

# The paradigm of equality in the Namibian Constitution: Concept, contours and concerns

*Dianne Hubbard*

Equality before the law remains a concept fraught with difficulty in interpretation as well as application. It is, as in most of the other fundamental rights, not precisely defined in the Constitution and the Court must therefore define its content, and limitations.<sup>1</sup>

This paper will look at how the Namibian courts have handled the challenges of interpreting and applying Article 10 of the Namibian Constitution during the first 20 years of independence.

## Concept: The equality clause in context

Equality before the law was one of the tenets which the Constituent Assembly was bound to include in the new Constitution of the Republic of Namibia by virtue of the 1982 Constitutional Principles negotiated prior to Independence.<sup>2</sup> Although the inclusion of the principle of equality in this constitutional blueprint may have stemmed primarily from fears that whites would be excluded from equal rights in a post-apartheid dispensation, the Namibian Constitution made equality a cornerstone of the values it enshrined for a new, free society.

---

1 *S v Vries* 1998 NR 316 (SC) at 276G–H, per O’Linn J (concurring judgment).

2 “There will be a declaration of fundamental rights, which will include the rights to life, personal liberty and freedom of movement; to freedom of conscience; to freedom of expression, including freedom of speech and a free press; to freedom of assembly and association, including political parties and trade unions; to due process and *equality before the law*; to protection from arbitrary deprivation of private property or deprivation of private property without just compensation; and to freedom from racial, ethnic, religious or sexual discrimination. The declaration of rights will be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights” [Emphasis added]; *Principles for a Constitution for an Independent Namibia*, United Nations (UN) Secretary-General’s Report S/15287 (12 July 1982) at clause 5. See also *Further Report of the Secretary-General Concerning the Implementation of Security Council Resolutions 435 (1978) and 439 (1978) Concerning the Question of Namibia*, UN Document S/20412 (23 January 1989) at paragraph 35; *Further Report of the Secretary-General Concerning the Implementation of Security Council Resolution 435 (1978) Concerning the Question of Namibia*, UN Document S/20967/Add 2 (16 March 1990); Wiechers (1991).

The role of the 1982 Constitutional Principles is also discussed in *S v Heita & Another* 1992 NR 403 (HC) at 405J–406I, per O’Linn J; and *Kauesa v Minister of Home Affairs & Others* 1994 NR 102 (HC) at 136C, 140J–141A and 143C–H, per O’Linn J. See also Erasmus (2000:8–10).

Equality is in fact the starting point: the first clause of the Preamble to the Constitution makes it clear that the entire enterprise is based on “recognition of the inherent dignity and of the *equal* and inalienable rights of all members of the human family”, which is “indispensable for freedom, justice and peace”.<sup>3</sup> The second clause of the Preamble elaborates by noting that the “right of the individual to life, liberty and the pursuit of happiness” applies “regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status”, while the third clause of the Preamble states that these rights are most effectively maintained and protected in a democratic society with a government accountable to freely elected representatives of the people, a sovereign constitution and an independent judiciary.<sup>4</sup> Thus, one of the stated purposes of the entire structure of government for an independent Namibia is to ensure that individual rights are enjoyed on an equal basis.

The linchpin for ensuring equality is Article 10:

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

This prohibition on discrimination, like the other fundamental rights and freedoms, applies not just to discrimination by the state, but “where applicable to them, by all natural and legal persons in Namibia”.<sup>5</sup>

The constitutional context makes it clear that Article 10 is aimed at the achievement of substantive equality rather than formal equality, as a means to right past wrongs.<sup>6</sup> The remainder of the Preamble focuses on the previous denial of rights as a result of “colonialism, racism and apartheid”, and on victory in the struggle against these wrongs as a means of “securing to all our citizens justice, liberty, equality and fraternity”. This concern with redressing past inequalities is woven throughout the rest of the Constitution.

The commitment to substantive equality is put into historical context by Article 23, which explicitly prohibits “the practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered

---

3 Emphasis added.

4 For a discussion of the role of the Preamble in constitutional interpretation, see *Kauesa v Minister of Home Affairs & Others* 1994 NR 102 (HC) at 134H–135H, per O’Linn J.

5 Article 5.

6 Formal equality involves eliminating legal distinctions. Substantive equality requires an examination of laws in their social context to see what approaches will best advance meaningful equality in real life. The South African case of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) provides a clear example of this distinction in practice, with the court noting that “although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved”; at 23E–G, per Goldstone J.

for so long". The Constitution gives teeth to this prohibition by mandating Parliament to pass legislation making future racial discrimination criminally punishable.<sup>7</sup>

Article 23 also explicitly approves of affirmative action –<sup>8</sup>

... for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.

The Public Service Commission, the Inspector-General of Police, the Chief of the Defence Force and the Commissioner of Prisons are all charged to pay special attention to this balanced structuring,<sup>9</sup> which was part of the 1982 Constitutional Principles,<sup>10</sup> and the independent Ombudsman is given power to act on complaints that balanced structuring has not been achieved.<sup>11</sup>

Substantive racial equality is reinforced by Article 63(2)(i), which charges the National Assembly –

... to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies[.]

---

7 Article 23(1). This mandate has been realised by the enactment of the Racial Discrimination Prohibition Act, 1991 (No. 26 of 1991).

8 Article 23(2).

9 Articles 113(a)(aa), 116(2), 119(2) and 122(2).

10 "Provisions will be made for the balanced structure of the public service, the police service and defence services and for equal access by all to recruitment of these services. The fair administration of personnel policy in relation to these services will be assured by appropriate independent bodies"; *Principles for a Constitution for an Independent Namibia*, UN Secretary-General's Report S/15287 (1982) at clause 7.

11 Article 91(b). The effect of Articles 23 and the constitutional provisions on the balanced structuring of government services on the application of Article 10 is discussed in *Kauesa v Minister of Home Affairs & Others* 1994 NR 102 (HC) at 137J–141I, per O'Linn J, which posits that neither of these principles is elevated to the status of a fundamental right or freedom. The case also expresses the opinion that Article 23(2) provides an express qualification to Article 10 – in contrast to the provisions on balanced restructuring, which must not be applied in a way that violates Article 10. However, the Supreme Court criticised the High Court in this case for producing a "wide-ranging judgment dealing with matters not only extraneous and unnecessary to the decision[,] but which have not been argued", and declined to approve or endorse the many obiter opinions expressed therein; *Kauesa v Minister of Home Affairs & Others* 1995 NR 175 (SC) at 183G–I, per Dumbutshena AJA.

