia's Atlantic seaboard revealed that the *Gaob*[12] of the Topnaar was a person believed to be endowed with supernatural insight, whose commands were understood to require human beings to recognise that nature had a right to exist over and above its utility to them. Thus, the Topnaar see themselves as a people to whom the sea was donated: they had to take control of it, but the power of control came with the responsibility of ensuring its resources were not depleted. This is also what informed the Topnaars' preservation of the sea – the water and its catchable and other resources, especially fish – because it sustained this artisanal fishing community physically and supported their lifestyle. Traditional resource management among the Topnaar also demonstrates how customary law succeeded in ensuring intergenerational equity.

Legal anthropological research in the TFO Project has begun, by way of interviewing different opinion holders in the Kavango Basin as regards their views and perceptions of the river. Questions include the following:

- Where does the river come from?
- Who created it?
- What spirits are related to it?

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a fieldworker in customary law in the TFO project under the direction of Prof. MO Hinz, is currently occupied with interviews regarding customary water law.

10 See Hinz (2011); Hinz et al. (2010); Hinz & Ruppel (2008); Mapaure ([Forthcoming]).

11 To the following, see Chikozho & Latham (2005); Kapfudzaruwa & Sowman (2009); Maganga (2010).

12 "King" in the Nama language spoken by the Topnaar community.

- Is the river understood to be the lifeline of the Kavango people that needs protection?
- How can the river be protected?
- What is to be done so that water flows?
- What should be done if the river dries up?
- What does the customary law say about the utilisation and management of water?
- Are there customary rules that govern activities that cross the national border?
- Are there shared transborder responsibilities?
- Is there transborder cooperation?

The preliminary research results show that people who live along the Kavango River believe that the way they use the water is closely monitored by a mystical creature called *Ekongoro*,[13] which can punish polluters and abusers of the water resource.[14] The claim is that *Ekongoro* owns the water in the Kavango River. People believe that while the (Christian) God created water, *Ekongoro* holds more power in controlling its conservation and utilisation.[15] Because humans are believed to be less powerful compared with this mystical creature, people in the community generally refrain from abusing or polluting the waters of the Kavango River.

Indeed, creatures such as *Ekongoro* send messages to water users that they have to manage and utilise water resources in a proper and sustainable way. The uncle of one of the co-authors of this comment, namely C Mapaure, was 'taken' by a Zimbabwean *Ekongoro* and disappeared for years. When he was 'released', he came back with mystical powers enabling him to heal people using herbs, i.e. he had become a traditional healer. As he reported to the community, he had come by a wealth of knowledge on the utilisation of natural resources, including water. This knowledge enabled him to advise the community where they could best water their livestock, where to dig a well, or where in the Basin to drill a borehole. In other words, local knowledge had received a spiritual blessing and, by carrying this blessing, had gained a protected status within the customary order of the community.

13 *Ekongoro* (in the Kwangali language) or *Dikongoro* (in the Mbukushu language) is a mythical being living in the Kavango River, whose image varies. In a recent interview conducted by Christian Thapa Mukuve, the TFO field assistant, Dikongoro was described as "similar to a very big snake. It is about 15 to 20 m long. It pushes and pulls water and it can produce a rainbow". Among residents of the Kapako and Sivara Villages at the Kavango River, where Mapaure's research was conducted, Ekongoro was described as a creature that looked like a fish from the waist down and like a human from the waist up.

14 See Mapaure ([Forthcoming]) as well as fieldwork by CT Mukuve on file with the TFO Project.

15 Mapaure ([Forthcoming]).

No place for customary law: The example of the Water Resources Management Act

The water law of Namibia has been in the process of reform for quite some time. Parliament passed new legislation in 2004 by way of the Water Resources Management Act,[16] which replaced the pre-Independence Water Act.[17] However, the new Act has not yet been enforced because the requisite notice[18] by the competent Minister enabling this has not been issued. Whether or not the 2004 Act will become law is not known. Nevertheless, it is interesting to note how this post-Independence Act deals with matters at the local level, i.e. the level of customary law, which regulates most aspects of life for many Namibians.

