

# The forerunners of the Namibian Constitution

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## Introduction

The Namibian Constitution is a compromise document. Erasmus<sup>1</sup> correctly points out that it is much more than a futuristic document to organise a post-Independence Namibia. The document itself was an instrument to obtain sustainable peace. Consequently, the new Constitution was not fully negotiated by the Constituent Assembly. The Assembly often opted for a compromise rather than enter into bitter debates between former military opponents.

The United Nations (UN), as the successor of the League of Nations, was involved in settlement talks with all parties involved for many years. Indeed, both the General Assembly and the Security Council had maintained constant pressure on South Africa since the 1960s.

A Namibian settlement was extremely important for the international community, not only to bring peace to a war-stricken country, but also to stabilise the southern African region. The Namibian experiment was used by the South African government to pave the way for meaningful negotiations and, eventually, the replacement of the apartheid-based society with a democratic dispensation.<sup>2</sup>

In this atmosphere, the Constituent Assembly completed the immense assignment of writing a Constitution for a nation ready to be born. The Constitution's replacement of the oppressive apartheid system with a constitutional, democratic society was done in accordance with the principle of inclusion, rather than an "exclusionary shadow".<sup>3</sup>

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1 Erasmus (2002:9f). See also Erasmus (2000).

2 It was not a coincidence that the then South African President FW de Klerk made his dramatic speech – announcing the unbanning of the African National Congress (ANC), the South African Communist Party (SACP), the Pan-Africanist Congress of Azania (PAC), the Azanian People's Organisation (AZAPO) and other movements, as well as the release of Nelson Mandela on 1 February 1990 – shortly after the Namibian Constituent Assembly had unanimously accepted the Constitution. The smooth and peaceful elections and the acceptance of a liberal Constitution with an entrenched Bill of Human Rights broke new grounds for negotiations in South Africa.

3 I borrow the metaphor from the French philosopher, Michel Foucault (e.g. Foucault 1967). His philosophy of power is based on the conflict between the in-group and the vagabonds, the outcasts, who are always shifted to the periphery of society, or the "exclusionary shadow", as Foucault calls it. However, contrary to popular belief, Foucault did not believe in the inevitability of exclusion. See, for example, his positive view of the Iranian people's revolution (Afary & Anderson 2005:203–209). See also Miroslav Volf's interpretation of Foucault (1996:64, footnote 2).

The dream of a community of equal people, sharing resources equally, runs like a golden cord throughout the document – especially Chapter 3, entitled “Fundamental Human Rights and Freedoms”. The Chapter is clearly based on the Universal Declaration of Human Rights.

The high value assigned to human rights and social and democratic values was the result of this negotiated settlement. The demise of communism, the inability of Eastern Europe to fund the war in Angola, and especially the Cuban military presence in the latter country, all contributed to a milieu conducive to negotiations. Under these circumstances, it was undoubtedly necessary for both parties to compromise. But since South Africa was in power, one can assume that most of the compromises came from the liberation movement – the South West Africa People’s Organisation, SWAPO – eager to return to Namibia and contest UN-supervised elections.

But the parties did not come to the negotiations with empty hands. Some important historical documents undoubtedly paved the way for war enemies to understand each other and come to acceptable compromises. This paper looks at some of these documents.

## **The Constitutional Principles by the Western Contact Group**

Two important international decisions smoothed the transition to Namibia’s independence, but also had a decisive influence on the content of the Namibian Constitution. Firstly, in 1978, the UN Security Council accepted Resolution 435 as a basis for Namibia’s independence. While Resolution 435 was elaborated into an extensive plan including UN-supervised elections, the disarmament of the South West African Territorial Force (SWATF) and the confinement to base of the People’s Liberation Army of Namibia (PLAN), it was not implemented for another 11 years.

The second important international initiative was the drafting in 1981 of the Constitutional Principles by the Western Contact Group (WCG), also known as the Eminent Persons Group, consisting of Canada, France, West Germany, the United Kingdom, and the United States (US). The Constitutional Principles represented an attempt by the WCG to ease the fears of both South Africa and the internal parties.<sup>4</sup>

In January 1981, the UN sponsored the so-called pre-implementation conference for Security Council Resolution 435. The conference took place in Geneva, where a South African delegation under the leadership of the Administrator-General for South West Africa, Danie Hough, including 30 Namibian leaders from internal parties, met Sam Nujoma and a SWAPO delegation. The conference was aimed at getting the negotiations for Namibia’s independence back on track. At that stage, South Africa was no longer convinced that an international settlement was possible in Namibia without SWAPO’s participation. The election victory of the Zimbabwe African National Union – Patriotic Front (ZANU-PF) under Robert Mugabe in Zimbabwe in March 1980 was a major shock

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4 The Democratic Turnhalle Alliance (DTA) and some smaller parties who cooperated with South Africa in the Transitional Government for National Unity (TGNU).

to the South African government. The fact that the moderate compromise leader, Abel Muzorewa, was politically destroyed by ZANU-PF did not strengthen the hopes for a recognised DTA government in Windhoek.

The conference, however, came to naught because the delegation comprising the South Africans and the internal parties used the opportunity to attack the UN for its partiality. The WCG planned to introduce a three-phase negotiation proposal on the Namibia question, but the process broke down when one of the internal parties, the Democratic Turnhalle Alliance (DTA), presented the UN with a list of demands to stop its pro-SWAPO approach.

After the Geneva conference, the WCG started working on constitutional principles that would ease the fears of whites and be acceptable to all the parties involved. The first draft of these principles was released in October 1981.<sup>5</sup>

The WCG established minimum guarantees for the constitutional process and the eventual Constitution, including a Bill of Rights as part of the latter, an independent judiciary, and a multiparty democracy. Eight supplementary points were added to Resolution 435.