Furthermore, Article 23 makes it clear that affirmative action must take into account –<sup>12</sup>

... the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

Substantive sexual equality is given further emphasis in Article 95, which calls for legislation to ensure “equality of opportunity for women” in “all spheres of Namibian society”, particularly in the workforce.<sup>13</sup>

The principle of equality is integrated into other fundamental rights and protective provisions. Against a background where voting rights were granted on the basis of race, the Constitution requires that the President is to be elected by “direct, universal and equal suffrage”;<sup>14</sup> ensures that all citizens have an equal right to political activity;<sup>15</sup> and requires election of the National Assembly by the voters by “general, direct and secret ballot”.<sup>16</sup> Mindful of the apartheid history of ethnic homelands, the Constitution requires that regional and local authorities are to be formulated “without any reference to the race, colour or ethnic origin of the inhabitants of such areas”.<sup>17</sup> It is also noteworthy that the Constitution recognises the need “to promote justice on the basis of equal opportunity” by providing for “free legal aid in defined cases”.<sup>18</sup>

In a nation where racial inequality once reached into the most personal areas of life, family rights in an independent Namibia are specifically guaranteed “without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status”.<sup>19</sup> Sexual equality is given particular prominence again here, with the promise that “[m]en and women ... shall have the right to marry and to found a family” and have “equal rights as to marriage, during marriage and at its dissolution”.<sup>20</sup>

Thus, the Constitution’s equality provision is contextualised by promises of equality in a range of specific contexts, with the primary aim being to redress the wrongs of the past.

This break with the past has been highlighted in many judgments, often with particular reference to Articles 10 and 23. For example, the case of *S v Acheson*<sup>21</sup> refers to –<sup>22</sup>

---

12 Article 23(3).

13 Article 95(a).

14 Article 28(2)(a).

15 Article 17.

16 Article 46(1)

17 Article 102(2).

18 Article 95(h).

19 Article 14(1).

20 (ibid.).

21 1991 NR 1 (HC).

22 At 17A–B, per Mohamed AJ.

... the right of the Namibian people to self-determination and to emancipation from colonialism and racism – ideals which are now eloquently formalised *inter alia* in the preamble to the Namibian Constitution and arts 10 and 23.

In *S v van Wyk*,<sup>23</sup> which held that a racial motive for a crime could be treated as an aggravating factor in sentencing, the three separate judgments all made reference to the principle of equality and the repudiation of apartheid. The primary judgment refers to several constitutional provisions, including Articles 10 and 23, and concludes that the provisions in question –<sup>24</sup>

... demonstrate how deep and irrevocable the constitutional commitment is to, *inter alia*, equality before the law and non-discrimination and to the proscription and eradication of the practice of racial discrimination and apartheid and its consequences. [Italics in original]

A concurring judgment notes the following:<sup>25</sup>

Throughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread – an abiding “revulsion” of racism and apartheid. It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people “for so long” and a commitment to build a new nation “to cherish and to protect the gains of our long struggle” against the pathology of apartheid. I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity.

The case of *Government of the Republic of Namibia & Another v Cultura 2000 & Another*<sup>26</sup> notes that the Constitution –<sup>27</sup>

... articulates a jurisprudential philosophy which, in express and ringing tones, repudiates legislative policies based on the criteria of race and ethnicity, often followed by previous administrations prior to the independence of Namibia.

After referring to the Preamble and Articles 10(2), 23(1) and 63(2)(i), the court in the *Cultura 2000* case goes on to conclude as follows:<sup>28</sup>

It is manifest from these and other provisions that the constitutional jurisprudence of a free and independent Namibia is premised on the values of the broad and universalist human rights

---

23 1993 NR 426 (SC).

24 At 452I, per Ackerman AJA, quoted with approval by Berger CJ in his concurring judgment at 455G.

25 At 456G–H, per Mohamed AJA. Portions of this passionate statement were quoted with approval in *Government of the Republic of Namibia & Another v Cultura 2000 & Another* 1993 NR 328 (SC) at 332I–333A, and *Ex Parte Attorney-General: In Re The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1998 HR 282 (SC) at 291D.

26 1993 NR 328 (SC).

27 At 332H–I, per Mahomed CJ.

28 At 333H–I.

culture which has begun to emerge in substantial areas of the world in recent times and that it is based on a total repudiation of the policies of apartheid which had for so long dominated lawmaking and practice during the administration of Namibia by the Republic of South Africa.

Another cogent example of judicial acknowledgment of the historical context of apartheid in constitutional interpretation is *S v Smith NO & Others*,<sup>29</sup> which found the definition of *racial group* in the Prohibition of Racial Discrimination Act<sup>30</sup> unconstitutionally overbroad on the basis that the Constitution —<sup>31</sup>

... does not justify restrictions with regard to groups of persons who never featured in the pre-independence of this country and were never part of or a party to the social pressure amongst the different peoples making up the population of this country that was occasioned by the erstwhile racist policies.

A somewhat broader view of the aims of Article 10 was articulated by the High Court in *Kauesa v Minister of Home Affairs & Others*,<sup>32</sup> where it was stated that —<sup>33</sup>

... although the Namibian experience was mainly derived from the oppressive and discriminatory system and ideology of apartheid, the representatives of the Namibian people who finally agreed on the exact content of the Namibian Constitution did not only take cognisance of the aforesaid settlement agreement and their own experiences, but of the evil of discrimination all over the world.

The equality provision was drafted with an eye to the future as well as the past. The principle of equality is entrenched against any amendment which would diminish or detract from it,<sup>34</sup> and equality before the law is one of the fundamental principles that must be respected even during states of emergency imposed to deal with national disasters, security threats or public emergencies.<sup>35</sup>

---

29 1996 NR 367 (HC).

30 No. 26 of 1991.

31 At 371C–D, per Frank J.

32 1994 NR 102 (HC).

33 At 143E, per O’Linn J. See also 153B–G.

34 Article 131 of the Namibian Constitution reads as follows: “No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect”.

35 Article 24(3) of the Namibian Constitution reads as follows: “Nothing contained in this Article [on the derogation of rights during a state of emergency, state of national defence or martial law] shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Articles 5, 6, 8, 9, 10, 12, 14, 15, 18, 19 and 21 (1)(a), (b), (c), and (e) hereof, or the denial of access by any persons to legal practitioners or a Court of law”.

## Contours: The equality clause in action

### *Judicial application of Article 10(1)*

The first judicial consideration of Article 10(1) was in the 1995 *Mwellie* case,<sup>36</sup> which involved the unlawful dismissal of a state employee and challenged the constitutionality of a provision of the Public Service Act<sup>37</sup> which set a shorter prescription period for claims arising under the Act than for other civil claims.<sup>38</sup> After surveying judicial application of similar equality clauses by courts in other countries and by international tribunals, this judgment established the procedure for applying Article 10(1), holding that it permits “reasonable classifications” which are “rationally connected to a legitimate object”.<sup>39</sup> The court explained why this approach was necessary in Namibia’s historical context:<sup>40</sup>

In countries such as ours where discrimination was the rule rather than the exception an absolute application of equality will in all probability have the opposite effect from what it was intended for. To treat people as equal who are not equal may lead to the abrogation of rights instead of the protection thereof.

Applying this test to the question before it, the court found that it was reasonable for a law to provide a shorter prescription period for claims against the state as an employer than for other civil claims. The judgment made reference to several factors: the state being by far the largest employer in Namibia, with the largest number of separate divisions and the widest geographic spread; the government having an unusually high turnover of staff and a special need to be able to timeously investigate employment disputes; and the state, as an employer, facing special budgetary constraints. The court also noted that, in terms of the Labour Act,<sup>41</sup> employment issues in respect of other employers had to be

---

36 *Mwellie v Minister of Works, Transport and Communication & Another* 1995 (9) BCLR 1118 (NmH). It is surprising that this significant case has not been included in the Namibian Law Reports.

