

The art of compromise: Constitution-making in Namibia

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How can we hope to understand the world of affairs around us if we do not know how it came to be what it is?

AL Rowse

For more than a century, the country that was to become Namibia was ruled in terms of constitutions and laws in whose drafting the inhabitants were never involved and seldom properly consulted.

During 1883, Adolph Lüderitz, a German merchant, established a trading station at what is today the coastal town of Lüderitz. To protect his interests, he persuaded the German Government to declare a protectorate in 1883 over large tracts of land in the south-western parts of the future Namibia.¹

From 1883, the country was first ruled by the military under *Landeshauptmann*² Curt von François, and then, in 1909, by a Landesrat.³

After the German forces were defeated by South Africa in 1915 and the subsequent end of the First World War in 1918 and the Peace Treaty of Versailles on 28 June 1919, South Africa took over control of the territory. A military government under an Administrator was installed, and continued to govern after South West Africa (SWA) was entrusted to South Africa to be administered as an integral part of the latter in terms of a mandate signed on 20 December 1920.

In 1925, South Africa, in terms of the SWA Constitution Act,⁴ introduced a Legislative Assembly for SWA with 18 members. Of these, 12 were elected by white voters and the other six (white) members were appointed by the Administrator. A four-member Executive Committee was also provided for.

In 1949, shortly after the National Party in South Africa defeated the United Party in a general election, the South African Parliament amended the SWA Affairs Act⁵ to give the

1 For the sake of clarity, I shall hereafter refer to the country as *South West Africa* when I discuss the period before Independence, and as Namibia from Independence onwards, even though the country went by the name *South West Africa/Namibia* for a while in the 1980s.

2 Captain.

3 Legislative assembly.

4 No. 42 of 1925.

5 No. 23 of 1949.

white voters in SWA direct representation in both houses of the South African Parliament by way of four Senators and six Members of Parliament. Thereafter, all 18 members of the Legislative Assembly were to be elected by the white voters in the territory. The South African Citizen Act⁶ extended South African citizenship to anyone born in SWA, but only whites had the vote. For all practical purposes, these laws made SWA a fifth province of South Africa.

In 1964, the South African Government, under Prime Minister Dr Hendrik Verwoerd, implemented the infamous Odendaal Plan. In terms of this Plan, 400 white-owned farms were expropriated to extend the so-called homelands set aside for the country's indigenous peoples.

In 1969, several Departments previously administered by the Executive Committee were placed under control of Ministers of the South African Government. The SWA Administration was, in this process, degraded to the level of a provincial administration, similar to that of other South African Provinces. This amounted to a de facto incorporation of the territory and had far-reaching international consequences.

Ethiopia and Liberia, the only African members of the United Nations (UN) who had been members of the League of Nations, instituted legal proceedings in the World Court against South Africa in 1960 on the grounds that the latter was administering SWA in a manner contrary to the League's mandate, the UN Charter, the Universal Declaration of Human Rights, and the opinions of the International Court of Justice (ICJ).

Six years later, in 1966, the World Court dismissed the applicants' claims because Ethiopia and Liberia had no rights or interests in the case. The court's ruling was widely interpreted as a victory for South Africa, even though there was no factual evidence to back this up.

The World Court also made it clear that it was not entitled to pronounce judgment on the merits of South Africa's administration of SWA.

In 1968, the UN General Assembly adopted a resolution which –

... took into account General Assembly Resolution 2145, by which the General Assembly of the United Nations terminated the mandate of South Africa over South West Africa and assumed direct responsibility for the Territory until its independence.

On 29 July 1970, the UN Security Council requested advice from the ICJ. The question put to the ICJ was this: What are the legal consequences for States of the continued presence of South Africa in South West Africa (Namibia) notwithstanding Security Council Resolution 276/1970.

In 1971, the ICJ made the following pronouncement:

6 No. 44 of 1949.

As the continued presence of South Africa in South West Africa is illegal, South Africa is under obligation to withdraw its administration immediately and thus put an end to its occupation of the territory.

Following the ICJ's directive in 1970 and far-reaching decisions by the UN, it became evident that South Africa was under tremendous pressure to withdraw its administration from SWA.

In 1972, local leaders had their first taste of international politics when Dr Kurt Waldheim, the UN Secretary General, visited South Africa in an effort to resolve the lingering SWA problem. Dr Waldheim paid a brief visit to the region to spell out the seriousness of the situation to local leaders. It was evident that he wanted to avoid confrontation and further actions by the UN General Assembly. During his visit to South Africa, Dr Waldheim indicated that he would appoint a special representative to visit that country and SWA for consultation with local leaders, apparently to find common ground.

Swiss diplomat Dr Alfred Escher, accompanied by a certain Mr Chaco from India and a Mr Pedanou from Togo, arrived in Windhoek in the beginning of 1973. Shortly before their arrival, Dr Hilgard Muller, the South African Minister of Foreign Affairs, unexpectedly requested me to accompany Dr Escher on a tour to various parts of the Territory. This was my first opportunity to have extensive deliberations with a representative of the international community, while hearing the views of the black inhabitants – a domain previously reserved for the South African Government and its representative in SWA, the Commissioner General for the Indigenous Peoples of SWA, Mr Jan de Wet. Mr De Wet accompanied Dr Escher on his visit to the northern homelands, Ovambo and Kavango.

When I took over from Mr De Wet at Otjiwarongo, I encountered my first problem, namely accommodation for Dr Escher's group and a place where I could entertain them and create an opportunity to meet local residents. The local hotel was initially not prepared to accommodate them because of the 'non-whites' in the group. The Mayor of Otjiwarongo explained to me that it would also be an embarrassment to make his property available for a barbeque. I eventually succeeded in convincing the hotel owner that the men were from the UN. This was my first experience in international politics, but certainly not my last. More were still to come on our trip to the South. Dr Escher addressed gatherings of Nama people, but instead of listening to them, he became prescriptive – proposing a federal system of government. I warned him on several occasions that South Africa's declared policy, as set out in the SWA Survey of 1967, was that the people themselves would decide on their system of government, and that, to my mind, he was overstepping the boundaries of his assignment.

Relations between Dr Escher and me deteriorated to such an extent that I phoned Dr Muller and Mr Pik Botha – then serving at the African Desk in the Department of Foreign Affairs – to meet the delegation at Oranjemund in order to clarify the purpose of Dr Escher's visit. I did not feel experienced enough to solve the problem, however. After Dr Muller and Mr Botha's visit to Oranjemund, our meetings on our way back to Windhoek were more fruitful. But again, we had problems with accommodation. In

Keetmanshoop and Mariental, the hotels were not prepared to accommodate our group for the same reasons mentioned before. We therefore had to overnight at the half-completed Hardap rest camp. These experiences made me more sensitive to racial discrimination than I had been before.

The Prime Minister's Advisory Council

During a meeting in Pretoria between Dr Escher and the Prime Minister of South Africa, Mr John Vorster, they reached an agreement that the Prime Minister would take full control of the administration of the Territory and that he would establish an office in Windhoek. Thus, instead of trying to find a way to end South Africa's illegal control over SWA, it was reinforced.

