In dubio pro libertate: The general freedom right and the Namibian Constitution

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To be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human.

Isaiah Berlin, *Four Essays on Liberty*, p LX

**Introduction**

Today, at the beginning of the third millennium, most United Nations (UN) member states\(^2\) subscribe to principles and axioms which, textually, appear akin to those precepts which can be found in international covenants, in particular the Universal Declaration of Human Rights of 10 December 1948. However, even constitutions which remain textually close to the UN Declaration gain different meaning, not only from jurisdiction to jurisdiction, but also over time. Such differences may be the result of a variance in factors contributing to social order in each of the different jurisdictions. An example is the death penalty:\(^3\) although not abolished by the constitution of the United States of

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1 The original version of this text, which can be accessed at http://www.polytechnic.edu.na/academics/schools/comm_legal_secre/legal/research.php, has been shortened in order to meet editorial requirements. The text is a continuous presentation of a scholarly position, without the constant intrusion of such observations as “Dworkin says this”, “Ackermann J says in … that”, etc. That the position put forth in this paper has not sprung up ex nihilo should be obvious throughout the text, but the text should be judged on its own merits against the intention to engender a discourse on the topic. However, it should be mentioned upfront that I have been greatly inspired by Robert Alexy, who explicated the normative dimension of negative freedom (liberty) exhaustively in his book *Theorie der Grundrechte* (1996:309–356). This explication has been accepted here, and to the extent that the discussion bears on this residual rights position, the paper owes its structure and content to Alexy.


3 Capital punishment was suspended in the United States from 1972 through 1976, primarily as a result of the Supreme Court’s decision in *Furman v Georgia* 408 US 238 (1972). Another case in point hinges on the different policy approaches with regard to sexual orientation. In South Africa, “sexual orientation” forms part of the grounds listed in Section 9(3) of the South African Constitution which result in the presumption that differentiation on the basis of one or more of the grounds amounts to unfair discrimination. Article 10 of the Namibian Constitution does not give sexual orientation such protection.
America (USA), the judiciary there has at different times found the death penalty either to be in line with the constitution or not.4

The above gives rise to the question about the relationship between specific constitutional concepts – in particular their limits – and overarching concepts like justice and human dignity, which, although deriving from political philosophy, have been introduced in many constitutions as positive constitutional law.5 This relationship may be characterised by strong tensions which inform the intricate relation between constitutional/political philosophy and theory on the one hand, and constitutional interpretation on the other. These tensions surface, inter alia, when citizens intend to enact behaviour which, in the absence of a specific right or freedom, remains unprotected against public censure and prohibition. The problem will be discussed in the following sections in view of the concept of a general freedom right.

Freedom and liberty

Freedom is a fundamental though ambiguous practical concept. A classical formulation stems from Thomas Hobbes, who stated that “Liberty, or Freedom, signifieth, properly, the absence of opposition”.6 The term has a constant positive emotive component that can easily be coupled with varying descriptive categories. Thus, it is not really surprising that Isaiah Berlin refers to “more than two hundred senses of this protean word recorded by historians of ideas”.7 Hobbes also notes that “it is an easy thing for men to be deceived, by the specious name of liberty”.8 I shall take Hobbes’ formulation as a point of departure, and for the purposes of this paper, freedom, in a juristic sense, shall mean an alternative action. The object of juristic freedom is not just one specific action – which would denote a positive freedom – but the entitlement to select a course of action from a feasible set of alternatives. In this sense, a person is ‘free’ to the extent that his/her alternatives for action remain unencumbered. Here we shall term this freedom negative freedom.9

4 Abolished in Namibia by virtue of Article 6 of the Namibian Constitution, there is no such clause to be found in the South African Constitution. The South African Constitutional Court, in S v Makwanyane 1995 (3) SA (391), nevertheless found that the death penalty was unconstitutional. However, this does not mean that the Court could not reverse this decision (albeit with difficulties) at another time.
5 As it has in Namibia, for example, where Article 1(1) of the Namibian Constitution reads as follows: “The Republic of Namibia is … founded upon the principles of democracy, the rule of law, and justice for all”.
8 Hobbes (1960:140).
9 Freedom can be explicated in various ways in terms of the ‘man on the street’, philosophy, the economy and law. Whoever intends to answer the question regarding the nature of freedom will get entangled in a demanding philosophical project. A venture of simpler dimensions lies in looking at the structure of freedom. But a comprehensive presentation thereof would likewise go beyond the boundaries of this paper, and we will therefore content ourselves with a rudimentary approximation, which is the juristic notion of freedom understood as the entitlement to select a course of action from a number of alternatives. In this sense, freedom refers to the absence of obstacles, hindrances or opposition; compare Alexy (1996:194ff).
Fundamental rights and freedoms under the Namibian Constitution

In Chapter 3, the so-called Bill of Rights, the Namibian Constitution enumerates fundamental human rights and freedoms. These are protected and entrenched under relevant special and general provisions. The difference between rights and freedoms is not explicitly defined therein, but it may be argued that the difference lies in the extent to which the Constitution allows derogation from either.

In respect of freedoms, Article 21(2), which provides for the freedom of speech and expression, thought, religion, association, etc., states 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.

Thus, as far as the freedoms enumerated in the Namibian Constitution are concerned, the Supreme Law allows infringements by virtue of sub-constitutional law within defined limits. This leaves the legislator with a wide margin of discretion. However, the Constitution does not provide such a general limitation clause in respect of fundamental rights, which are enumerated in Articles 6 to 20. Restrictions on rights may, therefore, only be imposed to the extent that they are expressly permitted.10

General freedom right

The proposition that the lists of both rights and freedoms are ‘enumerations’, and therefore thematically closed, might provoke a feeling of unease. The question whether we are indeed dealing with an enumeration of rights and freedoms is important, because it entails that social behaviour which cannot be subsumed thematically under one or more rights or freedoms lacks constitutional protection. It may be argued that this is a rather unlikely situation and, if it were to occur, it would probably concern issues that are by no means fundamental. Yet, a number of individual decisions and their behavioural expressions – like the self-infliction of somatic or psychic harm (i.e. consumption of licit and illicit drugs and alcohol, smoking tobacco, eating specific food like butter for its assumed negative impact on cholesterol levels), but also suicide and, as the case may, be one’s sexual orientation – could be affected. Whereas the examples are emotionally

10 Article 19 places the right to one’s culture, for instance, under the limitation of “…the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest”.