37 No. 14 of 1995.

38 The Public Service Act, 1995 (No. 13 of 1995) provides for a 12-month prescription period, in contrast to the Prescription Act, 1969 (No. 68 of 1969), which provides for a prescription period of three years in respect of other civil claims and provides for various grounds which delay the running of prescription. However, in respect of labour matters, the period provided for in the Public Service Act was similar to that provided in section 24 of the Labour Act, 1992 (No. 6 of 1992), which was the labour legislation in force at the time the case was considered.

39 At 1132F, per Strydom JP. See also 1134G–1135A.

40 At 1132D–E. Namibia’s history was also cited by the court at 1137H–1138A, when it rejected an assertion that the application of Article 10(1) should be restricted to classifications relating to the grounds enumerated in Article 10(2): “Bearing in mind the values expressed by the Namibian Constitution of recognising the inherent dignity of all, and according to all equal and inalienable rights, such an interpretation would run contrary to the spirit of the Constitution. To this must further be added the degree of development of the various people of Namibia, our past history of discrimination and the fact that we still sit with a legacy of pre-independence legislation originating from that era. An interpretation such as that contended for ... is therefore in my opinion too restricted and will not give effect to the aims of the Constitution”.

41 No. 6 of 1992.

brought before the Labour Court within 12 months. The Labour Act allowed a court to extend this period on “good cause shown” (an option not available under the analogous provision in the Public Service Act), but the court held in the *Mwellie* case that the absence of such a mechanism did not render the limitation clause unconstitutional if the time period provided for the claim was reasonable.<sup>42</sup>

A weak attempt to invoke Article 10(1) was dismissed out of hand in 1997 in a case involving a municipal levy, where it was suggested that applying values to property in a central business area that were different from those applied to property in a less affluent township constituted an impermissible form of inequality.<sup>43</sup>

In 1998, Article 10(1) was used to guide the interpretation of Article 12 – the right to a fair trial – in a case which found that the non-disclosure of certain witness statements to the defence in a criminal trial was unconstitutional. Article 10 was invoked to support the principle of “equality between the prosecution and the defence”.<sup>44</sup> In 2001, these two provisions were once again read together in a case which relied upon both of them to hold that it is unconstitutional to condition a convicted criminal’s right of appeal on a judge’s certificate which says that there are reasonable grounds for review. The court held that the right of fair trial applies until all channels available to an accused or convicted person have been exhausted, and that the right of appeal must be equally available to all.<sup>45</sup>

In 2001, the Namibian Insurance Association made an unsuccessful attempt to invoke Article 10(1) in respect of a temporary tax exemption granted exclusively to the Namibian National Reinsurance Corporation (Namibre) by the Namibian National Reinsurance Corporation Act.<sup>46</sup> The Supreme Court found that the challenged exemption did not violate Article 10(1) for two reasons:<sup>47</sup>

- As a state-controlled statutory body established to operate in the public interest, Namibre was *sui generis*; and the right to equality “does not require that everyone be treated the same, but simply that people in the same position should be treated the same”.

---

42 At 1138H–1140D.

43 *Grobbehaar & Another v Council of the Municipality of Walvis Bay* 1997 NR 259 (HC) at 267E–G, per Maritz AJ: “The allegation that the first respondent derogated from the applicants’ right to equality entrenched in art 10 of the Constitution by discriminating against them (because it did not apply the same land value to land in the central business district of Walvis Bay as that in a lesser affluent township) is not deserving of consideration. That suggestion is baseless and, in my opinion, founded on a misconception that the equality clause in our Constitution contemplates mathematical equality instead of normative or real equality”.

44 *S v Scholtz* 1998 NR 207 (SC) at 218B–E, per Dumbutshena AJA. See also *S v Nassar* 1994 NR 233 (HC) at 254–56, per Muller AJ, where several cases from other jurisdictions cited in the High Court’s judgment on the defence’s right to access information in the police docket cited the principle of equality for the same purpose, although the Namibian judgment did not otherwise place any weight on Article 10 in deciding this question.

45 *S v Ganab* 2001 NR 294 (HC), per Mtambanengwe J.

46 No. 22 of 1998.

47 *Namibia Insurance Association v Government of Namibia* 2001 NR 1 (HC) at 18F–19G, per Teek JP.



- The challenged provisions were rationally related to a defensible public interest, which was the development of a sound national insurance and reinsurance industry.

In 2004, the *Detmold* case<sup>48</sup> applied Article 10(1) in the examination of a provision in the Children's Act<sup>49</sup> which prohibited the adoption of children born to Namibian citizens by non-Namibian citizens.<sup>50</sup> The applicants were German nationals and permanent residents of Namibia, who did not wish to apply for Namibian citizenship because they did not wish to renounce their German citizenship (as Namibian law on naturalisation would require) and thereby lose the benefits of that citizenship. The child they applied to adopt had already been in their foster care for several years; they had been found suitable to be adoptive parents, and the child's biological mother had consented to the adoption. Therefore, the only obstacle to the adoption was their citizenship. The court found the prohibition in question to be unconstitutional as a violation of Article 10(1) and Article 14, which protects the family. With respect to Article 14, the court held that it could not be disputed that a "family" was "the best vehicle for bringing up children", and that the next best thing to a biological family was an adoptive family. The court further held that it was therefore the duty of society "to make possible, and not hinder or frustrate, a family for every child given up for adoption". The strict prohibition on adoption by non-Namibian citizens was found to be unconstitutional because it "deprives a child given up for adoption of the possibility of being adopted by persons who are prepared to afford it a secure and stable 'family'", which might not otherwise be available to the child.<sup>51</sup> In terms of Article 10, the court noted that the provision in question differentiated between categories of people in adoption matters in two senses, namely –

---

48 *Detmold & Another v Minister of Health and Social Services & Others* 2004 NR 174 (HC).

49 No. 33 of 1960.

50 Exceptions were provided only for relatives of the child or for non-Namibian citizens who qualified for Namibian citizenship and had a pending application for naturalisation. Section 71 of the Children's Act stated the following in relevant part:

"(2) ... A children's court to which application for an order of adoption of a child is made shall not grant the application unless the court is satisfied –

...

(f) in the case of a child born of any person who is a Namibian citizen, that the applicant or one of the applicants is a Namibian citizen resident in Namibia: Provided that the provisions of this paragraph shall not apply –

(i) where the applicant or one of the applicants is a Namibian citizen or a relative of the child and is resident outside the Republic; or

(ii) where the applicant is not a Namibian citizen or both applicants are not Namibian citizens but the applicant has or the applicants have the necessary residential qualifications for the grant to him or them under the Namibian Citizenship Act (Act 14 of 1990), of a certificate or certificates of naturalization as a Namibian citizen or Namibian citizens and has or have made application for such a certificate or certificates,

and the Minister has approved of the adoption".

51 At 181C–182C, per Damaseb AJ.

- between children born in Namibia to Namibian parents, and children born in Namibia to foreigners, and
- between Namibian citizens and foreigners who did not qualify or did not wish to become naturalised Namibian citizens.