Although SWAPO initially rejected the Constitutional Principles, they eventually agreed that the document could become the foundation for the independence process and the Namibian Constitution. Since SWAPO had confirmed similar principles back in 1976, their rejection was possibly based on the fact that they did not trust the Western powers and did not appreciate US and European states and former colonial powers playing such an important role in Namibia's future.

Eventually, the Principles became the foundation on which the Constitution was built. At the first meeting of the Constituent Assembly on 21 November 1989, Theo-Ben Gurirab of SWAPO proposed that the Assembly adopt the Principles as a "framework to draw up a Constitution for South West Africa/Namibia". The proposal was unanimously adopted.

Since the Constitutional Principles had become an official annexure to Resolution 435 in 1982, in the UN Secretary-General's note to the Security Council on 16 March 1990, he stated the following:<sup>6</sup>

The Constitution is to enter into force on Independence Day. As the fundamental law of the sovereign and independent Republic of Namibia, the Constitution reflects the "Principles for a Constituent Assembly and for a Constitution of an independent Namibia" adopted by all parties concerned in 1982 and set out in the annex to document S/15287 of 12 July 1982.

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5 The Principles, officially known as *Principles for a Constituent Assembly and for a Constitution of an independent Namibia*, were received as a UN document on 12 July 1982 (S/15287) and accepted by the Security Council as part of Resolution 435.

6 UN document S/20967/Add.2. Available at [http://www.un.org/en/sc/repertoire/89-92/CHAPTER%208/AFRICA/item%2005\\_Namibia\\_.pdf](http://www.un.org/en/sc/repertoire/89-92/CHAPTER%208/AFRICA/item%2005_Namibia_.pdf); last accessed 15 January 2010.

According to Wiechers, the Principles have remained part of Namibian and international law even after Namibia's independence and the implementation of the Constitution.<sup>7</sup> Indeed, they had already acquired the status of international law when they had been included with Resolution 435. They are also now a legally enforceable Resolution of the Security Council which can be invoked by interested parties and UN member states.

While the Principles were only guidelines in Namibia's pre-Independence era, they became the precondition upon which the Namibian Constitution and the institutions of state were to be founded when the Constituent Assembly adopted them in 1982. Wiechers calls the Principles a "fundamental 'constitutional impediment' on the Namibian legislature, which prohibits their abolition, repeal or amendment".<sup>8</sup> Consequently, Wiechers argues, the 1982 Principles cannot be changed or amended, and any amendment to the Constitution that goes against the 1982 Principles is de facto unconstitutional.<sup>9</sup>

While Wiechers goes too far in his evaluation of the 1982 Principles, it remains an important document for understanding the foundations of the Namibian Constitution. However, despite the fact that the Principles became a Security Council Resolution, they were never intended to have a life of their own. Once the Namibian Constitution had been drafted in compliance with the 1982 Principles and accepted by the Constituent Assembly, the said Principles had no further role to play.

In the early years after Independence, the status of the 1982 Principles was raised on a regular basis. In *State v Heita*, where Justice O' Linn considered to recuse himself mero motu, he did not go into the correctness of Wiechers' position, but nevertheless stated that it "at least serve as the background against which, and the context within which, the Namibian Constitution should be interpreted and applied".<sup>10</sup>

In *Ex Parte Attorney-General: In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*,<sup>11</sup> counsel for the Prosecutor-General relied strongly on the Principles in his argument in favour of an independent Prosecutor-General. While Justice Leon did not explicitly refer to the Principles in his judgment, it is interesting that he referred to the separation of powers as a Grundnorm of a Rechtsstaat.<sup>12</sup> In this sense, the judge defined Namibia's prosecutorial authority as part of the functions of the judiciary rather than the executive. To compromise the independence of the judiciary would be a violation of the Constitution.<sup>13</sup>

While the court did not refer to the 1982 Principles, one of the major tenets of the Principles, namely the independence of the judiciary, is not only strongly protected, but also interpreted broadly to include the prosecutorial authority. In *Kauesa v Minister of*

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7      Wiechers (1991:1ff).

8      (ibid.).

9      (ibid.).

10     1992 NR 403 (HC), at 407.

11     1998 NR 303 (SC); Heads of Arguments of State, p 48.

12     Or basic norm or foundation of a state based on the rule of law.

13     1998 NR 303 (SC); Heads of Arguments of State, p 48.

*Home Affairs & Others*, the High Court again relied on the 1982 Principles, but also stated that Wiechers' position was questionable.<sup>14</sup>

Since then the debate on the legal position of the 1982 Principles has died. It is doubtful that any Namibian court will in the near future rely on Wiechers' dictum. But it will remain a key to understanding the historical developments leading to the specific form and content of the Constitution.

However, apart from the independence of the judiciary, the protection of land (or property rights) also formed part of the 1982 Principles. The SWAPO government has been extremely sympathetic of the Zimbabwean land reform programme. While they never approved a 'land grab' for Namibia, the villain in Zimbabwe – as in the rest of Africa – was the white colonial farmer. The government has often referred to the fact that the struggle was about land and, therefore, real reconciliation can only take place if it goes hand in hand with an aggressive land reform programme that will assist the government programme of poverty alleviation.

The white farmers, on the other hand, refer to the negotiations of 1989 and the eventual settlement in which South Africa and SWAPO agreed that property will be protected. Thus, although they seldom refer to the 1982 Principles, the protection of property rights in Article 16 of the Constitution is often quoted. They see the protection of property rights in the Constitution as a settlement agreement between themselves and the new SWAPO government at Independence.

One of the aims of the 1982 Principles was to ease the fear of the white minority community. In that sense, it was indeed part of the settlement agreement between the South African authorities and SWAPO. However, while the Constitution has become the basis for property rights, the 1982 Principles will always feature in the background of the land issue, either to motivate the thesis that foreign countries prevented Namibia from dealing with the land issue in a responsible manner, or as part of the idea that the protection of property rights was part of the settlement that led to independence.

