

The constitutional jurisprudential development in Namibia since 1985

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Introduction

The jurisprudence evolving from the decisions of the Namibian courts and establishing a discernible epistemological paradigm can be best understood if studied within the context and perspectives of the historic evolution of the Namibian judiciary, and by an analysis of the pre- and post-independence decisions. The evolution of the Namibian judiciary is closely linked to the colonial history of the country.

Prior to the attainment of nationhood and the promulgation of the Namibian independence Constitution which creates an independent judiciary and Supreme Court of a sovereign nation, the courts of Namibia were an extension of the judicial system of South Africa. Following the imposition of South African administration over South West Africa, after the granting of the League of Nations' Mandate over the territory to South Africa, one obvious historical fact was the assumption of legislative powers over the territory by South Africa and the resulting extension of the South African legal system. The Administration of Justice Proclamation 21 of 1919 established the High Court of South West Africa, and the Appellate Division Act, 1920 (No. 12 of 1920) granted the appellate division of the Supreme Court of South Africa jurisdiction over decisions of the High Court of South West Africa to hear appeals from the judgments and orders from the court. By virtue of the provisions of the Supreme Court Act, 1959 (No. 59 of 1959), the judiciary of South West Africa was amalgamated into that of South Africa, resulting in the High Court of South West Africa being constituted as the South West Africa Provincial Division of the Supreme Court of South Africa. Logically, this meant the maintenance of the jurisdiction of the Appellate Division of the Supreme Court of South Africa over the decisions of the South West Africa Provincial Division of the Supreme Court of South Africa to hear and finally determine matters brought before it on appeal from the South West Africa Division or any other provincial or local division.

With the promulgation of the Constitution of the Republic of Namibia in 1990, the Supreme Court of Namibia became the highest court of appeal for Namibia.³⁷ It needs to be added that by Proclamation 21 of 1919, which provided, inter alia, that Roman-Dutch law was to be applied in the territory –

... as existing and applied in the Province of the Cape of Good Hope[.]

Roman-Dutch law became the common law of the territory. The overall impact of all these proclamations on the judicial and legal systems of South West Africa was that the decisions of the Supreme Court of South Africa and the Roman-Dutch law that were developed by the South African courts up until independence became binding on the courts of Namibia. This position was affirmed by Article 66(1) of the Constitution of the Republic of Namibia, which provides that –

[b]oth the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary law or common law does not conflict with this Constitution or any other law.

It has been pointed out that the South African legal system was constrained before the promulgation of that country's new Constitution by the jurisprudence and principles of legislative supremacy and analytical positivism.³⁸ John Dugard asserts that an empirical study of the legal process in South Africa leads to the conclusion that –³⁹

... judges adopt a neutral, non-activist position in their approach to human rights issues and that a form of positivism may account for this phenomenon.

This position was confirmed by MM Corbett, the then Chief Justice of South Africa, in his presentation to the Truth and Reconciliation Commission by these words:⁴⁰

37 See also Hosten, WJ, AB Edwards, F Bosman & J Church. 1997. *Introduction to South African law and legal theory* (Second Edition). Durban, p 398.

38 Dugard, J. 1971. "The judicial process, positivism and civil liberty". *South African Law Journal*, 88:181–200; Dugard, J. 1981. "Some realism about the judicial process and positivism – A reply". *South African Law Journal*, 98:372–387.

39 Dugard (1981:373).

40 Khan, E. 1998. "The Truth and Reconciliation Commission, and the Bench, legal practitioners and legal academics". *South African Law Journal*, 115:18.

[T]here are, and in the past always have been, constraints upon the exercise of judicial power. A judge is not always at liberty to do what he thinks is the best or most fair or expedient. He is required to dispense justice in accordance with the law. In the ideal situation law and justice coincide, but this need not necessarily be so, especially where the law consists of legislation. These truths are reflected in the oath which a judge is required to take upon assuming office. Prior to the coming into effect of the Interim Constitution, Act 200 of 1993, the oath prescribed was by s. 10 (2) (a) of the Supreme Court Act 59 of 1959 and it required the judge to swear to "... administer justice to all persons alike without fear, favour or prejudice, and ... in accordance with the law and customs of the Republic of South Africa".