The court also held that these differentiations had no rational connection to a legitimate government purpose, since they had the effect of excluding children born to Namibian parents from adoption by persons who might provide them with the best possibility of a secure family life.<sup>52</sup>

In the 2006 *Lisse* case, which dealt with an administrative decision to revoke a private doctor's authorisation to practise at a state hospital, the Supreme Court noted (somewhat in passing) that a Minister applying discretion on this issue had to "take into consideration and apply" Article 10. Since many private doctors are allowed to practise at state hospitals, refusing this authority to a particular private doctor without a sound reason would be a breach of the fundamental right of equality before the law.<sup>53</sup>

In the 2007 *Majiedt* case, the Supreme Court came to a similar conclusion as the High Court had in *Mwellie* (although curiously without making any reference to *Mwellie*).<sup>54</sup> Here the Supreme Court overturned a High Court finding that Article 10(1) had been violated by a provision of the Police Act<sup>55</sup> providing for a shorter prescription period for claims against the police than for other civil claims.<sup>56</sup> The High Court judgment had emphasised the connection between the challenged provision and past injustices, holding that it –<sup>57</sup>

---

52 At 182D–183B. The court unfortunately did not explain its application of the test for constitutionality in terms of Article 10(1) in any further detail.

53 *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC) at 757J–758B, per O'Linn AJA.

54 *Minister of Home Affairs v Majiedt & Others* 2007(2) NR 475 (SC), per Chomba AJA.

55 No. 19 of 1990.

56 The Police Act provides that claims against the state are to be instituted within 12 months after the cause of action arose, in contrast to the Prescription Act, 1969 (No. 68 of 1969), which provides for a prescription period of three years in respect of other civil claims and provides for various grounds which delay the running of prescription. Section 39(1) of the Police Act states the following:

“Any civil proceedings against the State or any person in respect of anything done in pursuance of this Act shall be instituted within twelve months after the cause of action arose, and notice in writing of any such proceedings and of the cause thereof shall be given to the defendant not less than one month before it is instituted: Provided that the Minister may at any time waive compliance with the provisions of this subsection”.

57 High Court judgment per Damaseb, JP, as quoted in *Minister of Home Affairs v Majiedt & Others* at 485H–J.

... carries the real risk that poverty and ignorance – which is the lot of the vast majority of this country because of past discriminatory policies – will only serve to perpetuate that condition for long. Instead of making it possible for as many people as possible to exercise the right to access to court which has been “denied to them for so long”, the law will achieve the opposite result.

The High Court found that the differing prescription schemes produced an inequality between claimants, and that no legitimate government objective had been offered which could justify the distinction.<sup>58</sup> In contrast, the Supreme Court found that the legitimate government objective was the need to promote the speedy resolution of claims against the state in order to allow the state to assess its liabilities promptly and accurately.<sup>59</sup> It also held that, because the shorter prescription period included the possibility of a waiver by the relevant Minister at any time, this flexibility was sufficient to protect the right of access to court for people of all socio-economic positions,<sup>60</sup> noting that claimants disadvantaged by poverty could also apply for legal aid.<sup>61</sup> In a conclusion which could be interpreted as raising the bar for the application of Article 10(1), the Supreme Court stated that –<sup>62</sup>

... in order to violate the constitutional rights and freedoms encapsulated in arts 10(1) and 12(1)(a), namely the right of equality before the law and of access to the courts, respectively, a statutory provision has to purport to ensure that every reasonable avenue to the enjoyment of those rights is closed ... .

The Supreme Court then found that the statutory provision examined in the case at hand did not have this effect.<sup>63</sup>

The most recently reported case to apply Article 10(1) was *Nationwide Detectives* in 2008, where the Supreme Court held that the term *persons* in Article 10 could include artificial persons such as corporations as well as natural persons, and then relied on Article 10(1) read together with Article 12(1)(a) on the right to a fair and public hearing to mean that it would be unconstitutional to forbid a corporation (particularly a small one) from being represented in court by an ‘alter ego’ who is not a legal practitioner.<sup>64</sup>

This survey shows that Article 10(1) has seldom been applied to invalidate laws, and that attempts to use it to motivate findings of unconstitutionality have generally only been

---

58 (ibid.:491E–G).

59 *Minister of Home Affairs v Majiedt & Others* at 491G–J.

60 (ibid.:489B–491A).

61 (ibid.:492A–H).

62 (ibid.:492H–I).

63 (ibid, 492I–J)

64 *Nationwide Detectives CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 (SC) at 300D–301F, per Shivute CJ.

successful where it has been applied in conjunction with other constitutional provisions which help define its meaning – as in the *Detmold* and *Nationwide Detectives* cases.<sup>65</sup>

### ***Judicial application of Article 10(2)***

There was an early brush with the application of Article 10(2) in the 1991 case of *S v Dameseb & Another*.<sup>66</sup> The High Court held that the special cautionary rule applied to sexual offences lacked any rational basis and rested on an unsupported assumption that false charges in such cases were particularly likely. The court stated that, given that the vast majority of complainants in such cases are female, this rule thus “has no other purpose than to discriminate against women”, and “probably also is contrary to art 10 of the Namibian Constitution which provides for equality of all persons before the law regardless of sex”.<sup>67</sup> However, this somewhat ambivalent pronouncement was ruled to have been obiter dicta by a subsequent case which found that there were no convincing

---

65 Article 10 has been cited in several other cases involving criminal matters, without being directly applied.

A case concerning the retroactive applicability of an amendment to the Criminal Procedure Act, which allows the prosecution as well as the defence to appeal the decision of a lower court in a criminal case, noted that this amendment gave effect to the letter and spirit of Article 10 by providing procedural equality to prosecution and accused; *S v Van den Berg* 1995 NR 23 (HC) at 35I–36C, per O’Linn J.

In the same vein, Article 10 was cited to stress the point that the rights of crime victims should be given emphasis equal to the rights of criminal offenders, in a concurring judgment in a case which found aspects of a statutory minimum sentence unconstitutional as a violation of Article 8 (*S v Vries* 1998 NR 316 (SC) at 268C–H, per O’Linn J (concurring judgment)). The same judgment, at 275D–F, also referred to Article 10 in support of the concept of mandatory minimum sentences as a mechanism for ensuring that “equal criminals must be punished equally for equal crime” [emphasis in original]. See also 277C.

Article 10 was also cited in a 1996 case in support of the proposition that labour laws should safeguard and balance the interests of both employer and employee; see *Du Toit v Office of the Prime Minister* 1996 NR 52 (LC) at 73G–H, per O’Linn J.

Without being specifically discussed, Article 10 was quoted to contextualise a holding that it was a violation of the right to a fair trial to refuse legal assistance to an indigent accused charged with a serious crime such as treason, and that government resources were not a factor to be considered in this regard; see *Mwilima v Government of the Republic of Namibia* 2001 NR 307 (HC) at 315D–E, per Levy AJ.

In 2007, the Supreme Court took note of an argument that criminal defendants charged with fraud had been discriminated against by being denied legal aid because they were foreign nationals, but found that there was no factual basis to this assertion; see *S v Luboya & Another* 2007 (1) NR 96 (SC) at 101E–102D, per Chomba AJA.