At the same meeting it was also decided that an Advisory Council, representative of the inhabitants of the Territory, would be assembled. The Commissioner General, Mr De Wet, was asked to nominate representatives for the indigenous groups, while Adv. Eben van Zijl and I were nominated as representatives of the white inhabitants.

I did not agree with the composition of the Advisory Council because most of the representatives were indoctrinated homeland leaders who were favourably disposed towards the South African Government. In March 1973, I made contact with Mr Clemens Kapuuo, Paramount Chief of the Herero people, who, since the UN had come into being, had petitioned the world body to bring an end to South Africa's occupation of the Territory.

Kapuuo was seen as an enemy by the South African Government, in spite of the fact that he was an outspoken opponent of violence or an armed struggle. Kapuuo refused to join the Advisory Council, but agreed to have further discussions with me regarding the future of SWA. Even at this early stage, it was evident that there were serious differences between me and my white colleagues on the one hand, and between us and the South African Government on the other.

House of Assembly

The October 1973 Session of the UN General Assembly

During the trip with Dr Escher, I realised that I was not adequately informed about the international situation. I was thrown in at the deep end without any background on the problems facing our country at international level. Dr Muller responded favourably to a request from me to attend the forthcoming Session of the UN General Assembly as an observer.

My visit to New York for this purpose in 1973 can be seen as a turning point in my political career. For the first time, I realised that South Africa was fighting a losing

battle regarding its control and administration of SWA. When Dr Muller ascended the rostrum to deliver his address, the vast majority of the members walked out, with only the representatives of a few Western countries and Malawi remaining. I conveyed my assessment of the situation to Mr Pik Botha, who attended the Session, and Mr Carl von Hirschberg, South Africa's Permanent Representative to the UN. I suggested that the only solution to the problem was to let the people of SWA determine the future of the country, as was promised to them in 1967.

Another incident that had a major impact on my way of thinking was a meeting with Mr Kapuuo, who was in New York to address the Fourth Committee of the UN. The two of us agreed that neither the UN nor South Africa could permanently solve the SWA problem because the UN was biased in favour of the South West Africa People's Organisation (SWAPO), who wanted to take over control of the country by force, and was biased against South Africa, who wanted to impose their policy of separate development on SWA. We also agreed that the armed struggle needed to be terminated and that a democratic solution should be found instead.

During this meeting with Mr Kapuuo, I understood for the first time the feelings of an oppressed black inhabitant of this country, betrayed by an organisation on which he and his people had for many years relied to find a peaceful and democratic solution to the Territory's problems. Mr Kapuuo felt beleaguered by the South African Government, who labelled him an enemy, and the UN, who had betrayed him. This meeting between two former political enemies led to a sincere friendship which lasted until his assassination in March 1978.

Prior to my departure from New York, I arranged a meeting with Prime Minister Vorster in Pretoria. I informed him that Messrs Botha and Von Hirschberg and I had come to the conclusion that South Africa's position at the UN was under threat, and that the only remaining solution was self-determination.

Mr Vorster undertook to arrange a meeting in January 1974 to discuss my proposals. On 24 January that year, a committee – later referred to as the *Quo Vadis Committee* – had its first meeting to discuss ways and means to enable the people of SWA to exercise their right to self-determination.

Mr AH du Plessis and I represented the National Party of SWA. The Prime Minister was accompanied by Ministers of his Cabinet, senior officials from certain Departments in the South African Government, and Mr De Wet, the Commissioner General for the Indigenous Peoples of SWA.

This was the first in a series of meetings of a committee under the chairmanship of Prime Minister Vorster, which ultimately led to the establishment of the constitutional conference later known as the Turnhalle Conference. I repeated my view that the real leaders of the people, including Kapuuo, needed to be invited to participate in the proposed conference.

Minister MC Botha and Mr Jan de Wet did not agree, however, and insisted that the homeland leaders be invited instead. SWAPO consistently refused to talk to internal leaders and made it clear that they were only prepared to talk to South Africa.

The first step towards self-determination

The Turnhalle Conference, an initiative of the people of South West Africa, representing 11 political parties and representing 11 population groups, convened in September 1975. This group included Mr Kapuuo, the leader of the National Unity Democratic Organisation (NUDO). I was elected as Chairman of the Conference, and had the opportunity to play a decisive role in uniting the delegates with a Declaration of Intent, which envisaged independence for the region by peaceful means as the ultimate goal.

It soon became obvious that my National Party colleagues and I had different agendas. Messrs Du Plessis and Van Zijl obviously wanted to safeguard white interests at the expense of the other groups, while I stood firmly on the principle of non-discrimination and respect for human dignity. Indeed, I advocated better human relations throughout my political career.

When a draft Constitution for an independent Namibia was discussed at the Conference, it became evident that there were serious disagreements between me and my National Party colleagues regarding the functions and powers of the different levels of government. My colleagues proposed extensive powers for second-tier (ethnic) authorities and a ‘toothless’ central government, while I proposed a strong central government with limited powers to ethnically based (cultural) authorities.

A more serious point of dispute was the National Party’s claim that the Representative Authority for Whites had to have jurisdiction over the so-called white area, in spite of the fact that more black than white people lived in that area. Relations between my party colleagues and me became more strained, and I was accused of disloyalty. My views on human relations and respect for human dignity were seriously challenged. I could not remain silent any longer.

Addressing a meeting in the small village of Kamanjab in November 1976, attended by farmers from that area, I declared that I did not need apartheid laws and the Prohibition of Mixed Marriages Act⁷ to maintain my identity. I also suggested that the National Party of SWA should sever its ties with the party in South Africa. I expressed myself strongly in favour of political cooperation across racial divides. National Party leader, Mr Du Plessis, reprimanded me sharply for criticising the party in a public speech.

Congress of the National Party, September 1977

After several attempts to resolve policy differences, I announced that I would challenge the National Party leadership at the Congress. In the weeks prior to the Congress I had

7 No. 55 of 1949.

discussions with a small group of party members who openly sided with me. We focused on policy matters, and agreed that my making myself available as party leader was, in the first instance, not a personal matter, but an opportunity for the Congress to either accept or reject my constitutional proposals. We also decided that I would not be personally involved in an election campaign.

After my announcement that I would challenge his leadership, Mr Du Plessis made it abundantly clear that, should he be re-elected, I would either have to accept his leadership and his policy, or leave the party. He said he would do the same, should he lose.

I lost by six votes (141–135). I had no option but to leave the Congress. The last words I spoke before leaving the hall was to thank those delegates who had voted for me for their support, and state in conclusion that “I’m leaving, but you must stay and correct what is wrong in the Party.”

In spite of my appeal, 78 delegates followed me when I walked out of the hall. There was chaos outside. Reporters were running around to get more information and delegates had no idea what was going to happen next. Somebody suggested that we meet that same evening to discuss the road ahead. At this meeting it was decided that action committees had to be formed in all constituencies, and that a conference would be held to decide on future action.

On 5 October 1977, the Republican Party was formed and I was elected as its leader. One month later, on 5 November, the Democratic Turnhalle Alliance (DTA) was established. Mr Kapuuu was elected as President, and I as Chairman. These developments, as could have been expected, divided the white population and led to emotional outbursts. Republican Party leaders and supporters were called traitors and our meetings were often disrupted. The DTA was the first-ever non-racial political organisation registered in South West Africa in the history of the country.

