AN INTRODUCTION TO THE NAMIBIAN CONSTITUTION

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I. ORIGINS AND HISTORICAL DEVELOPMENT OF THE CONSTITUTION

Namibia is a young country. It became independent in 1990. Its legal history as part of the greater southern African Roman Dutch legal system dates back to 1919.

The histories of South Africa and Namibia have been interwoven for centuries. Long before the colonisation of Namibia by Germany in 1884, people moved between South Africa and Namibia. Nama leader Jan Jonker Afrikaner and his tribe moved from Winterhoek in the Cape Colony to Central Namibia, and the Basters moved from the northern Cape to Namibia. After 1884, the country was known as Deutsch West Afrika (German West Africa).

Even a group of white Afrikaners (Boere as they were known; not to be confused with the people lead by Jan Jonker Afrikaner who are also known as Afrikaners), the Dorslandtrekkers, trekked through Namibia on their way to Angola.[2]

After World War I, the connection between the Union of South Africa and Deutsch West Afrika became formal. The Mandate Commission of the League of Nations approved the administration of the territory by South Africa, under a so-called Class C mandate, on 17 December 1920. The wording of the mandate was controversial from the outset. It mandated 'His Britannic Majesty to be exercised on his behalf by the government of the Union of South Africa'.[3] The country was renamed South West Africa.

Proclamation 1 of 1921 gave the Administrator of South West Africa legislative powers. Act 42 of 1925 of the South African Parliament instituted a Constitution for the territory.[4] From 1919, several South African laws were enforced in Namibia. In some cases, proclamations by the Administrator were brought into line with South African legislation, with minor adaptations here and there. It meant in practice that South Africa could implement its law in the territory. It had the effect that South West Africa was governed from Pretoria as an integral part of the Union of South Africa.

The mandate had very specific restrictions. General Jan C. Smuts, the then prime minister of the Union of South Africa, was instrumental in including a section preventing the mandate holders from occupying the mandated areas. This was contrary to the wishes of Australia and New Zealand, which,

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[2] The *Dorslandtrekkers* were conservative (white) Afrikaner Calvinists who left the South African Republic (after 1910 known as the Transvaal) in reaction to the political and theological liberalism of President Burgers. They approached the young Paul Kruger to lead the group, but he declined. He later became the President of the Republic and led the Republic into war against England in 1899.

[3] G. Carpenter, *Introduction to South African International Law* (Durban, Butterworths, 1987), p. 23; J. Dugard, *The South West Africa/Namibia Dispute* (Berkeley, University of California Press, 1973), p. 68.

[4] Carpenter (n. 3), p. 22.

in respect of Papua New Guinea, the German colony in the South Seas, saw occupation as the only solution. The mandate holders also had to exercise their mandates for the benefit of the indigenous people of the countries.[5]

The Appellate Division of the Supreme Court of South Africa nevertheless ruled, in *R v. Christians*,[6] that South Africa held sovereign power over South West Africa. Wiechers[7] points out that the Court was not compelled to go into the issue of sovereignty since the much wider *maiestas* (requiring submission to the rulers without having to prove citizenship or sovereignty) is an element of high treason, and not sovereignty. The South African government nevertheless accepted its status as the sovereign of South West Africa after the *Christians* case.[8]

After World War II, the United Nations (UN) organisation was formed in 1945, and the League of Nations was disbanded in 1946. The issue of the mandated territories was not resolved at the last meeting of the League of Nations. The League accepted a resolution that the mandate holders would administer the mandated territories in the same spirit as before, until a new arrangement was reached between the UN and the mandate holders.[9]

A long and often bitter struggle soon developed between South Africa and the UN. The government of the Union of South Africa was of the opinion that all obligations of the mandate holders lapsed when the League of Nations dissolved and that South Africa had the right to integrate South West Africa into South Africa.

In 1949, the General Assembly of the United Nations referred the issue to the International Court of Justice (ICJ) for an advisory opinion. The ICJ found that the mandate was still intact, that the United Nations had taken over the supervisory functions of the League of Nations, and that South Africa could not unilaterally change the status of the territory.[10]

In 1948, the National Party won the general elections in South Africa. The new government immediately started to administer South West Africa as a fifth province and implemented the policy of apartheid. The South African government maintained a policy of integration in southern African in that the apartheid government also negotiated with the United Kingdom to transfer the three protectorates – Swaziland, Basutoland (at independence renamed Lesotho), and Bechuanaland (at independence renamed Botswana) – to South Africa.

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[5] M. Wiechers, *South West Africa: The Background, Content and Significance of the Opinion of the World Court of June 1971* (1972), p. 445.
[6] 1924 AD 101.
[7] Wiechers (n. 5), p. 450.
[8] Ibid, p. 452.
[9] Ibid, p. 453.
[10] Ibid, p. 454 ff. See also International Court of Justice, *The International Status of South-West Africa* (1950) ICJ Reports, pp. 131-144.

In the late 1950s it became clear that the winds of change blowing over Africa would not allow Britain to hand over control and sovereignty of the protectorates to South Africa. At the same time, international pressure mounted against the policy to integrate Namibia into South Africa.

The General Assembly of the UN accepted the opinion of the ICJ in December 1950. The resolution did not resolve the problems between South Africa and the United Nations. Between 1955 and 1966 several issues regarding the South African mandate over South West Africa went to the ICJ. The international community, through the General Assembly, protested against the way in which South Africa executed its mandate over South West Africa, especially the fact that it refused to forward regular reports with petitions from the indigenous population to the United Nations.[11] South Africa settled itself in Namibia with a strong police and, later, military presence. The liberation struggle started when black nationals opposed South Africa's presence and its implementation of the apartheid policies. Although international pressure built up against South Africa in the early 1960s, it did not prevent the government from making a continued effort to integrate South West Africa into South Africa. Civil servants were transferred back and forth, whites in South West Africa had direct representation in the South African Parliament, and the territory was administered like a province.

In 1966, the General Assembly of the UN revoked the South African mandate over South West Africa, or Namibia, as the country was then called by the United Nations, following the line of the South West African Peoples Organisation (SWAPO), the major liberation movement working for the independence of the territory.[12] *De jure,* Namibia became the direct responsibility of the United Nations. However, *de facto,* South Africa ruled Namibia for another twenty-three years.

In 1970, the General Assembly of the UN declared South Africa's presence in Namibia illegal. This was followed by a case against South Africa before the ICJ in June 1971. The ICJ found that the continuous presence of South Africa in Namibia was convalescent and that South Africa should immediately end its administration of the territory. It also found that all countries were compelled to give expression to the UN decision.[13] As a result of the Court's Advisory Opinion, the General Council appointed a UN Commissioner for Namibia in 1975.

In 1975, South Africa set up structures for an internal settlement (excluding the United Nations and the liberation movements). The so-called internal parties were to draw up a new constitution and lead the country to independence in 1976. The Turnhalle Consultation, named after the historic Turnhalle building where the consultation took place, eventually led to an interim government of national unity (again excluding SWAPO).[14] In 1977, the South African Parliament empowered the

[11] See Wiechers (n. 5), pp. 461 ff.
[12] Carpenter (n. 3), p. 22.
[13] Wiechers (n. 5), p. 124; A. Du Pisani, *Namibia: The Politics of Continuity and Change* (Johannesburg, Jonathan Ball, 1986), p. 335.
[14] Carpenter (n. 3), p. 23.

State President of the Republic to promulgate legislation by proclamation to prepare for the independence of South West Africa. Simultaneously the Administrator-General, the representative of the South African government in South West Africa/Namibia, was given extensive legislative powers.[15]

In 1978, the Security Council of the UN adopted Resolution 435, which provided for South African withdrawal from the territory, UN supervised elections and, finally independence.

Negotiations went a long way before they broke down, mainly because of South Africa's insistence that elections in Namibia could only be free and fair if the huge contingent of Cuban troops in Angola left the country. The United States supported the South African position and, for the next ten years, the policy of linkage clouded all the other issues and brought the whole process to a standstill.[16]

The war between South Africa and its local supporters, the South West African Territorial Force (SWATF) on the one side and the People's Liberation Army of Namibia (PLAN), the military arm of SWAPO, on the other, was predominantly fought in Angola, where SWAPO had a huge contingent. South Africa felt that if it withdrew its troops, the balance would be disturbed and the Cubans would destabilise the process from Angola.[17] Finally, in 1988, after severe foreign pressure and internal instability in South Africa, all the parties agreed to the withdrawal of the Cubans from Angola, free elections under UN supervision, and independence in accordance with UN Resolution 435.[18]

Resolution 435 worked on a timetable of approximately seven months. The process was to start with a cease-fire between the fighting factions, known as D-day. On D-day, South Africa had to reduce its forces to 12,000 and within six weeks, to only 1,500. The forces were to be confined to two bases, Grootfontein and Oshivelo. SWAPO was not allowed to set up bases in Namibia, the SWATF forces, other military and para-military forces were to be demobilised and be confined to base.[19] The agreement included all the interested groups, including the western members of the Security Council (known as the Western Contact Group), South Africa, the Frontline States, the UN Commissioner for Namibia, and SWAPO, but not the transitional government.

During a visit to Namibia in 1984, the so-called Western Contact Group drew up a compromise settlement proposal that included the withdrawal of Cuban troops and certain constitutional elements that South Africa wanted in the new Namibian constitution.[20] It was also agreed that South Africa would administer the elections through the Administrator-General (AG), a South African appointee under the interim government. The AG, as the chief executive of the South African government in

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[15] Ibid.
[16] See M. Wiechers, *Namibia: The 1982 Constitutional Principles and their Legal Significance*, in (1998/90) Vol. 15 South African Yearbook of International Law p. 2.
[17] B. Harlech-Jones, *A New Thing? The Namibian Independence Process, 1989-1990* (Windhoek, Ecumenical Institute for Namibia, University of Namibia, 1997), pp. 14 ff.
[18] Ibid., pp. 46 ff.
[19] Ibid., pp. 66 ff.
[20] See Wiechers (n. 16), pp. 3 ff.

Namibia, had excessive executive and law-making powers before the implementation of Resolution 435.[21]

While the AG had to administer the elections, a Special Representative of the Secretary-General of the UN (SRSG), assisted by the United Nations Transition Assistance Group (UNTAG), was to assist him in supervising the elections. By 1989, the South West African Police Force (SWAPOL) operated independently of the South African police, although they were still interwoven. In the interim period, the SWAPOL was responsible for the maintenance of law and order, but the SRSG had the powers to send UN personnel with the SWAPOL on their duties.[22] On 16 January 1989, the Security Council adopted Resolution 629 and determined 1 April 1989 as D-day for the implementation of the independence process.

In the UN-supervised elections SWAPO received 58 per cent of the votes, which was 8 per cent less than the required two-thirds majority it needed to exclude the other parties from the process of writing a constitution for the last independent state in Africa. The former South African allies, the DTA received 28 per cent of the vote, while smaller parties shared the rest.

The first meeting of the Constituent Assembly took place on 21 November 1989. The two main political parties, SWAPO of Namibia with 41 seats, and the DTA with 21 seats, dominated the Assembly.

At the first meeting of the Constituent Assembly the 1982 Principles of the Western Contact Group was accepted as the foundation of the constitution-making process. On 12 December the Constituent Assembly accepted the SWAPO Party's proposed constitution as the working document of the Assembly, a proposal coming from prominent DTA member, Dirk Mudge, in the Standing Committee.[23] The Constituent Assembly adopted the Constitution on 9 February 1990.

II. FUNDAMENTAL PRINCIPLES OF THE CONSTITUTION

1. Introduction

Erasmus[24] has commented that the Namibian Constitution was much more than a futuristic document to organize a post-independence Namibia. The document itself was an instrument by which to obtain sustainable peace. Consequently, the new Constitution was not fully negotiated by the Constituent Assembly. The Assembly often opted for a compromise rather than enter into bitter debates between former military opponents.

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[21] G. Carpenter, *The Namibia Constitution – Ex Africa Aliquid Novi After All?* (1989/90) Vol. 15 African Yearbook of International Law (1991), pp. 23ff.
[22] Ibid, pp. 55 ff.
[23] Minutes of the Constituent Assembly Meeting, 12 December 1989.
[24] G. Erasmus, *The Impact of the Namibian Constitution After Ten Years*, in M.O. Hinz et al., *The Years of Namibian Nation* (Pretoria, VerLoren van Themaat Centre, UNISA, 2002), pp. 9 ff. See also C. Keulder (ed.), *State, Society and Democracy in Namibia* (Windhoek, Gamsberg Publishers, 2000).

Despite the emotional election, the short period available between the end of November 1989 and February 1990 to draft the Constitution, and the need for compromise, the Constituent Assembly drafted

> a Constitution [that] bears all the hallmarks of a constitutional democracy. It provides for the recognition and enforcement of fundamental human rights and freedoms, the separation of powers, judicial independence, a multiparty system, and regular elections. At the time of its adoption, the Constitution enjoyed the highest degree of legitimacy since it contained the promise of a future state conforming to all the tenets of constitutionalism.[25]

The Preamble emphasises the two aspirations of the Constitution:

> To replace a system of oppression, discrimination based on race and the denial of the inherent dignity of a humans with a government based on the undeniable rights of all humans such equality, freedom, justice and peace; and
> To promote amongst all the dignity of the individual and the unity and integrity of the Namibian nation and to strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state.

These goals and objectives are dealt with in several Articles of the Constitution.

On the unity of the Namibian nation and the equality of its entire people, Chapter 1, Article 1(1) establishes Namibia as 'a sovereign, secular, and justice for all democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all'. Chapter 2 provides for non-racial, non-sexist conditions for the acquisition of citizenship. Chapter 3, Article 10 protects equality and prohibits discrimination against different categories of persons, and Article 23 provides for an affirmative action plan to eradicate the racially based injustices of the past.

On the dignity of all people, Chapter 3, Article 6 protects the right to life, Article 7 the right to freedom, and Article 8 the right to dignity. Chapter 3, Article 8 protects dignity in proceedings before organs of the State and during enforcement of penalty, and against torture and cruel and inhumane treatment.

On national reconciliation, Chapter 3, Article 16 guarantees the right to own property and the right to just compensation when property is expropriated. Chapter 3, Article 20 guarantees the right of any person or group to establish and maintain private schools, if no restrictions are imposed with respect to the admission of pupils based on race, colour, or creed, and no restrictions of whatever nature are imposed with respect to the recruitment of staff based on race or colour.

On economic emancipation, Chapter 11 provides for state policies to advance the well-being of all the people.