66 1991 NR 371 (HC), per Frank J (also cited as *S v D & Another*).

67 At 374F–375F. This case was cited in the South African case of *S v Jackson* 1998 (1) SACR 470 (SCA), for the proposition that it had abolished the cautionary rule.

reasons for the continued application of the rule, without reaching the question of whether it breached the guarantee of sexual equality in Article 10.<sup>68</sup>

In 1997, it was contended in *Council of the Municipality of Windhoek v Petersen*<sup>69</sup> that a municipal decision to allow traders of handmade crafts to operate in a specified area in the central business district, while excluding vendors of other forms of goods, was a violation of Article 10(2). The evicted hawkers asserted that they had been discriminated against on the basis of their “economic status” by the distinction drawn between different members of the economic sector. The High Court held that this assertion was based on a misinterpretation of *economic status* in Article 10(2), which “relates to pecuniary or financial status or position and is primarily concerned with protecting the impoverished against discrimination”.<sup>70</sup>

A more robust but still unsuccessful attempt to utilise Article 10(2) took place in the case of *Müller v President of the Republic of Namibia & Another*<sup>71</sup>, where the Supreme Court for the first time laid down a general procedure for the application of this Article. When Mr Müller married Ms Engelhard, he wanted to adopt her surname, so that the two of them could operate their jewellery business under her more distinctive and well-established business name. Under Namibian law, she could simply have started using his surname upon their marriage if she had wished, but he could assume her surname only by going through a formal name-change procedure which involved extra effort and expense.<sup>72</sup> Mr Müller contended that the different name-change rules for husbands and wives violated Article 10, while the state asserted that, while they may have violated formal equality, they did not violate the principle of substantive equality, since most wives chose to adopt their husbands’ surnames on the basis of “traditions and conventions

---

68 *S v Katamba* 1999 NR 348 (SC) at 350C–351A, 360E, 362A–H, per O’Linn AJA. This judgment noted at 361C–J that courts have “a constitutional duty to protect the fundamental rights of victims”, and referred to “the contemporary norms, views and opinions of Namibian Society” but seemed to find the rule unnecessary rather than unconstitutional.

69 1998 NR 8 (HC).

70 At 11J–12D, per Hannah J.

71 1999 NR 190 (SC).

72 This situation resulted from section 9(1)–(2) of the Aliens Act, 1937 (No. 1 of 1937), which provides as follows:

“(1) If any person who at any time bore or was known by a particular surname, assumes or describes himself by or passes under any other surname which he had not assumed or by which he had not described himself or under which he had not passed before the first day of January 1937, he shall be guilty of an offence unless the Administrator General or an officer in the Government Service authorized thereto by him, has authorized him to assume that other surname and such authority has been published in the Official Gazette: Provided that this subsection shall not apply when –

- (a) a woman on her marriage, assumes the surname of her husband;
- (b) a married or divorced woman or a widow resumes a surname which she bore at any prior time ...

[Continued overleaf]

that have existed since time immemorial”.<sup>73</sup> The Namibian Supreme Court drew on precedent in South Africa and Canada in applying a stricter test for differentiation on the grounds enumerated in Article 10(2), in contrast to the “rational connection” test which the *Mwellie* case had held to be the appropriate method for applying Article 10(1). The court noted in *Müller* that the grounds for discrimination articulated in Article 10(2) “are all grounds which, historically, were singled out for discriminatory practices exclusively based on stereotypical application of presumed group or personal characteristics”,<sup>74</sup> and that the constitutional guarantee of non-discrimination would be negated if rational connection to a legitimate legislative objective were sufficient to justify discrimination on one of the stated grounds.<sup>75</sup>

The court also set out a four-step test for the application of Article 10(2) of the Constitution, as follows:<sup>76</sup>

The steps to be taken in regard to this sub-article are to determine –

- (i) whether there exists a differentiation between people or categories of people;
- (ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article;
- (iii) whether such differentiation amounts to discrimination against such people or categories of people; and
- (iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of art 23 of the Constitution.

The court held further that an element of unjust or unfair treatment was inherent in the meaning of the word *discriminate*, and that, to determine whether unfair discrimination was present, a court should look at the purpose of the discrimination in question; the impact of the discrimination on the victim and any previously disadvantaged groups in society; and whether the discrimination had the effect of impairing the victim’s human dignity.<sup>77</sup> It justified this incorporation of the concept of *unfairness* with reference to Namibia’s history of discrimination on all of the enumerated grounds listed in Article

- 
- (2) No such notice as is mentioned in subsection (1) shall be issued unless –
    - (a) the person concerned has published in the manner hereafter prescribed once in each of two consecutive weeks in the Official Gazette and in each of two daily newspapers which circulate in the district in which the said person resides and which have been designated for such publication by the magistrate of that district, a notice of his intention to assume another surname; and
    - (b) the Administrator General or an officer in the Government Service authorized thereto by him, has satisfied himself from a statement submitted by the said person and from reports furnished by the Commissioner of the South West African Police and by the said magistrate, that the said person is of good character and that there is a good sufficient reason for his assumption of another surname ...”.

73 At 194B–C, per Strydom CJ.

74 At 199H–I.

75 At 199F–H.

76 At 200B–D.

77 At 203.

10(2), noting that correcting this history might require attempts to “level the playing field”; otherwise the result might be to perpetuate persisting inequalities rather than to eliminate them. The court further noted that, while Article 23’s affirmative action provisions covered a wide field, they might not be sufficient to cover all forms of past discrimination. Thus, the court was apparently attempting to leave the door open to distinctions on the enumerated grounds which could advance substantive equality and permit positive steps to help redress past inequalities.<sup>78</sup>

Applying the test it had formulated to the issue before it, the Supreme Court held that the different rules for husbands and wives with regard to surnames did not amount to unfair discrimination. Key factors were that –<sup>79</sup>

- the complainant, a white male who emigrated to Namibia after Independence, was not a member of a prior disadvantaged group
- the aim of the name change formalities was not to impair the dignity of males or to disadvantage them
- the legislature has a clear interest in the regulation of surnames, and
- the impact of the differentiation on the interests of the applicant was minimal since he could adopt his wife’s surname by a procedure involving only minor inconvenience.

Somewhat ironically, given the court’s emphasis on the need to break with the past and right past wrongs, it placed significant weight on the fact that the challenged statutory provisions gave effect to “a tradition of long standing in the Namibian community that the wife normally assumes the surname of the husband”.<sup>80</sup>

The first successful application of Article 10(2) came only in 2000, ten years after Independence, in the *Myburgh* case.<sup>81</sup> The issue here was a husband’s marital power over his wife in a civil marriage in community of property, which rendered her incapable of

---

78 At 198B–F, 201C–H.

79 At 203G–204F. One commentator implies that the case outcome might have been different if it had focused on the corresponding discrimination against Ms Engelhard, who was deprived of the right to easily make her surname that of the married couple: “In effect, the rule allows women to give up their identity more freely than it allows this ‘privilege’ to men. This does not enhance gender equality in society”; Bonthuys (2000:467).