In summary, South Africa, the DTA and its allies embraced the Constitutional Principles from the outset. The Principles also formed the basis of a proposed plan for independence by the UN Security Council.<sup>15</sup> SWAPO, on the other hand, did not accept the Principles immediately and, in 1988, had still not seen the need to formally do so.<sup>16</sup> As will be pointed out later herein, SWAPO's reaction was not directed against the content of the Principles as much as the idea that a delegation of Western countries were once again prescribing the form of government in Africa.

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14 1994 NR 102 (HC) at 137.

15 *1982: Principles Concerning the Constituent Assembly and the Constitution for an Independent Namibia*, Document S15287/12 July 1982.

16 Erasmus (2002:10).

## **SWAPO's Discussion Paper on the Constitution of an independent Namibia**

The idea of a Bill of Rights as part of a future Namibian Constitution did not originate with the WCG. Neither was it alien to the two major political parties involved in the drafting of the Constitution. Katjavivi<sup>17</sup> observes that the debate started within SWAPO as early as the early 1970s.

In 1975, the South African government started preparations for a national conference of internal political parties to set the course for an internationally acceptable independence process without negotiating with SWAPO. The initiative provided the blueprint for the Turnhalle Conference, which later led to the formation of the Transitional Government of National Unity. At the time, the internal SWAPO movement was part of an internal pro-independence alliance, the Namibia National Convention, with the South West Africa National Union (SWANU) and three smaller parties.<sup>18</sup>

In response to the Turnhalle Conference, SWAPO released a Discussion Paper on the Constitution of an independent Namibia.<sup>19</sup> The document was a draft constitution, and closely resembled the draft that SWAPO eventually took to the Constituent Assembly after the UN-supervised elections in 1989.

In strong reaction to the South African policies, the document opts for a unitary state and rejects any notion of "Bantustans masquerading as federalism". The democratic and human rights stance is the point of departure for the rest of the text.<sup>20</sup>

Our experience of persecution and racialism over many years deepened our unqualified commitment to democratic rule, the eradication of racialism, the establishment of the rule of law, and the entrenchment of human rights.

All the proposals of the WCG are embedded in the Discussion Paper. It opts for a parliamentary democracy, with regular elections, an Executive President, a one- or two-chamber Parliament, an impartial public service, an independent judiciary, an entrenched Bill of Rights, and detailed anti-discrimination legislation. While no economic policy is spelled out, the document included a paragraph protecting "vested legal rights and titles

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17 Interview, Windhoek, July 2003. See also Katjavivi (1988:240); Van Wyk (1991:341ff).

18 Doubell (1998:45).

19 The internal SWAPO and NNC leader, Danny Tjongarero, played a prominent role in the process. See Serfontein (1977), who states that Tjongarero drafted the document. The draft was sent to the leadership in exile, who finalised its contents with the assistance of Western lawyers, including British lawyer Cedric Thornberry. Katjavivi (1988:246) confirms this interpretation when he says the document was the result of consultations between the internal and exiled leadership of SWAPO. Doubell (1998:45) overstates Thornberry's contribution: the latter was probably no more than a legal and technical constitutional adviser.

20 Doubell (1998:45).

in property". It even states that the pensions of public servants will be preserved after independence.<sup>21</sup>

The only radical aspect of the document was a proposal that the South African Roman–Dutch law was to be replaced by a totally new system, incorporating certain elements of customary law.<sup>22</sup>

The document was released in August 1975, shortly before the Turnhalle Conference assembled in Windhoek.<sup>23</sup> In hindsight, it seems almost tragic that neither South Africa, its Namibian partners in the Turnhalle deliberations, nor SWAPO understood the significance of the moment. SWAPO indirectly extended a hand of friendship and cooperation to South Africa, Namibian whites, and the Turnhalle groupings. The message was clear: SWAPO was not the Marxist/Leninist demon that South African propaganda had made them out to be. They were at pains to point out that the vested interests of whites would be respected, that expatriate expertise would be welcomed in an independent Namibia – a reference to South Africans in the civil service, the police, the defence force, banks and other private enterprises – and that national reconciliation would be an integral part of a future constitutional dispensation.<sup>24</sup>

The Discussion Paper was a clear indication that SWAPO would have been a meaningful and responsible negotiating partner, as observed by the South African press.<sup>25</sup> Unfortunately, some observers and the South African government were still preoccupied with the harsh separation between the East and the West during the Cold War.

Even the centre left *Rand Daily Mail* newspaper in South Africa was sceptical: but not so much about what the Discussion Paper said, but rather of what it did not say. The newspaper argued that SWAPO often used the rhetoric of African socialism in their speeches and propaganda. The Discussion Paper contained nothing that explicitly revoked the pro-communist SWAPO image. In other words, despite the positive elements of the text, the unwritten ghost behind the letters was a socialist demon.<sup>26</sup>

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21 (ibid.:45f).

22 (ibid.:46). The reaction against Roman–Dutch law is understandable, since it was the instrument used by the South African government to oppress the people. And if the courts confirmed the actions of the executive, it was inevitable that the perception would develop that Roman–Dutch law was oppressive and unjust per se. At the deliberations of the Constituent Assembly, SWAPO was advised by, among others, Arthur Chaskalson, later to become the President of the South African Constitutional Court, and Gerhard Erasmus, a Namibian-born Stellenbosch academic. It became clear that a total change in the legal system would create uncertainty and involve unnecessary state expenses. The Constituent Assembly eventually opted to maintain the South African Roman–Dutch law; see Article 140 of the Constitution.

23 (ibid.:46).

24 (ibid.:45).