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and morally loaded, there is a plethora of more mundane issues. However, it is only at the surface that the latter – e.g. keeping goldfish in an aquarium in one’s home (or keeping any pet); feeding pigeons, squirrels, etc. within municipal boundaries (or any animal anywhere, for purposes other than commercial ones); wearing body ornaments (piercing); wearing particular colours, e.g. red on Sundays (or wearing anything at all); sleeping with one’s windows open at night (or not opening windows at all) – appear negligible or even ridiculous, and the list could go on endlessly. It is these individual decisions and their behavioural expressions that fall within the ambit of the general freedom right (GFR).

Conceptually, the GFR is undetermined and thematically unspecific. It affords citizens the constitutionally protected prerogative to choose, think and act for themselves, unhindered, but within the remits of the constitutional order. On the other hand, it provides, prima facie, a (subjective) right vis-à-vis the state not to hinder, obstruct or otherwise interfere with this prerogative. And finally, the GFR encompasses the protection of (legal) states of affairs and entitlements. In this respect, it also provides the individual with an important locus standi, undergirding legitimate expectations to the constitutionality of the entire legal order. The GFR is a residual right in relation to the rights and freedoms that have been thematically enumerated in the Bill of Rights. Technically, the GFR only becomes operational where the domain of no other specific right or freedom is invoked; thus, it provides a subsidiary rights position. The relation between the GFR and other specific rights and freedoms is a relation of logical inclusion. The protective reach of the GFR encompasses anything which is covered by the norm texts of specific rights and

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11 For homosexuality, see e.g. http://www.hrw.org/en/news/2009/10/15/uganda-anti-homosexuality-bill-threatens-liberties-and-human-rights-defenders; last accessed 8 January 2010. This paper, however, is not primarily concerned with any actually affected category of behaviour, such as homosexuality, or a potentially affected one, such as suicide, the consumption of alcohol, or feedings pigeons in municipal areas.

12 The subjective importance of an act of behaviour may be irrelevant when compared with other individual or collective constitutional positions. Yet, for some people, those or similar acts may be more important than any entrenched positive freedom like association or practising a profession. One might therefore concur with Dworkin (1977), who posits that democracy points to a government treating all members of the community as individuals, “with equal concern and respect”. A similar formulation – though with regard to the concept of human dignity – was used by O’Reagan J in S v Makwanyane 1995 (3) SA 391 (CC), paragraph 328: “Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right is therefore the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]”.

13 See Ferreira v Levin NO 1996 (1) SA 984 (CC).

14 This is explicitly the position of the German Constitutional Court (Bundesverfassungsgericht, abbreviated BVerfG) in BVerfGE 29, 402 (408).

15 Interestingly, Article 18 (“Administrative Justice”) of the Namibian Constitution covers virtually the whole spectrum of the executive beyond the ambit of any specific fundamental right or freedom. Yet the Article is not a ‘mini’ GFR, because to the extent that the executive acts on the basis of legislation, the infringement on liberty outside the scope of specific fundamental [Continued overleaf]
freedoms – with the exception of the right to equality. From the prima facie position to be free to do or not to do anything which does not harm others, it follows logically that it is permissible to assemble and demonstrate peacefully, to petition, to join a trade union, or to freely express one’s opinion, belief, religion, etc. Hence, it is clear that the concept of the GFR lies at the root of specific fundamental rights and freedoms. Put differently, specific rights and freedoms constitute thematic sections of the general undetermined permission, which is referred to as the GFR.

GFR and the Namibian Constitution

The quest for the GFR in any constitution requires a more concrete notion of what to look for in terms of semantic structure and content. Against the backdrop of the above, one should expect a norm text which reflects the ‘negative’ openness of the protected entitlement, such as “Everyone is free to do anything that does not harm others”. This is missing from the Namibian Constitution; therefore, it seems fair to say that the Constitution does not contain a stipulation which expressly grants an undetermined, thematically unspecified, subjective right.

However, the fact that the Constitution makes no express textual reference to the GFR does not preclude a construction that presupposes its existence. The material or substantive foundation of the Constitution, particularly the Bill of Rights, is largely characterised by the openness of its concepts. Constitutional interpretation often has to deal with the lacunae which emanate from this openness of the authoritative material. In this context, we note that the Namibian Constitution makes use of the term liberty in Article 7, which reads as follows:

No persons shall be deprived of personal liberty except according to procedures established by law.

Liberty is a term which also serves as a synonym for freedom, and the tandem liberty/freedom then denotes the absence of obstacles, restrictions and hindrances. From this perspective, Article 7 might very well be constructed as the textual anchor for the GFR. But it is important to point out here that many will hold that, under the title “Protection of Liberty”, Article 7 refers only to the right or privilege of access to a particular place, undoubtedly encompassing also the physical integrity of the individual.

A number of corollaries discounted, constitutional law is always what the judiciary – by virtue of interpretation and construction of the constitutional text – reveals as binding

rights and freedoms remains without protection. Accordingly, only for the time being, i.e. in the absence of a law prohibiting male persons wearing earrings, individuals enjoy constitutional protection against incidents as reported in 2001 (see http://www.hrw.org/en/node/12326/section/4; last accessed 8 January 2010) where Special Field Force (SFF) members reportedly began rounding up men in Windhoek (Namibia) wearing earrings, claiming that it was an order from the President to take earrings off any male person.

16 See Footnote 9.
17 Chaskalson P in Ferreira v Levin NO 1996 (1) SA 984 (CC), at paragraph 170.
to the state, its organs, and the citizenry. Thus, constitutional interpretation refers to the
judiciary’s authoritative construction of the Supreme Law during judicial review of the
constitutionality of legislation and government action. It is prudent, therefore, to take a
look at the practice of constitutional interpretation by the Namibian judiciary.

In a country where extreme legal positivism had previously buttressed parliamentary
sovereignty, the advent of a Constitution entailed a fundamental paradigm shift. Since
the coming into force of the Constitution on 21 March 1990, a number of landmark
decisions by the Supreme Court have readjusted the normative landscape of Namibia.18
The Namibian courts greeted the new order positively, although their implementation
of it varied.19 In respect of the Bill of Rights, Namibia’s courts in general showed a
moderately courageous approach, which Amoo termed “a natural law cum realist or a
purposive approach”.20 In pursuing this approach, it may be argued, the courts understood
the selection of special rights and freedoms posited by the Constituent Assembly from
Namibia’s socio-historical and political context, reflecting the historical experience of
the Namibian people from the early colonial period. The Preamble of the Constitution
epitomises this perspective by referring to Chapter 3 as follows:

Whereas these rights have for so long been denied to the people of Namibia by colonialism,
racism and apartheid …

The Supreme Court keeps to the principle that constitutional interpretation, whether
historical, contextual or comparative, can never reflect a purpose that is not supported by
the constitutional text as a legal instrument. At face value, the majority judgment in The
Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another21
may be a case in point. In the Frank case, O’Linn J emphasised that constitutional
interpretation did not imply the freedom to –22

… stretch and pervert the language of the enactment in the interest of any legal or constitutional
theory.

