Intellectual property under the Namibian Constitution

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Paragraph 1 of Article 16, "Property", of the Constitution of the Republic of Namibia begins as a broad-ranging statement of property rights:

> All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others …

Later in this same paragraph, this right is limited by a provision that –

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

To some, this language may be clear enough; but in the area of intellectual property, it raises important issues, leaves some key questions unanswered, and renders some forms of property potentially unprotected.

Article 16 is best approached as a brilliant political move on the part of the SWAPO Party of Namibia[1] – the dominant political party since the country's independence in 1990 – to end the liberation war, reassure white property owners that their land and investments would be protected, and provide a sound legal footing for a multiracial and prosperous independent Namibia, with full access to world markets. It is less satisfying as a careful statement of property rights in a modern African country, although, if one compares this constitutional provision with others around the world, it is completely adequate for the purpose it was intended to serve.

This adequacy also reflects the intention of those who drafted Article 16: that it serve this foundational political and legal purpose – and not to purport to be any kind of a model property clause for world constitutions. Future interpretation could be left to a strong legal system, completely competent for that purpose, and able to interpret the property provision as new problems developed.

The language used for the Article, e.g. "own and dispose of all forms of immovable and movable property", might not have been the best possible, however, for it is bound up in outdated conceptions of *property*. The two terms *movable* and *immovable*, for example, refer to two distinct forms of 'tangible' property. *Immovable* property is real property: the basis of modern European property law, originating in feudal society, and intended to protect the landowning feudal class from the idea that kings had unlimited power, and

1 Formerly the *South West Africa People's Organisation*.

to recognise the dispossession of those who formerly lived on that same land.[2] *Movable* property serves as a catchall phrase for all other goods and, later, the commercial paper representing those goods. Both forms of property, movable and immovable, were *tangible* in that they were material and could be touched and held.

There was no concept of *intellectual property* in this property regime. Over time, without explicit constitutional provision, courts around the world have very consistently interpreted this general definition of *property* to extend to intellectual property never conceived of at the time the law of property began to evolve.[3] Traditional South African Roman–Dutch law's conceptualisation of 'things' as the centrality of the province of property law tended to put more emphasis on corporeality as the determining factor in delimiting that province than on the totality of the patrimony or estate of the individual. Contemporary South African jurisprudence[4] on property law recognises intellectual property as a species of real right that serves as the object of ownership by a legal subject. Since South African Roman–Dutch law has been recognised as one of the sources of law in Namibia, subject, of course, to its consistency with the provisions of the Constitution and legislation, the language of the Namibian Constitution is sufficient to include all forms of modern intellectual property under the protection of Article 16.

While this might be an appropriate starting position for interpreting intellectual property rights under the Namibian Constitution, it is neither completely clear nor without some significant problems of interpretation. To begin with, the Constitution, as a whole, is intended to create a new legal order in Namibia that recognises that all races are equal; however, it simultaneously aims to redress the evils of apartheid-era racism that left black citizens without the property rights of white citizens. Secondly, Namibia is an African and developing nation, with limited access to modern science, the vast array of laws that developed in Europe and the United States to protect that science, and the rights pertaining to patent and copyright. We shall address these two problem areas below.

The racial structure of property rights under Article 16

Property rights are inherently conservative. They legally recognise the legitimacy of the status quo, i.e. those already holding property. Literally as soon as the German colonisers of South West Africa had dispossessed the original inhabitants of their lands, they initiated a careful and detailed land recording system, and embodied it in their colonial law. Thus, the virtually genocidal dispossession of thousands of Namibian blacks from their lands was 'legal' under German law. The South Africans, in violation of international law, expanded this legal regime, making it even more racist and a principal element in their infamous apartheid regime, separating every aspect of life in the colony along racial lines. In 1989, at the time of the drafting of the Constitution, virtually all property rights were held by whites in Namibia, gained under the apartheid-era political order that legally entrenched white supremacy in every area, including property rights.