25 See the reactions of David Martin of *The Star* and Hennie Serfontein of the *Sunday Times*, quoted in (ibid.:46).

26 Imrie, J, in *Rand Daily Mail*, 31 August 1975; quoted in (ibid.:46).

When South Africa and the pro-South African parties ignored the hand extended for negotiation, SWAPO's attitude hardened. In the years that followed, SWAPO radically opposed the Turnhalle movement<sup>27</sup> and its political and social agenda.

In August 1976, an enlarged SWAPO Central Committee adopted a Constitution and Political Programme in Zambia. Doubell observes that the document had a predominantly internal purpose, namely to ease the struggle between the old guard and the stream of young people crossing the border to Angola after the fall of Portuguese rule.<sup>28</sup> It also served as an instrument of negotiation and reconciliation with the then ruling party in Angola, the *Movimento Popular para a Libertação de Angola* (MPLA). SWAPO was eager to move its headquarters from Zambia, which was under immense pressure from South Africa, to Angola.<sup>29</sup>

Whereas the Discussion Paper maintained a neutral or non-aligned stance on foreign relations, the SWAPO Constitution, adopted on 1 August 1976, opted to work with –<sup>30</sup>

... national liberation movements, world socialist, progressive and peace-loving forces in order to eliminate all forms of imperialism, *colonialism and neo-colonialism*. [Emphasis added]

The document is highly critical of Western governments and their support of the "Turnhalle circus", while it stands for building a classless, non-exploitative socialist state.<sup>31</sup>

While the Political Programme was never intended to be a proposal for a future independent Namibian state, it totally overtook the 1975 Discussion Paper. From 1976 onwards, the Political Programme was seen internationally as a statement of SWAPO's political ideology and perceived as the foundation of an independent Namibia. The Political Programme did not include any reference to a Bill of Rights, however. In the international world, SWAPO was seen as a hard-core Marxist movement that intended transforming Namibia into a non-democratic socialist state.<sup>32</sup>

Doubell asserts that the Political Programme did not really harm SWAPO in any material way, since the text was vague enough to be adapted to suit SWAPO's audience.<sup>33</sup> Furthermore, SWAPO's Scandinavian donors did not care much about the ideological streams within SWAPO, and the West could not afford to ignore SWAPO after Zimbabwe

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27 I use the phrase *Turnhalle movement* here as a collective name for all the role players who foresaw a possible future by way of a negotiated settlement with internal political parties, but without SWAPO.

28 Doubell (1998:55ff).

29 (ibid.).

30 Central Committee of SWAPO (1976:137).

31 (ibid.:6ff).

32 See Doubell (1998:57) for the reaction of the international press and the West in general.

33 (ibid.:58ff).

and the former Portuguese colonies – Angola and Mozambique – had been alienated from their sphere of influence in southern Africa.<sup>34</sup>

SWAPO themselves did not care much about the tags of the Cold War. It must be remembered that much of the socialist rhetoric was part of a genuine concern for the oppressed people in Namibia. It was not uncommon for liberation movements in Africa and Latin America to look at the oppression of authoritarian states from a Marxist/Leninist class struggle perspective.

SWAPO, like all liberation movements of its time, received the bulk of assistance – both financially and in terms of training and capacity-building – from the East European communist countries and Cuba. In the 1960s and 1970s, neither the old communist bloc nor the growing number of independent African states were overenthusiastic about human rights.

Klenner,<sup>35</sup> an academic from the former German Democratic Republic, expressed the view of many Marxists when he claimed that human rights were neither universal nor identical everywhere in the world. Human interests, he claimed, were determined by position in society “under the conditions of the system of private ownership of the means of production”.<sup>36</sup> To Marxists like him, the class struggle was the foundation of all abuse and oppression: taking care of the needs of humankind focused on the revolutionary overthrow of the bourgeois state, and individual rights were not a major issue.

At the same time, there was a strong feeling amongst African leaders that the outgoing colonial powers had a hidden agenda by insisting on the inclusion of an entrenched bill of human rights in the constitutions of newly independent African states. In the latter’s view, the colonial masters wanted to protect the property of settlers and companies owned by the “motherland”.<sup>37</sup> Bills of human rights – especially if entrenched in new African constitutions – are seen as a tool for keeping post-colonial Africa enslaved. Ironically, Britain, who insisted on an entrenched constitutional bill of rights for its former colonies, did not even have a written constitution of its own.<sup>38</sup>

Thus, in Namibia, history seemed to be pointing to a growing awareness of human rights. This made an enshrined bill of rights in the Constitution not only acceptable, but also desirable. The working document that SWAPO provided to the Constituent Assembly in fact already contained a bill of rights.

It is, however, unfortunate that SWAPO’s commitment to democracy, an independent judiciary, national reconciliation and the recognition of property rights was not fully appreciated by the West and, especially, South Africa and its Namibian allies in 1975.

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34 (ibid.).

35 1977; quoted in Shivji (1989).

36 (ibid.).

37 See Shivji (1989:19) and Legal Aid Committee (1985:12ff).

38 See Shivji (1989:19; see also Ramose (2003).

<sup>33</sup> See O’Linn (2003:15, 172).

Critics of SWAPO will point to the fact that the liberation movement never included a bill of fundamental rights in the organisation's own constitution during its years in exile, and neither did they emphasise a bill of rights after 1976. However, as Katjavivi<sup>39</sup> and Doubell<sup>40</sup> both pointed out, SWAPO presented a democratic constitutional plan to the world several years before the WCG came up with the Constitutional Principles.

Even though one cannot claim SWAPO had a worked-out plan on human rights in the 1970s, it is clear that discussions in the party had already started on this before 1975. Such a process was necessary in order to pave the way for the recognition of individual rights. It was this process that led to the acceptance of a Bill of Rights by SWAPO in 1982. That there were dissenting voices in SWAPO during the liberation struggle opposing such a Bill of Rights is understandable, and should be seen in its historical context.

## **The Windhoek Declaration**

The internal political parties are often seen as mere puppets of the South African colonial government.