The matter was subsequently referred to the United Nations Committee which oversees the International Covenant on Civil and Political Rights. This Committee ruled in 2002 that the different procedures for dealing with surnames did constitute unfair sex discrimination in terms of the International Covenant. As a result, in June 2002, the Committee gave the Namibian Government 90 days to report on what it had done to rectify the problem; UN Human Rights Committee, Communication No. 919/2000, CCPR/C/74/D/919/2000, 28 June 2002. Mr Müller changed his name to Mr Engelhard under the laws of his home country of Germany – but at the time of writing, more than seven years after the decision of the international forum, the impugned provisions of the Aliens Act remain unchanged.

80 At 204B.

81 *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC).

suing or being sued on her own and left her with limited contractual capacity.<sup>82</sup> Applying the test from the *Müller* case, the court found that the resulting sex differentiation amounted to unfair discrimination which violated Article 10(2). The persuasive factors were that women were a prior disadvantaged group, and that the differentiation was based on stereotyping which failed to take cognisance of the “equal worth of women” and impaired their dignity individually and as a class.<sup>83</sup>

This was followed by an unsuccessful attempt to invoke Article 10 in the *Frank* case,<sup>84</sup> which dealt with the role of a lesbian relationship between a foreigner and a Namibian citizen in the foreign partner’s application for permanent residence. It was argued on behalf of Ms Frank that, if her relationship with a Namibian citizen had been a heterosexual one, she could have married and would have been able to reside in Namibia or apply for citizenship as the spouse of a Namibian citizen. It was asserted that that the failure to afford her comparable rights in her lesbian relationship implicated the constitutional right to equality in Article 10 and the protection of the family in Article 14 (amongst other rights which were not given detailed consideration by the court).<sup>85</sup> The court found Article 14 inapplicable on the grounds that the “family” protected by it –<sup>86</sup>

... envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race.

---

82 Marital power in respect of civil marriages was abolished by Parliament in the Married Persons Equality Act, 1996 (No. 1 of 1996), section 2, but the loan agreement which was the starting point of the case was entered into prior to the date when this statute came into force.

83 At 265H–266J, per Strydom CJ.

84 *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).

85 The right to privacy in Article 13(1) and the right to reside and settle in, and leave and return to, Namibia in Article 21(1)(h)–(i) were also raised, but these were rather summarily rejected by the court as being irrelevant and farfetched; see *Frank* at 147A–E, 148G.

86 *Frank* at 146F–G, per O’Linn AJA. The South African case of *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) at paragraph 51, per Ackermann J, discusses the problems with this focus on procreation as a defining feature of marriage:

“From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy”.

[Continued overleaf]



With respect to Article 10, the court noted that Article 10(2) does not expressly prohibit discrimination on the grounds of “sexual orientation”,<sup>87</sup> indicating (somewhat obliquely) that the term *sex* in this provision does not encompass “sexual orientation”.<sup>88</sup> Turning to Article 10(1) and purporting to apply the test set forth in *Mwellie*, the court concluded (without further discussion) that there was no “unfair” discrimination because “[e]quality before the law for each person does not mean equality before the law for each person’s sexual relationships”.<sup>89</sup> This finding is elaborated in the court’s *meru moto* consideration of whether the respondent’s right to dignity had been violated, when it notes that the state’s failure to afford the same treatment in respect of permanent residence to “an undefined, informal and unrecognised lesbian relationship with obligations different from that of marriage” as compared to “a recognised marital relationship” amounts to differentiation, but not discrimination.<sup>90</sup>

It is somewhat hard to follow the court’s reasoning, as the test it applies is actually a mixture of the approaches taken to Article 10(1) and 10(2) in previous cases. In respect of Article 10(1), *Mwellie* requires an examination of whether a differentiation bears a rational connection to a legitimate purpose; in respect of Article 10(2), *Müller* requires

---

This criticism is even more applicable to the concept of family, where extended family units can and often do comprise other groupings not defined by procreative potential, such as siblings, aunts or uncles and their nieces or nephews, cousins, single parents and children, single grandparents and children, and child-headed households – just to name a few of the myriad household compositions one might find in Namibia. The Canadian Supreme Court had the following to say on this score (*Canada (Attorney-General) v Mossop* (1993) 100 DLR (4th) 658 at 710C–E, per L’Heureux-Dubé J, quoted in *National Coalition* at paragraph 52):

“The argument is that procreation is somehow necessary to the concept of family and that same-sex couples cannot be families as they are incapable of procreation. Though there is undeniable value in procreation, the Tribunal could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families. The flaws in this position must have been self-evident. Though procreation is an element in many families, placing the ability to procreate as the inalterable basis of family could result in an impoverished rather than an enriched version [of the concept]”.

87 At 149I.

88 The court states the following in *Frank* at 149G–H: “Whereas the word ‘sex’ can be defined as ‘being male or female’, or ‘males or females as a group’, ‘sexual orientation’ could encompass in theory ‘any sexual attraction of anyone towards anyone or anything’. The prohibition against discrimination on the grounds of sexual orientation is so wide, that a case may even be made out for decriminalizing the crime of bestiality, particularly, when done in private” [citation omitted].

The Court also notes “in passing” at 145E–F that the International Covenant on Civil and Political Rights specifies sex as one of the grounds on which discrimination is prohibited but not sexual orientation. In fact, in March 1994 (before Namibia’s ratification of the Covenant), the Human Rights Committee charged with monitoring the Covenant stated that the references to *sex* in the provisions on discrimination are “to be taken as including sexual orientation”; see *Toonen v Australia* Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994).

89 At 155E–F.

90 At 155I–156C.

checking to see if a differentiation upon one of the enumerated grounds amounts to discrimination, which is interpreted to mean unfair discrimination, and if so, whether it falls within the affirmative action exceptions provided for in Article 23.<sup>91</sup> The *Frank* analysis purports to be applying Article 10(1), but discusses the question of whether or not the differentiation amounts to unfair discrimination, rather than whether the differentiation bears a rational relation to a legitimate government purpose. Some other problematic aspects of this case are discussed below.

The prohibition on racial discrimination has been applied on its own only once, in the 2003 *Berendt* case, which dealt with the race-based rules in the Native Administration Proclamation 15 of 1928 that govern inheritance.<sup>92</sup> When Martha Berendt died unmarried and intestate in 1999, the Native Administration Proclamation provided that her property must devolve in accordance with “native law and custom”.<sup>93</sup> In the course of a dispute between her three children about the actions of one of them as the executor of the estate, the other two siblings challenged the constitutionality of the relevant provisions of the Native Administrative Proclamation and asserted that the estate should be administered in terms of the Administration of Estates Act,<sup>94</sup> which applies to most estates not covered by the Proclamation.<sup>95</sup> The court found that the legislative provisions which

---

91 See *Müller* at 199J–200D, quoted in *Frank* at 154I–155C.

92 *Berendt & Another v Stuurman & Others* 2003 NR 81 (HC). Section 2 of Regulation GN 70 of 1 April 1954, which was promulgated under section 18(9) of Native Administration Proclamation 15 of 1928, provides as follows:

“If a native dies leaving no valid will, his property shall be distributed in the manner following:–

- (a) If the deceased, at the time of his death, was –
  - (i) a partner in a marriage in community of property or under antenuptial contract; or
  - (ii) a widow, widower or divorcee, as the case may be, of a marriage in community of property or under ante-nuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if he had been a European.
- (b) If the deceased does not fall into a class described in paragraph (a) hereof, the property shall be distributed according to native law and custom”.