2. Values of the Constitution

[25] M. Wiechers, *The Namibian Constitution: Reconciling legality and legitimacy, in* A. Bösl, N. Horn and A. Du Pisani, *Constitutional democracy in Namibia. A critical analysis after two decades* (Windhoek, Macmillan Education Namibia, 2012), p. 56.

At first glance, a question about the values of the Namibian Constitution seems to be so clear that it hardly justifies discussion. The values are those principles that, in the words of Wiechers, 'contained the promise of a future state conforming to all the tenets of constitutionalism.'[26] In other words, the values of the Constitution are embedded in the constitutional guarantees of the rule of law, recognition and enforcement of fundamental human rights and freedoms, the separation of powers, judicial independence, a multiparty system, and regular elections. However, the High and Supreme Courts have operated, at least in theory, with another set of values as an interpretive tool, namely the norms and values of the Namibian people.

In one of the early constitutional cases, *S v. Acheson*[27] – which concerned a person who was suspected of co-operating with a covert military unit of the South African Defence Force to kill Anton Lubowski, a prominent member of the SWAPO Party – the High Court made the following comments on constitutionality:

> The Constitution of a nation is not simply a statute that mechanically defines the structures of government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the process of the judicial interpretation and judicial direction.[28]

The term 'spirit and tenor of the constitution' was not fully developed by the Court. However, the Court made it clear that if the accused persons were not going to be extradited by the South African authorities soon, it would have to reconsider its earlier ruling that Acheson was to remain in custody. The Court was confronted with taking a constitutional approach to bail applications, or toeing the populist line by continuing to postpone the case while Acheson remained in custody *ad infinitum*. The judge took the first option. He based his decision on a definite emphasis on constitutional rights.

In *Ex Parte Attorney General, Namibia: In re Corporal Punishment by Organs of State*[29] the Supreme Court used the norms and values of the Namibian people as the interpretive tool to determine the constitutionality or otherwise of corporal punishment applied by organs of the state.

3. The Rule of Law

The Constitution meets the minimum requirements for Namibia to be considered as a constitutional state or a *Rechtsstaat* (justice state). The term comes from the German *Gründzätze* and was used in one of the early constitutional cases, *Ex Parte Attorney-General: In re The Constitutional Relationship between The Attorney-General and The Prosecutor-General*.[30]

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[26] Ibid.
[27] 1991 (2) SA 805 (Nm).
[28] Ibid, p. 814.
[29] 1991 NR 178 (SC).
[30] 1998 NR 282 (SC) (1).

The Supreme Court considered the independence of the Prosecutor-General in the light of the function of the Attorney General (a political appointee) as set out in Article 87(a): 'to exercise the final responsibility for the office of the Prosecutor-General'. The Court concluded that the independence of the prosecution authority is a vital mark of a *Rechtsstaat.*

The Court discussed the whole issue of a *Rechtsstaat* and concluded that Namibia, with its new Constitution and its fundamental adherence to the Declaration of Human Rights, conformed to a modern *Rechtsstaat* where state authority is bound by a set of higher juridical norms (*Grundgesetz*).[31] In the same way, the South African apartheid regime was not a *Rechtsstaat.*

The Supreme Court used the term *Rechtsstaat* here as a synonym for the phrase 'rule of law' to indicate a system where the people are governed by principles and just laws rather than the uncertainty of human judgments, where there is a clear separation of power, and where not only the judiciary, but also the prosecution authority is independent.

To guarantee the separation of powers, the Constitution differentiates between political appointees, who are appointed by the President, and independent offices appointed by the President at the recommendation of the Judicial Service Commission, also an independent body.

Judges, the Prosecutor-General, and the Ombudsman are independent constitutional offices. They are not political appointees and have tenure of office. Foreign judges, while generally independent and accountable to the Constitution and the Chief Justice, do not have tenure of office. In addition, while magistrates cannot be said to be totally independent, the Magistrates Act[32] and the recent *Shaanika* case[33] have limited the power and influence of the Minister of Justice considerably.

4. Democracy and electoral principles

Namibia is an inclusive democracy. Presidential elections are by direct, universal, and equal suffrage and are held every five years when the term of the President expires. If a sitting President dies, is removed from office, or resigns more than one year before the date of Presidential elections, a new election shall be held within ninety days from the date on which the vacancy occurred.

The National Assembly elections are on party lists and are held in accordance with the principles of proportional representation every five years, provided that the President may dissolve the National Assembly by proclamation on the advice of the Cabinet before the end of its five year term if the government is unable to govern effectively.

If the President dissolves the National Assembly, national elections for a new National Assembly and a new President must take place within ninety days from the date of such dissolution.

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[31] Ibid., p. 32
[32] Act 3 of 2003.
[33] *Minister of Justice v. Magistrates Commission and Another* (SA 17/2010) 2012 NASC 8 (21 June 2012).

The National Council, consisting of two members from each region, is elected from amongst their members by the Regional Council for such region. The Constitution does not make provision for new elections of the National Council if the President dissolves the National Assembly.

Elections are organised and conducted under the auspices of the Electoral Commission in terms of the Electoral Act.[34]

5. The Welfare State and the Namibian economic order

Economic, social, and cultural (ESC) rights are not included in Chapter 3 of the Constitution, which is the Bill of Rights. They only find their way into the Constitution in Chapter 11 as part of the Principles of State Policy. Chapter 11 is written in a completely different tone from that of Chapter 3. It does not refer to rights, but to obligations of the State, in non-imperative terms: 'The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:'.[35]

Then follows a long list of the government's duty to promote what are normally known as ESC rights. These rights include equal opportunity for women in all spheres of society, legislation to ensure the health of workers, the right of access of public facilities, social benefits for the unemployed, the incapacitated, the indigent, and the disadvantaged, free legal aid, and a living wage ensuring a decent standard of living. The provision falls far short of the minimum standards of international ESC rights expectations. There is no specific mention of a general right to health care, but only of the health of workers; there is no reference to shelter, unless it is read into a broad interpretation of a decent standard of living; and any item that might cost the government money is limited by an affordability statement: 'with due regard to the resources of the State'.[36] Consequently, in Article 95 of the Constitution, the rights to housing and to clean water are only indirectly guaranteed.

In the same vein, one can argue that Article 95(j), which refers to the obligation on the State to consistently plan to raise and maintain an accepted level of nutrition and standard of living, as well as to improve public health, indirectly creates rights to water, decent nutrition, and affordable (or free health care).

However, Namibian litigation has done little to improve the socio-economic fate of the vast number of poor people and to narrow the gap between the rich and the poor, despite the fact that the

[34] The Electoral Act (Act 24 of 1992).
[35] Art. 95.
[36] See Art. 95(g) and (h).

Vienna Declaration and Programme of 1993[37]has declared that all human rights are universal, indivisible, interdependent, and interrelated.[38]

In summary, the Namibian Constitution has laid a strong foundation for the enforcement of civil and political rights in both the private and public spheres. When it comes to ESC rights, it is a different story. The protection afforded by the property clause in Article 16 only benefits the more affluent white community. The ESC rights listed in Article 95 do not place a heavy burden on the State, and Article 101 protects the State against litigation.

This, however, does not mean that the Constitution is not concerned with the restructuring of Namibia. If one reads Article 98 with Article 95 and Article 16, which deals with property as a fundamental right, the Constitution seems to create a welfare state without undermining the capitalist structures of the pre-independent economy. Article 98(2) lists the different types of ownership envisaged for Namibia: private, public, joint public-private, co-operative, co-ownership, and small scale farming. In addition, Article 98(1) bases the economic order of Namibia 'on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians'.

Article 98 opens the door to foreign investment, while Article 99 lays claim on all natural resources:

> 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.

Reconciling these competing interests has proved to be a difficult endeavour, as was indicated in the *Wal-Mart* cases.[39] The Namibian Competition Commission initially approved the take-over by Wal-Mart, an American company, of a South African business with five Namibian subsidiaries, subject to the following stringent requirements: allowing Namibian participation and promoting the increase of ownership of historically disadvantaged people; protecting the position of current employees; and not creating harmful competition practices that could disadvantage small and medium enterprises. Wal-Mart challenged the conditional approval of the merger and then approached High Court to prevent a review by the Minister of Trade and Industry in terms of the Competition Act. On both occasions, the High Court ruled in favour of Wal-Mart. Eventually the Supreme Court of Namibia held

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[37] Vienna Declaration and Programme of Action , Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Art. 5.

[38] See J. Nakuta, *The Justiciability of Social, Economic and Cultural Rights in Namibia and the Role of the Non-governmental Organisations*, in N. Horn and A. Bösl, *Human Rights and the Rule of Law in Namibia* (2008) pp. 89 ff.

[39] *Wal-Mart Stores Inc v. Chairperson of Namibian Competition Commission and Others* (A 61/2011) [2011] NAHC 126 (28 April 2011); *Wal-Mart Stores Incorporated v. Chairperson of the Namibian Competition Commission and Others* (A 1/2011) [2011] NAHC 165 (15 June 2011); and *Namibian Competition Commission and Another v. Wal-Mart Stores Incorporated* (SA 41/2011) [2011] NASC 11 (4 November 2011).

that the review of the Minister had to be completed before the parties involved could take further action.

The tug-of-war between Wal-Mart on the one hand, relying among other things on the Foreign Investment Act, and on the other, the Namibian Competition Commission, supported by the Minister of Trade and Industry, which emphasised the interests of workers, small enterprises, and transformation, is a reminder that running a mixed economy involves a constant battle to find the right balance.

6. Respect for human rights.

The founding fathers and mothers of the Namibian nation made international and human rights law binding upon Namibia and part of the laws of the country.[40] This means that all the human rights instruments ratified by Namibia are directly applicable in the Namibian legal system. No enacting law is necessary to make the UN human rights covenants and treaties applicable. Namibia has ratified all the important UN human rights instruments.

The Namibian Constitution has an entrenched Bill of Rights.[41] However, with a few exceptions,[42] second generation, or social, cultural, and economic rights, are not included in the Bill of Rights.

The Namibian courts are reluctant to apply the principles of the instruments without the backup of a legal framework. Parliament, however, has implemented several laws to strengthen the human rights framework of the Namibian legal system. There is, however, also a trend to challenge earlier human rights judgments with new conservative legislation. A good example is the new Criminal Procedure Act of 2004.[43] The Act was an attempt to minimise the effect of constitutional case law on the success of criminal procedure. It introduced stringent bail conditions and introduced disclosure by the defence, despite the fact that it would compromise the constitutional rights of accused persons. The Act was promulgated in 2004, but at the time of writing (March 2013) has still not been enacted, possibly because of the unconstitutional provisions.

7. The role of the armed forces

A close relationship between the President – who is also the Commander-in-Chief of the Defence Force – and the armed forces creates the possibility of a president ruling by decree and kept in

[40] Namibian Constitution, Art. 144. The article reads as follows:
Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.
[41] Chapter 3.
[42] E.g. the right to own property (Art. 16), the right to primary education (Art. 20), and the right to form unions and withhold labour (Art. 21).
[43] Criminal Procedure Act, Act 25 of 2004.

power by the military. The Namibian Constitution and the Defence Act[44] clearly define the limitation of presidential powers when it comes to his/her relationship with the military. The President is the Commander-in-Chief of the Defence Force. He/she also appoints the Head of the Defence Force at the recommendation of the Security Commission. The Security Commission consists of the head of the Public Service Commission, the Chief of the Defence Force, the Inspector-General of the Namibian Police, the Commissioner-General of the Correctional Service, and two members appointed by the President at the recommendation of the National Assembly.

However, the influence of the President on the appointment of the Chief of the Defence Force is limited. Only the two members of the National Assembly might have political accountability to the President, and only if the President is also the head of the majority party. While the President has always been the president of the majority party since independence, it is not a constitutional imperative since the President is elected directly. In addition, the members of the National Assembly serve on the Commission as representatives of an independent arm of government, and not as representatives of the ruling party. Once appointed, the Chief of the Defence Force can only be dismissed on good grounds and in the national interest.

The Act gives the President extensive powers over the commissioning of officers and the cancellation of commission. The President may confer a commission, other than a temporary commission, on any citizen who is a member of the Defence Force.[45] The Act does not say that the members should be recommended by the Chief or any other committee or commission, only that they should preferably have been trained at a military institution.[46] The power to cancel an officer's commission is also assigned to the President, but only after the member has been informed of the complaint against him/her and had the opportunity to show cause why his/her commission should not be cancelled. Since it is impossible for the President to personally confer commission on junior staff, one can assume that a precedent has developed where the Chief of the Defence Force and/or the heads of the three sections of the Defence Force informally advise the President.

In July 2009, the President suspended Lieutenant-General Martin Shalli, the Chief of the Defence Force who was investigated for alleged fraud which emanated from actions while he served as High Commissioner in Zambia. When it became clear that the criminal investigation would not lead to prosecution in the near future, the Presidency announced in January 2011 that Lieutenant-General Shalli had retired with full military honours. While no prosecution has been instituted against Lieutenant-General Shalli, the Prosecutor-General is driving an application for forfeiture of money in his Zambian bank accounts. The decision of the President not to remove Lieutenant-General Shalli in

[44] Act 1 of 2002.
[45] Section 21(1) of the Defence Act.
[46] Section 8.

terms of Article 117 of the Constitution is an indication of the limitations set by the Constitution to prevent unchecked actions of the President against the Chief of the Defence Force.

The President has the authority (Article 26(1)), with approval of two-thirds of the National Assembly, to declare a state of emergency. During a state of emergency, the President has the power to make regulations, including the power to suspend rules of common law and statutes, as well as any fundamental right or freedom, necessary to deal with the situation (Article 26(5)).

If a regulation provides for detention without trial, an Advisory Board of no more than five persons with no less than three judges appointed by the President at the recommendation of the Judicial Service Commission must approve the detention not more than one month after its commencement, and during the detention at intervals of not more than three months. The Advisory Board has the power to release a detainee if it is no longer reasonably necessary (Article 24(2c)).

The Constitution is silent on the right of the President as Commander-in-Chief of the Defence Force to engage the Defence Force in conflicts outside Namibian borders. In 1998 Namibia, Zimbabwe, and Angola sent troops to the Democratic Republic of the Congo (DRC) to assist President Laurent Kabila in his fight against rebels supported by the Ugandan and Rwandese armies.[47] Namibia does not have a joint border with the DRC and internal conflict has hardly affected Namibian stability.