However, the TGNU, often seen as a South African initiative, was in fact a compromise. Indeed, the relationship between South Africa and the internal parties – or Turnhalle movement – was complicated. The latter ranged from one extreme on the spectrum of political thinking to the other, and none were mere extensions of the South African government or its representative in Windhoek, the Administrator-General.

On the one hand, South Africa wanted to present the Turnhalle movement as the real representatives on Namibian aspirations; but on the other, they would present initiatives not supported by the majority of the movement. For example, in 1983, the South African government wanted to create a State Council in Namibia similar to the President's Council in South Africa. The idea was not supported by the Turnhalle movement, who wanted South Africa to hand over political power to Namibians. To trump the South African initiative, Moses Katjuongua of SWANU initiated a Multiparty Conference (MPC) on 12 November 1983.<sup>41</sup> On 18 April 1984, the MPC accepted and released the Windhoek Declaration. The Declaration contained a Bill of Fundamental Rights and Objectives. The Windhoek Declaration was a typical Western liberal document, and protected political and civil rights vigorously.<sup>42</sup> However, as Wiechers points out, this was not the first political grouping in Namibia to accept a Bill of Rights: SWAPO and

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39 Katjavivi (1988).

40 Doubell (1998).

41 Mudge invited the DTA, SWANU, the National Party, the Labour Party, the Rehoboth Liberated Democratic Party, SWAPO-Democrats, the Damara Council, the Namibia's People Liberation Front (NPLF) and SWAPO. When SWAPO declined the invitation, the Damara Council and the NPLF also withdrew. See Van Wyk (1999:153, 159).

42 Potgieter (1991).

the Frontline States had already accepted the African Charter on Human and Peoples' Rights in 1982.<sup>43</sup>

In 1985, the State President of South Africa, acting in terms of section 38 of the South West Africa Constitution Act,<sup>44</sup> issued Proclamation R101 to establish what it called a *Transitional Government of National Unity*.

Proclamation R101 included the Bill of Fundamental Rights and Objectives in an annexure, as well as an Article providing for the review of laws that contradicted that Bill of Rights.<sup>45</sup> The TGNU operated in the country between June 1985 and March 1989. The real political power and sovereignty, however, remained in South African hands. In Windhoek, the Administrator-General was the principal representative of the South African government. The Supreme Court of South West Africa approached the Bill of Rights in a liberal, purposive manner. Thus, despite the political pressure of the armed struggle and a transitional government that was constantly under pressure from its colonial master, the court protected the rights of citizens in the spirit of a constitutional democracy in the making.

The Supreme Court of SWA did not waver. The constitutionality of the Terrorism Act<sup>46</sup> came around in 1989, when a full bench confirmed a judgment by the Supreme Court of SWA ordering the release of six prominent internal SWAPO members who had been detained without trial in terms of section 6(1) of that Act. The appellant was the Cabinet of the TGNU.<sup>47</sup>

Although the applicants did not rely on the Bill of Rights to substantiate their application for a habeas corpus or an interdictum de homine libero et exhibendo, as the remedy was known in Roman–Dutch law,<sup>48</sup> the judgment of the full bench follows the constitutional lines of previous decisions. Emphasising the importance of strictly complying with the provisions of the law where the liberty of an individual was concerned, Justice Levy commented that –<sup>49</sup>

... [s]ince time immemorial the safety of the State, social unrest and warlike conditions have been invoked by enthusiastic executives as reasons for the Courts to overlook the executives' non-compliance with the provisions of the law.

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43 (ibid.:150).

44 No. 39 of 1968.

45 Proclamation R101 of 1985.

46 No. 83 of 1967.

47 *Cabinet for the Interim Government of South West Africa/Namibia v Bessinger & Others* 1989 (1) SA 618 (SWA).

48 For a detailed treatment of the Supreme Court of Appeal of South Africa's application of the Roman–Dutch remedy rather than the habeas corpus merely to undermine the rights of individuals, see Horn (2008:45–68).

49 (ibid.:622).

Even more fascinating is the contribution by Acting Justice Henning, who relied primarily on the Rechtsstaat concept.<sup>50</sup> He acknowledged that SWA/Namibia at the time could not be classified as a Rechtsstaat (a state governed by law), but still operated as a Wetstaat (a state based on laws) because of its captivity by the Appellate Division in South Africa. He quotes the *Katofa* case<sup>51</sup> to point out that the SWA/Namibian court did not have the power to review Acts that the South African Parliament had made applicable in SWA/Namibia, even if they contradicted the Bill of Rights.<sup>52</sup> He nevertheless suggested that, on the road to a justice state, power had to be limited by power: *le pouvoir arrête le pouvoir*.<sup>53</sup>

Furthermore, since it was not possible to strike the Terrorism Act down because of its obvious contradiction of section 3 of the Bill of Rights that prohibited detention without trial, the court nevertheless took the rights of individuals seriously by assuring that the procedures of the security legislation were adhered to before allowing the loss of liberty.<sup>54</sup> In yet another case<sup>55</sup> with strong political undertones, the full bench of the Supreme Court of SWA declared parts of an Act – ironically called the *Protection of Fundamental*

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50 The judge quotes both German and Dutch legal philosophers to state his case (ibid.:631): “*Der Staat soll Rechtsstaat sein: ... Er soll die Bahnen und Grenzen seiner Wirksamkeit wie die freie Sphäre seiner Bürger in der Weise des Rechts genau bestimmen ...*” [Friedrich Stahl] and “*Hoe meer de rechtsstaatsidee tot werkelijkheid wordt, destemeer zal de Overheid volgens regels van recht handelen*” [Stellinga].

51 *Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A). The ridiculous result of the judgment was that oppressive legislation could remain on the books and be enforced even when it contradicted the protection of Namibians’ rights under the Bill of Rights.