It has been argued, therefore, that the decisions of the Superior Courts of South Africa involving legislation dealing with state security, interracial marriages and legislation, *sui generis*, created a particular type of jurisprudence, with an epistemological paradigm towards the denial of civil liberties, and a departure from liberal principles and presumptions of common law that constitute the cornerstone of Roman-Dutch law as developed by the South African courts.⁴¹ The courts of South West Africa, by the application of the doctrine of judicial precedent and *stare decisis* were, therefore, bound to be influenced by this jurisprudence and the related epistemological paradigm. As pointed out by Justice O'Linn,⁴² –

... the Courts functioned in a legal system where Parliament was supreme, not the Constitution ... [and that] notwithstanding the considerable constraints of security legislation and the effects of racist indoctrination of society, the courts generally allowed considerable freedom of expression and the opportunity to place both sides on the table in accordance with long established legal procedures.

Prior to the coming into effect of the Constitution of the Republic of Namibia, also for reasons stated above, the Namibian judiciary comprised South African-appointed judges applying South African law, with the constraints imposed by reliance on the jurisprudence of legislative supremacy and analytical positivism. However, with the enactment of Proclamation R101 of 1985 by the South African government, the Namibian legal system assumed a dimension that engendered an important differentiation and digression, both in principle and practice, from the South African legal system. The Proclamation provided for a Bill of Rights⁴³

41 Dugard (1981:376).

42 O'Linn, Bryan. [n.d.]. *Namibia: The sacred trust of civilization, ideal and reality*. Windhoek: Gamsberg Macmillan, p 179.

43 These rights included protection against execution without due process (Article 1); liberty, security of person and privacy (Article 2); equality before the law (Article 3); fair trial

against which the Namibian courts could test and review the validity of certain laws and administrative decisions and actions. In this regard, reference should be made to the observations of Eric C Bjornlund,⁴⁴ when he wrote that –

[c]ases in the South West Africa [Provincial Division of the] Supreme Court [of South Africa] between 1985 and 1990 seem especially significant because of the vigour with which the South Africa[-]appointed Namibian judges expressed civil liberties principles regardless of whether the holdings were explicitly based on the constitutional text. ... To the extent that the South African Appellate Division prevented the Namibian judges from giving effect to the Bill of Rights through judicial review, those judges often used grounds other than the Bill of Rights to emasculate repressive legislation and in the process created a bully pulpit to take the place of genuine judicial review. These cases suggest that Namibian judges believed that courts are empowered to promote the rule of law, and the Bill of Rights only strengthened their resolve.

Similar observations were made by Justice O’Linn:⁴⁵

The culture of human rights does therefore not commence with independence and the enactment of the new constitutions in Namibia and South Africa, even though the new constitutions abolished the discriminatory and security-dominated legislative dispensation and the principle of the supremacy of parliament. Consequently the courts can now also declare laws of parliament unconstitutional and null and void on the ground of being in conflict with human rights enshrined in the aforesaid constitution.

In their judicial functions, the South West African courts had to apply South African laws; in the area of civil law, where the application of the generality of Roman-Dutch common law was the issue, they were always at liberty to be guided by the liberal presumptions and principles of Roman-Dutch common law, e.g. the principles relating to practices and behaviour *contra bonos mores*. Their mettle and resolve to maintain these liberal ideals were put to the test in

(Article 4); freedom of expression (Article 5); peaceful assembly (Article 6); freedom of association (Article 7); participation in political activity (Article 8); freedom of culture, language, tradition and religion (Article 9); freedom of movement and residence (Article 10); and ownership of property (Article 11).

44 Bjornlund, Eric C. 1990. “The devil’s work? Judicial review under a Bill of Rights in South Africa and Namibia”. *Standford Journal of International Law*, 391-434 at 429.

45 See O’Linn B. 1996. “The role of the court in balancing the fundamental rights of accused and convicted persons with those of the victims and potential victims of crime and in ensuring the innocent is not punished and the guilty does not escape punishment”. In Cilliers, C & SK Amoo (Eds.). *The role of the courts in balancing the fundamental rights of accused and convicted persons with those of the victims and potential victims of crime*. Pretoria: University of South Africa, p 32.

cases where the application of relevant South African legislation was potentially inconsistent with the rule of law and civil liberties of the individual.⁴⁶ As mentioned earlier, these were cases involving the security laws and emergency regulations, including detention without trial, the presumptions of fair trial in criminal proceedings, the review of administrative discretion, restrictions on freedom of expression, and apartheid laws regulating residence.

It is the purpose of this paper to analyse some of the cases of the courts of South West Africa and Namibia from 1985 after the implementation of Proclamation R101 and after the promulgation of the Constitution of the Republic of Namibia: firstly, in order to determine the extent to which the South West African courts were able to apply the laws by upholding the legal presumptions that protect the rights of the individual during the colonial era; and, secondly, to establish if there has been any perceptible trend towards a particular jurisprudence, and the constitutional and epistemological paradigm emanating from and associated with such jurisprudence, since 1985.