The Western Initiative

Simultaneously with the above-mentioned events, five major Western powers – Canada, France, Germany, the United Kingdom and the United States of America – took the initiative and proposed that a Constituent Assembly be elected under UN supervision. It was obvious that proposals such as these by Western countries were prompted by the initiative taken by the Turnhalle Conference.

We never considered a unilateral declaration of independence as an option.

I succeeded in convincing the DTA leaders to accept the Western proposals, subject to certain conditions, mainly with regard to the impartiality of the UN.

1978 elections

Because of the slow progress made with the negotiations between South Africa and the UN, and South Africa’s reservations regarding the UN’s impartiality, on 20 September

1978 Prime Minister Vorster declared that he was obliged to honour his government's commitments to the Turnhalle Conference, and that SWA would become independent on 31 December 1978. He announced that elections for a Constituent Assembly would be held in December that same year.

I had serious doubts about the wisdom of having an election without participation by SWAPO. SWAPO, however, having been recognised by the General Assembly as "the sole and authentic representative of the people", did not show any interest in a democratic process and insisted that the country be handed over to them. Be that as it may, the election provoked a serious and open debate concerning the independence issue.

White South West Africans – who had never believed that South Africa would give up SWA – realised that, sooner or later, the country would become independent. An unknown number of them sold their properties and left for South Africa.

Even without SWAPO's participation, it was the first multiracial election in the history of SWA, and can be described as an exercise in democracy. In spite of the reasons given by the South African Prime Minister as regards the holding of the 1978 elections, I suspected that, because of the infighting in SWA politics, he wanted the real leaders of the country to be elected. This was later confirmed by his successor, Mr PW Botha.

During the election campaign I experienced strong opposition from right-wing parties and some of my meetings were disrupted. At some of these meetings I was bombarded with eggs and tomatoes and, at Grootfontein, even assaulted. Emotions ran high and I was called a sell-out and traitor because I supported independence and condemned apartheid.

Reconciliation, respect for human dignity and an end to apartheid and racial discrimination formed the core of my colleagues' and my speeches. Even if this election did not achieve international recognition, it brought about a change of heart and attitude that was recognised and applauded by SWAPO leaders when they returned to Namibia in 1989.

Mr Hage Geingob and Mr Theo-Ben Gurirab assured me that the Namibia they came back to was not the same one they had left.

I often said that, although we did not write a final Constitution on paper during and after this election, we wrote a Constitution in the hearts of people, paving the way for a peaceful independence process.

The election was won by the DTA with an overwhelming majority. However, at the elected Assembly's first meeting after that, the newly elected Prime Minister of South Africa, Mr PW Botha, requested the elected members of the Constituent Assembly not to continue with the drafting of a final Constitution. This new approach by the South African Government originated at a meeting they had had with the five above-mentioned Western powers. The South African Government undertook to do its best to persuade the

elected leaders not to continue with the drafting of a Constitution, but to consider ways of achieving international recognition through cooperation in terms of Resolution 435. He described the election as a process to elect leaders.

Proclamation AG 21 of 14 May 1979

The South African Government agreed to transform the Constituent Assembly into a Legislative Assembly. The Administrator-General consequently issued proclamation AG 21 to institutionalise this new arrangement. For the first time in history, black citizens could participate in the making of laws at national level.

One of the first laws to be passed by this Assembly was a bill I introduced on 8 June 1979 to abolish racial discrimination in public facilities and residential areas. This led to another emotional outburst from conservative whites. On 11 June that year, probably for the first time in SWA's history, hundreds of white demonstrators bearing placards gathered outside the Turnhalle building. They placards bore derogatory remarks about me and my white colleagues.

The introduction of this anti-apartheid law also worsened the already strained relations between me and Prime Minister Botha. Mr Botha could not forgive me for dividing the whites in SWA, and this law, and especially the penalty clause it contained, angered him. I was summoned to Pretoria and warned that unless the penalty clause was scrapped, he would immediately dissolve what was then termed the *Interim Government*. He also insisted that the majority party should include members of the minority ethnic parties in its executive. I undertook to make some concessions by amending the penalty clause to provide for the loss of licence in the case of contravention of the law, and deleted the imprisonment provision. As was proven later, Mr Botha was empowered and prepared to dissolve the National Assembly – the last thing I wanted to have happen. We were, however, satisfied when the Administrator-General approved the bill.

On 2 August 1979, Dr Gerrit Viljoen succeeded the first Administrator-General, Judge Theunie Steyn. It immediately became obvious that Dr Viljoen had been instructed by the South African Government to establish second-tier authorities for the different population (ethnic) groups on the basis of the draft Turnhalle Constitution. I tried to convince Dr Viljoen to limit the powers of such Representative authorities to those functions directly affecting ethnic groups. He made certain concessions, but it was evident that he had definite instructions.

Proclamation AG 8 of 1980

Dr Viljoen published Proclamation AG 8, thus establishing Representative Authorities for the different ethnic groups. On 12 June 1980, he also established a 12-member Executive Council. I was elected as its first Chairman. Apart from the fact that functions that should have been administered by the central government were allocated to Representative Authorities, the Representative Authority for Whites was allocated sources of state

revenue that the others did not get. This meant that the Representative Authority for Whites had surplus funds, while the others could do little to improve standards of education, health care, and the other responsibilities entrusted to them. This, more than anything else, was the beginning of the end of the second-tier system of government.

On 2 August 1980, Mr Danie Hough became the third Administrator-General of SWA. It was generally accepted that the Interim Government would be allowed to administer the Territory without interference from South Africa until Resolution 435 – elections under UN supervision – came into force.

The implementation of Resolution 435 was delayed several times because of differences between South Africa and the UN. After Mr Ronald Reagan became President of the United States in November 1980, he found common ground with the South African Government regarding the withdrawal of Cuban and Soviet troops from Angola.

During Reagan's term of office, the US Administration – particularly Mr Chester Crocker, the new US representative in the Western Contact Group – embarked on a new policy of Constructive Engagement. Mr Crocker's approach was that once the Angolan problem had been resolved, the problems regarding the Implementation of Resolution 435 could be resolved without much trouble.

It was without doubt the best option, but it took years to achieve this goal.

Another positive development during this period was the endorsement by the UN Security Council of the 1982 Principles proposed by the Western Contact Group, accepted by the internal parties and endorsed by the Security Council. These Principles stipulated, amongst other things, that the Constitution needed to be adopted by a two-thirds majority in the yet-to-be-elected Constituent Assembly.

Realising that this exercise might take some time, Mr PW Botha – now elevated to President of South Africa – again interfered in the affairs of the Interim Government: this time in an attempt to appease his right-wing supporters in South Africa and SWA.

On 12 November 1982, I was again summoned to Pretoria. Upon my arrival I found five leaders of ethnic parties in the company of President Botha, namely Koos Pretorius, Hans Diergaardt, Justus Garoëb, Barney Barnes, and Peter Kalangula. Several senior members of the South African Defence Force were also present. President Botha gave us until the next morning to make proposals on how to restructure the Interim Government to make provision for ethnic representation – that is, in his words, “to make the Government more representative”. I refused to cooperate. I could not understand the President's logic. How could he consider a government elected in a ‘one person, one vote’ election as not being representative? It became obvious that the President was obsessed with the idea that a government could only be representative if all ethnic groups were included. President Botha's obsession consequently spelled confrontation between the two of us.