The press made allegations that Namibian and Zimbabwean troops were in the DRC to protect interests in diamond mines.[48] The Namibian government later admitted that it gave a mine to a para-statal enterprise run by the Namibia Defence Force, August 26 (Pty) Ltd, in Tshipaka in the DRC.[49]

The President did not inform the National Assembly of the deployment of troops in a foreign conflict, despite an outcry by politicians and activists.[50] The Namibian involvement in the DRC was never reviewed by a competent court. However, it seems logical in terms of the separation of powers that the President or even the Cabinet should not have the power to exclude Parliament from issues such as the deployment of troops in foreign countries. In 2002 the Defence Act was promulgated, forcing the President to inform the National Assembly of any such deployment and giving the National Assembly the power to stop deployment in a foreign country by a two-thirds majority.[51]

In conclusion, as Commander-in Chief the President has extensive powers in states of national disaster and national defence. He/she can also deploy Namibian soldiers in foreign countries. However, in all these instances the National Assembly supervises the President's actions. It has the power to block all important presidential actions as Commander-in-Chief of the Defence Force. It is highly

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[47] See N. Cook, *Diamonds and Conflict: Policy Proposals and Background*, in A. Levy, *Diamonds and Conflict: Problems and Solutions* (New York, Novinka Books, 2003), p. 37.
[48] *Outrage after Namibia Owns up to Diamond Interests in Congo* (Associated Press, 24 Feb. 2001).
[49] Cook (n. 46), p. 40. See also *Namibia has a mine in the DRC Admits Minister* (Deutsche Presse Agentur, 22 Feb. 2001).
[50] T. Ampuadhi, *Government confesses about Congo Kinshasa Gem Mine* (*The Namibian*, 23 Feb. 2001).
[51] The Defence Act, Act 1 of 2002, compels the President to inform the National Assembly within thirty days of the decision to deploy troops on foreign soil. The National Assembly can block the deployment if 2/3 of its members disapprove of it.

unlikely that the President will be able to abuse his/her authority to commission officers in the Defence Force or to cancel the commission of senior staff to control the Defence Force. All presidential action is subject to Article 18 of the Constitution, which requires administrative actions to be fair and reasonable.

8. The Relationship between State and Religion

The Constitution defines the State as 'a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all'. At the deliberations of the Constituent Assembly, the representatives of the DTA initially wanted some reference to the sovereignty of God, but eventually accepted the idea of a secular state.[52] The Monitor Action Group, a small conservative party that consisted predominantly of members of the Nationalist Party and the Deutsche Action, abstained from voting for the final Constitution because it did not recognise God's sovereignty over the nation.[53]

Article 10 of the Constitution lists religion as a category of non-discrimination, Article 21(1)(b) guarantees freedom of thought, conscience, and belief, and Article 21(1)(c) grants 'freedom to practise any religion and to manifest such practice'. Article 20(4) guarantees the right to establish and to maintain private schools. This was important so as to ensure that the old respected pre-independent church schools, which were mainly Catholic and Anglican, are able to continue and to ease the minds of the white communities who wanted to establish church schools.

Most of the private Christian schools that came into being after independence were from the Reformed and Pentecostal ranks. The crisis in Namibian education (more than 40 per cent of grade 10 students failed in 2008) helps to keep private schools in business. Despite allegations that Christian schools are elitist or vestiges of the old unequal apartheid education, these schools will expand if segments of the population are not happy with government schools.

Namibia has a small, but active, Rastafarian community. The freedom of Rastafarians, who smoke cannabis (a prohibited substance in Namibia) as part of their religious liturgy, was raised in a criminal case.[54] Sheehama, a well-known Namibian artist, was convicted in a magistrate's court of possession of cannabis. The Magistrates Court stated that it did not have jurisdiction to test the constitutionality of laws and Sheehama appealed to the High Court. The High Court refused Sheehama constitutional relief on the grounds that he had used the wrong forum. The High Court ruled that a criminal appeal can only deal with the four corners of the judgment in the court *a quo*. Sheehama

[52] D. Mudge, *The Art of Compromise: Constitution-making in Namibia*, in A. Bösl, N. Horn and A. Du Pisani, *Constitutional democracy in Namibia. A critical analysis after two decades* (Windhoek, Macmillan Education Namibia, 2010), p. 39.
[53] Personal discussion with the then leader of the MAG, Kosie Pretorius, 26 March 2013.
[54] *Sheehama v. S*, 2001 NR 281 (HC).

should have applied to the trial court to postpone the criminal case to give him the opportunity to approach the High Court with an application in terms of Article 25(2) of the Constitution to determine if Rastafarians have a constitutional right to use a prohibited substance as a religious ordinance during worship.

Consequently, the constitutional issue of using an illegal substance in religious liturgy remains uncertain.

Several old South African Acts made applicable in Namibia were based on Calvinist moral teaching. A case in point is the Publications Act of 1974. In terms of section 1 of the Act, the Publications Board, in applying the Act, stated that 'the constant endeavour of the population of the Republic of South Africa to uphold a Christian view of life shall be recognised'. In a case that dealt with the sale of erotic and pornographic material, the High Court looked at the wording of two Acts: section 2(1) of the Indecent and Obscene Photographic Matter Act 37 of 1967 and section 17(1) of the Combating of Immoral Practices Act 21 of 1980. The first gave an extremely broad definition of both publication and the words 'indecent and obscene', while the latter worked with a broad interpretation of the phrase 'unnatural sex'.

The Court did not look at the religious foundation of the two Acts, but it made it clear that in setting legal standards to uphold standards of decency and morality in society, the basic constitutional principles, such as freedom of speech or freedom to carry on any trade or business, could not be ignored. The Court rejected the idea that Christian values could be a determining factor in a secular constitutional dispensation and clarified that, in determining the scope of decency and morality, the benchmark was not the values of the conservative Christian community, but the Constitution.[55]

III. FUNDAMENTAL RIGHTS PROTECTION

1. Introduction

The Bill of Rights deals predominantly with civil and political rights, as noted above. Article 16, which protects the right to property, was possibly only included to satisfy the demand for protection in the 1982 Principles, i.e. '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.'[56] The right to education, and more specifically the right to free primary education, is also guaranteed in Chapter 3, as is the right to form

[55] *Fantasy Enterprises CC t/a Hustler the Shop v. Minister of Home Affairs and Another; Nasilowski and Others v. Minister of Justice and Others*, 1998 NR 96 (HC), p. 100.

[56] S.K. Amoo and S.L. Harring, *Intellectual property under the Namibian Constitution*, in A. Bösl, N. Horn and A. Du Pisani, *Constitutional democracy in Namibia. A critical analysis after two decades* (Windhoek, Macmillan Education Namibia, 2010) p. 299.

trade unions.[57] Other ESC rights are hidden in Chapter 11 (Principles of State Policy), which cannot be enforced by a court of law (Article 101).

The protection of the rights and freedoms in Chapter 3 is in total contrast with Article 101's non-enforceability clause of the ESC rights of Article 95. In terms of Article 25(2), any aggrieved person 'who claims 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'.

The aggrieved person can obtain legal assistance from the Ombudsperson. The competent courts have the power to 'award monetary compensation in respect of any damage suffered by the aggrieved persons' (Article 25(3)).

An aggrieved person will normally approach the High Court by way of a Notice of Motion to obtain relief, in terms of Article 25(2).

In *Myburgh v. Commercial Bank of Namibia*,[58] the Supreme Court ruled that the word 'laws' in Article 140(1) and, by implication Article 25(1), refers only to statutory laws. According to Article 140(1), these laws remain intact until they are declared unconstitutional by a competent court. In other words, common law, customary law, and (although not mentioned by the Court) case law that was in force at the time of independence could only survive the new dispensation if it was not contradicted by the Constitution or other statutory laws.[59] Statutory law that contradicts Chapter 3 needs to be declared unconstitutional by a competent court, while only constitutionally sound common law, customary law, and case law became part of Namibian law at independence.

While provisions of the Constitution can only be repealed and amended by a two-thirds majority in the National Assembly and the National Council (Article 132), Chapter 3 places a further restriction on the legislator: no repeal or amendment 'may diminish or detract from the fundamental rights and freedoms'. In other words, the Bill of Rights may be amended by adding rights and freedoms, but not by diminishing or detracting from rights and freedoms contained in Chapter 3.

Chapter 3 deals extensively with civil and political rights. Article 5 sets out the scope of Chapter 3, Articles 6 to 20 cover constitutional rights, and Article 21 lists the fundamental freedoms under the Constitution. Articles 222 to 224 deal with several limitations of Chapter 3 (General Limitations, Article 22; Affirmative Action, Article 23; and Derogations, Article 24). Article 25 is the protection clause.

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[57] Article 20 and Article 21(e).

[58] Unreported case of the Supreme Court of Namibia; Coram: Strydom, C.J., O'Linn, A.J.A., and Manyarara, A.J.A, CA; SA 2/00 of 2000, delivered on 8 December 2000.

[59] *Myburgh v. Commercial Bank of Namibia*, 1999 NR 287 (HC), 1999, p. 287, at p. 292, quoted in *Myburgh v. Commercial Bank of Namibia*, unreported case of the Supreme Court.

2. Application of the Bill of Rights

The Bill of Rights is both horizontally and vertically applicable. Article 5 confirms that the fundamental rights and freedoms 'shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia'. In the South African case of *Du Plessis v. De Klerk*,[60] the Constitutional Court had to consider the horizontal application or otherwise of the Interim South African Constitution. Arguing that it did not provide for horizontal application, the Court made the following comment: 'Had the intention been to give it a more extended application that could have been readily expressed. One model which would have been available is article 5 of the Namibian Constitution'.[61]

The expectations raised by the South African Constitutional Court were not realised in Namibia. Constitutional adjudication in the private sphere remains rare.

3. Discussion of rights and freedoms

3.1 The Right to Life

3.1.1 Abortion as a constitutional issue

The right to life is broadly stipulated in Article 6: 'the right to life shall be protected'. Article 6 further prohibits any law that permits law courts or tribunals to impose a death sentence.

When Namibia became independent, the South African Abortion and Sterilisation Act (1975) dealt with the legal issues of abortion. The Act outlawed abortion, allowing specific exceptions.

In 1996, the government released a draft Abortion and Sterilization Bill for discussion. The Ministry of Health and Social Services campaigned for three years to convince the Namibian people that the Bill – following a strong liberal, pro-choice approach – was the way forward for Namibia.

The churches reacted immediately. The opposition to the Bill was overwhelming across denominational and confessional lines. In April 1999, the Minister announced that the government had dropped the Bill because 99 per cent of the population opposed it.[62]

3.1.2 Life imprisonment as a competent verdict under Article 6

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[60] 1996 (5) BCLR (CC).
[61] Ibid., p.878.
[62] *Namibia drops move to legalise abortion* (*The Namibian*, 20 April 1999), available at [http://www.euthanasia.com/nambia.html] (accessed 10 February 2008).

In *S v. Tjijo*[63] the High Court ruled that life imprisonment is a form of death penalty. However, in *S v. Tcoeib*,[64] both the High and Supreme Courts ruled that life imprisonment is constitutional as long as it does not deprive the convicted person of hope. In other words, life imprisonment without parole or other forms of release at some point will be unconstitutional.

3.2 Protection of liberty, Article 7

The Namibian courts have often linked the right to liberty with the right to a fair trial. Unreasonably long periods of detention without bail for suspects awaiting trial are only allowed under extra-ordinary circumstances. In *S v. Acheson*,[65] the High Court refused a postponement for the State in the case against the alleged murderer of SWAPO activist, Anton Lubowski, when it became clear that other suspects, who were members of a covert section of the South African Defence Force, would not be extradited to Namibia. The State was left with the option of agreeing to bail or withdrawing the case. The Prosecutor-General opted for the latter.

A person who is in illegal custody is entitled to break out of police custody. In *S v. Kazondandona*[66] the appellant was convicted in the Magistrates Court of escaping from legal custody and assault. The High Court ruled that the suspect was not guilty of escape since he had not been in legal custody.

In *Amakali v. Minister of Prisons and Correctional Services*,[67] a magistrate ordered that a sentence of six months for escaping from legal custody should run concurrently with another sentence, contrary to section 48 of the Prisons Act 8 of 1959. The sentence was confirmed by a judge on review. Shortly before Mr. Amakali had completed his sentence on 8 March1999, a prison officer informed him that he was to start serving the six month sentence for escaping from custody once he had completed the sentence. The High Court ruled that Mr. Amakali's detention after 8 March 1999 was unconstitutional and interdicted and restrained the Prison Services from detaining him.

In *Djama v. Government of the Republic of Namibia and Others*[68] the High Court ordered the release of a suspected illegal immigrant who was detained while the authorities were still waiting for the tribunal envisaged in Article 11(4) of the Constitution to be established.[69]

3.3 Respect for Human Dignity, Article 8

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[63] *S v. Tjijo*, unreported case of the High Court of Namibia, delivered on 4 September 1991.
[64] *S v. Tcoeib*, 1993 (1) SACR 274 (NM) and 1996(7) BCLR 996 (NmS).
[65] 1991 (2) SA 805 (Nm).
[66] 2007 (2) NR 394 (HC).
[67] 2007 (2) NR 394 (HC).
[68] 1992 NR 37 (HC).
[69] See also *Government of the Republic of Namibia v. Sikunda*, 2002 NR 203 (SC) below.

Article 8 guarantees respect for human dignity in judicial proceedings and other proceedings before any organ of the State and during the enforcement of a penalty, and prohibits torture and cruel, inhuman, or degrading treatment or punishment.

The rights to respect and to humane treatment of prisoners and suspects awaiting trial were considered in two cases dealing with the practice of putting prisoners or suspects who were considered a flight risk in leg irons or chains. In *Namunjepo and Others v. The Commanding Officer, Windhoek Prison and Another*,[70] five prisoners awaiting trial were put in chains. The Supreme Court ruled that the practice was an impermissible invasion of the dignity of the prisoners in terms of Article 8(1) and in breach of Article 8(2)(b) of the Constitution.

In *Engelbrecht v. Minister of Prisons and Correctional Services*[71] the plaintiff claimed damages for injurious treatment that infringed his rights to personal safety and dignity after having been kept in chains for seventeen days while he was in prison awaiting trial. He was later acquitted. The court granted him damages, confirming that dignity must be respected.

In *Ex Parte Attorney General, Namibia: In re Corporal Punishment by Organs of State*[72] the Supreme Court dealt with the question of whether 'the imposition and infliction of corporal punishment by or on the authority of any organ of State contemplated in legislation is in conflict with any of the provisions of chapter 3 of the Constitution of the Republic of Namibia and more in particular art 8.' The Court ruled out all forms of corporal punishment by organs of the State.