Security laws

State v Angula⁴⁷

This case involved a capital prosecution of seven alleged South West Africa People's Organisation (SWAPO) guerrillas under section 11(a) of the Suppression of Communism Act, 1950 (No. 44 of 1950) for furthering the aims of communism, and under section 2(1) of the Terrorism Act, 1967 (No. 83 of 1967) for promoting the aims and objectives of SWAPO and participating in terrorist activities.

Under section 19 of Proclamation R101,⁴⁸ which constituted the interim government, the courts were given the power of judicial review over Acts of the South West Africa/Namibia Legislative Assembly. However, the Proclamation did not expressly grant the courts the jurisdiction to test the validity of the Acts of the South African Parliament under the South West Africa/Namibian Bill of Rights. The defence, nevertheless, challenged prosecutions under the Terrorism Act and the Suppression of Communism Act on the ground that both Acts conflicted with the provisions of the South West Africa/Namibian Bill of Rights

46 O'Linn (ibid.:179).

47 *State v Angula* 2 SA 540 (SWA 1986).

48 Proclamation R101, *Government Gazette* 9790 (South Africa 1985).

that guaranteed the presumption of innocence and prohibited any criminal sanction with retroactive effect, and argued that the court had the jurisdiction to review the validity of the Acts because, under section 34 of Proclamation R101, existing laws continued in effect only “subject to the provisions of the proclamation”.⁴⁹

The prosecution submitted that the Bill of Rights, being only the appendix to Proclamation R101, was not part of the territory’s constitution and, thus, could not be used to block the prosecutions. J Strydom, one of the five judges on the Supreme Court of South West Africa (and later Chief Justice of the Republic of Namibia), found that the Bill of Rights did form part of the new constitution, i.e. Proclamation R101. But while he conceded that the Suppression of Communism Act and the Terrorism Act did conflict with the South West Africa/Namibian Bill of Rights, he upheld the validity of the statutes on the ground that all existing laws constitutionally enacted by a competent authority continued in force until repealed.⁵⁰

State v Andreas Johnny Heita⁵¹

However, in the case of *State v Andreas Johnny Heita*, the defence succeeded in their argument that the Bill of Rights constituted higher imperatives which executive/legislative enactments should comply with for the achievement of the rule of law. In this case, the accused persons appeared before Judge Levy in the Supreme Court of South West Africa on charges of murder, abduction and contravention of the Terrorism Act. Originally, there was only one charge under the Terrorism Act; but based on 187 separate counts. Later in the trial, the indictment was changed on the application of the state by the deletion of counts 134–187, and the adding and/or restructuring of the indictment to include, inter alia, nine counts of murder and 31 of attempted murder.

The point was taken by the learned defence counsel, ab initio, that the charges contained in the indictment did not disclose offences, in that section 2 of the Terrorism Act was in conflict with Annexure 1 to Proclamation R101 and, in consequence, no prosecution for offences allegedly committed thereunder was competent. On 5 September 1986, after the objection to the indictment had

49 (ibid.).

50 Bjornlund (ibid.:416).

51 *State v Heita & Others* 1987 (1) SWA 311.

been served but before the presentation of argument thereon, Proclamation R157 of 1986 – issued by the State President of the Republic of South Africa, purporting to amend Proclamation R101 – was promulgated with the clear intention to prohibit the court from pronouncing on the legal objection taken to the charges. This was clearly evidenced by the retroactive application of Proclamation R157.

Sections 2 and 3 of the State President's Proclamation R157 provided as follows:

Sec. 19 of the Proclamation is hereby amended by addition of the following subsection:

(5) *No Court of Law shall be competent to inquire into or pronounce upon the validity of any Act of Parliament of the Republic of South Africa enacted before or after the commencement of this Proclamation. This Proclamation shall be called the second South West African Legislative and Executive Establishment Amendment Proclamation of 1986 and shall be deemed to have come into operation on 17 June 1985.*

However, in his judgment, Judge Levy alluded to the retroactivity of the Proclamation and upheld the objection of the defence on the ground that section 2(2) of the Terrorism Act, under which the accused was charged, was in conflict with the presumption of innocence contained in Annexure 1 to Proclamation R101 of 1985.