2 Andreasson (2006).
3 Sprankling et al. (2006:8).
4 Badenhorst et al. (2006:2).

In fact, there was an entirely separate system of black property rights, i.e. 'communal rights' held by black communities, with the underlying title held 'in trust' or on some other basis by the South African state. Over 100 or more years of colonial dispossession, originally under the Germans and later under South Africa, black property had been taken from its original owners through various devices, including genocide, murder, threats of murder, theft, fraud, alcohol-fuelled treaties, and almost any other illegality that can be named. Namibians have faced a long and sad history of the loss of their lands.[5]

At Independence, these facts clearly existed in a national political discussion. In fact, they had been central to the formation of SWAPO and the war for independence. The very legitimacy of existing – white – property rights had been challenged by SWAPO during the war. The promise of land reform, of the return of stolen lands, among other ideals, underscored the social revolution that SWAPO led. Once the war for independence had been won, it was the incorporation of Article 16 property rights that gave legitimacy to the existing, racially structured, property regime in Namibia. Thus, the political expediency of ending the war at the expense of recognising white property rights was a political compromise. This cannot be judged backwards against the flow of history: it is what occurred and it is now embodied in the Constitution.

In this compromise, Article 16 did not take adequate account of the property rights of the black majority because that was not its political object. This can be shown in the law of intellectual property, but it is even more obvious in the failure of Article 16 in particular and the Constitution in general to explicitly recognise the various forms of black land rights that are collectively lumped under the label *communal land rights*. One view, of course, is that the phrase "*all* forms of movable and immovable property individually or in association with others"[6] included a constitutional recognition of communal land rights. One may argue that communal land rights are clearly immovable, and that the word *all* has an unambiguous meaning: it includes all forms of land rights that were known at the time of the drafting of the Constitution. Clearly, a wide range of communal land rights was known to all parties at the time, since South African apartheid-era law dealt with such rights in a number of contexts.

Indeed, since other sections of the Constitution require equality (Article 10) and affirmative action (Article 13) to abolish the vestiges of apartheid, it seems impossible that the Supreme Law of the land could have intended to protect one system of property rights held by whites and, at the same time, fail to recognise and protect the property rights held by blacks.[7] Similarly, while Article 16 specifically recognises property held "in association with others", it is not clear whether it protects communal or tribal or traditional associations with others as much as it protects corporations or partnerships or other Eurocentric associations, long recognised by the law.

5 For an extensive history of the dispossession of the lands of the peoples of Namibia, see Amoo & Harring (2009).

6 Emphasis added.

7 These arguments are developed in more detail in Harring (1996).

This lack of clarity has a parallel in intellectual property rights. White inventors, including farmers with ideas for new agricultural methods or products, had full access to the South African system of intellectual property rights protection, including patent and copyright law. But black inventors, with their own unique experience concerning the land, both as farmers and as hunters and foragers, did not have access to this system. Now, as modern agriculture and medicine have come to look to indigenous knowledge, this indigenous knowledge is not legally protected in the same way that other forms of intellectual property are.[8]

The situation is even more complex when it is recognised that patent and copyright law exists to protect individual initiative in seizing new ideas and legally registering some property right in them. However, if a group or collective of individuals develop similar ideas and choose to use them for the benefit of the group, no such registration occurs. Therefore, it is not just that black Namibians lacked access to the law of patents and copyrights: they also held property in a different way, and held different world views on the concept of *property* itself, which made it impossible to use the law to protect their intellectual property rights. As with communal land rights, this failure to recognise black intellectual property rights under Article 16 contradicts Articles 10 and 23 and the entire spirit of the anti-apartheid Constitution.

This failure becomes particularly significant in the modern international arena in the rapid development of European and North American scientific institutions with great research capacity who focus on developing new agricultural methods or new forms of medicine, and focusing on the experience of various peoples in developing and underdeveloped nations as a source of knowledge about these techniques.[9] They are, bluntly, stealing and patenting indigenous peoples' knowledge – all of which is unprotected by Article 16. Indeed, such knowledge is beyond the entire scope of constitutional protection in Namibia.

There is a growing body of literature on this issue in the world, with a specific chapter of it grounded in Namibia. The San, in particular, have raised the issue of *biopiracy* – the theft of biological knowledge and materials from the San – and other peoples in the developing world – by Western corporations.[10] Some companies in developing nations, including Namibia, are beginning to react by motivating the enactment of legislation to protect these intellectual property rights, but statutory protection cannot compare with explicit constitutional protection.