Indeed, section 1 of the Water Resources Management Act recognises and defines customary law in general terms as follows:

> … "customary rights and practices" means such rights and practices in relation to water resources management and utilisation as have been exercised and practiced by any given community for years; ...

The Act therefore recognises customary water law to the extent that the above definition provides for it. However, there is not much follow-up to this recognition: all water resources belong to the state, as section 4 of the Water Resources Management Act reads:

> Subject to this Act –
> (a) ownership of water resources in Namibia below and above the surface of the land belongs to the State; and
> (b) the State must ensure that water resources are managed and used to the benefit of all people in furtherance of the objective referred to in section 2 and compatible with the fundamental principles referred to in section 3.

Customary law only comes into the picture where the Water Resources Management Act regulates certain water licences, as section 35(h) stipulates:

> In deciding whether a licence to abstract and use water should be issued, the Minister must consider the following criteria –
> …
> (h) the existence of any traditional community and the extent of customary rights and practices in, or dependent upon, the water resource to which an application for the licence relates; …

16 No. 24 of 2004.
17 No. 54 of 1956, as amended.
18 See section 138(b), Water Resources Management Act.

Section 37(b) goes on to add the following:

> A licence to abstract and use water is issued subject to –
> (b) the protection of the environment and water resource from which the abstraction will be made, the stream flow regime, and other existing and potential use of the water resource, including uses by virtue of customary rights and practices …

The bodies responsible for the administration of customary law – namely its custodians, the various Traditional Authorities – have no place at all in the Water Resources Management Act. Thus, the responsibility for managing water at a local level is regulated in terms of section 16 of the said Act:

> (1) Any group of rural households using a particular water point for their water supply needs may form a water point user association to maintain the water point and to manage water supply services at the water point.
> (2) The members of a water point user association must elect a water point committee to manage the affairs and the day to day activities of the water point user association, including financial matters.
> (3) A water point committee must consist of not less than five and not more than seven members elected in accordance with its constitution and rules.
> (4) A group of water point user associations and other persons using a particular rural water supply scheme for their water supply needs must form a local water user association to coordinate the activities and management of their water points and to protect the rural water supply scheme against vandalism and other damages.

Consequently, the water management structure established in accordance with section 16 of the Water Resources Management Act is not accountable to the Traditional Authorities at the local level, but rather to the line Ministry responsible, through government-appointed Agricultural Extension Officers.

It is certainly possible for water point user associations to elect traditional leaders as members, but whether such elections will be accepted as due recognition of a Traditional Authority per se in such an association remains to be seen. Research conducted in the Ohangwena Region supports these apprehensions: the Oukwanyama Traditional Authority, which has jurisdiction in the area under study, does not recognise water point committees.[19] This Traditional Authority has stated that water point committees have no legitimacy: they are called the "puppets" of the Ministry of Agriculture, Water and Rural Development.[20] Moreover, water point committees are viewed as

19 Mapaure ([Forthcoming]).
20 (ibid.).

being manipulated by the central government to impose the state's rules on the traditional management of water.[21]

Conclusion: The need to rediscover customary water law

Law, whether customary or otherwise, is a system of representation: one that creates meaning within a system of power. The power of custom and customary law is based on the fact that it reflects the conduct of people toward one another. The further a society moves – or is moved – away from customary law systems and their internal control mechanisms, the greater is the perceived need for laws coercively applied by the state.

The Namibian Water Resources Management Act is a very informative example of an enactment that adopted a state-centred approach by concentrating on the statutory framework for water resource management at the expense of customary systems. This is debatable not only because there is potential to save costs and human administrative potential at the local level, but also from a constitutional point of view, according to which customary structures and their laws enjoy constitutional protection.[22]

21 TFO project research will pursue matters of this kind in the Kavango River Basin.

22 Cf. Articles 19 and 66, Namibian Constitution.