The court further held that –⁵²

... the State President's Proclamation R157 of 1986 neither dealt with a new procedure nor did it prescribe new rules of evidence; it was a substantive amendment in so far as it purported to prevent the Court from enquiring into or pronouncing upon the validity of Acts of the Republic of South Africa; that accordingly, since the present case had been pending before 5 September 1986, it was not affected by Proclamation R157; that accordingly, sec. 2 (1) (a) of the Terrorism Act had been repealed by Proclamation R101 so that the offences alleged to have been committed by the accused after June 1985 (the date on which Proclamation R101 had been promulgated) were no longer offences for which they could be prosecuted.

52 However, it needs to be added that, in the case of *Cabinet of the Interim Government v Katofa*, 1987 (1) SA 695 (A) at 727 G–729 F, the Appellate Division of the Supreme Court of South Africa held that Annexure 1 to Proclamation R101 of 1985 only applied to laws enacted by the newly installed Legislative Assembly and not to prior laws of the South Africa Parliament and, by implication, also not to administrative authority exercised in accordance with such laws.

Judge Levy's views on constitutional interpretation bore clear testimony to his resolve to use the Bill of Rights as higher imperatives to promote the rule of law.⁵³

Emergency regulations and detention without trial

***Kafota v Administrator-General of South West Africa*⁵⁴**

The applicant applied in the Supreme Court of South West Africa to order the release of his brother who had been detained in terms of section 2 of Proclamation AG 26 of 1978. The court ordered the authorities to grant the detainee access to a lawyer. The court found that the Administrator-General's *ipse dixit* – or unsubstantiated statement – that he was satisfied that the detainee was a person as intended by section 2 was not sufficient to discharge the onus resting on him to justify the detention of the detainee. Therefore, the court granted an *interdictum de libero homine exhibendo* ordering the detainee's release. The court found it unnecessary to consider whether the new Bill of Rights provided independent grounds to declare the continuing detention unlawful.

Other cases, like *Cabinet for the Interim Government of South West Africa v Bessinger*,⁵⁵ *NANSO v Speaker*,⁵⁶ and *Shifidi v Administrator-General of South West Africa & Others*,⁵⁷ involved the interpretation and application of the provisions of the Bill of Rights by the courts of Namibia before independence, indicating the resolve of these courts to use the Bill of Rights as higher principles to challenge the validity of the laws of the South African regime and promote the rule of law.

As indicated earlier, after the attainment of independence and sovereignty, Namibia adopted a Constitution with an entrenched Bill of Rights and a provision that elevated the Constitution as the supreme law of the land.⁵⁸ This effectively

53 See O'Linn (ibid.:24).

54 *Kafota v Administrator-General for South West Africa* 4 SA 211 (SWA 1985); see also 1986 (1) SA 800 (SWA).

55 1 SA 618 (SWA 1989).

56 *Namibian National Students Organisation (NANSO) v Speaker of the National Assembly for South West Africa*, 1 SA 617 (SWA 1990).

57 1989 (4) SA 631 (SWA).

58 Article 1(6) of *The Constitution of the Republic of Namibia* provides that “[t]his Constitution shall be the Supreme Law of Namibia”.

replaced the doctrine of legislative sovereignty – which, from the history of the legal systems of both South Africa and Namibia, was equated with legislative supremacy – with that of constitutional supremacy, which has provided the Namibian judiciary with the constitutional leverage to promote the principles of the rule of law and constitutionalism, and protect and advance the fundamental rights of the individual. This exercise has involved the interpretation of the Constitution and, since independence, the Namibian courts have adopted a values-oriented approach to such interpretation, and have thereby developed a jurisprudence based on value judgments and an epistemological paradigm rooted in the values and norms of the Namibian people. Chief Justice Strydom, in his address to judicial officers at the first Retreat of the Office of the Attorney-General at Swakopmund on 20–22 November 2002, stated the following:⁵⁹

[I]t is trite that ordinary presumptions of interpretation will not independently suffice in interpreting such a document [the Constitution] and that our Courts must develop guidelines to give full effect to the purport and aim of our Constitution. The Constitution remains the Supreme Law of Namibia from which all laws flow and against which all laws can be tested ... [I]n interpreting the Constitution, particularly Chapter 3, the Courts are often called upon to exercise a value judgment. It was this exercise that led the Court in the Corporal Punishment⁶⁰ decision to encompass both aspects of constitutional interpretation and judicial independence.

Chapter 3 of the Constitution provides for fundamental human rights and freedoms, which are entrenched. However, the Constitution draws a distinction between *rights* and *freedoms* and, with regard to the latter – in Article 21(2),⁶¹ for example – provides that they –

... shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

These limitations, together with the general nature of the provisions of a constitution, *prima facie*, require the exercise of the constitutional jurisdiction

59 The address was entitled “Namibia’s constitutional jurisprudence – The first twelve years”.

60 1991 (3) SA 76 (NmS).