The San situation bears some more discussion here because it illustrates how remote their intellectual property rights are from the reach of Article 16, especially when compared with the rights to be discussed in the next section, namely the expansion of international intellectual property rights from developed nations to poor developing nations. This remoteness from Article 16 protection, it is argued, remains inconsistent with Articles

8 Kuyek (2002).
9 Wynberg (2000).
10 Hoving (2004).

10 and 23 of the Constitution, indicating that the 1990 failure to protect black property rights on par with white property rights is still an issue 20 years later.

The San are among the indigenous inhabitants of Namibia, with distinct San groups living in many places in the northern, central, and eastern parts of the country. They have traditionally lived away from the sources of law and government, and few San have had the education or money to engage the law. Nonetheless, they have had good cause to do so: they have been subject to dislocation and war, and about 40,000 members of San communities are widely dispersed in the country and across Namibia's borders.[11] But the San, as traditional hunters and foragers, have a unique relationship to the land and to its plants and animals. They were adept at using plants for survival and know of thousands of medicinal and other uses for various local plants. Some of these medicinal uses have become extremely valuable, while others have that potential.

Perhaps the most well known of these plants is the hoodia, a genus of succulents that the San have eaten for perhaps thousands of years to stave off hunger and thirst – a necessity on their long hunting and foraging journeys in a harsh desert climate. In 1963, under the apartheid regime, a South African scientific organisation began a large research project to document the uses of wild plants in the southern African region. Hoodia were included in this project, which was run by colonial botanists and ethnographers. In 1995, i.e. five years after Namibia's independence, the organisation patented the active elements of the plant responsible for appetite suppression – without any consent from the San, and without recognising any property rights of the San in the patent.[12] The patent was sold to Phytopharm, a company based in the United Kingdom, which in turn, entered into a joint development agreement in 2004 with Unilever, a Dutch company, which intends to market appetite suppressant products based on various hoodia extracts to overweight Europeans and North Americans. Clinical trials have begun, and the product will now enjoy a share in this US$65-billion pharmaceutical industry. After an article in a British newspaper exposed the deal, and Pfizer, an American company, withdrew from the arrangement, an agreement was reached to pay a miniscule royalty[13] to the San – the first agreement of its kind in the world. While this can clearly be seen as a positive step, the San apparently had no legal protection for their rights under existing South African or Namibian law, and the amount of money was small in relation to the potential value of the knowledge.[14] Moreover, although a *royalty* is a type of property interest, it is not the legal equivalent of a patent or copyright.

The San have knowledge of other plants that may be of equal value, including various uses of devil's claw, another medicinal plant found in the Kalahari Desert.[15] They also have artistic designs that are being used by commercial interests without licence. This knowledge is currently unprotected by the Namibian Constitution. A statute has been

11 Harring & Odendaal (2006).

12 Convention on Biological Diversity (2008).

13 "The San people are set to receive less than 0.003% of net sales of the product" (Hall 2006).

14 Wynberg (2008).

15 Krugmann (2001).

proposed to address this shortcoming, but as previously mentioned, statutory protection is not constitutional protection. Ironically, while Namibia fails to protect San intellectual property, international intellectual property regimes protect the patents and copyrights of foreign corporations on that same San property.

Legislative sources of intellectual property rights in Namibia

In most jurisdictions, including Namibia's, the most direct source of protection for intellectual property – including patents, industrial designs, trademarks and trade names – is the municipal law. Other sources include legal instruments of regional and multilateral bodies which contain provisions on intellectual property, such as the North American Free Trade Agreement, the Berne Convention, and the Agreement on the Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement). As the Namibian law currently stands, however, there is no specific legislation protecting indigenous intellectual property rights.

The words of Maritz J in the Namibian case of *Gemfarm Investments (Pty) Ltd v Trans Hex Group Ltd & Another*[16] aptly describe the current status of legislative sources governing intellectual property rights in the country. In tracing the applicable Namibian legislation, Maritz J made the following statement:

> All the exceptions raised in this action concern the application or interpretation of probably the most neglected area of statutory regulation in Namibia: patent legislation. In a world increasingly driven by globalised economies and markets; in an age where more technological advances have been made in a single century than in all the centuries which have preceded it combined; at a time when commerce and industries are increasingly based on and benefiting from the power of knowledge converted into ideas, inventions and technologies for the benefit of humankind and its environment, it should be a serious legislative concern that our statutory laws designed to record, preserve and protect those ideas, inventions and technologies are marooned in outdated, vague and patently inadequate enactments passed by colonial authorities in this country about a century ago.