93 Section 18(1) of Native Administration Proclamation 15 of 1928 provides as follows:

“All movable property of whatsoever kind belonging to a Native and allotted by him or accruing under native law or custom to any woman with whom he lived in a customary union, or to any house shall upon his death devolve and be administered under native law and custom”.

It should be noted that this section uses overtly sexist terminology, and is silent on what happens when an African woman. This omission probably stems from the fact that women were regarded under customary law as perpetual minors who could not own property. Section 18(2) provides as follows:

“All other movable property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom”.

94 No. 66 of 1965.

95 As another remnant of colonial history, the deceased estates of ‘Basters’ of the Rehoboth community are governed by Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941.

drew distinctions on the basis of race violated Article 10(2), following the reasoning in an analogous South African case:<sup>96</sup>

There can be no doubt that the section and the regulation both impose differentiation on the grounds of race, ethnic origin and colour, and as such constitute discrimination which is presumptively unfair ... . The Minister and the Master suggested that the administration of deceased estates by magistrates was often convenient and inexpensive. However, even if there are practical advantages for many people in the system, it is rooted in racial discrimination, which severely assails the dignity of those concerned and undermines attempts to establish a fair and equitable system of public administration. Any benefits need not be linked to this form of racial discrimination but could be made equally available to all people of limited means or to all those who live far from the urban centres where the offices of the Master are located. Given our history of racial discrimination, I find that the indignity occasioned by treating people differently as “blacks” ... is not rendered fair by the factors identified by the Minister and the Master.

The court concluded that the impugned statutory provisions were unconstitutional violations of the prohibition on racial discrimination, and gave Parliament a time frame of almost two years to correct the defect.<sup>97</sup> In response, Parliament passed the Estates and Succession Amendment Act,<sup>98</sup> which actually made no reforms whatsoever to the substantive law of succession. In fact, the wording of the law practically defies belief, as it repeals the sections found to be unconstitutional, but then effectively reinstates them by making them applicable to the same persons they would have applied to “had the said provisions not been repealed”.<sup>99</sup>

The most recently reported case applying Article 10(2) at the time of writing is the 2007 *Frans* case, in which the High Court examined the constitutionality of the common law rule prohibiting ‘illegitimate’ children from inheriting intestate from their fathers. The court found that the differentiation between *legitimate* and *illegitimate* children was based on “social status” and therefore proceeded to apply the *Müller* test. It found that the basis for the rule was the punishment of sinful parents – although the rule made no distinction between children born of adultery, incest or a relationship between loving

---

96 At 84E–H, per Manyarara AJ, quoting *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC) at paragraph 22.

97 This remedy was based on Article 25(1)(a) of the Constitution. The government subsequently requested and received a six-month extension of the deadline.

98 No. 15 of 2005.

99 Section 1 of this law reads in full as follows:

“(1) Section 18 of the Native Administration Proclamation, 1928 is amended by the repeal of subsections (1), (2), (9) and (10).

(2) Despite the repeal of the provisions referred to in subsection (1), the rules of intestate succession that applied by virtue of those provisions before the date of their repeal continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed”.

This failure to give effect to the court’s decision was not challenged as there were no further instructions from the clients at this stage; information from Legal Assistance Centre, which represented the clients in this case.

partners who live together without being married – and thus gave a “social stigma” to all such children. The court concluded that this amounted to unfair discrimination and that the rule was, therefore, unconstitutional.<sup>100</sup>

So in the last 20 years, the equality clause has been invoked in the name of sex, sexual orientation, economic status, social status, and race – and applied three times to invalidate existing laws: once on the basis of sex (*Myburgh*), once on the basis of race (*Berendt*), and once on the basis of social status (*Frans*).

It is strange, given that the concept of *equality* in the Namibian Constitution is premised on a definitive break with the country’s apartheid past, that the equality clause has been so seldom used to challenge racial discrimination. It would be tempting to hope that this is because all vestiges of racial discrimination have been obliterated in Namibian law, but this is sadly not the case. As the Committee on the Elimination of Racial Discrimination has pointed out, some Namibian laws that remain in force retain a “discriminatory character”, including aspects of customary laws with gender-related dimensions of racial discrimination.<sup>101</sup>

## **Concerns: Some anomalies in the application of Article 10**

Looking at the court’s role in interpreting equality, one finds some worrying incongruities in the approaches taken in various cases.

100 *Frans v Paschke & Others* 2007 (2) NR 520 (HC) at 528–29, per Heathcote AJ. By the time this case came to court, Parliament had in fact already done away with the common law rule in the Children’s Status Act, 2006 (No. 6 of 2006), which had been passed by Parliament but had not yet come into force. Section 16(2) of this Act provides as follows:

“Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by testamentary disposition, be treated in the same manner as a person born inside marriage”.

However, while the Act generally has retrospective effect, there is an exception in respect of the provision on inheritance by children born outside marriage: it applies only “to estates in which the deceased person died after the coming into operation of this Act” (section 26(2)). This exception was made in an effort not to upset transactions which were regarded as settled. The Children’s Status Act came into force a little over a year after the High Court judgment was handed down, on 3 November 2008; Government Notice No. 266 of 2008, Commencement of the Children’s Status Act, 2006 (Act No. 6 of 2006), Government Gazette 4154.

101 See Committee on the Elimination of Racial Discrimination (73rd session), CERD/C/NAM/CO/12, 22 September 2008 at paragraph 11. The Committee recommended as follows (*ibid.*): “The Committee urges the State party to review its laws with a view to removing discriminatory laws in order to provide equal protection and treatment to all persons. Recalling its general recommendation No. 25 (2000) on gender-related dimensions of racial discrimination, the Committee recommends in particular that the State party urgently ensure that its laws, especially on marriage and inheritance, do not discriminate against women and girls of certain ethnic groups. It invites the State party to consider introducing a system which allows individuals a choice between customary law systems and the national law while ensuring that the discriminatory aspects of customary laws are not applied”.

[Continued overleaf]

### ***The timing of the invalidity***

One anomaly concerns the timing of the application of Article 10 (along with other constitutional provisions) to statute law, as opposed to common law and customary law. We have examples of past, present and future application. *Detmold* invalidated a statutory provision with immediate effect, while *Berendt* found several statutory provisions unconstitutional, but allowed them to remain in place temporarily in order to give Parliament time to correct the problem. *Myburgh*, with *Frans* following in its footsteps, held that common law provisions found to be in conflict with Article 10 were invalid from 21 March 1990, the date on which the Constitution came into force. According to *Myburgh*, provisions of common law or statutory law which conflicted with the Constitution were in fact “swept away” at Independence by virtue of Article 66(1),<sup>102</sup> with the role of court judgments on this point being only “to determine the rights of parties where there may be uncertainty as to what extent the common law was in existence”.<sup>103</sup> In contrast, statutory provisions remain in force by virtue of Article 140(1) “until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court”.<sup>104</sup>

---

The law on default marital property regimes also still utilises race-based rules; see *Mofuka v Mofuka* 2001 NR 318 (HC) and 2003 NR 1 (SC). Both judgments discuss the provisions of Native Administration Proclamation 15 of 1928, which apply to marriages between “blacks” in certain parts of Namibia. (The constitutionality of these provisions was not challenged in this case.) The Legal Assistance Centre and the Law Reform and Development Commission have both published recommendations for law reforms which would remove remaining race and sex discrimination in the laws pertaining to marriage, divorce and inheritance; see LAC (1999, 2000, 2005a, 2005b, 2005c); LRDC (2003, 2004a, 2004b).