On 19 November 1982, President Botha arrived in Windhoek, accompanied by Mr Pik Botha, and I was summoned to the Administrator-General's office. President Botha accused me of many things, one of which was repudiating him in public. When he again raised the issue of ethnic representation, I realised that he was looking for a reason to dissolve the elected government and to replace it with an ethnically composed Legislative Assembly. After a heated argument I left the room, slamming the door. The following morning, President Botha announced that the Interim Government would be dissolved on 28 February 1983.

On 10 January 1983, two months before the Interim Government's intended dissolution, the Administrator-General informed me that he was not prepared to approve a Bill on Public Holidays introduced by me and already passed by the National Assembly. The Bill abolished certain public holidays, amongst which was the Day of the Covenant, which had sentimental value for the white population only. The Bill caused an emotional reaction from conservative Afrikaners, and President Botha had probably instructed the Administrator-General not to approve it. On 18 January that year, I resigned as Chairman of the Council of Ministers in protest. Before the Speaker could call a special session of the National Assembly, the Administrator-General dissolved the National Assembly with immediate effect. After this humiliating experience, I was determined never to serve in any Interim Government again.

On 15 February 1983, Dr Willie van Niekerk succeeded Mr Danie Hough as Administrator-General. Much to my surprise, he announced that he intended to convene a State Council, similar to the one he had chaired in South Africa. The purpose of the Council would be to draft a Constitution for an independent Namibia. I was vehemently opposed to any South African initiative and conveyed my views to him accordingly.

Two members of my party, the DTA, had secret meetings with the Administrator-General. Similarly, two newcomers to the internal politics of SWA – Mr Andreas Shipanga and Mr Moses Katjuongua – had meetings with the Administrator-General. They proposed that a Multiparty Conference (MPC) instead of a State Council be convened to discuss the constitutional future of Namibia. As in the past, they did not have any problems in convincing members of the DTA and other parties to participate, seeing that there would be financial benefits involved. I found myself standing alone in the DTA and, much against my will, I agreed to participate – provided that the MPC confine itself to a discussion on constitutional proposals, and that an interim government would not be considered. I should have known better. It did not take long before the possibility of another interim government was raised and strongly supported by virtually every member of the MPC.

During May 1985, the Administrator-General arranged a meeting in Cape Town between President Botha and the leaders of the MPC. The objective of the meeting was to hand over a petition to President Botha requesting a transitional government. The idea of a

transitional government had earlier been accepted by the MPC at the initiative of Messrs Shipanga and Katjuongua. There was a strong feeling among MPC leaders that I should keep a low profile during the meeting, because they were afraid that I might bedevil everything.

They were aware of my reservations regarding the establishment of an interim government and the strained relationship between me and President Botha. Right at the start of the meeting, President Botha referred to the incident in 1982, insisting that I apologise for repudiating him. Looking at the faces of my colleagues with whom I had come a long way, I had to consider whether I should remain stubborn or rather make a compromise which I had, for the sake of unity, done several times before.

I did not apologise, but I stated that, had I done anything that might have obstructed progress regarding the future of my country, I was sorry. Much to the relief of my colleagues, President Botha accepted my 'apology' and my colleagues got their interim government. In terms of Proclamation R101, the Transitional Government of National Unity (TGNU) was established on 17 June 1985, and recomposed to represent the following parties:

- DTA – 22 members
- Aksie Christelik Nasionaal (ACN, a white party) – 8 members
- Federal Convention of Namibia (FCN, a Baster party) – 8 members
- Labour Party (a so-called Coloured party) – 8 members
- SWAPO-Democrats (SWAPO-D) – 8 members, and
- National Patriotic Front (NPF) – 8 members.

President Botha got what he wanted: an ethnically composed interim government. With it, he got the support he demanded of colleagues who were supposed to have accepted Resolution 435, which provided for a democratic election under UN supervision. Representative Authorities, with the Representative Authority for Whites being financially far better off than the others, survived again. SWAPO-D and the NPF did not control a Representative Authority, since they had never contested an election. Because of that, they were opposed to the existence of Representative Authorities.

The DTA, having strong and proven support, found itself in a much weaker position than before. It could easily be outvoted by the other five (mainly ethnic) parties.

Again I found myself at a political crossroads. Should I quit, i.e. be politically marginalised or totally neutralised? By staying on, I could possibly influence future developments and ensure that SWAPO did not get the two-thirds majority as required by the 1982 Principles. I could only hope that, should the TGNU succeed in bringing about the necessary social and economic changes and agree on a draft Constitution, it could improve the internal party's chances of getting more than 33.3% of the votes in the proposed election. I decided to stay on, knowing that the road ahead would not be an easy one. I was fighting a lone battle, but I refused to give up. On more than one occasion the South African Government tried to get rid of me.

On 1 July 1985, Adv. Louis Pienaar became the last Administrator-General of SWA. He served in this capacity until Independence. I expected him to level the playing field for the internal parties and to assist them in winning the confidence of the population, but he was the worst of them all. During the last four years before Independence, he opposed and obstructed me in every possible way. Adv. Pienaar was a close friend and loyal servant of President Botha's, and although it might sound stranger than fiction, the two of them continued to put the TGNU under pressure to protect and promote ethnicity. When I proposed that the ethnically based Representative Authorities be abolished, Adv. Pienaar, in a report that became available after Independence, referred to my "demagogical utterances" and accused me of "trying to be popular by emphasising independence", "confusing Mudgian logic", "a domineering style and autocratic behaviour", and spoke about a "post-Mudge era". In one of his reports to President Botha, he stated that he had reliable information that I was not popular in the ranks of the DTA and the TGNU. This conclusion was not entirely unfounded, because some of my colleagues did not look forward to Independence: to them it meant losing their salaries, fringe benefits, and the opportunity of promoting their personal images. During a DTA executive meeting on 29 June 1987, I made the following remark: "After 13 years, I am no longer prepared to tolerate political opportunists who can be bought with a car, a house and a salary." My statement was taped by an informer and made available to the Administrator-General.

In a desperate effort to force the TGNU to protect minority (ethnic) interests in a draft Constitution, President Botha announced South Africa's financial contribution to SWA's budget would be reduced by R200 million. At this very late stage, Adv. Pienaar wanted an election for whites to take place, but this required approval from the TGNU – and we rejected it. In spite of all this and the financial threat, I insisted that minority rights could only be protected by the majority and that we would make ourselves the laughing stock of the world if we continued insisting on the protection of minorities: only minorities had been protected in the past, while the frustration, fears and suffering of the majority had not been appreciated.

Cuban withdrawal from Angola

In terms of a New York agreement between South Africa, Angola and Cuba, the withdrawal of Cuban troops from Angola was finally agreed upon on 22 December 1988, paving the way for the implementation of Resolution 435. On 16 January 1989, the Security Council set 1 April that year as the target date for the implementation of Resolution 435 and, on 1 March, in terms of the Resolution, the TGNU was dissolved. On the same day, an election for a Representative Authority for Whites took place. On principle, the Republican Party did not participate: a white election, only months before the election scheduled for 7–11 November 1989 in terms of Resolution 435, was considered a futile exercise.