However, the classical adage of legal interpretation that respect must be paid to the
language employed, the consideration of the historical factors that led to the adoption
of the Constitution in general, and the fundamental rights and freedoms in particular,
together indicate that our courts perceive the Bill of Rights as thematically exhaustive,
or closed. In the Frank case, at least, the court did not consider the existence of a GFR,
possibly because such a rights position was not invoked by the applicants. O’Linn J,

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18 For example, S v Acheson 1991 (2) SA 805 (Nm) 813A-C; Namundjepo & Others v Commanding
Officer, Windhoek Prison & Another 2000 (6) BCLR 671 (NmS); Ex Parte Attorney General,
Namibia: In Re Corporal Punishment by Organs of the State 1991 NR 178 (SC), to name but a few.
21 Supreme Court Case No. SA 8/99.
22 Compare Kentridge AJ in S v Zuma 1995 (2) SA 642 (CC), paragraph 17; see also S v
Makwanyane 1995 (3) SA 391 (CC), at paragraph 9.
with regard to the burden of proof in regard to fundamental rights and freedoms, stated the following:  

… the applicant will have the burden to allege and prove that a specific fundamental right or freedom has been infringed. This will necessitate that the applicant must also satisfy the Court in regard to meaning, content and ambit of the particular right or freedom. [Emphasis added]

According to this logic, and since the applicants did not presuppose the GFR, the court deemed it had no reason to enter a presumably irrelevant discourse. However, from the argumentative architecture and phrasing of the judgment, it may be inferred that the GFR had not yet appeared on the court’s conceptual horizon. The court concretised the meaning of rights and freedoms in somewhat awkward isolation, without presupposing a conceptual interrelation of all precepts contained in the provisions of the Bill of Rights. It is against this background that one may confidently say that the Supreme Court has not yet made space for the GFR in the Namibian Constitution.

Beyond actual constitutional dogmatism, however, there are arguments which suggest that the GFR has a legitimate place in the Namibian Constitution. In the following, we will first address the GFR in historical perspective, and thereafter compare the approach taken so far by the South African and the German Constitutional Courts.

The GFR in historical perspective

In terms of a concrete traditional lineage, human rights and freedoms are understood exclusively as punctual normative assurances – a position which cannot easily be

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23 Constitutional law is by and large embedded in the domain of ever-evolving constitutional dogmas, practice and political philosophy. This is different from the usual domain of the learned jurist, where the issue is rather the skilful application of received principles and concepts of the positive law. Where the onus of doing constitutional fieldwork is placed on the applicant, this would expect him or her to shoulder a burden that not only results in prohibitive costs, but that should also rest on society, i.e. the state – or, more precisely, the judiciary and the academe. It is held, therefore, that the court’s duty is to ascertain whether any part of an applicant’s freedom or rights position has been infringed, provided only that the applicant provides the facts in which to find a hindrance, namely a restriction of liberty; see also Ackermann J in Ferreira v Levin NO 1996 (1) SA 984, at paragraph 44; De Waal et al. (2001:140); but see, contra, the approach of Chaskalson P in Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC), at paragraph 16.

24 In fact, the discourse about the GFR would only have been relevant with regard to the second respondent (Khaxas) to the extent that her sexual orientation and choice to live with the first respondent (Frank) in a lesbian relationship would have been negatively affected if the motivation of the Immigration Board had been not to give permanent residence status to the applicant because of her sexual orientation (lesbian). In exercising its discretion, the GFR would have required the Immigration Board to consider the impact of its decision on the second respondent.

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reconciled with the concept of a GFR. However, history provides another, more abstract lineage regarding the concept of freedom. Article 4 of the Declaration des droits de l’homme et du citoyen (1789) pointedly posits the primacy of the GFR:

La liberte consiste a pouvoir faire tout ce, qui ne nuit pas a autrui: ainsi l’existence des droits naturels de chaque homme n’a de bornes que celles, qui assurent aux autres membres de la societe la jouissance de ces mes droits.

And it is in this line of thought that Kant posited the following:

Freiheit (Unabhaengigkeit von eines Anderen noethigender Willkuer), sofern sie mit jedes Anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, urspruengliche, jedem Menschen kraft seiner Menschheit zustehende Recht.

GFR in comparative perspective: Germany and South Africa

The GFR has been acknowledged by the German Constitutional Court since its first opportunity to express itself on the issue, and it has held this position strongly ever since. The German Constitution, the Grundgesetz, stipulates two positions on freedom in Article 2 (Rights of Liberty). Article 2(1) grants the right to free development of the personality:

Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmässige Ordnung oder das Sittengesetz verstösst …

26 The extreme empirical historical perspective recognises fundamental rights and freedoms only to the extent to which the constitutional text determines specifically protected categories of action. This leads inherently to crude constitutional positivism, and may be criticised from a variety of angles.

27 “Freedom consists of the power to do anything which does not harm another: thus, the existence of the natural rights of every man has no other limits than those which ensure other members of the society the enjoyment of the same rights” (translation S Schulz).

28 Kant (1797:237). “Freedom (independence from the constraint of another’s will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity”; (translation available at http://praxeology.net/kant7.htm; last accessed 15 January 2010).

29 In its decision of 16 January 1957 (BVerfGE 6, 32), the German Constitutional Court had to decide whether or not to deny granting a passport to the applicant, a certain Mr Wilhelm Elfes. The Constitutional Court decided that no specific right had been violated, but resorted to the GFR as a residual subjective right.

30 See e.g. the more recent decision of the German Constitutional Court in BVerfGE 59, 275 (278).

31 “Basic Law”.

32 “Article 2 (Rights of Liberty)

(1) Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.

(2) The freedom of the individual is inviolable. …” (translation S Schulz).
whereas Article 2(2) declares the following, inter alia:

... Die Freiheit der Person ist unverletzlich ...