The Criminal Procedure Act 51 of 1977 and several other statutes made provision for the whipping of both adult and juvenile male convicts.[73] The Court ruled that corporal punishment is always degrading and inhumane.[74]

3.4 Dignity and freedom of speech

In *Trustco Group International Ltd & Others v. Matheus Kristof Shikongo*[75] the Supreme Court had to weigh the respondent's right to dignity against a newspaper's right to freedom of the press and freedom of speech.

The Supreme Court ruled that the right to dignity and the right to freedom of speech (more specifically, freedom of the press), needed to be balanced. However, the right to freedom of expression is never license to ignore the dignity of others. The mere fact that a newspaper article is defamatory does not mean that it cannot be published. However, in this case the appellants did not establish that the

[70] 1999 NR 271 (SC).
[71] 2000 NR 230 (HC).
[72] 1991 (3) SA 76 (NmS).
[73] See *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State*, pp. 181-185 for the full list of all the legislation quoted by the Court.
[74] Ibid., pp. 189-193.
[75] 2010 (2) NR 377 (SC).

facts asserted in the article were true or substantially true. Therefore, publication of the article could not be said to be reasonable or that it constituted responsible journalism. Consequently, the appellants could not rely on the right to freedom of speech to exonerate the defamatory publication.

3.5 The Non-discrimination clause

Article 10(1) deals with the equality of all humans and lists certain non-discriminatory categories, such as sex, race, colour, ethnic origin, religion, creed, and social or economic status.

The Namibian courts have not addressed the question of whether the categories are a closed group. However, the equality clause of Article 10(1) seems to be a *capita selecta* of some prominent categories of persons against whom the colonial government had discriminated.

There are indications that until 1992, the Namibian government and Parliament had interpreted the prohibition of discrimination on the grounds of sex to include sexual orientation. In an early post-independence Act, the Labour Act, sexual orientation was listed as one of the non-discriminatory categories.[76] However, in the mid-1990s, the President and some senior ministers verbally attacked homosexuals in public.[77]

The High and Supreme Courts were confronted with the issue in the case of Elizabeth Frank, a German citizen.[78] The High Court reviewed and set aside a decision of the Immigration Selection Board that refused a permanent residence permit to Ms Frank. She felt that her lesbian relationship with a Namibian citizen may have been the reason why her application was rejected. She asserted that if it had been legally possible to marry, she and her partner would have done so. The Immigration Selection Board denied that Ms Frank's sexual orientation played any role in its decision.

The High Court concluded that a same-sex partnership falls under the common law principle of universal partnerships, a common practice recognised by the courts between a man and a woman living together as husband and wife, but who are not married legally. Referring to Article 10 of the Namibian Constitution, the Court concluded that if a man and a woman could enter into such a relationship, and since the partnership was so strong that a court of law would divide the assets if it dissolved, in terms of the constitutional equality principle of Article 10(2), two lesbian women should also be able to enter into such a partnership. The Court held that the word 'sex' in Article 10(2) included sexual orientation as a non-discriminatory category.

The Immigration Board appealed to the Supreme Court, which overturned the High Court judgment. The Supreme Court found that the High Court *a quo* had erred in its conclusion that the law

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[76] Act 6 of 1992.
[77] *The Namibian*, 2 April 2002.
[78] *Frank v. the Chairperson of the Immigration Selection Board*, 1999 Nr 257 (HC). The case went on appeal to the Supreme Court: *The Chairperson of the Immigration Selection Board and Erna Elizabeth Frank & Another*, 2001 NR 107 (SCA).

protects a lesbian relationship. It held that to require a court to read a homosexual relationship into 'the provisions of the Constitution and/or the Immigration Act would itself amount to a breach of the tenet of construction that a constitution must be interpreted "purposively". The Court nevertheless stated that nothing in its judgment justified discrimination against homosexuals as individuals, or depriving them of the protection of other provisions of the Constitution.

After the *Frank* case it was clear that the Namibian Constitution and Namibian laws were not perceived by the Supreme Court to protect partnerships emanating from same-sex relationships. The categories of protected entities in Article 10(2) of the Constitution do not include sexual orientation. The Supreme Court judgment limits the application of the Bill of Rights in the case of same-sex partners living together in a long-term relationship.

3.6 Fair trial and the Bill of Rights

Article 12 of the Namibian Constitution guarantees a fair trial. Over the years, the South African government introduced amendments to the Criminal Procedure Act and other legislation to assist the State in its prosecutorial efforts. The Act was made applicable to Namibia in 1977. The amendments and other legislation created presumptions, reversed the onus of proof, limited access by the defence to evidential material before the trial (maintaining that the police docket was privileged), and allowed inadmissible evidence under certain circumstances.

Namibia's prosecutorial authority took a while to make peace with the Bill of Rights. Initially, the State vigorously opposed all applications of a constitutional nature. However, in 1999, at the Annual Conference of the International Association of Prosecutors in Beijing, China, the Namibian delegation signed the Human Rights Charter for Prosecutors.[79]

Several elements of a fair trial were argued before the High and Supreme Courts in the first five years of Namibia's independence.

In *S v. Kapika and Others*,[80] the High Court looked at the right of an accused to be warned of his/her right to legal representation. However, in both the *Kapika* case and *S v. De Wee*,[81] the High Court, following Canadian case law, ruled that illegally obtained evidence and more specific confessions obtained without the accused being warned of his/her right to legal representation could only be allowed if disallowing the evidence would bring the legal system into disrepute.

In *S v. Shikunga and Another*,[82] the Supreme Court considered a case where there was additional evidence that showed clearly that an accused could be convicted even if the unconstitutional

[79] E. Myjer, B. Hancock and N. Cowdery (eds.), *International Association of Prosecutors: Human Rights Manual* (The Hague, International Association of Prosecutors, 1999).
[80] 1997(1) NR 286 (HC)
[81] 1999 NR 122 (HC).
[82] 1997 NR 156 (SC), 2000 (1) SA 616 (NMS).

evidence had not been obtained. The Court stated that an accused person 'who is manifestly and demonstrably guilty should not be allowed to escape punishment simply because some constitutional irregularity was committed in the course of the proceedings.' The right to a fair trial, according to this judgment, does not negate constitutionally obtained evidence merely because the State also relied on evidence obtained unconstitutionally that was not needed for a conviction. In the same vein, in *Van As and Another v. Prosecutor-General*,[83] the High Court ruled that 'release' following an unreasonable delay, in Article 12(1)(b), could not be equated with an acquittal.

In *S v. Uahanga and Others*,[84] the High Court confirmed an acquittal of an accused in the Magistrates Court on the ground of unreasonable delay.

In *S v. D and Another*[85] the Court stated in an *obiter dictum* that the cautionary rule for single female witnesses in sexual offences could be contrary to the non-discriminatory clause since it operated from the presumption that female complainants were likely to lie and lay false charges. The presumption was, however, only declared unconstitutional in *S v. Katamba*.[86]

In one of the first cases concerning a reversed onus, *S v. Titus*,[87] a full bench of the High Court concluded that the mere reversal of onus does not negate the presumption of innocence and the right not to testify against oneself. The Court used the so-called rational connection test, and cited the American case *Tut v. The United States of America*.[88] The Supreme Court overturned the judgment in *S v. Shikunga and Another*.[89]

In *S v. Pineiro*[90] the High Court abandoned the rigid constitutional test of the *Titus* case. The Court ruled that the presumption of guilt in the Sea Fisheries Act, Act 58 of 1973 contradicted the presumption of innocence contained in Article 12(1)(d) of the Constitution.

The old question concerning the conclusions that a court can draw from the decision of an accused not to testify was raised in *S v. Haikele and Others*.[91] The Court ruled that the privilege of an accused against self-incrimination means that the State has to prove all the elements of the crime. The mere fact that an accused does not give evidence cannot remedy deficiencies in the State's case.

In other cases, the common law obligation of a presiding officer to assist an accused, especially if she/he is undefended, was placed within a constitutional framework. In *S v. Khoeinmab*[92] the court held that it is a gross irregularity not to allow an accused person to address the court. In addition, since

[83] 2000 NR 271.
[84] 1998 NR 160.
[85] 1991 NR 371 (HC).
[86] 1999 NR 348 (SC).
[87] 1991 NR 318 (HC).
[88] 319 US 463.
[89] 1997 NR 156 (SC), 2000 (1) SA 616 (NMS).
[90] 1991 NR 424 (HC).
[91] 1992 NR 54 (HC).
[92] 1991 NR 99 (HC).

it affects the fairness of the trial, it cannot be remedied. In *S v. Nassar*[93] and *S v. Scholtz,*[94] the High Court and the Supreme Court, respectively, ruled that the police docket was not privileged and that an accused had to have access to it.

The crucial right to free legal representation has been seldom recognised as an absolute principle, mainly because the Constitution differentiates between the right to legal representation, which is part of Chapter 3, Article 12(1)(e), and the right to free legal aid, which is part of Chapter 11, Article 95(h). While the right to legal representation is an enforceable right, free legal representation is part of the Principles of State Policy, and cannot be enforced. It was, however, recognised and enforced in the so-called *Caprivi* case, where 132 accused were charged with high treason.[95]

3.7 Family

The Constitution sees 'family' as 'the natural and fundamental group unit of society and is entitled to protection by society and the State'. However, 'family' is not defined. Since the Supreme Court judgment in the *Frank* case it is clear that only a marriage between heterosexual couples is protected. One can thus conclude that the family referred to in Article 14 protects the traditional farther/mother/children type of family, and homosexual partnerships with or without children are not included in its coverage.

However, the exclusion of same-sex relationships does not answer all the questions. What is protected? Is it only the father/mother/children relationship mentioned above, or does it also include a polygamist relationship, since Article 166 acknowledges both common law and customary law? Alternatively, does Article 14(1) exclude polygamy because it does not guarantee equal rights between husbands and wives? If a male partner can marry more than one wife, why cannot a female partner? Since a competent court has not yet addressed the issue, it remains a lacuna in Namibian constitutional law.

The same can be said about the customary laws in Namibia prohibiting widows from inheriting. Hinz points out that the Ondonga Traditional Authority changed its laws and widows can now inherit.[96] The Communal Land Reform Act[97] also makes it possible for a widow to inherit communal land title, even if she was not born into the same traditional authority as the deceased husband.

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[93] 1995 (2) SA 82 (NM).
[94] 1998 NR 207 (SC) at 216 H–I.
[95] See *Government of the Republic of Namibia and Others v. Mwilima and All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC), for a later case where the Supreme Court eventually recognised the right to free legal representation in some cases.
[96] M.O. Hinz, *Law Reform from Within in Northern Namibia* (1997) No. 39 Journal of Legal Pluralism p. 72.
[97] Act 5 of 2002.

In *Myburgh v. Commercial Bank of Namibia*[98] the High Court ruled that after independence, and especially since the introduction of the Marriage Equality Act, women married in community of property have *locus standi* in their own right and can sue and be sued in their own names.

In *Müller v. President of the Republic of Namibia & Another*[99] the equality issue was raised in a weird twist. Müller and his wife Ms Engelhardt claimed that the Aliens Act of 1937 was unconstitutional since it unfairly discriminated against both men and women by allowing wives to take on their husband's surname after marriage, but denying the same rights to men.

The Court stated that the words 'discriminate against' in Article 10(2) of the Constitution refer to the pejorative meaning of 'discrimination' and not to its benign meaning.[100] The Court concluded that the enumerated list of categories in the anti-discrimination provision, Article 10(2), must be seen in the light of Namibia's past. All these categories had previously been singled out for discrimination. Reading the non-discrimination clause (Article 10) with the affirmative action clause, Article 23, it was clear that the purpose of Article 10 was 'not only to prevent further discrimination on these grounds but also to eliminate discrimination which occurred in the past'.[101]

The Court concluded that this was not a matter of unfair discrimination since Müller, being a white male who emigrated from Germany after Namibia's independence, could not claim that he had been part of a disadvantaged group under the previous dispensation. The dignity of males, whether as a group or as individuals, was not impaired by the Act. Moreover, names and surnames play an important role in the ordering of society and the provision stating that wives could take on their husband's surname was based on a tradition of longstanding in Namibia. Lastly, a husband was not without remedy. He could change his surname using the procedure open to all Namibians.

Müller and Engelhardt submitted a complaint under the Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR), claiming to be victims of a violation by Namibia[102] of provisions dealing with the equality of males and females. The Human Rights Committee delivered an Advisory Opinion in favour of Müller and Engelhardt.[103] The Aliens Act has not yet been amended.

Article 14 of the Constitution is vague. Several issues have not yet been before the courts. The *Müller* case seems to maintain elements of discrimination against wives, while the issues of the inheritance of widows under customary law, and the protection of a polygamist family under Article 14, remain uncertain.

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[98] 1999 Nr 287 (HC) 1999 Nr P287.
[99] 1999 NR 190 (SC).
[100] Ibid., p. 665.
[101] Ibid., pp. 666 and 667.
[102] The Optional Protocol entered into force for Namibia on 28 November 1994 by accession.
[103] Human Rights Committee, 2002, Communication 919/2000, Seventy-fourth session of the Human Rights Committee, 18 March-5 April 2002.

3.8 Children's rights

The Constitution and the rights of an "illegitimate child"

The Roman Dutch common law prohibited an illegitimate child from inheriting from his/her father. In *Frans v. Paschke and Others*[104] the court ruled that the differentiation between 'legitimate' and 'illegitimate' children was based on social status. The rule condemned all children born out of wedlock, without even considering whether the illegitimate child was born as a result of incest, adultery, or a loving relationship between two people who were co-habiting but for whatever reason opted not to get married.

The court ruled that the differentiation between legitimate and illegitimate children was discriminatory and intended to punish the parents. This punishment was transferred to the children and amounted to unfair discrimination against illegitimate children. After the *Paschke* case, Parliament adopted the Children's Status Act,[105] which extended the borders of the rights of children and further alleviated the *ad hoc* treatment of children.

3.9 Right to Property

Article 16 was a compromise. While it protects private property, it also gives the State the power to 'expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.'

In *Kessl v. Ministry of Lands Resettlement & Others and Two Similar cases*,[106] the High Court looked at expropriation both from the constitutional limitation on the fundamental right of ownership and the constitutional imperative for administrative action to be fair and reasonable and comply with the requirements imposed. The procedural aspects of the expropriation of the farms of Kessl and two others, who were all German citizens, did not comply with the prescriptions of the Agricultural (Commercial) Land Reform Act. The Court rejected the argument of the respondent that violations in the administrative process were constitutionally irrelevant, since Article 16(2) is self-contained and embodies the complete constitutional law of expropriation.