Ten political parties registered for participation in one of the world's most fiercely contested elections. SWAPO won the election, but since it could not draw two thirds of the vote, it was not mandated to write a Constitution independently.

Drafting a Constitution for an independent Namibia

The Constituent Assembly, elected in terms of Resolution 435, met on 29 November 1989. After a few introductory speeches and policy statements, it became obvious that drafting a Constitution in a meeting consisting of 72 members would be a mission impossible.

It would have been even more difficult because the meetings would be open to the press and the public. This would without doubt have had an inhibiting affect on the members and would make them hesitant to make compromises that would make them unpopular with their parties. The Assembly therefore tasked the already elected Committee on Rules and Standing Orders with the responsibility of drafting a Constitution. This Committee, henceforth referred to as the *Constituent Committee*, consisted of 21 members. Our meetings were not open to the public or the press.

The parties who won seats in the Constituent Assembly were represented as follows:

- SWAPO – 11
- DTA – 5
- ACN, FCN, NNF, NPF and UDF – 1 each.

Constitutional proposals submitted by parties

On 8 December 1989, political parties were given the opportunity to table their constitutional proposals. To my surprise, only two complete and comprehensive documents were handed in: the SWAPO draft Constitution and the DTA draft Constitution.

According to our information, SWAPO's proposal was drafted by a South African judge of Indian descent. Although I had no further information on the drafting of their Constitution, I concluded that the contents of our two proposals were not that far apart and, in a spirit of give and take, we could reach consensus.

The DTA draft was the result of more than ten years of discussions within our party and negotiations with the South African Government. During this period, we stood firm on the principle of a central government elected by all South West Africans on the basis of universal franchise (one person, one vote). The DTA never ignored the existence of different ethnic or cultural groups, but had problems in clearly defining *ethnic group*, what their areas of jurisdiction (geographic or demographic) were, and how to register voters in terms of ethnic groups. This would have been very problematic in the case of the white 'ethnic group', for example, with its diversity of languages and cultures. But these were problems we had to face, and even our party had members who were not completely 'detrribalised'.

The TGNU eventually passed the Constitutional Council Act⁸ with the following task: "To work out a basis on which the territory can exist as an independent and Sovereign

8 No. 8 of 1985.

state”. The Chairman was to be a judge or a retired judge. Judge VG Hiemstra, a retired judge from South Africa, was approached to lead the Council.

The Council consisted of 16 members appointed by six parties. The DTA was represented by six members and the other five parties by two each. On 10 June 1987, the Constitutional Council approved the final draft with the required two-thirds majority. The National Party and the Basters voted against the final draft, which provided for the following:

- A Bill of Rights
- A ceremonial President
- A National Assembly of 60 members elected by proportional representation
- A Senate of 28 members
- Regional Councils
- Municipal Councils, and
- An independent judiciary.

SWAPO draft becomes the Working Paper

After having studied the Constitution drafts handed in by some of the political parties and in particular the SWAPO proposals, I suggested that we use the SWAPO draft as a discussion document, later referred to as the *Working Paper*. Committee members were noticeably surprised and they afterwards admitted that they had wondered what had motivated me to make such a proposal. Mr Mosé Tjitendero understood, and reacted as follows:

In any conference you start with a working document. You look for its shortcomings and its omissions and then you try to rectify those. I thought the reason why Mr Mudge suggested the adoption of a working document was that he took into account how conventionally it covers the areas that are dealt with by Constitutions.

Suspensions and distrust soon disappeared and a team spirit developed.

I could not imagine that former enemies could join hands in a spirit of goodwill and patriotism, determined to write a Constitution for a democratic and peaceful Namibia. We almost immediately became friends and I will always remember the way in which my DTA colleagues and I were accepted unconditionally as co-writers of the Constitution.

We were privileged to have had a very capable Chairman, Mr Hage Geingob. He was a real consensus-builder, and often succeeded in ‘marrying’ SWAPO and DTA proposals.

The Constituent Assembly unanimously decided that the draft Constitution needed to adhere to the 1982 Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia, drafted by the five Western powers and circulated as a document of the Security Council.

These proposals, often referred to as “the holy cow”, contained principles accepted by all parties before the 1989 election. It was obvious from the outset that all members were deeply aware of the responsibility resting upon our shoulders. The future of our country was at stake. We had to shape Namibia’s future – and this would not be an opportunity to go for each other’s throats. We all realised that it was not only a privilege to be involved, but that it was the final round of a process which had been dragging on for years. There was no turning back. Party-political considerations had to make way for positive and rational thinking. We were fully aware of the obstacles ahead of us, but we also considered the alternative if we did not succeed in reaching consensus on a Constitution.

Of course we also had our lighter moments. Once, we were discussing the composition of the government and I referred to the system in another country. Mr Nahas Angula remarked that we must not be ‘copycats’ by taking our cues from other Constitutions. I reminded him that SWAPO’s proposal contained a Chapter “Directive Principles of State Policy”, literally borrowed from the Indian Constitution. He was caught by surprise. Because I strongly opposed the inclusion of matters of policy in the Constitution, I was curious to determine where they had come from. Because I was informed that the SWAPO draft had been compiled by a Judge of Indian descent, it was easy to find the source.

This did not often happen to Mr Angula. I admired him for his sharp intellect, rational thinking, and willingness to listen and to consider another person’s point of view. Once, when I had fought hard to convince the Committee of something, he remarked: “I agree with Mr Mudge, as I usually do.” Of course, this was not always the case, but it is true that we often agreed.

Having now mentioned his name, it would only be fair to mention a few other members of the Committee who impressed me and who played an important role in drafting our Constitution.

During the entire period of three months that we met in the Constituent Assembly, the members of all parties with the exception of Mr Kosie Pretorius of ACN impressed me with their positive approach and their willingness to consider different views and proposals. It often happened the members of the same party disagreed and supported proposals coming from another party.

Koos Pretorius was the exception. In spite of having accepted the SWAPO draft as a working paper, he differed fundamentally from the basic principles contained in both the SWAPO and DTA proposals and there was no way his outdated Turnhalle principles could be accommodated.

As a matter of fact, he did not even try to incorporate them.

He seldom participated in the deliberations and reserved his position on almost every article, preferring to ask permission to state his position “outside”. The Chairman often

referred to Mr Pretorius's "standard position". But the Constitution was not drafted 'outside'; it was not even drafted in the Constituent Assembly, but in the Constituent Committee. When I asked him why he did not participate more in the debates, he replied that it was because he had difficulty expressing himself in English. I told him that this should not be a problem and that English was not my home language either. Even his party colleague Mr Jan de Wet found it difficult to support him all the way.