Whereas the construction of the GFR under the Grundgesetz is textually, contextually and systematically supported, the situation is different in South Africa. Neither the 1994 Interim Constitution nor the 1996 Constitution contains any reference to a right to the free development of the personality. Nevertheless, the South African Constitutional Court was urged to consider the matter when Ackermann J sought the opportunity in Ferreira v Levin NO\textsuperscript{34} to propose a “broad and generous” reading of Section 11(1) of the Interim Constitution.\textsuperscript{35} Ackermann J held that this subsection should be read disjunctively, separating a right to freedom from a right to security of the person. Citing Isaiah Berlin\textsuperscript{36}, he argued that the right to freedom was a constitutional protection of a sphere of individual liberty, a bulwark against the imposition of restrictions on the individual by the state without sufficient reason.\textsuperscript{37} However, the majority of the bench rejected Ackermann’s views and embraced the dictum proposed by Chaskalson P\textsuperscript{38} namely that the primary purpose of Section 11(1) of the Interim Constitution was to ensure that the physical integrity of every person was protected. Chaskalson P then referred to the meaning of freedom and security of the person in public international law:

[170] ... The American Declaration of the Rights and Duties of Man, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human

\textsuperscript{33} De Waal et al. (2001:247); Currie & De Waal (2005:292).
\textsuperscript{34} Ferreira v Levin NO 1996 (1) SA 984 (CC), paragraph 45ff. The essential facts on the case are as follows: The South African Constitutional Court received the issue as a referral from the Witwatersrand Local Division of the Supreme Court by Van Schalkwyk J. The matter at hand was the constitutionality of section 417(2)(b) of the South African Companies Act, 1973 (No. 61 of 1973), which compels a person summoned to an inquiry to testify, even though such person seeks to invoke the privilege against self-incrimination. In his minority judgment, Ackermann J held that the applicants had no standing on the grounds of Section 25(3) of the Interim Constitution, which embodies the fair trial principles. The reasons for his approach do not matter here, but given his analysis of the issue of standing, Ackermann J was driven to scan the Interim Constitution for other subjective rights the applicant may have been entitled to which could have been infringed. Whereas there was no such right to be found among the enumerated rights and freedoms of Chapter 3, Ackermann J resorted to the concept of the GFR, which he textually anchored in Section 11(1) of the Interim Constitution. Chaskalson P, for the majority judgment, rejected Ackermann J’s analysis of the issue of standing with regard to Section 25(3) of the Interim Constitution, and granted relief on the ground of a violation of the fair trial principle. In passing the majority decision, he gave a brief exposition of its position with regard to a residual freedom right for the time being.
\textsuperscript{35} The text of Section 11 of the Interim Constitution (1994) has been virtually taken over into Section 12 of the current South African Constitution (1996), although the text of Section 12(1) (a) to (e) is now more specific in its formulation.
\textsuperscript{36} Berlin (1969:121).
\textsuperscript{37} Ferreira v Levin NO 1996 (1) SA 984 (CC), at paragraph 54.
\textsuperscript{38} (ibid.:paragraph 158ff).
Rights and Fundamental Freedoms, and the African Charter on Human and [Peoples’] Rights, all use the phrase “liberty and security of the person” in a context which shows that it relates to detention or other physical constraints. [Sieghart] notes that although “... all the instruments protect these two rights jointly in virtually identical terms, they have been interpreted as being separate and independent rights”, and that the European Commission of Human Rights and the European Court of Human Rights have found that what is protected is “physical liberty” and “physical security”. There is nothing to suggest that the primary purpose of section 11(1) of our Constitution is different.

This finding is buttressed by systematic arguments regarding the various thresholds for limitations of fundamental freedoms as set out in Section 33 of the Interim Constitution. Without the necessity to expound the very substance and delineation of Section 11(1) of the Interim Constitution, Chaskalson P rendered a clean sweep of the substance of Ackermann J’s judgment, albeit not entirely excluding the future emergence of sufficient reasons to acknowledge the residual right:

… I can see no objection to accepting provisionally that section 11(1) is not confined to the protection of physical integrity and that in a proper case it may be relied upon to support a fundamental freedom that is not otherwise protected adequately under Chapter 3.

GFR – an axiological presupposition

The excursion into the history of ideas and into the comparative approach of two selected jurisdictions to the GFR has shown that the concept holds heuristic, intellectual and practical appeal. Without a specific textual reference to the GFR in the Namibian Constitution, however, it remains a question of logical reasoning to establish whether or not the GFR forms part of its normativity.

With the Constitution as its Supreme Law, Namibia abandoned crude legal positivism, which was then and there epitomised by the orthodox, text-based (literal) approach to juristic interpretation. The literal approach has been widely substituted by the so-called purposive approach, which departs from the assumption that the purpose or object of the

39 (ibid.:paragraph 173ff).
40 Technically, and with regard to Section 11(1) of the Interim Constitution, the majority judgment in Ferreira v Levin NO is an obiter. The question as to whether a residual constitutional right to negative freedom should be read into Section 11(1) was not the basis for the majority decision. In fact, against the backdrop of the nature of the GFR as a residual rights position (supra), and the fact that the majority decision referred to in Article 25(3) of the Interim Constitution, i.e. the specific principle of fair trial as the principal anchor of its decision to invalidate section 417(2)(b) of the South African Companies Act, there was no urgency or need to delineate the boundaries of Article 11(1) of the Interim Constitution. It is submitted, therefore, that the view expressed by the concurring majority in this regard is not binding. See also Ferreira v Levin NO 1996 (1) SA 984 (CC), paragraph 185, where Chaskalson P posits that “the rule against self[-] incrimination is adequately protected” and so “it is not necessary to consider ... whether the ‘residual right’ claimed is of a character appropriate for protection under section 11(1)”.
41 Botha (2005:47ff).
legislation is the prevailing factor in its interpretation. But whereas the Constitution is now the frame of reference within which everything is obliged to function, the prism through which everything and everybody has to be viewed, the question arises as to where to find the prism through which to view the Constitution itself.

This question which relates to the normative theoretical question of the foundation of validity cannot be ignored, especially not with regard to topics such as the GFR that are not addressed explicitly by the constitutional norm text. While endeavouring to answer the question, the interpreter, however, encounters the problem that, in the context of positive constitutional law, there are no other sources which share the same normative quality as the Constitution. Thus, the Constitution (Kelsen’s “Grundnorm”, Hart’s “rule of recognition”) shares the solitude which characterises the normativity of a norm text that is not derived from any other, superior norm. Confronted with this situation, Mahomed J made the following dogmatic statement:

All Constitutions seek to articulate, with different degrees of intensity and detail, the shared aspirations of a nation, the values which bind its people … and the moral and ethical direction which that nation has identified for its future.