61 Article 21 provides for the freedom of speech and expression, thought, religion, association, etc.

of the courts in interpreting the grey or penumbra areas of the Constitution, for example as to what constitutes *decency* or *morality*. Since independence, the courts been called upon to interpret similar provisions of the Constitution and, as mentioned earlier, have adopted a natural law-cum-realist or purposive approach, and have developed a particular jurisprudence based on the values of the Namibian people. These cases include the interpretation of the constitutionality of legislative provisions or practices relating to corporal punishment,⁶² the restraining of prisoners by chaining them to each other by means of metal chains,⁶³ homosexual relationships,⁶⁴ etc.

In the address mentioned above, Chief Justice Strydom also stated the following:

In the two Mwangingi cases⁶⁵ the High and Supreme Courts of Namibia accepted the principle that a Constitution, and more particularly one containing a Bill of Rights, calls for an interpretation different from that which courts traditionally apply to ordinary legislation. Dealing with instances where the courts were required to make value judgments[,] the corporal punishment case authoritatively laid down that a court, in coming to its conclusion, should objectively articulate and identify the contemporary norms, aspirations and expectations of the Namibian people and should have regard to the merging consensus of values in the civilized international community. These cases set the tone for Namibian Courts and the way it was required of them to interpret the [C]onstitution.

In the case of *Minister of Defence v Mwanginghi*,⁶⁶ the Supreme Court approved the dictum in *State v Acheson*⁶⁷ that –

[T]he Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion.

62 See *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* 1991 NR 178(SC); 1991 (3) SA 76 (NmS).

63 See *Namunjepo & Others v Commanding Officer, Windhoek Prison & Another*, 2000 (6) BCLR 671 (NmS).

64 See *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another*, Supreme Court of Namibia Case No. SA 8/99.

65 1992 (2) SA 355 (NmSC); 1993 NR 63 (SC).

66 1992 (2) SA 355 (NmSC).

67 1991 NR 1 (HC) at 10 AB.

In the case of *Government of the Republic of Namibia & Another v Cultura 2000*,⁶⁸ the late Chief Justice Mahomed reiterated this approach to the interpretation of the Constitution, as follows:

A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the “austerity of tabulated legalism” and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.

As mentioned above, this approach requires judicial decisions oriented to value judgments, which have been followed by the Namibian courts, but the value-judgment approach raises questions relating to the following:

- The identification of not only the values but also the authoritative source that has the mandate to do so
- The inherent elements of the subjectivity of this approach
- The nature of the mechanism to be employed to ascertain the values and norms, and
- The binding effects of the values.

These issues will be addressed in the analysis of the cases in which this approach has been used to interpret relevant provisions of the Constitution. One could perhaps refer to the views of Chief Justice Strydom on the question of the ascertainment of the norms and aspirations of the people of Namibia as an initial point of reference. In the same address, he stated the following:⁶⁹

[T]o determine the contemporary norms, aspirations and expectations of the Namibian people is a most important requirement when it comes to the interpretation of the Constitution and how it should be applied. What those norms and aspirations are is not always easy to determine and the parameters thereof are always not limitless. When the Constitution says that there shall be no discrimination on the grounds of sex, even if there is a majority who may be in favour of such discrimination[,] it cannot change the express prohibition against discrimination set out in the Constitution. Many of the norms and aspirations of the people are contained in the Constitution itself. Discrimination on the basis of certain stereotypes is rooted out. The dignity of all persons is guaranteed

68 1993 NR 328 (SC) at 340 B–D; 1994 (1) SA 407 NmSC, at 418 F–G. See also *Minister of Defence, Namibia v Mwandighi*, 1993 NR 63 (SC) at 68–71; (1992) (2) SA 355 (NmS) at 361–3; *State v Acheson*, 1991 NR 1 (HC) at 10 A–C at 10; or (1991) (2) SA 805 (NmH) at 813 A–C.

69 See footnote 23 supra.

by the Constitution. The theme against the violation of a person's dignity starts with the preamble of the Constitution and can be traced to many of the provisions of Chapter 3 and other provisions of the Constitution. These and other provisions should constantly be in the mind of the judge called upon to interpret the Constitution.

The matter relating to the identification and ascertainment of the norms and values of the Namibian people, unfortunately, does not rest there. It is trite that constitutional provisions and legislation, *sui generis*, are couched in a language that is often broad and vague and, therefore, will require judicial interpretation. The Constitution may be the reference point to identify these norms and values, but, as Chief Justice Strydom correctly pointed out, the parameters of determining them are limitless.