Points of material dispute

Immediately after the SWAPO draft was accepted as the Working Paper, members were given the opportunity to identify points of material dispute, i.e. articles which they wanted to have deleted or amended. The following points were identified:

The President

SWAPO proposed a President with extensive powers assisted by Ministers without original powers, and who would be mere advisers to the President. SWAPO's proposals provided as follows:

- The President shall be the head of State and of the Government and Commander in Chief of the armed forces.
- The executive power of the Republic of Namibia shall vest in the President.
- Except as may otherwise be provided by law, the President shall in the exercise of his functions be obliged to act in consultation with the Council of Ministers, but he shall not be obliged to follow the advice tendered by the Council of Ministers or any other person.

The DTA was in favour of a ceremonial head of state as well as a Cabinet of Ministers and a Prime Minister. After a heated debate which lasted several weeks, it was agreed that SWAPO's proposal be amended as follows:

- The President shall be the head of State and the Government and the Commander in Chief of the armed forces.
- The executive power of the Republic of Namibia shall vest in the President and the Cabinet.
- Except as may be otherwise provided in this Constitution or by law, the President shall in the exercise of his duties be obliged to act in consultation with his Cabinet.

Election of the President

SWAPO stood firm on their proposal that the President "shall directly be elected on a secret ballot by a simple majority". SWAPO delegates were adamant that the President would be accountable to the voters and not to Parliament, and that s/he would not be obliged to attend sessions of Parliament. The DTA and other parties wanted the President to be elected by Parliament, that he would attend sessions of Parliament, and that s/he would be accountable to Parliament. Again, this point of material dispute provoked a long and heated debate. It was ultimately agreed as follows:

- The President shall be elected by direct vote.
- The President and the Cabinet shall each year during the discussion of the official budget attend Parliament, during which session the President shall address Parliament on the state of the nation and the future policies of the Government, shall report on the policies of the previous year, and shall be available to respond to questions.

I supported the proposal and stated that the President could hardly be expected to attend all sessions of Parliament, taking into account his multitude of other official and ceremonial duties.

The compromise limited the powers of the President extensively. While the President is more than a ceremonial figure, he cannot execute the executive functions of government without the Cabinet and he is accountable to Parliament.

The National Council (House of Review)

The provision for a bicameral Parliament was strongly opposed by SWAPO, mainly because they feared that nomination of its members by Regional Councils would promote ethnicity. Some of the parties representing mainly ethnic communities insisted on the provision of a second chamber. In the end, SWAPO reluctantly conceded to this.

Proportional representation

SWAPO's proposal provided for single-member constituencies in terms of which the country would be divided into constituencies. A Delimitation Commission appointed by the President would be responsible for demarcating the different constituencies, taking into account the size of the area and number of voters in each constituency. This entailed that constituencies would not all have the same number of voters.

A strong argument in favour of single-member constituencies was that every constituency would be represented in Parliament by a person they had elected independently. The strongest argument against this procedure was that, because of the difference in the number of voters in the various constituencies, a party winning the majority of seats need not necessarily have a majority in terms of total votes cast.

The DTA proposed a party-list system in terms of which seats were allocated to parties in proportion to the number of votes they received. The disadvantage of this proportional representation system was that members nominated by parties would not be responsible for particular constituencies. The DTA proposal was approved.

Affirmative Action

Affirmative Action was not really a point of material dispute since the DTA proposal also made provision for it. But I had serious problems with its formulation and the Article in which it was provided for.

Chapter 1 in Part Two of the Working Paper provided for “Fundamental Rights, Responsibilities and Guarantees”. Article 6 of this Chapter, which dealt with “Equality of Citizens and Freedom from Discrimination”, read as follows:

- (1) All people shall be equal before the law.
- (2) No person may be discriminated against on the grounds of colour, ethnic origin, gender, religion, creed or social or economic status.
- (3) The practice of racial discrimination and the practice and ideology of apartheid, from which the majority of the people of Namibia have suffered so long, shall be prohibited and Parliament shall be entitled to render such practices and the propagation of such practices criminally punishable by the ordinary courts, by means of such punishment as Parliament which deems necessary for expressing the revulsion of the Namibian people to such practices.
- (4) Nothing contained in this Article, or any other part of the Constitution, shall prevent Parliament from making special provision for the advancement of any class of persons within the territory of the Republic of Namibia, who have, in the bona fide perception of Parliament, historically been handicapped socially, economically, politically, or educationally by unfair or discriminatory laws and practices perpetrated by any administration or government prior to the independence of Namibia. [Emphases added]
- (5) The Executive and the Administration shall likewise not be precluded by this article or any other part of the Constitution from advancing such handicapped classes of persons contemplated by the preceding Article by policies and practices conferred on the members of such handicapped classes of persons’ preferences in public employment and in the allocation of educational, housing and welfare resources. [Emphases added]
- (6) The provisions of Article 6b(5) and 6(6) hereof shall cease to be of any application upon the expiry of twenty-five (25) years from the date of the independence of Namibia.
- (7) In the application of any practices and policies such as contemplated in Article 6(5), Parliament shall be entitled to pay regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged to play a full, equal and effective role in the social, political and cultural life of the nation.

I had serious reservations about the provision in Article 6(4) that nothing contained in that Article – or in any other part of the Constitution – could prevent the government from making any special provision for the advancement of “any class of persons”. I identified these stipulations as points of material dispute during the early stages of the Committee’s deliberations, but it was a very sensitive issue and I had to give it a lot of thought – and I did.

Mr Pretorius was often under fire because of his repeated reference to “groups” and “group rights” – and yet, here, SWAPO wanted to provide for groups in our Constitution. Even worse, the SWAPO draft described the previously disadvantaged as a “class of persons”. I strongly objected to the division of the population into classes.

There could be no doubt that Article 6 protects the fundamental freedom from discrimination and primarily that of the individual. Indeed, Sub-article (2) states clearly that “*No person* may be discriminated against” [emphasis added].

My submission was that not all black persons had been disadvantaged equally, that not all white persons had been advantaged equally, and that other considerations should be taken into account as well. A mere division of the population into two classes would be an oversimplification of this complicated issue. My proposal was accepted and the phrase “class of persons” was replaced by “persons”. Thus, once the policy of Affirmative Action was implemented, the individual’s fundamental right would be effected. For instance, if a person’s farm was expropriated, it did not affect the rights of a group (class of persons) but of the individual; and when a person’s application for employment was turned down, only the person could go to court, not the group (class of persons) to which s/he belonged, as the group would only be affected indirectly. This means that not all previously advantaged persons would be affected equally and, likewise, not all previously disadvantaged persons would benefit equally.

Again, my objection was not to the principle, but to the reference to “classes of persons”.

I could, however, not deny that the colour of a person’s skin had dominated the unacceptable policies of the past, and that a common desire to redress the inequalities of the past was understandable.

To accommodate this historical inequality, the Article was replaced by a new one providing for “a balanced structuring of the civil service, defence force, police force and the prison service”. Here, *balanced* meant that these formerly white-dominated bodies needed to be restructured to make it racially balanced as should be the case with land ownership.

The essential point I had wanted to make was that colour could not be the only gauge.

Expropriation and land reform

Land reform was never discussed by the Constituent Committee. In fact, the Constitution does not contain an Article providing for land reform. It is true that the Herero-speaking members of the Committee on several occasions insisted that this issue be discussed, but it never happened. Land reform only came to the fore two years after Independence, when a Land Conference was called. It was obvious at the time that there were concerns in some circles about the Herero nation’s claim for the restitution of ancestral land. The Conference decided against the restitution of ancestral land in favour of a policy on land reform. Strictly speaking, land reform is not a constitutional matter: it is a matter of policy. I will, therefore, not elaborate on this issue.