From here it flows naturally that the interpretation of the Constitution always requires ascertaining the foundational values inherent in the Constitution, underpinning the listed fundamental rights and freedoms, and proceeding from there to an interpretation that best supports and protects those values. Technically, what is required is the logic-rational interconnection of material aspects of political philosophy, to the extent that they can be recognised as being moulded into the Constitution by virtue of a linguistic anchor. This approach is supported by the fact that (the) law is always the expression of a reasonable logical and rational enterprise, i.e. the establishment of the rule of law. The idea of the

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42 (ibid.:51); see already Schreiner JA in Jaga v Dönges 1950 (4) SA, at paragraph 653 (A).
44 S v Makwanyane 1995 (3) SA 391 (CC), at paragraph 262.
45 This does not mean resorting to natural law, which in essence holds that the dictates of law are universal, unchanging and discoverable by human reason. Natural law shares epistemological problems with other theories of (objective) values, i.e. intuitionism. The fundamental problem with such theories is that the proclaimed a priori ‘values’ have to be established individually by means of intuitive, evidentiary processes. In the absence of criteria for true or authentic evidence, intuitive processes amount to nothing more than subjective positions. The same problematic affects the substance of natural law. It is prudent, therefore, to determine the relation between the Constitution and natural law with caution: natural law concepts are reflected in the Constitution and form part of the constitutional law to the extent that they have been textually anchored in the form of politico-philosophical concepts such as human dignity, liberty, equality, and democracy.
46 This inevitably requires a (value) judgment, which is not a value judgment to be made on the basis of the judges’ personal values. Mahomed J set out the requirements for constitutional interpretation in Ex parte Attorney General, Namibia: In Re Corporal Punishment by Organs of the State 1991 (3) SA 76 NmSC 91 D–F. However, the judgment added a degree of confusion [Continued overleaf]
rule of law connotes a limitation on government; it is the antithesis of arbitrary rule. Whilst the norm text of the Constitution constitutes the outer limit, which is pledged not to be transgressed by the state and its organs, it remains the repository from which the purpose has to be taken.

Interestingly, the Namibian Constitution may be understood to embrace the ‘principles of integrity’ in the above sense in the opening words of its Preamble:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace; …

The Preamble suggests a functional integration of dignity/rights, on the one hand, and freedom, justice and peace on the other. For the purposes of this paper, therefore, we may assume that the normative-analytical approach is compatible with the Constitution. For lack of space, the discussion hereafter will focus on the residual right as necessary to give substance to the right to human dignity; and the conceptual correspondence between the GFR and the “volonté générale” (Rousseau), which describes the ideal type (Weber) of democracy, informing virtually all contemporary conceptions of democracy.

for scholars, among others. In the judgment of the Frank case referred to earlier, the court referred to the concept of institutions as understood in the judgment In Re Corporal Punishment, and gave guidelines as to how the norms and values were to be identified with reference to the dictionary meaning of institution. Amoo (2008b:51) thus concluded as follows: “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 …”.

O’Linn J and Amoo squarely sideline the tenets of constitutionalism, a direction of constitutional interpretation which Mahomed J presumably did not have in mind either, or rather, which cannot be inferred from his dictum given above. The evolutionary step from parliamentary sovereignty to constitutional supremacy needs to be seen in the abdication of the dictatorship of the majority, while, at the same time, through the establishment of a representative democracy, the legislator became liberated from the volatile day-to-day opinion of the electorate (as to the difficulties, see Cassidy 2002:186). Constitutionalism and representative democracy facilitate the development of a consistent logic-rational legal order (rule of law), which evolves notwithstanding daily shifts in public opinion and the momentary whims and caprices of the electorate, against the backdrop of such principles and precepts as have been agreed upon by the members of a constituent assembly in a presumably sober state, rationally distanced from the vagaries of emotions and irrational states of mind. In fact, the text by Mahomed J is closer to Dworkin’s (1986:225) legal theory, which posits law as integrity, requiring a judge to identify the purpose, content, and command of the law on the assumption that the legal rules at hand were all created by a single author – the community personified – expressing a coherent conception of justice and fairness, an undertaking which instructs the interpreter “to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole” (ibid.:245).

47 Amoo (2008a:313), quoting Nwabueze: “it is the antithesis of arbitrary rule; ...” One of the first norm texts in this tradition was the Magna Carta (1215), which King John the Baptist (1167–1216) had to concede to the Barons.
State of nature, society, individual, autonomy

The recognition of the GFR obviously carries some of the momentum or an element of liberty – which is always presupposed in the natural state – into the state of freedom, which, as cited above, the Preamble of the Namibian Constitution envisages.\textsuperscript{48} The term natural state pertains to the political philosophy of the modern era, to be found particularly in the writings of Thomas Hobbes and Jean-Jacques Rousseau. The natural state (of personal freedom) is the axiological presupposition which leads to Rousseau’s “volonté general”.\textsuperscript{49} Admittedly, all contract models from Hobbes to Rawls face the problem that they presume something which is, however, only emergent in the social process: they posit the contrafactual existence of a presocial individual. But this is not the problem of the GFR. The postulation of the GFR is perfectly compatible with Berger and Luckmann’s (1966) contention that “to be in society is to participate in its dialectic process”, which represents the background for the ontogenesis of the person as a member of society.

In order to understand this concept of freedom, it is necessary to take a closer look at its construction. A state of freedom does not denote the idea of a presocial individual at all. To conjure the image of the isolated individual is not at all justified since, like any subjective entitlement, whether a specific right or freedom, the GFR is – through the balancing law, which requires weighing in accordance with the proportionality principle – deeply embedded in the social. Although the GFR remains contentually undefined, which could be equated with being ‘borderless’, it is factually as limited as any other (specific) fundamental right or freedom. Logically, this rests on the assumption that the GFR would have to be placed under a general limitation clause comparable to Article 21(2) of the Namibian Constitution. What is decisive, eventually, is only that which is definitely placed under protection – which is not at all without boundaries, and certainly not arbitrary. The practical ambit of the negative freedom will always remain the result

\textsuperscript{48} The utility of theoretical considerations derived from the politico-philosophical discourse on democracy (and other constitutional precepts) in the context of constitutional interpretation cannot be ignored. Whereas theoretical aspects may be of purely academic importance at the level of sub-constitutional law (Terblanche 2007:172), the theoretical discourse gains crucial relevance for construction where the normativity (purpose and scope) of concepts represented in the norm text has to be ascertained. It is difficult – if not impossible – to conceive of any other or preferable method of interpretation where the norm text by and large makes use of concepts, because concepts are cognitive units of meaning (abstract ideas), usually built from other units which act as a concept’s characteristics, and are typically associated with a corresponding linguistic representation such as a word. Therefore, it is held that the purpose of the constitution – or simply any selected constitutional concept – has to be sought under observance of the theoretical discourse which engendered that very concept in the first place. It is this discourse which provides the ‘concept characteristics’ that are otherwise absent from the text of the constitution.