The late Chief Justice Mahomed, in deciding whether corporal punishment authorised by law can properly be said to be inhuman or degrading and, therefore, whether it was inconsistent with Article 8 of the Constitution,⁷⁰ in the case of *Ex Parte Attorney[-]General. Namibia : in re Corporal Punishment* used the national institutions as sources of identification of norms and values of the society, and thereby added another dimension to the jurisprudence. He stated the following:⁷¹

[T]he question as to whether a particular form of punishment authorized by the law can be said to be inhuman or degrading involves the exercise of value judgment by the Court. It is[,] however[,] a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in a civilized international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.

70 Article 8 of the Constitution of Namibia provides as follows:

- (1) *The dignity of all persons shall be inviolable.*
- (2) (a) *In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.*
(b) *No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.*

71 1991 (3) SA 76 (NmS) at 91 DF.

It will be observed from the *Cultura 2000* case⁷² that, even though the Court laid down the value-oriented or purposive approach to the interpretation of the Constitution as one to be used by the Namibian courts in interpreting the Constitution, in the *Corporal Punishment* case,⁷³ the late Chief Justice Mahomed went further to identify some sources, i.e. the institutions and the Constitution, where these values may be articulated.

In the case of *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Elizabeth Khaxas*,⁷⁴ the court identified some of these institutions and gave some guidelines as to how the norms and values are to be identified. In the words of Justice O'Linn, —⁷⁵

[t]he “institutions” referred to were also described in the decision of the High Court in State v Tcoeb.⁷⁶ The Shorter Oxford English Dictionary was referred to wherein the following definition appears:

... an established law, custom, usage, practice, organization or other element in the political and social life of the people; a well-established or familiar practice or object; an establishment, organization or association, instituted for the promotion of some object, especially one of public utility, religion, charitable, education, etc.

The Namibian Parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian Churches and other relevant community-based organisations can be regarded as *institutions* for the purposes hereof.

In this court's judgment in *State v Namunjepo*,⁷⁷ it was also accepted that –

... Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current[-]day values of the people.

72 1993 NR 328 (SC); 1994 (1) SA 407 NmSC.

73 *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* 1991 NR 178(SC); 1991 (3) SA 76 (NmS).

74 Supreme Court of Namibia Case No. SA 8/99.

75 (ibid.).

76 1993 (1) SACR 274 (NmS) at 284 d–e.

77 *Namunjepo & Others v Commanding Officer, Windhoek Prison & Another*, 2000 (6) BCLR 671 (NmS) 678 H.

This attracts a few comments and observations. First of all, Parliament's legislative function is exercised by way of debates in order to ascertain the weight of authority to be placed on an opinion, and in most cases, a decision is taken by the requisite majority vote, followed by the enactment of the relevant legislation. In this case, the guideline being offered here is not adequate as it does not indicate whether the contemporary values or the norms of the Namibian people are those that have been articulated and enacted in the form of legislation, or whether they are those that constitute mere expressions of opinions of members of Parliament in the form of debates, etc. To do justice to the decision of Justice O'Linn, however, it must be added that, with reference to the recognition of homosexual relationships in Namibia, certain specific reasons and yardsticks were provided for the reliance on Parliament as one of the sources of the identification of the values and norms of the Namibian people. Justice O'Linn stated that –

[a]lthough homosexual relationships must have been known to the representatives of the Namibian nation and their legal representatives when they agreed on the terms of the Namibian Constitution, no provision was made for the recognition of such a relationship as equivalent to marriage or at all. It follows that it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual relationship. ... In Namibia as well as Zimbabwe, not only is there no such provision, but no such legislative trend. In contrast, as alleged by the respondents, the President of Namibia as well as the Minister of Home Affairs have expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships. As far as they are concerned, homosexual relationships should not be encouraged because that would be against the traditions and values of the Namibian people and would undermine those traditions and values. It is a notorious fact of which this Court can take judicial notice that[,] when the issue was brought up in Parliament, nobody on the Government benches, which represent 77% of the Namibian electorate, made any comment to the contrary. It is clear from the above that far from a "legislative trend" in Namibia, Namibian trends, contemporary opinions, norms and values tend in the opposite direction.