The Court pointed out that expropriation, although legal and commanded by the Constitution, is a limitation of the fundamental right to ownership. Therefore administrative prescriptions require strict compliance. The Ministry did not appeal the judgment.

3.10 Administrative Justice

As noted above, the Constitution specifically demands that 'administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon

[104] 2007 (2) NR 529 HC.
[105] Children's Status Act, Act 6 of 2006. It was only enacted late in 2008.
[106] 2008 (1) NR 167 (NH).

such bodies'. It is not enough that administrative actions comply with the enacting legislation or rules. In *Aonin Fishing (Pty) Ltd & Another v. Minister of Fisheries and Marine Resources*[107] the court explained that constitutional administrative justice requires not only reasonable and fair decisions, based on reasonable grounds, but fair and transparent procedures are inherent in that requirement .

In *Viljoen & Another v. Inspector-General of the Namibian Police*,[108] the transfer of a police officer was ruled to be 'unconstitutional and null and void due to the respondent's failure and non-compliance with the provisions of article 18 of the Constitution and the principles of natural justice, the *audi alteram partem* rule'. In *Minister of Health and Social Services v. Lisse*,[109] the Minister of Health and Social Services was directed by the Supreme Court to issue a private specialist with an authorisation letter to practice in the State Hospital after his application was refused without affording him an opportunity to present his case and he was subjected to a biased and arbitrary process.

3.11 Freedom of speech

3.11.1 Hierarchy of Rights: The *Kauesa* Cases

One of the first clashes between two opposing judgments concerning the Constitution occurred in the *Kauesa* cases.[110] The High Court judgment was not only overturned by the Supreme Court, but was also severely criticized.

A junior officer, Kauesa, appeared on national television and accused senior white officers of racism and being disloyal. He was internally charged with misconduct in terms of Police Regulation 58(32)[111] for undermining the authority of the police leadership structures. Kauesa argued that the Regulation restricted his constitutional right to freedom of speech and that he was an 'aggrieved person' as contemplated by Article 25 of the Constitution. The High Court dismissed the application on the premise that there is a specific difference between fundamental rights and fundamental freedoms. Fundamental rights form part of 'the law of Namibia', while fundamental freedoms are exercised, subject to, or limited by the laws of Namibia whenever they may be in conflict.[112]

Consequently, freedom of speech is subject to fundamental freedoms, such as dignity, which the High Court classified as the all-embracing constitutional right. A supposed hierarchy of rights and freedoms, where the freedoms are subject to fundamental rights, formed the heart of the High Court's reasoning.

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[107] 1998 NR 147 (HC) at 150 G.
[108] 2004 NR 225 (HC).
[109] 2006 (2) NR 739 (SC).
[110] *Kauesa v. Minister of Home Affairs and Others*, 1995 (1) SA 51 (NM). *Kauesa v. Minister of Home Affairs and Others*, 1996 (4) SA 965 (NMS);. NM –High Court: NMS – Supreme Court
[111] Published under Government Notice R203 in Government Gazette 791, 14 February 1964.
[112]) *Kauesa v. Minister of Home Affairs and Others*, 1995 p. 57.

The Supreme Court took a different approach. Constitutional issues cannot be answered with reference to technical issues alone. The appropriate way for the Supreme Court to approach the problem was to look at it within the broader spectre of the Constitution and Namibian society.

The Supreme Court rejected the position of the High Court *a quo* that whenever there is an infringement of a fundamental right, the freedom must be restrictively interpreted. Instead, the Supreme Court opted 'to be strict in interpreting limitations to rights so that individuals are not unnecessarily deprived of the enjoyment of their rights.'[113] While it may be true that some of the utterances of the appellant were indeed offensive, the necessity to deal with 'the practice of racial discrimination and the ideology of apartheid …. expressly prohibited by art 23(1) of the Constitution' was more important.[114] The Supreme Court confirmed the right of the appellant to participate in an uninhibited and robust manner in a debate of public concern, such as the lack of transformation and affirmative action in the police force. Debates such as these, the Court commented, are the essence of democracy.

3.11.2 Freedom of speech and hate speech

In *State v. Smith and others*[115] the High Court considered section 11 of the Racial Discrimination Prohibition Act 26 of 1991. The case emanated from an advertisement in a Windhoek newspaper that congratulated the Nazi war prisoner Rudolph Hess on his birthday. In an *obiter dictum* in *Kauesa v. Minister of Home Affairs and Others*, a full bench of the High Court found section 11 to be constitutional. However, the *Kauesa* judgment was overturned by the Supreme Court.

The Supreme Court saw the Racial Discrimination Prohibition Act as a bridge from the old apartheid order to the new democratic, constitutional era.[116] The significant objective of the Act was the prevention of a recurrence of the type of racism and its concomitant practices which prevailed prior to Namibia's independence. Consequently, the Court concluded that groups of persons who had never featured in Namibia's pre-independence era and had never been part of, or a party to, the social pressures amongst its different peoples could not be seen as objects that justified the restrictions to freedom of speech described in Article 21(a) and (b) of the Constitution.

The Court criticized the Act for not allowing language or publications that might be offensive to certain groups, if the facts contain therein were true. Offensive language, or even views that were shocking and disturbing to the State or sectors of the population, were needed to build a democratic society.

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[113] *Kauesa v. Minister of Home Affairs and Others*, (NMS) p. 981.
[114] Ibid, p. 982.
[115] 1996 NR 367 (HC).
[116] The metaphor was first used by the late Etienne Mureinik. See E. Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights* (1994) 10 SAJHR 31.

The State did not appeal the judgment, and Parliament opted to amend the Act. The amendments followed the case almost to the letter.[117] The new section 14(2) exonerates racist language and publication envisaged in section 11(1) if it is a subject of public interest, is part of a public debate, is true, or on reasonable grounds is believed to be true. It also excludes prosecution if someone contravenes section 11(1) with the intention of improving race relations and removing racial insult, tension, and hatred.

The unfortunately narrow perception of the objectives of section 11(1) of the Racial Discrimination Prohibition Act, together with the amendments of 1998, have limited the application of the Act to such an extent that aggrieved Namibians are now forced to use the old common law remedy of *crimen injuria.*

3.12 The Right to practice any profession of choice and labour hire

In *African Personnel Services v. Government of Namibia and Others*,[118] the High Court ruled that the prohibition of so-called labour hire practices in the new Labour Act was in line with the Constitution. In a landmark decision, the Supreme Court overturned the judgment of the High Court.[119] The Supreme Court held that the total ban of the system known as labour hire was not only a contravention of Article 21 (1)(j) of the Constitution (the freedom to carry on any trade or profession), but was also contrary to the International Labour Organisation's (ILO) Private Employment Agencies Convention.[120] The Supreme Court agreed that labour hire needs to be regulated, but it did not agree that labour hire was a contravention of the Constitution or the ILO Convention.

IV. SEPARATION OF POWERS

The principle of separation of powers is clearly adhered to in the Constitution. The President is the head of State and Government and the Commander-in-Chief of the Defence Force (Article 27(10)), but the executive power is vested in the President and the Cabinet (Article 27(2)). The wording seems strange, since the President is part of the Cabinet with the Prime Minister and other ministers (Article 35(1)). The words 'President and Cabinet' seem to emphasise the special position of the President in the executive. He/she is the only member of the Cabinet directly elected by the Namibian people and he/she appoints members of the Cabinet from the ranks of the National Assembly. The President has the power to appoint not more than six members, without voting rights, to the National Assembly, and these members are eligible to be given Cabinet positions by the President.

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[117] The Racial Discrimination Prohibition Amendment Act, Act 26 of 1998.
[118] (Case No. A 4/2008) [2008] NAHC 148.
[119] (SA 51/2008) [2009] NASC 17; [2011].
[120] ILO Convention 181 of 1997.

Taking into account that there is no prescription that the President is bound to take into consideration the party lists under which members of the National Assembly are elected, he/she can promote his/her own National Assembly appointees to the Cabinet. He/she can remove ministers from the Cabinet, which all underlines the powerful position of the President as part of the executive and the Cabinet. However, there are also several limitations to presidential power which make the Namibian President less that an executive President.

Except for ministers, deputy ministers, the Attorney-General, the Director of the Planning Commission, the governors, the six non-voting members of the National Assembly, and his/her advisors, all other constitutional office bearers are elected by the President 'at the recommendation of'.

Decisions of the President as Commander-in-Chief of the Defence Force to involve Namibian soldiers in a conflict outside Namibia must be approved by the National Assembly, and the President and the Cabinet are accountable to Parliament. Proclamations of a state of emergency or martial law are likewise dependent on scrutiny by the National Assembly, and the President can be impeached and dismissed by the National Assembly.

1. Election of the President

The President is not an elected member of the National Assembly, but is elected by direct, universal, and equal suffrage (Article 28(2)(a)). The President must attain at least 50 per cent of the votes cast to be elected (Article 28(2)(b)). Only persons who are Namibians by birth or descent, older than 35 years of age, and eligible to be elected as a member of the National Assembly can stand for President (Article 28(3)). While all registered parties may nominate candidates, a candidate can also be nominated if he/she is supported by a number of registered voters prescribed by an Act of Parliament (Article 28(4)). Even if the President is elected after being nominated by a political party, nothing in the Constitution compels him/her to appoint only members of his/her own party to the Cabinet, or to follow party guidelines.

2. Appointment of members of the Cabinet

The Prime Minister, who is the head of the public service, Cabinet ministers, deputy ministers, the Attorney-General, and the Director of the National Planning Commission are appointed at the discretion of the President. Although the Constitution does not directly refer to the Attorney-General and Director-General of the National Planning Commission as members of the Cabinet, they are appointed by the President similar to ministers and deputy ministers, and they appear in the same list as Cabinet ministers. Consequently, both the Attorney-General and the Director of the Planning Commission have been members of the Cabinet since independence.

3. Election of Members of Parliament

In theory, Namibia has a majoritarian bi-cameral system, consisting of the National Assembly and the National Council. However, the National Council has limited powers of recommendation.

3.1 The National Assembly

The National Assembly's members are elected on party lists and in accordance with the principles of proportional representation. It is composed of seventy-two elected members and not more than six members (without voting rights) who are appointed by the President by virtue of their special expertise, status, skill, or experience.

In *Federal Convention Of Namibia v. Speaker, National Assembly of Namibia and Others,*[121] the High Court ruled that the Speaker has no choice but to follow the decision of a political party if it wishes to remove or replace a member elected to the National Assembly on a party list. Consequently, the fact that a party has filed a list with the Electoral Commission does not bind the party to the list. This High Court ruling emphasises that parties compete for seats in the National Assembly and voters vote for parties, not the candidates on the lists.

3.2 The National Council

The members of the National Council are not directly elected by the Namibian electorate, but indirectly by the members of the different Regional Councils from among their members. The members of the Regional Councils are elected by constituencies according to the principle of first past the post. The principle of proportional representation does not apply to the election of the National Council by the Regional Councils. Consequently, smaller parties are not likely to be represented in the National Council and the majority party in the Regional Councils will dominate the National Council.

4. Powers of the President

The President is both head of State and Government. The Prime Minister plays a less important role as the head of the public service. In terms of his/her general responsibilities for the administration of the country (with the Cabinet), the President has to attend Parliament for the consideration of the budget (with the Cabinet) and address it on the state of the nation. He/she may dissolve the National Assembly on the advice of the Cabinet if it fails to govern effectively. He/she negotiates and signs international agreements.

[121] 1991 NR 69 (HC); also reported at 1994 (1) SA 177 (NM).

In all other governmental and constitutional appointments, the President appoints 'on the recommendation of' a so-called Article 32(4) commission: the Judicial Service Commission, the Public Service Commission, and the Security Commission.

The meaning of the words 'on the recommendation of the Judicial Service Commission' has not yet been tested in a competent court. However, the principle was raised in 1997 after the death of the first Ombudsman. The President appointed the then acting Ombudsman, Advocate Kasutu, as Ombudsman without waiting for the Commission's recommendation. After an uproar from both the public and the legal profession, the President withdrew the appointment. The Commission forwarded a priority list with three names to the President with Advocate Bience Gawanas at the top and Advocate Kasutu as number 3. The President appointed Advocate Bience Gawanas, creating a strong precedent for future appointments to be made on the Commission's recommendation.

The President also establishes and dissolves government departments and ministries; signs, promulgates, and publishes in the Government Gazette Acts passed by Parliament; and signs and promulgates any Proclamation which by law he/she is entitled to proclaim.

All actions taken by the President can be reviewed, reversed, or corrected by a resolution of a third of the National Assembly and passed by two-thirds of all the members of the National Assembly (Article 32(9)).

5. Power and Functions of the Cabinet

The main functions of the Cabinet (Article 40) are:

- To direct, coordinate, and supervise ministries, government departments, and para-statals;
- To initiate bills for submission to Parliament;
- To formulate the budget of the State and its economic development plans for the National Assembly;
- To formulate and explain to the National Assembly the content and goals of national foreign policy, foreign trade policy, and Namibia's relationship with other countries;
- To assist the President in determining the government's position on conclusion, accession, or succeeding to international agreements;
- To advise the President on the state of national defence; and
- To ensure that apartheid, tribalism, and colonialism do not manifest themselves in any form in an independent Namibia.

The ministers are individually accountable to the President and to Parliament for the administration of their own ministries and collectively for the administration of the work of the Cabinet (Article 41).

6. Instruments at the disposal of Parliament in order to control the Government

The watchdog function of the National Assembly is extensive. It has to approve the budgets of government; determine and provide for revenue and taxation; make final decisions on ratification or accession of international agreements signed by the President; receive reports on the activities of the executive, including reports from para-statals; and require senior officials of ministries and para-statals to appear before a committee of the National Assembly. A member can introduce a private member's Bill.

While these functions look impressive on paper, the National Assembly's independence is compromised by the high number of members of the Cabinet who are all also part of the National Assembly. After the 2010 elections there were twenty-two ministries, and the President appointed a minister in his office. Add to this the Prime Minister and Deputy Prime Minister, as well as the Director of the National Planning Commission (NPC) and the Attorney-General. While the latter two posts are nowhere designated in the Constitution as Cabinet posts, they are appointed by the President just like other Cabinet ministers without any recommendation, and have been members of Cabinet since independence.