\textsuperscript{49} Arguably, to the extent that Namibian society is required to be built on the principles of democracy, as stated in Article 1(1) of the Namibian Constitution, the axiological position has been made part of our constitutional ambit.
of the balancing act\textsuperscript{50} performed between the actual or intended use of liberty and other contrary (legal) positions, individual or collective.\textsuperscript{51} Within the thematic ambit of the special fundamental rights and freedoms, the Constituent Assembly has to some degree, and for a number of probable cases, anticipated the balancing/weighting results. Whereas the interpreter has so far been relieved from establishing the most basic preference relations in the domain of fundamental rights and freedoms, this is still outstanding whenever the GFR applies.

However, in all cases, irrespective of the rights position in question, the balancing of different freedoms (of different subjects) becomes necessary. The result of this balancing constitutes what is definitively protected: it contributes to the comprehensive state of freedom referred to in the Preamble of the Namibian Constitution. It follows naturally from the above that bringing about and sustaining a (comprehensive) state of freedom always comes with opportunity costs, which need to be measured in the currency of freedom or liberty. From a historical perspective, \textit{freedom}, in a legal and constitutional sense, means the provisional end-point of a tandem of social and legal developments from the Middle Ages to modernity. This development is epitomised by the emancipation of the law from morality.\textsuperscript{52} By the end of this development, the legal status of a person had become independent from his/her social status in a specific hierarchical social system, and we observe the emergence of a status of formal equality of all citizens. This development, which afforded individuals the potential to shape their life spheres according to their own preferences and inclinations, can very well be described as a social-evolutionary phenomenon, since it brought about a type of society which later proved to be highly flexible and adaptable, far better suited to withstand the challenges and vagaries of change in the system environment,\textsuperscript{53} and the idea of the GFR may be

\begin{itemize}
  \item \textsuperscript{50} Fundamental rights and freedoms are not absolute. Even if rights – such as the right to dignity in Article 8(1) of the Namibian Constitution – do not carry an express limitation provision, they have immanent boundaries which are elucidated in relation to the rights of others and the collective interests of society.
  \item \textsuperscript{51} The GFR as a normative concept is certainly commensurate with preference relations, with an emphasis on collective goods/interests at the cost of personal freedom. In this case, the margin of definitive negative freedom becomes very small.
  \item \textsuperscript{52} Compare Maine (1861).
  \item \textsuperscript{53} To posit as much may invite critique for it is a deconstruction based on ethnocentric perceptions having emerged in the context of the European Enlightenment. Yet, in the wake of the Enlightenment, science, technology and human development thrived, because the emancipation of the law as its concurrent expression unlocked thinking unencumbered by moral conventions, and created unprecedented alternatives for action. Advances in science were followed by an agricultural revolution, which stabilised food security enormously. Whether the Enlightenment era was such a blessing overall may be doubtful, in particular if one considers the current world economic and social order. The specific anthropocentric world view of the modern era, with its instrumental logic – which is especially associated with liberalism – is largely incapable of conceiving of ‘others’ who define themselves by means of a non-instrumental, ecological relation with nature, as persons, i.e. autonomous subjects (see Benhabib 1992). But the question about viable alternatives lingers. There is certainly more to it than can be discussed.
\end{itemize}
seen as this development’s culmination point. The recognition of the GFR preserves the ever-evolving status quo of individual freedom, since it buttresses the autonomy of the person (vis-à-vis morality). It is, thus, only under the conditions of the GFR, the residual negative freedom, that the person is “free to choose, and not to be chosen for”.

*Human dignity* is a term used to signify that a being has an innate right to respect and ethical treatment. But it is also closely related to concepts like *autonomy*, *human rights*, and *enlightened reason*, and used to critique the treatment of oppressed and vulnerable groups and peoples. But while *dignity* is a term with a long philosophical history, it is rarely defined outright in political, legal and scientific discussions. The inseparable link between *negative freedom* and *dignity* is, thus, less than obvious. Nonetheless, this link emerges immediately if one considers the conceptual core of human dignity as having developed over time.

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54 The Ancient Greek *autonomia* from *autonomos*, from *auto-* “self” and *nomos*, “law”; “one who gives him-/herself their own law”.

55 Ackermann J posits in *Ferreira v Levin NO* at paragraph 49 that, without freedom, human dignity is little more than an abstraction: “Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential. … An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual’s right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others”.

Chaskalson P’s contrary position is as follows: “In the context of the multiplicity of rights with which it is associated in Chapter 3, human dignity can and will flourish without such an extensive interpretation being given to section 11(1)” (*Ferreira v Levin NO*, paragraph 173). This position can only be reconciled with a more positivist-material understanding of human dignity which reduces the right to dignity to just another subjective entitlement. This formal approach places human dignity at the same level as any other subjective right or freedom, without consideration of the functional interrelation between and interdependence of these constitutional precepts. The latter consideration, however, does not go well with Chaskalson P’s standpoint in *S v Makwanyane* (paragraph 144): “The right to life and dignity are the most important of all human rights and the source of all other personal rights in the Bill of Rights …”.

Although not the first to elaborate on the structure, nature and meaning of the concept,\textsuperscript{56} Kant’s discourse on human dignity arguably had the most profound influence. He held that there were things that should not be discussed in terms of value, and that these things could be said to have dignity. \textit{Value} is necessarily relative, because the value of something depends on a particular observer’s judgment of that thing. Things that are not relative (that are “ends in themselves”, in Kant’s terminology), are by extension beyond all value, and a thing is an ‘end in itself’ only if it has a moral dimension. In Kant’s words, this ‘thing’ could only be humans. Kant continued his elaboration of human dignity and put forth the three formulae of will. From formula to formula, and increasingly so, human dignity focuses on self-determination – and autonomy. The emergence of human dignity takes place at the pace of the self-determination/autonomy of the person. It is this autonomy which brings about the person as specifically human. The person has the dignity to choose his/her own ways, to develop the Self, the dignity of autonomy or, in Berlin’s words, “to choose and not to be chosen for”. Kant, like Pico de Mirandola, posits a structural relation between \textit{dignity} and \textit{liberty}: the (human) person has the dignity to be free. Humanity has the dignity to be free in the wider sense of \textit{autonomy}. Against this background, it is clear that freedom/autonomy are the necessary prerequisites for human dignity to unfold; in this sense, the subjective right becomes the most intensive form of autonomy. This perspective has, virtually without exception, become the focal point for oppressed and vulnerable groups and peoples around the world.\textsuperscript{57}

\textbf{The GFR and democracy}

Eventually, it is the foundational concept of \textit{democracy} itself which suggests the recognition of the GFR. In respect of democracy as a form of government, the GFR is (at the level of the individual) the complement of the formal aspects of democracy.