Although Maritz J's observation refers specifically to patent law in Namibia, the same may apply to legislation sui generis. The latest legislation on intellectual property is the Copyright and Neighbouring Rights Protection Act,[17] which provides for the protection of copyright and performers' rights.

It must be mentioned, however, that Namibia is in the process of promulgating a piece of legislation on intellectual property.[18] The expectation is that there will be adequate provision made to protect the rights of indigenous people to traditional or indigenous knowledge.

16 Case No. PI 445/2005
17 No. 6 of 1994.
18 An Industrial Property Bill has been drafted and is being processed.

The recognition of foreign intellectual property rights in Namibia

Nothing in the Namibian Constitution requires recognition of foreign property rights. In fact, Article 16 expressly permits Parliament to "by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens". Thus, a foreign patent may expressly not be protected, and a foreign company may be denied the right to patent protection in Namibia – but only if Parliament so legislates.

If foreign property interests are present in Namibia, they are protected by the Constitution until Parliament legislates otherwise. The same is true of foreign land ownership, as the case of *Kessl & Ors v The Ministry of Lands and Resettlement* makes clear.[19] This makes sound policy sense for a number of reasons, most of which relate to the benefits of an open economy and the free flow of foreign capital into Namibia.

The problem with this approach is that the European and North American intellectual property rights regime prices many developing – particularly African – nations out of the market for technology, medicine, and ideas that they need for development. A computer program costing US$1,000 may be easily affordable in the United States or Europe, but in a developing economy, may be beyond what almost the entire population can afford. The high cost of AIDS[20] medications is one area in which there has been a great amount of attention, and has led Western pharmaceutical corporations to make available cheaper – but, by local standards, still expensive – drugs.[21]

Namibia, in accordance with South African law that remained valid post-Independence, has always recognised international intellectual property rights. Modern international intellectual property rights regimes, particularly the TRIPS Agreement, have further imposed North American and European intellectual property rights on developing countries as an aspect of trade relations, leaving many of these nations little choice but to comply with such agreements because they produce little and are very dependent not only on foreign trade but also, particularly, Western technology, medicine, agricultural methods, and ideas.

Namibia, however, is among the few countries that have not followed this international trend. For this reason, the Namibian Registrar of Companies, Patents, Trademarks and Designs has simply declined to register patents on plants and other living organisms. In this regard, Edward Tueutjiua Kamboua, Deputy Director in the Ministry of Trade and Industry, commented as follows:[22]

19 Case No. (P) A 27/2006. (P) A 266/2006 cited in Harring & Odendaal (2008).

20 Acquired immune deficiency syndrome.

21 Musungu (2007).

22 Quoted in Kuyek (2002:11).

> By their very essence, patent rights are monopoly rights that are given to individuals and those individuals are from the developed world … As such our indigenous biodiversity is then surrendered by way of patent rights to people that are living in other countries.

This administrative policy of giving away indigenous biodiversity rights, for example, has never been challenged in the Namibian courts, so it is currently law. This is despite the fact that a statute on biodiversity in relation to the patent law system that supports the protection of indigenous biodiversity has been before Parliament for several years.

Under Article 144 of the Constitution –

> … the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Therefore, the TRIPS or any other international agreement that Namibia signs are protected by the Constitution and are incorporated into domestic law. Beyond this, the reference to "the general rules of public international law" may well cover all property rights protected under international law. This would include a wide range of human rights protected in various international agreements, including rights to life, indigenous land, culture, equality, family, and privacy. Potentially, this puts this recognition of human rights in conflict with patent rights – whether Namibian or international – recognised under the TRIPS Agreement. Article 25, entitled "Enforcement of Fundamental Rights and Freedoms", forbids both Parliament and the Executive from making or enforcing any law that violates a fundamental right or freedom enumerated in Articles 5 through 24 of the Constitution.