Since the Cabinet reshuffle of 2012, the Secretary-General of the SWAPO Party, who is also a member of the National Assembly, has attended Cabinet meetings.[122] Consequently, there are twenty-seven Cabinet members and one Cabinet observer in the National Assembly, which is a massive thirty-nine per cent of the seventy-two voting members.[123]

A further twenty-two deputy ministers may be appointed by the President from the ranks of the National Assembly and National Council. While the deputy ministers are dealt with in Chapter Six of the Constitution, which concerns the Cabinet, it is not clear that the deputies are part of the Cabinet. The wording seems to point in the opposite direction: their function is 'to exercise **on behalf of Ministers** any powers, functions and duties which may have been assigned to such ministers' (emphasis added).

Even if the deputy ministers are not part of the Cabinet, they work in close relationship with and in subordination to the ministers. If all the deputy ministers come from the National Assembly, this leaves us with fifty members who can hardly be said to be independent of the executive: a huge 69.4 per cent of the National Assembly!

More satisfactory is the monitoring role of the Standing Committees. The Public Accounts Committee plays an important role in monitoring the spending of ministries and para-statals, and brings

[122] C. Sasman, *Mbumba's presence in Cabinet under spotlight* (*The Namibian*, 22 March 2013).
[123] This was the position of the Cabinet after the 2012 reshuffle. There was no non-voting member of the National Assembly in the Cabinet.

abuses to the attention of the public. However, their lack of real power leaves the Committees' questions and recommendations in the hands of the Cabinet, or more specifically, in the hands of the Prime Minister as the executive head of the public service, or the Minister of Trade and Industry, who is responsible for the para-statals.

7. Term of Office of the President

The term of office is five years (Article 29(1)) and only two presidential terms are allowed (Article 29(3)). The Constituent Assembly wanted to avoid a second round of elections. Consequently, Article 134 made provision for the first President to be elected by the Constituent Assembly by a simple majority. In 1998, Article 134 was amended to grant President Nujoma a third term.[124] The third term was restricted to Nujoma, and future presidents will only be allowed to serve two terms. The justification for the amendment was that Nujoma was elected only once and he is technically entitled to stand for election a second time.

8. Impeachment and removal of the President

The President can be removed from office if he/she is guilty of violating the Constitution, of seriously violating the law, or of serious misconduct, and after the National Assembly has adopted a resolution of impeachment with a two-thirds majority of all its members, confirmed by a similar majority of the National Council.

No criminal prosecution or civil action can be taken against the President during his/her term of office. No civil or criminal action can be taken against a former President for acts and/or omissions performed act during his tenure of office.

After leaving office, the criminal and civil courts will only have jurisdiction to entertain proceedings against the President in respect of an act perpetrated in his/her personal capacity while in the Office of President, and only if Parliament has removed the President in terms of the Constitution and if Parliament (both the National Assembly and the National Council) has adopted a resolution that such proceedings were in the public interest, despite the damage it will cause to the image of the Office of the President.

9. Dismissal of the Prime Minister and the other Ministers

Since the President appoints the members of the Cabinet, he/she can also reshuffle or rotate the Cabinet and remove a minister. While the President has a broad mandate to appoint and dismiss Cabinet members, his/her actions need to be fair and reasonable in terms of Article 18 of the Constitution.

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[124] Namibian Constitution First Amendment Act, Act 34 of 1998.

If the National Assembly moves a vote of no confidence in a minister by a simple majority of all its members, the President is obliged to terminate his/her appointment (Article 39).

10. Dismissal of Members of Parliament

A member of the National Assembly automatically loses his/her seat if he/she has ceased to have the qualifications rendering him/her eligible to be a member, such as if he/she is convicted of a criminal offence and is sent to prison for at least twelve months without the option of a fine.
The National Assembly (in the absence of any quota, one can presume with an ordinary majority) can remove a member if its rules and standing orders permit or require such a removal 'for good and sufficient reasons' (Article 48 (d)). The Constitution is silent on what constitutes good and sufficient reasons, and the courts have not yet addressed the issue.
Members must vacate their seats if they miss sessions of the National Assembly for ten consecutive days without having obtained special leave. Despite the imperative tone, the demand for just and fair administrative action means that a member of the National Assembly must be given the opportunity to defend himself/herself according to the right to be heard.

The Constitution is silent on the removal of National Council members.

11. The adoption of bills

Namibia has a Law Reform and Development Commission, with the object 'to undertake research in connection with and examine all branches of the law of Namibia and to make recommendations for the reform and development thereof.'[125] The Law Reform and Development Commission is not independent and reports to the Minister of Justice.[126] Recommendations by the Law Reform and Development Commission and *ad hoc* committees or commissions instructed to draft concept bills generally report to the Minister of Justice or the minister of the line ministry responsible for a draft bill. A minister will introduce the bill into the National Assembly after it has served at a Cabinet meeting. All bills passed by the National Assembly are referred by the Speaker to the National Council (Article 75).

The National Council has limited powers. It can send a bill back to the National Assembly with amendments. The National Assembly can accept or reject the amendments.

The National Council can, with a two-thirds majority of all members of the Council, object to the principle of a bill. In its report to the Speaker, the National Council must indicate whether it proposes amendments if the principle is confirmed by the National Assembly. If the National Assembly

[125] Law Reform and Development Commission Act, No. 29 of 1991, section 6.
[126] Ministry of Justice, Law Reform and Development Commission, Background, available at [http://www.lawreform.gov.na/].

affirms the principle by a two-thirds majority of all its members, the principle is no longer an issue and the bill can be dealt with like any other bill.

If the principle of the bill is not confirmed by a two-thirds majority, the bill will lapse.

12. The Role of the President

Once the National Assembly has passed a bill and it has gone through the review process of the National Council, it goes to the President for assent. The review powers of the President are determined by his or her perception of the constitutionality of the bill.

If the President does not question its constitutionality, he/she is obliged to assent to a bill passed by a two-thirds majority of the National Assembly and confirmed by the National Council. If a bill was passed the National Assembly by a simple majority and confirmed by the National Council, the President may decline to assent to it. The National Assembly may then pass the bill in its original form, or an amended form, or decline to pass the bill. If the bill is passed with a majority, it does not have to go back to the National Council.

If the bill is passed the second time with a simple majority, the President can maintain his/her power to withhold assent. If he/she elects not to assent to the bill, it must lapse. If the bill is passed with a two-thirds majority, the President is obliged to consent to it.

If the President is of the opinion that a bill is in conflict with the Constitution, he/she may withhold assent and inform the Speaker. The Speaker will inform the National Assembly and the Attorney-General, who will refer the bill to a competent court. If the court finds that the bill is unconstitutional, it lapses. If the court finds the bill is not in conflict with the Constitution, the general rules apply.

While the checks and balances of the Constitution seem impressive, the review powers of the National Council and the power of the President to address undesirable or unconstitutional legislation has not prevented obvious unconstitutional laws being promulgated. A case in point was the notorious Communications Act.[127] When it was debated in Parliament, it was severely criticised by civil society, human rights organisations, and even the Ombudsman.[128]

The main concern of the Ombudsman and others was that 'law enforcement agencies will be entirely free to decide whether circumstances will justify recourse and being allowed to unlimited discretion in determining the scope and duration of the surveillance.'[129]

Despite the outcry, the bill was passed in the National Assembly. In response to the public's resistance, the National Council arranged for public hearings before considering the bill. The

[127] Communications Act, Act 8 of 2009
[128] B. Weidlich, '*Spy Bill' violates Constitution, says Ombudsman Walters* (*The Namibian*, 15 Sept. 2009), available at [http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=59545&no_cache=1].
[129] The Ombudsman, quoted in Ibid.

Ombudsman, several non-governmental organisations, academics, and the press presented submissions or testified before the Council. The Council raised expectations with the hearings, but against all expectations passed the bill without amendments or comments. The press reported a rumour that it was an 'administrative slip-up, considering the engagement of the members during the hearings. However, staff members of the Council confirmed to the press that "the decision was deliberate"'.[130]

13. The adoption of the national budget

Both the President and the rest of the Cabinet are compelled to attend the presentation of the budget in Parliament. The President also addresses Parliament on the state of the nation on the same day. Apart from approving the annual budget, Parliament is also responsible for providing for taxation and the raising of revenue and approving the budgets of the different ministries and departments.

However, because of the overwhelming number of Cabinet members in Parliament, the approval of the budget has become a *de facto* function of the Cabinet. The constitutional accountability of the Cabinet to Parliament has, for all practical purposes, been transferred to the President. The weak influence on the budget of the Opposition, by creating awareness of budgetary flaws, was abandoned after the 2009 elections. No alternative budgets are prepared by the Opposition and its contribution to the budget debate is seldom more than criticism of big allocations to some ministries and not enough money going towards development.

14. The role of the judiciary in relation to the political branches of government

Namibia's judicial power is vested in the Supreme Court, the High Court, and the lower courts. All courts are independent and subject only to the Constitution (Article 78(2)). Neither the executive nor the legislature or its members may interfere with judges or judicial officers in the execution of their judicial function. The first serious constitutional conflict between the judiciary and the government erupted in *Ngoma v. the Minister of Home Affairs*.[131] The accused were asylum seekers who were in a band, the Osire Stars, which played at a party held by the Congress of Democrats. They were arrested, and upon a motion application, Justice Shilungwe interdicted the Minister of Home Affairs from arresting the asylum seekers or removing them from the Osire refugee camp.

The Minister of Home Affairs reacted to the judgment by stating that he would withdraw the work permits of some foreign judges whom he perceived to be 'working against the best intentions of the government'.[132] A statement by the Minister of Justice, N. Tjiriange, that judges perform their judicial functions based on presidential appointment, and not a work permit, soon followed. Dr Tjiriange further said that the Minister had reacted to a factually incorrect report that he had received

[130] T. Mongudhi, *NC Passed 'Spy Bill' deliberately* (*The Namibian*, 28 Sept. 2009).
[131] Case No. A 206/2000, unreported case of the High Court of Namibia.
[132] *The Namibian*, 18 September 2000.

from an official. He added that the Minister had apologized to the judges, a fact that was confirmed by Chief Justice Strydom.[133]

In the *Sikunda* case,[134] José Domingo Sekunda was one of a group of alleged UNITA members who were held in the police cells in Dordabis. The Minister of Home Affairs informed Sikunda that his 'activities and presence in the Republic of Namibia endanger[ed] the security of the state and that he was declared a prohibited immigrant and his removal from the Republic of Namibia was ordered.' A week later the Minister issued a warrant of detention on his letterhead, stamped by the Inspector-General.

Sikunda's son brought an urgent application for his release to the High Court of Namibia, which was granted. The State did not file a defence to the application. Sikunda remained in detention. Sikunda's son brought a new application for his father's release. The High Court found the Minister guilty of contempt of court and again ordered the immediate release of Sikunda. Sikunda was freed 108 days after the Court initially ordered his release.

V. FEDERALISM/DECENTRALISATION

Before independence, Namibia had a strong central government. In the 1960s, South Africa attempted to implement its version of decentralisation in Namibia by the implementation of the so-called Odendaal Plan, based on a report by Fox Odendaal, a former Administrator of the old Transvaal province. The Plan was never accepted by the majority of the Namibian people, mainly because of its foundation of ethnic homelands.

At the time of the negotiations in the Constituent Assembly, the opposition parties were of opinion that the SWAPO Party's support was restricted to the northern regions. Consequently, they expected that a National Council elected by the Regional Councils could have a non-SWAPO majority and be a check for the SWAPO-dominated National Assembly. That expectation came to naught. After independence the SWAPO Party gained momentum in all thirteen regions. At the 2010 Regional Council elections the SWAPO Party won 98 of the 107 Regional Council seats and consequently 23 of the 26 National Council seats.[135]

The three-tier government implemented at independence consisted of the central government, the Regional Councils in thirteen demarcated regions, and the local authorities. The Regional Councils,

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[133] Permanent Secretary of Justice 2000, Press release by Ministry of Justice, 12 September 2000, available at [http://www.afrol.com/News/nam002freejudiciary.htm#up)], accessed on 12 June 2003.

[134] Two High Court cases and the appeal case in the Supreme Court were reported: *Sikunda v. Government of The Republic of Namibia And Another* (1) 2001 NR 67 (HC); *Sikunda v. Government of The Republic of Namibia And Another* (2) 2001 NR 86 (HC); *Government of The Republic of Namibia v. Sikunda*, 2002SA5/0 NASC 1.The first two cases were not reported. I shall refer to them as *Sikunda v. Government of the Republic Of Namibia And Another* (unreported 1 per Justice Manyarara, judgment of 24 October 2000) and *Sikunda v. Government of the Republic Of Namibia And Another* (unreported per Justice Levy, judgment of 31 October 2000).

[135] Inter-Parliamentary Union, 1996 -2011, *Namibia National Council*, available at [http://www.ipu.org/parline/reports/2226_E.htm].

while elected by constituencies on the principle of first past the post, were envisaged to bring the government closer to the people.

In 1998 Namibia launched an official Decentralisation Policy. Its basis was a process of transferring power and development responsibilities to the regions. At the release of the official Namibian development plan, Vision 2030 in 2004, decentralisation was again mentioned as a priority. The document mentioned that an obstacle that remained was the unwillingness of the line ministries to devolve their powers.

The Regional Councils remain an uncomfortable entity between the central government and the local authorities. In 2010, Parliament passed the Special Advisors and Regional Governors Appointment Amendment Act.[136] It empowers the President to appoint governors for each region. Their functions include representing the central government in the regions, investigating issues of importance on behalf of the President or the minister, and acting as a link between the central government and the Regional Council and other local and traditional authorities. The Act strengthens the position of the central government in the regions. The most important official in the regions will not be an elected person, but an appointee of the President.

The Namibian Constitution makes no reference to the right to self-determination or self-government for local communities. The emphasis is on Namibia as a unitary state, possibly still in reaction to the South African policy of self-governing ethnic states, set out in the so-called Odendaal Plan.[137] A succession movement in the Caprivi launched a failed armed attempt to secede in 1999. The attack on Katima Mulilo was suppressed within a few hours and resulted in the leaders getting amnesty in Denmark. A high treason case against the secessionist was not finalised at the time of writing (April 2013).

VI. CONSTITUTIONAL ADJUDICATION

1. Constitutional Jurisdiction of the Courts

The Supreme and High Courts have inherent jurisdiction and have the power to deal with, among other issues, appeals which involve the interpretation, implementation, and upholding of the Constitution and fundamental rights and freedoms. The Supreme Court also deals with constitutional matters referred to it by the Attorney-General for decision and legal clarity.

The Constitution does not empower the lower courts with the same constitutional adjudication powers. In terms of Article 25(2), an aggrieved person can approach a competent court. The term ‘competent court’, with the power to grant relief to persons whose fundamental rights and freedoms

[136] Act 15 of 2010.