It is the structural-logical extension of the substantial-material limitations imposed on the majority rule by virtue of the specific rights and freedoms which already textually form part of the positive constitutional law. Most often, democracy is seen as a specific principle applied in decision-making, be it at a political level or elsewhere, i.e. the majority rule. Yet, a functional analysis of the constitutional nexus between the majority rule and freedom – against the backdrop of the discourse on democracy in political philosophy – reveals that the establishment of the democratic government is not aimed merely at installing the majority rule as an end in itself. Rather, \textit{democracy} has primarily

\textsuperscript{56} In 1486, at the beginning of the modern era and about 200 years before Kant, Pico della Mirandola (1469–1493) presented his \textit{Oration on the dignity of man (Oratio de hominis dignitate)}, in which he revealed the central problem of dignity and freedom. This oration is commonly seen as one of the central texts of the Renaissance, intimately tied with the growth of humanist philosophies; see Baruzzi (1983:111).

\textsuperscript{57} This view is echoed in \textit{State v Acheson 1991 (2) SA 805 (Nm)}, where Mahomed J considered that “Mr Lubowski … was during his lifetime perceived to be a vigorous proponent of the right of the Namibian people to self-determination and to emancipation from colonialism and racism – ideals which are so eloquently formalised inter alia in the preamble of the Namibian Constitution and arts 10 and 13”.

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been accepted to mean that legitimate government rests on the citizens’ consent, in that
the consent of the governed is the defining characteristic of the relationship between
the state and its subjects. In other words, government has to be based on the will of the
people – in Rousseau’s words, the “volonté générale”. For the lingering question What
constitutes the will of the people? in the context of our discourse, a short excursus to the
history of ideas may be instructive.

In political philosophy since antiquity, the emphasis lies on liberty as democracy’s
underpinning principle; and Aristotle argues, in essence, that liberty is what every
democracy should make its aim. More than 2,000 years later, the foundational principle
of liberty was elaborated upon by Rousseau in his perhaps most important work, The
social contract.58 Rousseau, like Aristotle before him, makes liberty or personal freedom
the pivotal point of his theoretical construct. Rousseau’s concept of democracy takes its
bearings from personal freedom/liberty as an axiological a priori. But, if we were to take
this a priori seriously, democratic decision-making would always require unanimity.
However, Rousseau concedes, realistically, that this is not only impracticable, but
impossible:

Were there a people of gods, their government would be democratic. So perfect a government
is not for men.

If we take the term in the strict sense, there never has been a real democracy, and there never
will be. It is against the natural order for the many to govern and the few to be governed. It
is unimaginable that the people should remain continually assembled to devote their time to
public affairs, and it is clear that they cannot set up commissions59 for that purpose without the
form of administration being changed.

From there emanates the recognition that democracy is not a suitable form of government
for human societies, as well as the practical necessity to deviate from unanimity as the
democratic ideal type of volonté générale. Whereas, as a matter of consequence, any
form of human government – even democracy – poses a continuous threat to liberty,
Rousseau does not suggest the abandonment of the democratic aim, namely liberty.
Instead, he suggests the relaxation of the unanimity requirement in favour of qualified
majorities in relation to the comparative importance of an issue at hand, and the urgency
of decision-making:

There are two general rules that may serve to regulate this relation. First, the more grave and
important the questions discussed, the nearer should the opinion that is to prevail approach
unanimity. Secondly, the more the matter in hand calls for speed, the smaller the prescribed
difference in the numbers of votes may be allowed to become; where an instant decision has to

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58 Published in 1762, it became one of the most influential works of political philosophy in the
Western tradition. It developed some of the ideas mentioned in an earlier work, the article
“Economie Politique” (“Discourse on Political Economy”), featured in Diderot’s Encyclopédie.
The version of The Social Contract referred to here is available at http://www.constitution.org/jjr/socon_03.htm/#004; last accessed 13 January 2010.
59 Rousseau obviously did not support the idea of a representative democracy.
be reached, a majority of one vote should be enough. The first of these two rules seems more in harmony with the laws, and the second with practical affairs. In any case, it is the combination of them that gives the best proportions for determining the majority necessary.

The principles which have been pinned down by Rousseau in the ‘two general rules’ can be found today in just about all democratic societies. Namibia is no exception in this regard. The Namibian Constitution, the fundamental law, consists of all regulatory material that has been considered functionally, structurally, procedurally, formally and materially as ‘more grave’. The specific majority requirements which have to be met for the repeal and amendment of the constitutional text are laid down in Article 131. Accordingly, repeals and amendments of general constitutional norm text require a two-thirds majority of votes. But a difference is made even within the Constitution, and rights and freedoms under Chapter 3 (Bill of Rights) have been placed under special and absolute protection by virtue of Article 132.\(^\text{60}\) With regard to any other issue, i.e. those matters which do not require repeal or amendment of the constitutional text, a simple majority of votes cast is sufficient for resolutions.\(^\text{61}\)

Against this background, the postulation of a normative tandem of human dignity, namely autonomy, and negative freedom appears as a consequence, flowing naturally from the very text of the Namibian Constitution. It can be seen as buttressed by the constitutional concept of democracy, which – bootstrapping from an initial understanding of Rousseau’s volonté générale – de-emphasises the decision-making principle which democracy also denotes, and reminds us that even the objective of the principle as the ideal type of democracy is not so much the formal aspect of decision-making (the majority rules), but the underpinning primordial liberty of the individual.

**Intention of the Constituent Assembly**

If the conceptual consequences of the political philosophical discourse on democracy are carried over from the theoretical level to the normative constitutional level, one question remains: Would it matter if it could be established that the Constituent Assembly excluded the GFR deliberately, wilfully and consciously from the constitutional text? The question points towards the normative theoretical issue of the significance of the Constituent Assembly’s intention – which is indecisive. The quest for the historical legislator’s intention would open the same Pandora’s box of problems encountered before the advent of the Supreme Law. This quest was always assumptive, and usually amounted to no more than divination.\(^\text{62}\) Of course, this does not mean that the ‘intention’ has no significance at all; but to the extent that an intention has been reconstructed, it at best becomes one set of arguments among others during the logical rational process of

\(^{60}\) See also Article 22 of the Namibian Constitution (“Limitations upon Fundamental Rights and Freedoms”).

\(^{61}\) Compare Articles 54, 67 and 77 of the Namibian Constitution. The usual democratic requirements for decision-making have been also relaxed under the impression of urgency in Chapter 4 (“Public Emergency, State of National Defence and Martial Law”) of the Constitution.

\(^{62}\) See Cassidy (2002).
purposive construction and determination of the purpose sought to be advanced by the Constitution.