52 *Cabinet for the Interim Government of South West Africa/Namibia v Bessinger & Others* 1989 (1) SA 618 (SWA), p 631.

53 (ibid.).

54 (ibid.:632). It is interesting that the Supreme Court of SWA considered striking down the Terrorism Act despite the *Katofa* case: “In passing I should point out that many of the other provisions of Act 83 of 1967 are also in clear conflict with the provisions of the Bill of Fundamental Rights and Objectives. This has already been authoritatively laid down by the Appellate Division in *S v Marwane* 1982 (3) SA 717 and repeated by this Court in *S v Heita* 1987 (1) SA 311 in October last year. Marwane’s case dealt with a provision in the Constitution of Bophuthatswana which is similar to the corresponding provision in our Bill of Rights. Under the circumstances one is filled with dismay that our Legislative Assembly has still not made use of its powers under Proc[.] R101 of 1985 to repeal or amend the Terrorism Act. It is incomprehensible that citizens of South West Africa should still be subject to the Draconian [sic] provisions of a South African Act of Parliament which was repealed in South Africa 15 years ago and which is moreover in conflict with our Bill of Rights.

“This Court has in the past refrained from adopting the procedure of American Courts of “striking down” legislation which conflicts with fundamental constitutional rights. We have done so because the Court hoped and indeed expected that the National Assembly would itself take the necessary steps to repeal or amend such laws, but the time might come when the Supreme Court of South West Africa has to reconsider its attitude in this regard”.

55 *Namibia National Students’ Organisation & Others v Speaker of the National Assembly for South West Africa* 1990 (1) SA 617 SWA.

*Rights Act*<sup>56</sup> – unconstitutional since it contradicted entrenched rights such as freedom of expression and freedom of assembly. As Justice Hendler commented,<sup>57</sup> –

[i]t is clear that it creates criminal offences for activities which in democratic societies have been perfectly acceptable and legal.

In another brave decision the full bench declared the notorious Proclamation AG8 of 1980 unconstitutional.<sup>58</sup> The South-African-appointed Administrator-General (AG) had legislative powers to make proclamations. AG8, as this particular Proclamation was known, laid the foundation for a segregated future Namibia. It divided the people of Namibia into 11 ethnic groups, and created a so-called second-tier government for each such group. Every Namibian was obliged to belong to one of these groups, even if he or she did not belong to one in an ethnic sense.

The budget allocation to each group was not based on its member total, but on the taxes they paid. Consequently, the whites – with less than 10% of the total population – received a budget substantially higher than that for any other group.

The court took cognisance of the fact that –<sup>59</sup>

... articles or provisions laying down fundamental rights were, by their very nature, drafted in a broad and ample style which laid down principles of width and generality, and ought to be treated as *sui generis*.

Therefore, the interpretation of the said articles or provisions should not be subjected to rigid literalism. Consequently, when the court had to interpret the word *advantage* in the Bill of Rights, they concluded that it should also include *material advantage*, even if the rights enshrined in the Bill of Rights were civil and political, and not social or economic.<sup>60</sup> The court found that AG8, in its entirety, was in conflict with the Bill of Rights.

The judgment is important not only because it challenged the principle of racially separated development in South-African-occupied Namibia, but also because it laid the foundation of the constitutional pillars framed by the South African Parliament for a future, independent Namibia. While the tenability of a segregated state based on race or ethnicity had been rejected by both the SWAPO and SWANU liberation movements, the Supreme Court declared that it was also impossible to reconcile a state where ethnicity is the ideological foundation of all its laws and interaction with its citizens with a Bill of

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56 No. 16 of 1988.

57 *Namibia National Students' Organisation & Others v Speaker of the National Assembly for South West Africa* 1990 (1) SA 617 SWA, at 627.

58 *Ex Parte Cabinet for the Interim Government of South West Africa: In re: Advisory Opinion in terms of s 19(2) of Proclamation R101 of 1985* (RSA) 1988 (2) SA 832 (SWA).

59 (*ibid.*).

60 (*ibid.*:835).

Fundamental Rights; or, to use Justice Henning's terminology in the *Bessinger* case, "a Rechtsstaat cannot be built on the pillars of a Wetstaat".

The Supreme Court of SWA had a constant battle with both the transitional government and the South African Appellate Division. By this, the judiciary charted the course way for a new dispensation in Namibia, where the courts would play a much more significant role in enforcing constitutional rights against oppressive legislation. The TGNU, however, opted to take refuge at the South African Appellate Division rather than strengthen its Supreme Court in the making.

The judgments of the Appellate Division are typical of the fundamentalist approach of courts in South Africa before 1994. This is a typical example of what Dyzenhaus calls "the unwillingness of judges to allow any moral sensibilities to have an impact on interpretation".<sup>61</sup>

However, political influence on the judgments cannot be ignored. For example, Justice Rabie's examples in the *Eins* case are anything but neutral.<sup>62</sup> Eins, a South African living in Namibia, approached the court to declare section 9 of the Residence of Certain Persons in South West Africa Act<sup>63</sup> unconstitutional because it was in conflict with several articles of the Bill of Rights protecting residential rights in South West Africa/Namibia. The Supreme Court of SWA agreed with Eins, and declared the said section unconstitutional.

However, the South African Supreme Court of Appeal did not agree. Justice Rabie took it for granted that Proclamation R101 of 1985 (including the Bill of Rights) was subject to the laws of the South African Parliament.<sup>64</sup> He also refused to weigh the restriction that new laws laid on people residing in South West Africa/Namibia against the protected human rights of Proclamation 101. Justice Rabie restricted the application of the Bill of Rights by pointing out that Eins, a South African citizen living in SWA/Namibia, had always been restricted in his residence rights. Section 9 of the Residence of Certain Persons in South West Africa Act was just a repetition of earlier proclamations, he pronounced, and Eins could have faced deportation in terms of the security legislation. He further ruled that, since restrictions to the enjoyment of certain residential rights had always been part of Namibian law, the categorisation of section 9 could not be seen as unreasonable and, therefore, a derogation from the Bill of Rights was permissible.