[137] Report of the Commission of Enquiry into South West African Affairs, published by the South African government in 1963, known as the Odendaal Report (named after the chairperson of the commission responsible for the report, Fox Odendaal).

have been infringed or threatened, is not defined in the Constitution. However, Chapter 6 grants adjudication powers to interpret, implement, and uphold the Constitution and the fundamental rights and freedoms only to the High and Supreme Courts.

In *S v. Heidenreich*,[138] the High Court, dealing with an application in the Magistrates Court to release an accused on the grounds of his right to a trial in a reasonable time, acceded that the Magistrates Courts clearly did not have that jurisdiction in terms of the Constitution and the Magistrates Court Act.[139]

That, the Court stated, did not imply that a Magistrates Court has no constitutional adjudication authority. The Court differentiated between the superior courts and the lower courts. The superior courts (the High and Supreme Courts) are competent courts able to adjudicate Article 25 issues. They can grant relief when someone's constitutional rights are violated or threatened. However, Magistrates Courts are not without constitutional powers. They have, like the superior courts, the 'jurisdiction to ensure the observance of certain fundamental rights guaranteed by the Constitution during the course of proceedings.'

The right to a trial within a reasonable time (Article 12(b)), the Court stated, is one of the rights complementary to the right to a fair trial (Article 12(a)), and an issue upon which the Magistrates Courts can decide. The Court quoted Article 5 to substantiate the point:

> The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

Consequently, the Court ruled that the remedy according to which the accused had to be released (Article 12(b)) 'must mean released from further prosecution for the offence with which he is charged.'

2. The appointment of judges and other quasi-judicial officers.

Judges, the Prosecutor-General, the Advisory Board appointed in terms of Article 24, and the Ombudsman are appointed by the Judicial Service Commission. If the Commission is not independent, the idea of an independent judiciary will be a farce from the outset. A politically-minded, politically manipulated Judicial Service Commission will hardly be able to make viable appointments to the Bench.

The composition of the Judicial Service Commission has a ring of independence about it. It consists of the Chief Justice, a judge appointed by the President, two members of the legal profession, and the Attorney-General. Since judges are also appointed by the President upon recommendation of

[138] 1996 (2) SACR 171 (Nm).
[139] Magistrates Courts Act, Act 32 of 1944.

the Judicial Service Commission, one can assume that the judges on the Commission will be independent in their thinking and conduct. In addition, since the Law Society appoints the representatives of the profession in terms of the Constitution,[140] they have no direct relationship with political powers and are not accountable to political officials. Consequently, the only political appointee on the Commission is the Attorney-General. In terms of this composition, political manipulation will be extremely difficult.

3. Independence of the judiciary in lower courts

The position of magistrates as part of the independent judiciary in terms of the Namibian Constitution was inherited from South Africa at independence. In *Mostert v. Minister of Justice*, the Supreme Court ruled that in the light of the constitutional independence of magistrates, the general practice of seeing magistrates as public servants was unacceptable.[141] The Namibian Constitution makes a clear difference between the appointment of judges and magistrates. There is no indication that magistrates must be appointed by an independent commission. Magistrates have a lesser jurisdiction,[142] they do no not have constitutional review powers (i.e. they cannot strike down unconstitutional laws), they are courts of first instance,[143] aggrieved persons can take all the judgments of the Magistrates Courts on appeal, and longer sentences of district courts are automatically reviewed by the High Court.

However, that does not mean that their independence should not be protected. The Court made it clear that the independence of magistrates is part of the constitutional dispensation. Sections in the Constitution dealing with the independence of the judiciary, the Supreme Court stated, covered all the courts in Namibia.

The main cause of disagreement of the appellant, Magistrate Mostert, was the power of the Minister of Justice to appoint magistrates. The Act was amended by Act 1 of 1999, but the amendment was not aimed at bringing the magisterial profession in line with the Constitution. The Supreme Court concluded correctly that the amendment did not give effect to the constitutional demand for an independent judiciary.

Consequently, the Supreme Court declared the assignment of the Minister of Justice to appoint magistrates and the categorising of magistrates as public servants subservient to the Minister of Justice and the permanent secretary to be unconstitutional. The government was given six months to pass legislation that would make magistrates genuinely independent. As a result, the Magistrates Court Act,

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[140] Article 85(1).
[141] 2003 NR 11 (SC).
[142] The jurisdiction of regional court magistrates has increased tremendously since independence. A regional court magistrate can try any crime except high treason, including murder and rape. He or she can impose a sentence of twenty years per charge.
[143] The Community Courts Act has given district courts appeal powers over the community court judgments.

3 of 2003, was passed by Parliament. However, the objectives set by the Act in section 3 seem to give the Minister the central stage.

In *Kobi Alexander v. the Minister of Justice and Others*,[144] the Court ruled that the Chief Lower Courts (a magistrate appointed to oversee all administrative issues of the Magistrates Courts) could not sit on this extradition case since he was a public servant and in terms of the Extradition Act, the appointment of a magistrate to hear an extradition application had to be done by the Minister, and not the Magistrates Commission. The judgment gave with the one hand, ruling that the Chief Lower Courts was a civil servant who could not be on the Bench, and took away with the other hand by restoring the power of the Minister to appoint magistrates, albeit only to preside in extradition hearings. The Extradition Act[145] has not yet been amended.

While the Magistrates Act did not guarantee the independence of magistrates, it limited the power of the Minister of Justice.

4. The Independence of the Prosecutor-General

Although prosecution is not generally recognised as a judicial function of government, its independence is crucial for the functioning of a just judicial system. The Namibian Constitution introduced a new dispensation whereby the prosecution authority is placed in the hands of a new office, the Prosecutor-General (Article 88). The Constitution also makes provision for an Attorney-General.[146] The Attorney-General follows the pattern of Britain and Wales, where the Attorney-General exercises 'the final responsibility for the office of the Prosecutor-General'[147] and is the 'principal legal adviser to the President and Government'.[148] He is also responsible 'for the protection and upholding of the Constitution' (Article 87(c)).

There is also a difference between the appointment of the Attorney-General and the Prosecutor-General. The Attorney-General is 'appointed by the President in accordance with the provisions of Article 32', similar to the appointment of the Prime Ministers and ministers. Although the Constitution nowhere states that the Attorney-General is part of the Cabinet, his/her appointment is provided for in the same article as that of prominent members of the Cabinet.

The Prosecutor-General is 'appointed by the President on the recommendation of the Judicial Service Commission.'[149] Other offices appointed in the same category are judges[150] and the

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[144] Unreported case of the High Court, heard on June 16-17 2008, delivered on 2 July 2008; Coram: Justice Parker.
[145] Act 11 of 1996.
[146] Articles 86 and 87.
[147] Article 87(a).
[148] Article 87(b).
[149] Article 88(1).
[150] Article 82(1).

Ombudsman.[151] The Prosecutor-General is a quasi-judicial appointment, while the Attorney-General is a political appointment. By creating the two posts, the mothers and fathers of the Namibian Constitution made a distinction between the political official and the Prosecutor-General as a free agent.

The fact that the Attorney-General and Prosecutor-General were vaguely based on the English system, without the specific boundaries of the two positions being spelled out, soon led to intense conflict between the Attorney-General and the Prosecutor-General, which was eventually settled by the Supreme Court in *Ex Parte: Attorney-General. In re: The Constitutional Relationship Between The Attorney-General And The Prosecutor-General.*[152]

The conflict centred on the function of the Attorney-General to 'exercise the final responsibility for the office of the Prosecutor-General.' The Court ruled that the Prosecutor-General is independent in the execution of his/her political mandate. 'Final responsibility', although meaning more than just financial responsibility, does not make the Prosecutor-General subservient to the Attorney-General and it does not give the Attorney-General any authority over the decisions of the Prosecutor-General whether or not to prosecute.

'Final responsibility' includes the Attorney-General's duty to account to the President, the executive, and the legislature,[153] but it does not allow the Attorney-General to interfere with the prosecutorial mandate of the Prosecutor-General.

5. Electoral matters

The Electoral Act[154] makes provision for aggrieved parties to approach the High Court within thirty days of the announcement of the election results.[155] The Opposition approached the High Court after the July 2000 regional elections and after the last two National Assembly elections in 2004 and 2009.

In terms of section 110(1) of the Electoral Act, an application by an aggrieved party must be made 'within 30 days after the day on which the result of the election in question has been declared as provided in this Act.' Moreover, in terms of section 110(3)(3), security must be furnished within five days of the launch of the application. In *DTA of Namibia & Another v. SWAPO Party of Namibia and Others*[156] the Court ruled that the time prescribed is of the essence in election cases, that the thirty days in section 110 are calendar days rather than court days, and that the prescribed time is peremptory

[151] Article 90(1).
[152] 1998 NR 282 (SC) (1).
[153] Ibid., p. 38.
[154] Act 24 of 1992, substantially amended by Act 23/1994, again amended by Act 30 of 1998, Act 19/1999, Act 20 of 2002, Act 7 of 2003, and Act 4/2006.
[155] Section 110.
[156] 2005 NR 1(HC).

rather than directory. Consequently, an application to declare void the election results for the constituency of Gobabis was dismissed.

In 2005, in *Republican Party of Namibia and Another v. Electoral Commission of Namibia and Others*,[157] the High Court found enough evidence of flawed counting procedures to order a recount of the National Assembly votes, albeit not enough to declare the election void.

After the 2009 National Assembly election, an application by nine political parties (the SWANU of Namibia being the only party that earned a seat in the election not to join the application) went to the High Court, where it was rejected mainly because it contravened a rule of the High Court concerning the time of filing.[158] The parties appealed to the Supreme Court. The Supreme Court held that the papers were indeed legally before the court and referred the case back to the High Court.[159]

In the second round before the High Court[160] the respondents requested the Court to disallow the bulk of the papers submitted by the applicants (the so-called 'amplified papers', allegedly the high water mark of the applicants' case) that were filed late. The applicants had filed their application in time (according to the ruling of the Supreme Court) and had furnished the Registrar with security in time. However, when the applicants served the papers on the respondents (in time) ten days later, they were far more extensive than those initially filed. The Court ruled that the amplified papers were not properly before the court and as a result the application was dismissed.

The applicants appealed to the Supreme Court.[161] The Court dismissed the appeal. The Supreme Court stated that it did not necessarily agree with the High Court's decision. However, since the High Court had exercised discretion in ruling that there were no special circumstances to allow the late filing of the amplified papers, the Supreme Court did not intervene.

The literalist approach of the High Court and the unwillingness of the Supreme Court to intervene in a case where the court *a quo* had exercised discretion meant that the real question as to whether election fraud was committed was not answered.

6. Prohibition of political parties

No political parties are prohibited in Namibia. The 2009 Presidential and National Assembly elections were contested by a communist party as well as the Monitor Action Group, the present name of the old Nationalist Party. In July 2004, the Electoral Commission refused to register the Caprivi

[157] (A387/05, A387/05) [2005] NAHC 2 (26 April 2005).
[158] *Rally for Democracy and Progress and Others v. Electoral Commission of Namibia and Others* (A01/2010) NAHC (4 March 2010).
[159] *Rally for Democracy and Progress and Others v. Electoral Commission of Namibia and Others* (SA 6/2010) [2010] NASC 8 (6 September 2010).
[160] Rally *for Democracy and Progress and Others v. Electoral Commission of Namibia and Others* (A 01/2010) [2011] NAHC 26 (14 February 2011).
[161] *Rally for Democracy and Progress and Others v. Electoral Commission of Namibia and Others* (SA 12/2011) [2012] NASC 21 (25 October 2012).

National Democratic Party because of the word 'Caprivi' in its name.[162] It was contrary to the Constitution's definition of Namibia as a unitary state, the Commission found. The party was eventually registered under the name National Democratic Party.

It is unlikely that a party that openly advances and propagates apartheid in any form will be allowed to register in Namibia in the light of the negative references to apartheid in whatever form in the Constitution.

7. Impeachment of high officials

Parliament can impeach the President and members of the Cabinet and hold its own members accountable in terms of their rules and standing orders. The President, however, may remove the Chief of the Defence Force, the Inspector-General of the Namibian Police, and the Commissioner-General of Correctional Services 'for good cause and in the public interest' (Chapter 15). The dismissal of Lieutenant-General Martin Shalli, the Chief of the Defence Force, in 2009 is the only example of a dismissal of a Chapter 15 official. Shalli was reinstated in January 2011 and retired with full military honours.

Judges and the Ombudsman can only be dismissed by the President on the recommendation of the Judicial Service Commission 'on the ground of mental incapacity or for gross misconduct'. While Article 88, which deals with the Office of the Prosecutor-General, makes no mention of his/her dismissal, one can assume that since he/she is appointed on the recommendation of the Judicial Service Commission, he/she can only be dismissed on the recommendation of the Judicial Service Commission.

8. Control of international treaties before ratification and the process to ratification and the distribution of treaty-making powers between the executive and the legislature

The Constitution assigns the duty to the Cabinet 'to assist the President in determining what international agreements are to be concluded, acceded to or succeeded to and to report to the National Assembly thereon' (Article 40(i)). The President has the power to 'negotiate and sign international agreements, and to delegate such power' (Article 32(3)(e)). If one gives a broad interpretation to the term 'international agreements' to include 'international treaties', it would leave the final decision in the hands of the President and the role of the Cabinet would be reduced to giving advice to the President. The National Assembly is informed of the succession, accession, or ratification of treaties, but plays no significant role in the negotiations thereof.

[162] R. Lumamezi, *Namibia: Political Party Struggles to Register* (*New Era*, 30 July 2004).

However, Article 63(2)e) gives the National Assembly the power to 'agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) hereof.' The role of the President or his/her delegate is to indicate the initial approval of the treaty by Namibia. It can only become part of Namibian law and binding on Namibia in the international sphere once the National Assembly has approved its ratification or succession.

9. Constitutional Interpretation

The High and Supreme Courts of Namibia have not developed a single interpretive model of interpretation. Instead, one finds a constant battle for the adjudicative high ground between a classical positivist approach and what can be termed a more transformative approach grounded in the principles of the Constitution. Since the Supreme Court, initially, was for many years overstaffed, many of the ground-breaking judgments were initially given or written by High Court judges serving on the Supreme Court bench. Consequently, initially one cannot speak of opposite positions of the High and Supreme Courts. However, during the period of the fourth Chief Justice, Shivute J, there has been a marked difference between the interpretive models of the two courts. Reference to a few cases will illustrate the point.