Expropriation of property did not constitute a new principle. Laws providing for the expropriation of immovable and movable property had existed before Independence – but under the proviso that it could only be done in the public interest. During the discussion of this principle, I emphasised that we were not discussing land reform, but the expropriation of land to build a road, school, or pipeline in the interest of a community or town, i.e. in the public interest.

A secular state

Mr Pretorius of the ACN identified the provision for Namibia to be a secular state as a point of material dispute, but he did not at any stage motivate his objection to it. I, too, had a problem with regard to a secular state as proposed in the Working Paper. I tried my best to convince my colleagues that provision needed to be made for the supremacy of God in the affairs of our country, and wanted to know exactly what the correct interpretation of *secular state* was.

Our legal advisors were very helpful, and provided us with a legal and constitutional interpretation of the word *secular*. It simply means a separation of state and Church, and that there would not be a state religion or a Church recognised by the state, as was the case in the past when the National Party Government and Afrikaans Churches were political allies.

For me, one of the members of SWAPO made it absolutely clear when he said, “We do not want another Iran here.” It must be stated that the Namibian Constitution is not against religion. Freedom of religion is guaranteed in Article 10.

I accepted the explanation and Mr Pretorius did not have anything more to say on this issue in the meeting, but he continued to make public statements outside the meeting. The proposal in the Working Paper was approved.

Adoption of the Constitution

When the Constitution drafted by the Constituent Committee was adopted in front of the Tintenpalast on 9 February 1989, I was excited and proud of our achievement. It was without doubt the climax of my political career. The Chairman, Mr Geingob, came to me and we embraced each other. He was my Chairman and my friend, and the colour of our skins was irrelevant. The final Constitution belonged to all Namibians, irrespective of our political differences in the past.

I was determined to retire from politics and spend the rest of my life with my wife Stienie on our farm, Ovikere. After almost half a century in politics, during which I had had very little time to attend to my farming operations, I had to recover financially. I was on the receiving end of strong opposition and character assassination by my own (white) people, who for a long time had resisted change and independence. I had always had to rely on my own resources: I had never received a salary from a political party, and had used my car and aircraft without compensation. I was tired and wanted to spend more time with my family.

I was confident that, thanks to the spirit in which our new Constitution had been written, Namibia faced a bright future. I also had no doubt that the DTA was more than capable of filling the role of opposition. Both the DTA leaders and my SWAPO Committee colleagues persuaded me to serve in the new National Assembly for one term.

I agreed reluctantly, and even now, 20 years later, I regret having done so, because in a short period of time after Independence many of my dreams vanished. Soon after the establishment of the first government, I discovered that in politics – as in life – you have no permanent friends, but only permanent interests. I was prepared to fulfil my role as a member of the opposition, and I was equally prepared to be criticised. What I did not expect was that my white skin would again become a trump card in the hands of the ruling party and an embarrassment to my own party. My DTA colleagues were accused of being stooges of a white man. This was the last thing I expected from the very same people with whom I had had such good relations in the Constituent Committee. But I was also disappointed by the reaction of my DTA colleagues. They were noticeably embarrassed. For many years I had served under a black President and a black Vice President in the DTA. I had never apologised for that, and at no stage was it ever embarrassing to me. This was, to my mind, not the intention of the writers of the Constitution. Our Constitution condemns racism in the strongest possible terms, and sets reconciliation and racial harmony as a supreme goal. After three years in Parliament I decided to retire in the interests of my country and to remove myself as a stumbling block in the way of reconciliation. But it did not end there: racism also poked its ugly nose into our party affairs, but that is a story for another day.

I found consolation in the fact that I did not experience the same attitude outside Parliament. My humble contribution before Independence was recognised, and I experienced only goodwill and respect from my countrymen and -women. That was the end of my political career and I have since kept a low profile. Alas, the attitude of SWAPO leaders towards me did not change. It became obvious that the role I had played in the past and the contribution I had made in drafting the Constitution became an embarrassment to them. They prefer to see Mr Pretorius as a prototype of white Namibians, and Mr De Wet as a fresh convert.

The Constitution after 20 years

Our Constitution has, without any problems, survived 20 years of Independence. In spite of demands from radical groups and the Monitor Action Group (MAG) to amend the Constitution, the Namibian Government has, as far as I know, not considered these demands favourably.

Most of these suggested amendments were directed at the Articles in Chapter 3 of the Constitution, which provide for the protection of fundamental rights and freedoms. Their amendment is not possible, because fundamental rights and freedoms are entrenched in our Constitution. Indeed, Article 131 provides as follows:

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

Except for Chapter 3, our Constitution can be amended and it might be necessary in future to do so. The procedure to be followed is clearly stipulated in the Constitution. So far, the government has not tampered with the Constitution – and I praise them for that. As I will point out later, the government unfortunately has not always interpreted all the provisions of the Constitution correctly.

The Constitution and Independence are interrelated

The uncertainty that prevailed for many years came to an end when Namibia gained its independence. Namibia was recognised internationally and investor confidence grew, resulting in economic growth. Job opportunities increased as a consequence of a restructured government service and growth in the private sector. Foreign aid became freely available, and the last remnants of racial discrimination were removed. All this and much more changed the lives of Namibian citizens.

The result was a Constitution firmly establishing a multiparty democracy, protecting the fundamental rights and freedoms of every person in Namibia, and setting out to promote the welfare of the people of Namibia, with special reference to the less privileged and the historically disadvantaged. The Constitution also provided for an executive power vesting in the President as well as the Cabinet, and legislative powers vesting in the National Assembly and an independent judiciary. This separation of powers constitutes a very important element in the constitution of a democratic dispensation.

Our Constitution is, therefore, not the product of any political party or person, but the common product of joint effort by patriotic Namibians. Thus, we can expect that all the members of the Constituent Assembly will remain guardians of their own creation. All this makes our Constitution strong. But it was no easy achievement.

Ignorance concerning the provisions of the Constitution

The majority of Namibians have never researched or been informed of the provisions of the Constitution and their fundamental rights enshrined in it. Most people are better informed about the traffic laws and the hunting laws than about the Supreme Law of the state. Much more should be done to encourage citizens to study the Constitution. Making the minutes of the Constituent Assembly and the Constituent Committee available to them will undoubtedly be of great help in such an endeavour. Although courts of law are not obliged to consider the intentions of lawmakers in their judgments, knowing and understanding the Constitution will also greatly benefit ordinary citizens.

I have already mentioned that the meetings of the Constituent Committee were not open to the public and the press. For reasons I have already mentioned, I can see no reason why now, after 20 years, the minutes cannot be released.

National reconciliation

I am sad to say that national reconciliation has not been fully achieved. Clearly, the Constitution alone cannot solve the problem: it only sets the ideal. What is needed is a change of heart, a change of attitude, and observance of the Great Command: love your neighbour as you love yourself.