One seeks in vain for any indication in the judgments that the Appellate Division had any vision whatsoever of the birth of a nation. The Supreme Court of SWA, on the other hand, took the Bill of Rights and the protection of the people of Namibia extremely seriously.

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61 Dyzenhaus (1998:16ff).

62 See *Eins v The National Assembly for the Territory of South West Africa*.

63 No. 33 of 1985.

64 Cf. his words: "*Artikel 2 van die Handves handel met die persoonlike vryhede* ("liberty of person") *van die individu wat nie deur die bepalings van art[.] 9 van die Wet in gedrang gebring word nie*" ("Article 2 of the Bill of Rights deals with personal liberties ... of the individual not dealt with in the stipulations of section 9 of the Act"; translation Nico Horn).

The legal fraternity gave little – if any – attention to the paradigm shift that took place in the Supreme Court in Windhoek between 1986 and 1990. Scholars often refer to the post-Independence 1991 judgment of *State v Acheson* as the turning point in Namibian jurisprudence, ignoring the radical stance of the Supreme Court of SWA in the 1980s.

In South Africa, Kruger and Curren<sup>65</sup> only took notice of the positive constitutional interpretations after Namibia's independence. And Nico Steytler took it for granted that the white judges of the Namibian High Court would be the protectors of the old order.<sup>66</sup>

While the judges may not have expressed support for SWAPO during the struggle, their relationship with the transitional government was anything but friendly. On the contrary, the Supreme Court of SWA bench proved to be a thorn in the transitional government's flesh. Looking at the Supreme Court's track record in protecting the rights of Namibians during the struggle, they can hardly be seen as part of the governing elite.

O'Linn criticises the judges in the interim period for their overenthusiastic evaluation of Proclamation R101 of 1985.<sup>67</sup> The criticism is justified. It should have been clear at the time that there would be no settlement in Namibia without SWAPO's presence. However, the bench was not a political party and it did not have a power base in politics. Even if Proclamation R101 was not a Constitution and Namibia was not a sovereign state, the Proclamation gave the court a tool that enabled them to take Namibian jurisprudence out of the rigid, oppressive thinking of the South African Supreme Court of Appeal.

The fact that Proclamation R101 was so closely linked to the transitional government and the latter's lukewarm commitment to the rule of law clearly undermined the status of the Bill of Rights. The exclusion of SWAPO from the so-called constitutional process also alienated the majority of the people. However, despite these shortcomings, the SWA Supreme Court played an important role in laying the foundations of a culture of constitutional supremacy in Namibia.

One also needs to remember that, before Independence, the courts operated under a system of parliamentary supremacy, which limited them in respect of applying human rights principles. Moreover, the Administrator-General had legislative powers. Successive Administrator-Generals did not hesitate to use these powers to enact draconian proclamations during the struggle for liberation. O'Linn justifiably softens his criticism of the Supreme Court of SWA by concluding that they maintained a high legal standard, especially after the implementation of Proclamation R101.<sup>68</sup>

It is unfortunate that the South African Appellate Division, which remained the final legal authority in Namibia, did not deviate from their stance on parliamentary sovereignty. It ignored the challenge of the Supreme Court of SWA to evaluate the values and aims

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65 Kruger & Curren (1991).

66 Steytler (1991:488).

67 O'Linn (2003:264).

68 (ibid.:280).

of the Bill of Rights, and instead followed the traditionally rigid approach by looking primarily to the intention of the legislator and the legal interpretation surrounding the issues.

Neither the TGNU nor the highest court in South Africa gave any indication to the international world or SWAPO that they were serious about implementing a Bill of Rights. The international community had to wait several more years for the TGNU and the internal parties to catch up with the insights of the High Court.

While the South African Supreme Court of Appeal decisions pleased the TGNU and the white minority in Namibia, the decisions did not assist in giving the transitional process and the transitional Bill of Rights credibility.

One can criticise the TGNU for its short-sightedness, its lack of credibility, and the fact that it did not represent the majority of the Namibian people. One can also point to the lack of political will of the South African government to make the Bill of Rights work, and criticise the Appeal Court for its lack of understanding of the fundamental values in a constitutional dispensation. In addition, the Bill of Fundamental Rights and Objectives was undoubtedly premature, since it lacked SWAPO support, and was consequently rejected by the majority of the population. In that sense, it was a failed exercise that did not contribute to an internationally acceptable settlement in Namibia.<sup>69</sup>

However, the innovative and brave interpretations of the Supreme Court of SWA gave credibility to this premature, weak action and helped to create a human rights culture amongst the followers of the DTA and other internal parties. The Bill of Fundamental Rights and Objectives played a positive role in furthering human rights in conservative communities both in Namibia and South Africa.<sup>70</sup>

## **The Hiemstra Constitution<sup>71</sup>**

The MPC only accepted the TGNU on the condition that the South African government created a political forum for Namibians to start writing their own Constitution for a future independent Namibia.<sup>72</sup> On 30 August 1985, the Constitutional Council was created. PW Botha appointed Victor Hiemstra, the former Chief Justice of Bophuthatswana, a South African Bantustan, as the Council's Chairperson. He was known for his constitutional and human rights judgments in the so-called Republic of Bophuthatswana.

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69 See O'Linn (2003:15, 173).

70 Wiechers (1991:110) points out that, since transgressions of the Bill were declared justifiable, both the South West African courts and the South African Appellate Division made a number of human rights judgments which proved a valuable learning process.

71 Dirk Mudge points out that the name is a misnomer because the document was basically a political document, drawn up by politicians and based on specific political convictions. Judge Hiemstra played the important role of putting the Constitution into a legal framework. Telephone interviews, Dirk Mudge, Windhoek–Otjiwarongo, 30 January 2010.