This position, however, has received some comments and criticisms, and in this regard, reference is made to the observations of EK Cassidy,⁷⁸ when she commented as follows:

78 Cassidy, EK. [n.d.]. "Article 10 of the Namibian Constitution: A look at the first ten years of the interpretation of the rights to equality and non-discrimination and predictions of the future". In Hinz, Manfred, Sam Amoo & Dawid van Wyk (Eds.). *The Constitution at work: 10 years of Namibian nationhood*. Pretoria: University of South Africa, p 186.

The decision assumes, without including any additional support, that the comments of the other two government officials (albeit ones in very high positions) necessarily reflect the views of the majority of Namibians in this matter. Their argument would have been stronger logically with more definitive evidence of public opinion. The majority did not consider, for example, the possibility that the silence of the ruling party Parliamentarians may have reflected party loyalty and/or respect for the President and Minister rather than agreement with their views.

The other questions relating to the identification of norms and values are the methods of verification and the subjectivity or objectivity of such methods used in the process of the identification and ascertainment of the ethos of the Namibian people.

Justice O'Linn in the *Elizabeth Frank* case⁷⁹ gave these guidelines on the subject:

The value judgment, as stated in S v Vries,⁸⁰ can vary from time to time but which [sic] is one not arbitrarily arrived at but which [sic] must be judicially arrived at by way of an attempt to give content to the value judgment by referral to the prevailing norms which may or may not coincide with the norms of any particular judge. As was pointed out in Coker v Georgia 433 US 584 (1977) at 592 these "judgments should not be, or appear to be, merely the subjective views of individual justices; judgment should be informed by objective factors to the maximum possible extent".

The objective factors can be derived from sources which include, but are not limited to: the Namibian Constitution; all the institutions of Namibia as defined supra including: debates in Parliament and in the regional statutory bodies and legislation passed by Parliament; judicial or other commissions; public opinion as established in properly conducted opinion polls; evidence placed before Courts of law and judgments of Courts; referenda;[and] publications by experts.

He continues:

[T]he relevance and importance of public opinion in establishing the current or contemporary values of Namibians when the Court makes its value judgment has been discussed in various decisions, including the decision in State v Vries⁸¹. To avoid any misunderstanding, I reiterate what I said in State v Vries in this regard: "In my respectful view the value of public opinion will differ from case to case, from fundamental right to fundamental right and from issue to issue. In some cases public opinion should receive

79 See footnote 28, supra.

80 1996 (2) SACR 638 (NmS) at 641 c-d.

81 (ibid.).

very little weight, in others it should receive considerable weight. It is not a question of substituting public opinion for that of the Court. It is the Courts that will always evaluate the public opinion. The Court will decide whether the purported public opinion is an informed opinion based on reason and true facts; whether it is artificially induced or instigated by agitators seeking a political power base; whether it constitutes a mere 'amorphous ebb and flow of public opinion' or whether it points to a permanent trend, a change in the structure and culture of society. ... The Court therefore is not deprived of its role to take the final decision whether or not public opinion, as in the case of other sources, constitutes objective evidence of community values".

The methods of which a Court can avail itself to obtain the necessary facts for the purpose of the enquiry, include, but are not limited to: taking judicial notice of notorious facts; testimony in viva voce form before the Court deciding the issue; facts placed before the Court by the interested parties as common cause; the compilation of special dossiers compiled by a referee in accordance with the provisions of Article 87(c) read with Article 79(2) of the Namibian Constitution and sections 15 and 20 of the Supreme Court Act and Rule 6(5)(b) of the Rules of the Supreme Court and Rule 33 of the High Court Rules.

He concludes that the essence and advantage of the evidential enquiry are that it serves as an objective assessment mechanism. As he puts it, –

... it may be the only appropriate way to achieve the purpose of establishing the contemporary norms and values[,] etc. ... and that [i]f the Court refuses to launch an evidential enquiry, it will fall into the trap of substituting its own subjective views for an objective standard and method. The requirement to consider the Namibian norms and values will then become a mere cliché to which mere lip service is paid.

The issue of public opinion raises questions relating the doctrine of separation of powers and the very nature of public opinion as a legitimate source of law because of, inter alia, the vicissitudes inherent in the nature of public opinion. It would appear that the position taken by the court in this case with regard to the integration of public opinion as a legal norm by the courts is a balance between what Max du Plessis calls the “utopian” and “Rawlsian” approaches to the issue of public opinion.⁸²

The other element involved in the issue of public opinion is one relating to the separation of powers. It is recognised that it is within the purview of the mandate of the legislative branch of government to legislate for matters raised to the level of national awareness by public opinion. It is also an accepted principle that, in

82 Du Plessis, M. “Between apology and utopia: The Constitutional Court and public opinion”. *South African Journal on Human Rights*, 18, 1:1–41.