Wrong interpretations of the provisions of the Constitution: The advancement of persons and the redistribution of wealth (Article 23(2))

In spite of the fact that the Constitution provides for the advancement of “persons”, the government, for the purpose of Affirmative Action, continued to differentiate between ‘classes of persons’, namely a black class and a white class. This, to my mind, was not the intention of the Committee, where both Mr Geingob and Mr Angula agreed with me that not all disadvantaged persons had suffered equally and that not all advantaged persons had benefited equally. They had also agreed with me that the term “class of persons” in the Working Paper had needed to be replaced by “persons”. By way of an example, let me illustrate what the result of this wrong interpretation was. A particular previously disadvantaged person was elected as a Minister or appointed as a senior civil servant. He receives a high salary with all the fringe benefits. He purchases a farm with a soft loan from Agribank, or even a second one in the name of a relative. Perhaps he is allocated a fishing quota or a mineral concession, and is appointed as the chief executive of a leading company. There appears to be no end in sight. He becomes a multimillionaire.

A former colleague of mine who received a fishing concession left N\$8 million to his beneficiaries when he passed away. Ironically, he was very much privileged under the previous government. But he qualified for the fishing quota because he belonged to a disadvantaged ‘class of persons’. But what has happened to tens of thousands of other members of the same ‘class’? Is this not a serious violation of the fundamental principle of non-discrimination?

This unacceptable situation started with a misinterpretation of and confusion regarding the concepts *wealth* and *welfare*. The promotion of the welfare of the people was what the writers of the Constitution had in mind. The redistribution of wealth is mentioned nowhere in the Constitution, while the promotion of the welfare of the people is repeatedly emphasised. Government and political leaders have consistently argued that you can only share in the wealth of the country if you can own or share in the ownership of its natural resources.

In principle, there is nothing wrong with this argument because, in the past, black Namibians were denied opportunities. The indisputable fact that natural resources are the sources of wealth is unfortunately forgotten. Ownership by a few privileged persons does not necessarily mean that the welfare of the people has been or will be promoted. Should natural resources not be utilised responsibly and productively, not only the owners will be negatively affected: workers will have to be retrenched, the turnover of the business

sector will decline, and this will be followed by further retrenchments. The ripple effect of the mismanagement of natural resources goes far beyond the effect it might have on the owners.

Land – particularly agricultural land – is a valuable and limited natural resource: there will never be more land. Unfortunately, during elections, politicians created the impression that every Namibian was entitled to land – a promise that can never be kept. The problem is further complicated by the fact that the landless are not prepared to be settled on vacant land. Thus, land reform policies are focused entirely on the redistribution of around 4,000 commercial farms, a substantial number of which have already been acquired by individual farmers through Agribank loans and for resettlement purposes by the Ministry of Lands and Resettlement.

Even if all the existing commercial farms were to be acquired for the resettlement of landless Namibians, not more than 300,000 people can be accommodated, while the same number will have to be settled somewhere else or will have to roam the country in search of a livelihood.

The question can rightfully be asked: Does the Land Reform Policy, as it is being implemented, make economic sense? Will it promote the welfare of the people, or is the policy politically motivated and an effort to keep election promises?

Land reform has become the most controversial and emotive part of the policy of Affirmative Action. Why land? What makes land different from other natural resources? It is a proven fact that farming is not as profitable as many people seem to believe. Should a prospective farmer have to buy a farm for millions of dollars, even if is by means of soft loans, his/her prospects of making a success are bleak. It is also a proven fact that small-scale farming can, for several reasons, not succeed. Resettlement farms are not different from communal land: they are only smaller, scattered all over the country, and difficult to control. It remains a fact that most poor Namibians prefer to opt for wage employment.

Did the government leaders ever take cognisance of the disastrous consequences of the Odendaal Plan, implemented in Namibia by South Africa, when 400 commercial farms owned by successful and productive farmers were expropriated to ‘resettle’ black farmers? What could have been the most impressive land reform plan ever failed dismally because the plan was politically motivated. Existing homelands had to be enlarged so that black people could be encouraged to leave the white areas and settle in the homelands. Political considerations overshadowed economic realities, and the tragic results are now there to be seen, especially in what was supposed to have been the Damara homeland. Fences have been broken down and carried away; and farmhouses have collapsed in ruins, spoiling the wonderful scenery of what has now become a tourists’ paradise, mainly because of its emptiness and desolation. It could be argued that the present situation is after all preferable to a homeland without a future for its inhabitants. Fortunately, the mountains, the rivers and the grasslands are still there to be admired and enjoyed by

tourists and to provide a livelihood for an unknown number of inhabitants finding wage employment at lodges and other tourist facilities.

A balanced structuring of the public service, the police force, the defence force and the prison (now correction) service

The implementation of a policy to restructure the abovementioned services can be described as successful and welcomed by those who suffered from discrimination in the past. Although the restructuring was seen as discrimination by white citizens, nobody could deny that the civil service was unbalanced because of past discriminatory policies and practices, and these issues had to be redressed.

A relevant question now, however, would be this: At what stage will the public service be considered to be sufficiently balanced? The SWAPO Constitution (Working Paper) had proposed the following:

Preferences in public employment and in the allocation of educational, housing and welfare resources shall cease to be of any application upon the expiry of twenty-five (25) years from the date of the Independence of Namibia.

The Committee unanimously agreed that 25 years was too long, and that the programme needed to be phased out sooner. Affirmative Action cannot continue indefinitely. Today, 20 years have lapsed since Independence. To my mind, now is the appropriate time to take stock and make the necessary decisions concerning future policies on Affirmative Action.

Amendment of the Constitution

The constitutions of all democratic countries can be amended, should changing circumstances necessitate this. Articles 131 and 132 of our Constitution also provide for amendments, as follows:

Article 131 Entrenchment of Fundamental Rights and Freedoms

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or retracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

Article 132 Repeal and Amendment of the Constitution

- (1) Any bill seeking to repeal or amend any provision of this Constitution shall indicate the repeals and/or amendments with reference to the specific Articles sought to be repealed and/or amended and shall not deal with any matter other than the proposed repeals or amendments.
- (2) The majorities required in Parliament for the repeal and/or amendment of any of the provisions of this Constitution shall be:
 - (a) two-thirds of all the members of the National Assembly; and
 - (b) two-thirds of all the members of the National Council.

Article 132(3) provides for a referendum, should the above-mentioned majorities not be secured.

It is evident, therefore, that amending our Constitution can be quite complicated. I accepted the final draft without reservations and I stand by it. At this point, I can see no reason why we should tamper with it.

For over 20 years we have been praised by the international community for our democratic Constitution. The Security Council endorsed the 1982 Principles prescribing a multiparty democracy. We cannot ignore that fact, and if we do, we can expect an international reaction and even interference. But even more importantly, over the past 20 years, a democratic culture has grown in Namibia and I am sure it will continue.

It is crucial that our Constitution should become a living document. I have often in the past emphasised that a Constitution must not only be written on paper but in the hearts of the people. The Constitution is now on paper. How can it become a living document if the majority of the population remains ignorant of its contents? But they need more than just knowledge of the contents of the Constitution. They should be made aware of the ideals and the intentions of those who wrote it. Namibians need to accept the Constitution with pride and passion.

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