Thus, if an intellectual property right is protected under Article 16, then there is a conflict of fundamental rights that will need to be resolved by the courts. For example, if an intellectual property right under the TRIPS Agreement is protected by statute alone or additionally by another provision of the Constitution such as Article 144, the fundamental right must be given preference. Depending on how the courts construe various intellectual property rights, this issue can become even more complex, adding new layers of protection. Such fundamental rights as that to free expression in Article 21, to culture in Article 19, to education in Article 20, and to privacy in Article 19 have all been argued to protect intellectual property rights, giving intellectual property rights the status of a fundamental freedom, specially protected under the Constitution.[23] No Namibian court has so held, however. In fact, it is doubtful that such an expansive view should even be held: it would provide an inflated level of protection that would endear Namibia to foreign corporations, but would make protected items beyond the reach of most Namibians. This, in turn, raises constitutional issues in such areas as equality (Article 10) and affirmative action (Article 23).

At this point, another set of issues needs to be considered: that of administrative justice (Article 18) and of legal capacity. Assuming that intellectual property is protected in Namibia by statute only and that these statutes are not protected by Article 16, intellectual

23 Nwauche (2009).

property law is an extremely complex area of law, requiring highly specialised and educated administration, and necessitating the existence of a highly trained subspecialty of law – that of patent and copyright lawyers. Namibia has a strong legal profession and a highly regarded judiciary, so this is not impossible, but it is a very expensive regulatory regime. The civil service, especially, has had difficulty with training in legal capacity, again as *Kessl* revealed within the Ministry of Lands and Resettlement. Training staff in this capacity is also not going to be a simple or inexpensive matter.

The sum of this discussion is that there are potential conflicts between international patent law under the TRIPS Agreement and Namibian law that may ultimately come before the Namibian courts. The extent to which the Constitution protects various intellectual property rights, particularly foreign rights, when in conflict with the various rights of Namibian citizens – especially in the context of biodiversity issues – is unresolved.

Intellectual property rights in the Namibian courts

The *Gemfarm* case, delivered on 7 April 2009, describes patent law as "probably the most neglected area of statutory regulation in Namibia". Indeed, it is the only reported case interpreting Namibian patent law. As such, the case makes clear that patent law is protected under Namibian law, while at the same time, it also calls for a modern revision of Namibia's patent laws, dated from section 18 of the Union Patents, Designs, Trademarks and Copyright Act of 1916, imposed on the Territory of South West Africa by the Government of South Africa, acting under its League of Nations Mandate. The subsequent layering of various revisions has created an interpretive nightmare. But, as Maritz J demonstrated in his lengthy and detailed opinion referred to earlier herein, difficulty of interpretation does not stop any modern court from rendering a judgment.

While not referring to Article 16 in the opinion, Judge Maritz described a patent as "incorporeal property", which would bring it within the scope of Article 16. Indeed, this is so obvious that neither party raised any Article 16 issue. Therefore, the case demonstrates that intellectual property law, even if it is rarely raised in Namibian courts, will receive the careful and full protection of Namibian law, under both statutory law and, presumably, under Article 16 of the Namibian Constitution.

Conclusion

Article 16 of the Namibian Constitution protects intellectual property rights as "incorporeal property", included in the phrase "all forms of property, movable or immovable". This said, the constitutional language is sparse and requires a revised and modern series of intellectual property statutes, appropriate to the needs of the people of Namibia. The detail and care evident in the legal analysis in *Gemfarm* required no less than seven firms of advocates, all well paid by parties with a large investment in the case. This is most often true of intellectual property litigation in the modern world. The courts are obliged to take cases as they are presented and, if the involvement of so much legal talent is a requirement of intellectual property law, this will have an unequal impact on

such law and on those requiring and deserving access to it – which will inevitably protect the rich at the expense of the poor.

The intellectual property of the poor people of Namibia cannot be defended in this same process or under existing statutory law. The Union Patents, Designs, Trademarks and Copyright Act gave no concern to black property rights, whether relating to intellectual property or land. Full attention has to be paid to the intellectual property rights of the indigenous peoples of Namibia in future revisions of intellectual property law in the country. It can be argued that this is constitutionally required under Article 16, especially when read together with Articles 10 and 21, because the Constitution was adopted as an instrument to end the vestiges of apartheid, racism, and inequality.

The issue of biodiversity may pose the most pointed challenge yet to Namibian courts in applying the Constitution to intellectual property rights. Here, the basic property and human rights of the poorest in Namibia – the traditional farmers – are potentially in conflict with international corporate interests and the protection of the latter's intellectual property rights under international law.

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