**Article 7 of the Namibian Constitution and the GFR**

Notwithstanding the abandonment of the literal approach of legal interpretation, if one accepts the legitimacy of law as a convention, it is imperative for the constitutional norm text to serve as the outer normative boundary. It is, thus, necessary to identify a textual anchor for the GFR. Article 7 of the Namibian Constitution is suitable in this regard.

Although Article 7 has been discussed in relation to the arrest of a person, its structure and context do not suggest that the meaning of *liberty* is limited to deprivation of physical freedom. In terms of its constitutional context, liberty in Article 7 is placed in the middle of a sequence consisting otherwise of life (Article 6) and human dignity (Article 8), two fundamental and – in respect of human dignity – generic concepts. Against the background of the discourse about the relation between human dignity and negative freedom, this positioning suggests the GFR over the much narrower concept of *physical freedom*.

One might want to draw support for a counterargument from the ordinary understanding of ‘freedom (liberty) and security of the person’ and lean on the argument by Chaskalson P in *Ferreira v Levin NO*, who in turn relies on the sense in which the phrase *freedom and security of the person* is used in public international law. But following this route would ignore that the structure of Section 12 of the South African Constitution is different from Article 7 of the Namibian Constitution. In its Section 12(1), the South African Constitution combines the right to freedom with the right to security, whereas Article 7 of the Namibian Constitution deals exclusively with liberty. Whereas the “right to freedom and the security of the person” in Section 12(1) of the South African Constitution has been placed alongside prohibitions of, inter alia, “detention without trial”, “torture”, and “cruel, inhuman or degrading treatment or punishment” – matters that are all concerned primarily with physical integrity – such topics are not dealt with in Article 7 of the Namibian Constitution. The latter deals with arrest and detention in Article 11, and fair trial guarantees in Article 12. If one agrees with Chaskalson P that the mechanical application of the expressio unius principle is not appropriate to an interpretation of Chapter 3, and that, hence, the structure of Chapter 3 – the detailed formulation of the different rights – and the language of Article 7 of the Namibian Constitution cannot be ignored, there is no compelling reason to construe the purpose of Article 7 as concerned primarily with physical integrity.

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63 Namibian Police (2000:61ff); S v Boois, S v Thomas 1991 NR 455 HC, at paragraphs 455I–456B.
64 *Ferreira v Levin NO* 1996 (1) SA 984 (CC), paragraph 170.
65 Although largely in form of an obiter, in *Ferreira v Levin NO* the South African Constitutional Court speaks with the authority of a custodian of the law. Yet, as has been pointed out above, the court did not categorically exclude the potential for the residual freedom right to be [Continued overleaf]
Conclusion

It is a towering question how to deal with an infringement of liberty, where the actual, intended or only desired behaviour does not fall within the ambit of any special fundamental right or freedom. The non-recognition of a residual (negative) freedom, here called a general freedom right (GFR), results in the possibility that the legislator and, more importantly, the executive may unlawfully and even under wilful ignorance of the rule of law, infringe, restrict or violate the life sphere of the individual. The discourse about the GFR takes place at a time when constitutional interpretation has become guided by the notion of purpose as opposed to intention. The purpose of the Constitution, at large and specific constitutional precepts in particular, takes into account the relevant context, which includes social factors and political policy directions. Since the constitutional text stands at the apex of the hierarchy of laws, it remains largely its own context, and the question that continues to linger on is how to proceed from there. However, given the fallacies of the literal approach, the interpreter cannot fall back on the notion of the intention of the pouvoir constituant. Accepting the conventional nature of law, the interpreter has to find answers that can be fettered to the norm text of the constitution in question, which is a linguistic expression of an overarching agreement. Inside the Namibian Constitution, the primordial foundational values are human dignity, liberty, and equality. These values were put forward during the historical process towards the self-determination of the Namibian people. A (preliminary) logical-rational analysis of the functional interrelation of the foundational values suggests that specific fundamental rights and freedoms presuppose an a-priori residual freedom, which encompasses the thematic guarantees offered by them. Based on the consideration that Article 7 of the Namibian Constitution is phrased in a way that already semantically points to a negative freedom, and the fact that freedom, in the sense of a state of affairs, has been posited as an objective, it is held here that the Namibian Constitution comprises the GFR. A state of freedom presupposes that infringements on the liberty of a person may only take place if reasonable arguments can justify such infringement. This is the normative effect, which flows from the acknowledgement of the GFR. The GFR is, therefore, a necessary component of a democratic society and, by extension, a necessary component of the Namibian democracy. Where the normative reach of the GFR is dogmatically ignored, the loss of freedom may be minor, and therefore negligible. But even if this were the case, certainty can only be gained once the balancing of values and principles has taken place. Without the actual invocation of negative freedom, the quantum and quality of liberty sacrificed will remain unknown; and any justification of the sacrifice becomes futile.

The discourse that began with this contribution is primarily one which centres on the Namibian Constitution. The benefits and challenges (and solutions) of the concept of a GFR in general have been recognised elsewhere. But the challenge remains to engender a meaningful discourse within the Namibian context. It seems more than probable that the positions taken herein will not remain unchallenged. A number of counterarguments will certainly be fuelled by the routines and habituations, the received techniques of
interpretation, which often come with their own bias. One of the contentious positions has already been pointed out by Ackermann J and Chaskalson P in Ferreira v Levin NO. The consequential challenge may be how deal with the fact that, with the GFR, any tenuous restriction placed on an individual would constitute an infringement of liberty, thus compelling the judiciary to scrutinise every infringement of freedom in this broad sense as meeting the requirements of proportionality. However, answers and constructive suggestions will certainly be provided along the road of the discourse.

References


constructed in the South African Constitution. The court’s approach, thus, keeps a door open for the construction of the notion of freedom in Section 12(1) in light of the needs of a changing society. The fact that the court took a cautious approach to the question can also be explained with reference to the function of the judiciary, which is to give dogmatic answers to legal questions placed before it. In Ferreira v Levin NO, according to the majority judgment, there was no justification to fully engage with the question of whether and how to develop the GFR as a conception under the South African Constitution. The academic discourse does not find itself under such limitations, however, and may venture into logical-rational reasoning with the objective of delineating the normative boundaries of the Constitution and propose definitions of the intricate relationships among the foundational precepts captured by the Constitution’s norm text, and so shelf knowledge for judicial reference whenever the need arises.

66 Compare Kentridge AJ in the very first judgment of the South African Constitutional Court, S v Zuma 1995 (2) SA 642 (CC), at paragraph 17: “… it is nevertheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a singular ‘objective meaning’. Nor is it easy to avoid the influence of one’s personal and intellectual and moral preconceptions” [Emphasis added].

67 Ferreira v Levin NO 1996 (1) SA 984 (CC), paragraph 179.
Landsdowne: Juta.