72 Dirk Mudge and the DTA did not want another transitional government, which they thought would be used to slow down the process; see Van Wyk (1998:152ff).

The draft Hiemstra Constitution, as had the Supreme Court of SWA before it, rejected the idea of ethnic, second-tier governments or territorially ethnic local governments. It also did not include sections protecting minorities. Consequently, the South African government ignored its own creation. It refused to give any legal or political status to the draft constitution, despite the money that had been put into it and after Judge Hiemstra had spent two years of his life chairing the Council.

Nonetheless, the Hiemstra Constitution played an important role in the development of Namibian constitutionalism. After the Supreme Court's judgment declaring second-tier ethnic governments a violation of the TGNU's Bill of Rights, and since the Hiemstra Constitution also rejected ethnic governments as a constitutional principle, the sectarian ethnic thinking of the National Party was destroyed. It played no role in the Namibian Constituent Assembly.

The Hiemstra Constitution also became the official draft put forward by the DTA at the Constituent Assembly. This Constitution and SWAPO's draft were so similar that Mudge proposed the SWAPO draft be used as the working document of the Standing Committee of the Constituent Assembly.<sup>73</sup> Constitutional scholars are of the opinion that as much as 80% of the content of the Hiemstra Constitution correlated with the Namibian Constitution.<sup>74</sup>

## **Conclusion**

Modern critics of the Constitution are possibly correct in asserting that SWAPO only accepted the Constitutional Principles to reach their principal objective: the withdrawal of South Africa from the territory and an independent Namibia. They are also correct in pointing out that the Constituent Assembly went into the constitutional chambers with their hands tied. However, as we have seen, the basic tenets of the Constitutional Principles were all part of SWAPO's Discussion Paper of 1975.

Since SWAPO was extremely critical of the role and objectives of the Western powers in southern Africa, it is hardly surprising that they were slow to accept the Constitutional Principles of the WCG.

The Constitutional Principles went much further than describing the transitional process, the UN-supervised elections, and the working rules of the Constituent Assembly. It also prescribed elements that had to be included in the Namibian Constitution. Among these were the principle of constitutional democracy and an entrenched supreme constitution, as well as the independence of the judiciary, including the function of constitutional review and the separation of powers.

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73 Constituent Assembly of the Republic of Namibia. 1989/1990. Constituent Committee Documents, pp. 1–2; quoted in Van Wyk (1998:181,194).

74 These include Marinus Wiechers and Dr Paul Szasz, legal advisor of Martti Ahtisaari; see (ibid.:183, 194).

The principle of constitutional supremacy vis-à-vis a parliamentary democracy has been a bone of contention in many circles. Ramose sees it as a vote of no confidence in the new government, which in a sense it was.<sup>75</sup> Erasmus correctly points out that the strong Constitution was necessary to ease the fears of the DTA and smaller internal parties – and possibly also those of South Africa.<sup>76</sup>

However, it is also possible to see constitutional democracy as a victory over the oppressive parliamentary ‘democracy’ of South African rule, where the South African Parliament ruled supreme. Okpaluba<sup>77</sup> remarks that even attempts by the Appellate Division of the Supreme Court to review one of the racially based Acts was dealt with contempt by Parliament. They simply repealed the specific legislation and followed it up with a subsequent, strongly worded new clause.<sup>78</sup>

One cannot deny the role of the WCG or that of the UN and the international community in drafting the conditions for Namibia’s independence and the content of its Constitution. However, as has been pointed out, the Namibian people represented by both internal parties and the SWAPO leadership that came from exile eventually agreed to the inclusion of the Constitutional Principles in the independent country’s Constitution. Indeed, the participants of the constitution-drafting exercise engaged in a real democratic process of compromises and exchanges that prevented any of the parties from manipulating the event.

The mere involvement of the WCG and the international community does not make the Constitution a foreign document, therefore.

Werner Ustoff’s approach to the missionary churches in Africa is helpful in understanding the dynamics of cultural adaptation.<sup>79</sup> Long after indigenous leaders had assumed control of the the churches founded by European missionaries, since they kept the liturgical and dress code inheritance of the various missions, it is wrong to assume that the originally European religious concepts and codes continue to be alien to African culture and tradition today. Although the missionaries’ traditions may have originated in Europe, when the Anglicans in northern Namibia or the Lutherans in the south sing the hymns of the Reformation today, they are expressing the cultural values of the Namibian people. In the same way, the Constitutional Principles embodied in the Namibian Constitution become Namibian if the Namibian people embrace them as their own and live by them.

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75 (ibid.).

76 Erasmus (2002:10).

77 Okpaluba (2003:110ff).

78 See e.g. *Harris v Minister of Interior* 1952 (2) SA 428 (A), which overruled *Ndlwana v Hofmeyr NO* 1937 AD 229.

79 Ustoff was Professor of Missions at the University of Birmingham when the author spent a sabbatical as a William Paton Fellow at that University and at Selly Oak Colleges in 1992. This extract of Ustoff’s thoughts is based on his lectures at the time, and is derived from personal notes.

In conclusion, Erasmus's view that the Namibian Constitution should be seen as a process rather than a mere document is helpful. If the Constitution is seen as part of an important process, its value does not only lie in its post-Independence application. Indeed, without the Constitutional Principles, the pre-Independence negotiations could not have gone progressed.

The dynamics of the negotiations, the history of the process, and international participation are part of the unwritten texts of Namibia's independence. Several constitutional documents submitted by the various parties played a role in the constitution-making process. The 1981 Constitutional Principles, SWAPO's 1976 Discussion Paper, the 1984 Windhoek Declaration, and the Hiemstra Constitution of the mid-1980s all pushed back the frontier for the consensus Constitution that gave birth to the Namibian nation in 1990.

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