The different approaches were first seen in the Supreme Court case of *Ex Parte Attorney General, Namibia: In re Corporal Punishment by Organs of State*.[163] The Attorney General requested the High Court to determine whether corporal punishment by organs of the State was cruel and inhumane in terms of Article 8 of the Constitution. The Court turned to other democratic countries with similar constitutions and therefore shared norms and values. Since these countries had abandoned corporal punishment, the Court concluded that it is against the norms and values of the Namibian people. The case was severely criticised by Justice O'Linn, a judge of the High Court, in his subsequent judgments, mainly because the Supreme Court did not follow any fixed rules to find out what the norms and values of the Namibia people are.[164]

In the *Kauesa* cases, a non-commissioned officer of the Namibian Police went on national television and accused the appointed Inspector-General, a former security police officer in the South West African Police, and other senior white officers of unpatriotic and racist attitudes. He was charged and disciplined in terms of the Police Regulations.[165] Kauesa brought a review application to the High Court on the grounds that the Regulations were unconstitutional because they limited his right to freedom of expression. The High Court, working strictly with the wording of the Regulation and the dignity of the police officers, rejected the application.[166] The Supreme Court, while agreeing that the dignity of the

[163] 1991 NR 178 (SC).
[164] *S v. Vries*, 1996 (2) SACR 638 (Nm).
[165] Police Regulation 58(32), published under Government Notice R203 in Government Gazette 791, 14 February 1964.
[166] *Kauesa v. Minister of Home Affairs and Others*, 1995 (1) SA 51 (NM), also reported in 1994 NR 102 (HC).

white senior officers had been compromised, nevertheless found that the word of the Regulation was an over breath. The Supreme Court rejected the idea of a pyramid of rights and opted for an interpretation where rights are in competition with one another.[167] In this specific case there was a need to give priority to freedom of speech. The appeal succeeded.

In the *Kauesa* cases the High Court opted for a typical positivist approach, while the Supreme Court, without using the phrase, worked with a transformative model. The intention of the Constitution and the necessity for an interpretation that will contribute to the transformation of society is a central interpretive position.

The High and Supreme Courts looked at the constitutional rights of homosexuals in the now famous case of Elizabeth Frank.[168]

The High Court reviewed and set aside a decision of the Immigration Control Board refusing a permanent residence permit to Frank. She asserted that her sexual orientation was lesbian and that if had been legally possible to marry, she and her female partner would have done so. If her relationship with a Namibian citizen had been a heterosexual one, she could have married and would have been able to reside in Namibia or apply for citizenship in terms of Article 4(3)(a) of the Constitution. She argued that the Immigration Control Board did not take this factor into account and therefore violated her right to equality and freedom from discrimination guaranteed by Article 10, her right to privacy guaranteed by Article 13(1), and protection of the family guaranteed by Article 14 of the Constitution. The High Court equated the relationship with the common law universal partnership and concluded that such relationships are protected by law. Referring to Article 10 of the Constitution,[169] the Court concluded that if a man and a woman could enter into such a relationship, and since the partnership was so strong that a court of law would divide the assets when it dissolved, in terms of the constitutional equality principle of Article 10(2), two lesbian women should also be able to enter into such a partnership.

The Supreme Court, per Justice O'Linn, gave the Immigration Selection Board extremely wide discretionary powers, while at the same time limiting the review powers of the High Court. The Supreme Court extensively investigated the issue of the protection given to lesbian couples in terms of the Constitution, especially Article 10(2), and concluded that:

> (I) It is only unfair discrimination which is constitutionally impermissible, and which will infringe Art. 10 of the Namibian Constitution;[170]
> (ii) A homosexual relationship does not have the same status and protection of a heterosexual marriage:

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[167] *Kauesa v. Minister of Home Affairs and Others*, 1996 (4) SA 965 (NMS).

[168] *Frank v. The Chairperson of the Immigration Selection Board*, 1999 NR 257 (HC) and *The Chairperson of the Immigration Selection Board and Erna Elizabeth Frank and Another*, 2001 NR 107 (SCA).

[169] 1. All persons shall be equal before the law.
2. No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

[170] *The Chairperson of the Immigration Selection Board and Erna Elizabeth Frank and Another*, 2001 NR 107 (SCA), Majority judgment, p. 114.

> A Court requiring a 'homosexual relationship' to be read into the provisions of the Constitution and or the Immigration Act would itself amount to a breach of the tenet of construction that a constitution must be interpreted 'purposively'.[171]

On this occasion the High Court used a purposive interpretive model, while the Supreme Court (with High Court Justice O'Linn acting as a Supreme Court judge, writing the majority judgment) opted for a literal interpretation of the legislation and the interpretation of the non-discriminatory category 'men and women'.

It is clear from the examples above that the different interpretive models were not an indication of tension between the High and Supreme Courts, but rather the result of the interpretive preferences of strong personalities such as High Court judge O'Linn, J, who often acted as Supreme Court judge.

Since Justice Shivute became Chief Justice, the practice of High Court judges acting became less frequent. A clear difference between the interpretive methods of the High and Supreme Courts are clear in this period. In several judgments the High Court delivered conservative positivist judgments, while the Supreme Court opted for a transformative approach. In the *African Personnel Services* cases[172] the High Court ruled that the government had the right to forbid labour hire. However, after a thorough discussion of Article 21(j) – the freedom to practice any profession , or carry on any occupation, trade, or business – the Supreme Court concluded that the Act was unconstitutional in its outlaw of labour hire. The Court nevertheless emphasised the importance and necessity of regulating the practice.

In the dragged-out cases after the general elections of 2009, discussed above, the different interpretive models of the High and Supreme Court are clearly demonstrated.

Following the pattern that began in the *African Personnel Services* cases, the Supreme and High Courts clearly had different approaches in the election cases. The High Court followed the words of the rules and other legislation, while the Supreme Court was interested in the spirit of the Constitution. Or to put it in more philosophical terms, the High Court interpreted the Electoral Act and the Rules of the High Court with little, if any, interpreted vision of the Constitution, while the Supreme Court operated with a transformative model (i.e. an understanding that the judiciary has a duty to transform the law and the interpretation of the courts should comply with the expectations of the Constitution).

In conclusion, from the beginning of the constitutional dispensation there have been two clearly discernable approaches to constitutional interpretation. In the beginning, the differences cut across the High and Supreme Courts. In some cases the High Court took a typical traditional positivist approach, while the Supreme Court overturned the judgment with a transformative approach where the content

[171] Ibid., p. 115.
[172] *African Personnel Services v Government of Namibia and Others* (Case No. A 4/2008) [2008] NAHC 148 (1 December 2008) and *Africa Personnel Services (Pty) Ltd v. Government of Republic of Namibia and Others* (SA 51/2008) [2009] NASC 17; [2011] 1 BLLR 15 (NmS).

and values of the Constitution dominated the interpretation of the Constitution itself and other laws. In other instances the High Court rendered a transformative judgment, to be overturned by a conservative positivist judgment.

VII. INTERNATIONAL LAW AND REGIONAL INTEGRATION

1. The Application of International Law

Namibia has a monist system. Article 144 makes the general rules of international law and international agreements binding upon Namibia, as part of Namibian law. In principle it means that international law finds direct application in Namibian law without Parliament having to pass legislation to make it part of Namibia's municipal laws. While the Constitution makes the treaties directly applicable and does not demand a legal framework for the treaties to be implemented in Namibian domestic law, it is not always possible to obtain the results aimed at by the treaty without any domestic intervention.

The Convention Against Torture (CAT) is a case in point. In terms of the Convention, all member states are expected to criminalize torture. Torture has never been criminalised in Namibia. Instead, the prosecutorial authority has opted to prosecute for assault with the intent to do grievous bodily harm, a common law crime. At first sight, this seems to be a perfect solution since assault with the intent to do grievous bodily harm is a serious offence and the presiding magistrate or judge can impose a reasonably long prison sentence if the assault caused serious injuries.

However, the definitions of the two crimes are very different. While torture often constitutes a physical attack, it is not always the case. The European Union's guidelines for police officers include actions that do not even require that the body of the victim be touched.

The Committee against Torture has acknowledged that despite the broad framing of Articles 4, 5, 10, and 11, the CAT is not entirely self-executing and even if a constitution allows for direct effect of international law, a domestic legal framework is necessary for the implementation of the important aspects.[173] Thus, while the Namibian Constitution provides for the direct implementation of human rights treaties, it seems almost impossible to implement the treaties in the legal process without a legal framework. An investigation into the jurisprudence of the Namibian courts since independence shows that the human rights treaties have had almost no effect on the domestic legal processes. One searches in vain for an indication that the High and Supreme Courts are considering instruments.[174] In

[173] See Committee against Torture, Summary Records of the 28th meeting, note 15; of the 30th meeting, note 60; of the 50th meeting, note 62; etc. For a discussion of the criminalization of Article 4 in domestic law, see C. Ingelse, *The UN Committee Against Torture* (The Hague, Kluwer Law International, 2001) pp. 337-360.

[174] A case in point is the now well-known *Frank* case. The Human Rights Committee, the treaty body of the International Covenant on Civil and Political Rights, and other treaty bodies, have given several advisory opinions on the meaning of the word 'sex' as a category for protection. Almost without exception it included sexual orientation as a category. However, the Namibian Supreme Court opted to ignore the jurisprudence of international human rights law and followed the narrow

conclusion, despite the liberal approach of the Namibian Constitution, the UN human rights instruments are not given the prominence one would have expected. The courts have still expected the legislator to provide a legal framework for the implementation of treaty principles.

The high treason case against Caprivi secessionists who invaded the town of Katima Mulilo in 1999 had a very important legal side effect. In *Government of the Republic of Namibia and Others v. Mwilima and All Other Accused in the Caprivi Treason Trial*,[175] an appeal against a judgment in an application for legal aid, the Supreme Court dealt with the right to free legal representation.

The legal question focused on the enforceability of Article 95(h) of the Constitution. As noted above, ESC rights are not part of the entrenched rights Bill of Rights (Chapter 3).

Since Namibia has ratified both the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocols, it forms part of Namibian law and the courts must accede to it. Section 14(3) of the ICCPR is a combination of Articles 12(1)(e) and 95(h) of the Constitution, without the limitations of Article 95, which provides for legal aid 'in cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.' Consequently, as a party to ICCPR, Namibia is bound to apply its section 14(3) in its local jurisdiction. The Court made it clear that legal aid will never be automatic. The court will always have to satisfy itself that it is indeed in the interests of justice to grant legal aid in a specific case, and that the refusal of legal aid will make a fair trial impossible.

The direct application of section 14 of the ICCPR was an innovative and exciting development in constitutional jurisprudence in Namibia, albeit somewhat naïve. The constant reference in the decision to 'the Covenant' gives the reader the impression that the Court was not aware of the other Covenant – the Covenant on Social, Economic and Cultural Rights (ICSECR), which was ratified by Namibia on 28 November 1994, the same day that it ratified the ICCPR.

2. International relations

Namibia became independent on 21 March 1990, only a few months after the fall of the Berlin Wall and the subsequent collapse of several socialist states in Europe, many of them close allies of the Namibian liberation movements. Linked to the important role played by the United Nations in the Namibian independence process, as well as that of the Western Contact Group, the Namibian Constitution adopts and maintains a policy of non-alignment (Article 96 (a)).

Two sub-articles of Article 96 have been severely tested: 96(d), which fosters respect for international law and treaty obligations, and 96(e), which encourages the settlement of international disputes by peaceful means.

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interpretation of the Zimbabwean courts, defining sex as a category as men and women. See *The Chairperson of the Immigration Selection Board v. Frank*, 2001 NR 107 (SC).

[175] 2002 NR 235 (SC).

3. Namibia and the International Criminal Court

Although Namibia ratified the Rome Statute in 2002, it supported the African Union (AU) resolution in 2011 to refuse to execute warrants of the International Criminal Court (ICC) for the arrests of the Libyan leader Muammar Gaddafi and Sudan's Omar al-Bashir. Former Prime Minister Nahas Angula stated during the 17th ordinary session of the African Union in June 2011 that Namibia would support any resolution for African countries to withdraw from the ICC.[176] At a high-level UN meeting on the rule of law in New York in September 2012, President Pohamba echoed several of the AU's criticisms of the ICC – that it is biased against African countries.

Namibia's membership of the African Union, which organisation has stated that it will not execute arrest warrants against heads of state,[177] leaves the country with an untenable choice: to break with the AU's position, or not to comply with its obligations under the Rome Statute.

4. Namibia and the Kasikili Islands

When Namibia and Botswana clashed over the boundaries around Kasikili/Sedudu Island, the two countries decided to appoint a Joint Team of Technical Experts to resolve the issue in 1992. After failing to come to an agreement, they decided to refer the matter to the International Court of Justice for a final answer. The ICJ decided against Namibia. True to its Constitution, Namibia accepted the ruling.[178]

5. Constitutional provisions on the transfer of sovereign powers to regional bodies for integration purposes

There are no constitutional provisions on the transfer of sovereign powers to regional bodies. Namibia is an active member of the Southern African Development Community (SADC). It supported the idea of a tribunal dealing with trade and other regional conflicts. The SADC Tribunal was established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC, with its seat in Windhoek. However, when the Tribunal ruled against Zimbabwe in a complaint by a white farmer,[179] relying on Article 4 of the Treaty (which obliges states 'to act in accordance with human rights, democracy and the rule of law') the leadership summit decided in 2010 to suspend the work of the Tribunal pending further investigation.

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[176] C. Sasman, *Pohamba wants fair, unbiased ICC* (*The Namibian*, 26 Sept. 2012), available at [http://www.namibian.com.na/news-articles/national/full-story/archive/2012/september/article/pohamba-wants-fair-unbiased-icc/].

[177] African Union, 2012, Press Release Nº 002/2012, Addis Ababa, available at [http://www.iccnow.org/documents/PR-_002-_ICC_English_2012.pdf].

[178] International Court of Justice, 1999, *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Summary of the Judgment of 13 December 1999, available at [http://www.icj-cij.org/docket/index.php?sum=505&code=bona&p1=3&p2=3&case=98&k=b7&p3=5].

[179] *Campbell (Pvt) Ltd and others v. Republic of Zimbabwe* (SADC (T) 02/2007).

When the SADC Summit, with Namibia concurring, decided in August 2012 that a protocol for a new Tribunal would be negotiated and that the new Tribunal's mandate would be limited only to adjudication of member states' disputes, it was the end of Namibia's transfer of sovereign powers.

CONCLUSION

Namibia has, over the past twenty-three years, established itself as a constitutional democracy. The vast majority of judgments of its courts have played an important role in developing the rule of law and strengthening the independent constitutional offices. The rights of individuals have generally been protected.

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