their interpretive jurisdiction, they have a creative role which may involve the interpretation of a constitution or an ordinary legislative enactment. Therefore, in certain circumstances, the courts will be called upon to make authoritative pronouncements on grey or penumbra areas of the law, sometimes involving areas of public policy and values of the society, without first referring the matter to the legislature to be settled in a legislative enactment. Thus, the courts will have to play a balancing act to avoid what might constitute usurpation of the functions of the legislature. The degree of reliance on public opinion has to be determined by whether the issue involves the interpretation of a constitutional provision or a mere legislative enactment. In this regard, the courts will have to be mindful of the fact that values may not be equated with public opinion, and that it is the function of the courts to protect the rights of minorities in the face of the vicissitudes of the public opinion of the majority.

With regard to the binding effect of the values, the general principles of the judicial process – including the principles of separation of powers, judicial precedent and stare decisis – are that these values become binding if they are incorporated into legislation which is not inconsistent with the higher imperatives of a constitution, or where they are given the status of legal principles through judicial interpretation. The source of the binding effect of values elevated to principles of law through judicial interpretation is located and inherent in the constitutional jurisdiction of the courts. Therefore, these values get the authoritative stamp of legal principles and the force of law through the decisions of the court and, in this regard, through decisions involving interpretation of the Constitution.

Judge O’Linn, in addressing this issue in the *Erna Elizabeth Frank* case,⁸³ draws a distinction between the provisions⁸⁴ in the South African and Namibian Constitutions relating to the role of the courts in interpreting and giving effect to the Constitution, and concludes that –

[i]n South Africa, the judicial authority is stated in Art. 165 to vest exclusively in the Courts but as I pointed out Art. 39 vests wide powers, not only in the Courts but in tribunals or forums which appear to have judicial powers when interpreting the Bill of Rights. In regard to the judicial authority, the Namibian Constitution is ambiguous. The judicial authority is vested in the Namibian Courts by Art. 78(1), but Art. 78(2) makes their independence subject to the Constitution and the law. Although Art. 78(2) provides that the Cabinet or Legislature or any other person may not interfere with the Courts in the exercise of their judicial functions, Art. 81 provides that a decision of the Supreme

83 See footnote 38, supra.

84 See Article 39(1) and (2) and Article 165 of the Constitution of the Republic of Namibia.

Court is no longer binding if reversed by its own later decision or if contradicted by an Act of Parliament. This means ... that Parliament is not only the directly elected representative of the people of Namibia, but also some sort of High Court of Parliament which[,] in an exceptional case, may contradict the Supreme Court, provided of course that it acts in terms of the letter and spirit of the Namibian Constitution, including all the provisions of Chapter 3 relating to fundamental human rights.

This view tends to suggest that the relationship between the judiciary and the legislature with regard to the binding effect of the constitutional interpretations of the courts leads to a position of a vicious circle, but the relationship as envisaged under Article 81 of the Namibian Constitution is a logical result of the principles of the separation of powers. This relationship is not meant to create a never-ending process. It is meant to create an element of finality in the process; and even though the courts have the role of interpreting the Constitution and upholding the rights of the individual as enshrined in it, the legislative function of Parliament has to be recognised and maintained – subject, of course, to the proviso that legislative enactments are not inconsistent with the Constitution.

Conclusion

The constitutional history of Namibia prior to the promulgation of Proclamation R101 of 1985 and the Constitution of the Republic of Namibia in 1990 depicts a legal and judicial system that was constrained by the concept of legislative supremacy and analytical positivism. The promulgations of the two constitutional instruments saw the evolution of a new constitutional paradigm oriented towards the achievement of the rule of law and the promotion and maintenance of human rights, by the decisions of the courts.

Article 5 of the Namibian Constitution provides as follows:

The fundamental rights and freedoms enshrined in this Chapter [3] shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

This provision imposes a collective responsibility on all the organs of state, and requires a judiciary that is both willing and able to maintain its integrity and independence against the onslaught of executive intimidation, interference, and political patronage. The record of the Namibian judiciary indicates that, from 1985 to date, it has demonstrated the will power and integrity not to compromise

its independence, and to interpret and apply the laws of Namibia to uphold and protect the rights of the individual as provided in the Bill of Rights. In the process, the courts have adopted a particular constitutional jurisprudence and a related epistemological paradigm oriented towards value judgments, and rooted in the current and contemporary values of the Namibian people. This approach, however, raises questions relating to the courts' jurisdiction as the custodian of minority rights, and the integration of public opinion in the interpretive process of the courts.