102 At 261. Article 66(1) reads as follows:

“Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law”.

103 At 261E–G.

104 Article 140(1) states in full:

“Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court”.

According to the court in *Myburgh*, this Article is buttressed by Article 25(1)(b), which also applies only to statutory enactments. Article 25(1)(b) reads as follows in relevant part:

“Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

...  
(b) any law which was in force immediately before Independence shall remain in force until amended, repealed or declared unconstitutional. ...”.

Although *Myburgh* offers a detailed textual analysis to support its interpretation of the various constitutional provisions in question,<sup>105</sup> it seems odd that the type of law which is the source of the discrimination would determine the effective date for the removal of the discrimination, and one wonders if this can indeed have been the intent of the provisions in question. It would seem to fall foul of the principle of legal certainty,<sup>106</sup> as one can envisage a situation where prescription does not begin to run until the parties acquire knowledge of the effect of the Constitution on their rights through a court judgment,<sup>107</sup> so that events which happened years and years in the past could conceivably be challenged.

This aspect of *Myburgh* relies for its holding in part on a case decided under the Interim Constitution of South Africa, but the situation in South Africa was an easier one because the Interim Constitution provided that, unless the Constitutional Court ordered otherwise, a declaration that a law was invalid in terms of the Constitution “shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity”.<sup>108</sup> The final South African Constitution reaches the same result by a different route, giving the Constitutional Court powers to limit the retrospective effect of a declaration of invalidity.<sup>109</sup> It should also be noted that the rules in South Africa regarding the effect of a declaration of constitutional invalidity are essentially the

---

105 At 260H–265C.

106 See, for example, *Meintjies v Joe Gross t/a Joe’s Beerhouse* 2003 NR 221 (LC) at 223B–D, per Maritz J, which discussed (in relation to the doctrine of stare decisis) “the need for legal certainty, the protection of vested rights, the satisfaction of legitimate expectations and the upholding of the dignity of the court”.

107 See, for example, *Ditedu v Tayib* 2006 (2) SA 176 (W), where the prescription period did not run in a case where a claimant received wrong advice on the relevant law from an attorney; *Deysel v Truter & Another* 2005 (5) SA 598 (C), where a prescription period in respect of surgical operations did not begin to run until the claimant had secured a medical opinion confirming his suspicion that the operations were negligently performed; *Poolman & Others v Transnamib Ltd* 1997 NR 89 (HC), where a prescription period did not run because the plaintiffs said that they simply did not know of the relevant provisions of the 1992 Labour Act until January 1996; and *Jacobs v Adonis* 1996 (4) SA 246 (C), where a prescription period did not begin running until a factual finding in a court case provided key information.

108 Interim Constitution of South Africa, 1993, section 98(6)(a). The court also has the power to postpone the operation of the invalidity in terms of section 98(5). See *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC) at paragraphs 26–28, per Ackermann J.

109 The current South African Constitution (dating from 1996) provides as follows in section 172(1):

“When deciding a constitutional matter within its power, a court –

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including –
  - (i) an order limiting the retrospective effect of the declaration of invalidity; and
  - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect”.

[Continued overleaf]

same, regardless of whether the source of the law in question is a statute, common law, or customary law.<sup>110</sup>

In the *Bhe* case, which found the customary law rule of primogeniture and some related statutory provisions unconstitutional, the South African Constitutional Court articulated the problem which could face Namibia in the wake of the *Myburgh* case:<sup>111</sup>

The statutory provisions and customary law rules that have been found to be inconsistent with the Constitution are so egregious that an order that renders the declaration fully prospective cannot be justified. On the other hand, it seems to me that unqualified retrospectivity would be unfair because it could result in all transfers of ownership that have taken place over a considerably long time being reconsidered.

The court's solution in this case was to make the invalidity retrospective to the date on which South Africa's first democratically formulated Interim Constitution came into force, namely 27 April 1994, but to exempt the finding from applying to any completed transfer of ownership to an heir who had no notice of a challenge to the legal validity of the laws in question.<sup>112</sup>

Canada takes a similar approach. In Canada, a statute which is contrary to the Canadian Charter of Rights and Freedoms is technically invalid from the date of the Charter (or from the date the legislation was passed if that was after the Charter came into force), but this does not require giving retrospective effect to the judgment in every case:<sup>113</sup>

---

The starting point under South Africa's 1996 Constitution differs from that under its Interim Constitution of 1993. Under the latter, an order of invalidity operated only prospectively unless the court specifically made it retrospective; under the 1996 Constitution, constitutional invalidation is presumptively retrospective unless the court order specifically limits its retrospective effect. See *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 1288 (CC) at paragraphs 11–12, per Kriegler J.

110 The South African courts have additional constitutional powers to develop common law and customary law; see South African Constitution, sections 39(2) and 173. See also O'Regan (1999); *Bhe & Others v Magistrate, Khayeltisha & Others* 2005 (1) SA 580 (CC) at paragraphs 109–129, per Langa DCJ.

111 *Bhe & Others v Magistrate, Khayeltisha & Others* at paragraph 126.

112 (*ibid.*:paragraph 129). For further discussion of the handling of this issue in various jurisdictions, see *HKSAR v Hung Chan Wah*; *HKSAR v Asano Atsushi*, Criminal Appeal No.'s 411 of 2003 and 61 of 2004 in the High Court of the Hong Kong Special Administrative Region, Court of Appeal, 26 January 2006; available at [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_frame.jsp?DIS=51417](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=51417); last accessed 27 September 2009. This case notes at paragraph 30 that some jurisdictions (in some exceptional cases) apply court rulings of unconstitutionality only prospectively, where this is necessary "to protect those who have entered upon transactions giving rise to rights and obligations and who have, in doing so, genuinely relied upon that which was at the time fairly taken to be settled law, and where to reverse the consequences of that reliance would cause them undue hardship".

113 *Canadian Charter of Rights Decisions Digest*, "Section 32(1): Charter decisions" at section 8; available from the Canadian Legal Information Institute (CanLII) at [www.canlii.org/en/ca/charter\\_digest/s-32-1.html#\\_Toc68429571](http://www.canlii.org/en/ca/charter_digest/s-32-1.html#_Toc68429571); last accessed 29 September 2009.

A declaration of invalidity goes undoubtedly to the past since what it says, in effect, is that the law was *ultra vires* the legislature and, therefore, never acquired legal force and effect. The judgment does not create a new legal situation; it has a date and will be operative in the future, but it simply declares what is and what always has been. It does not mean that all that could have resulted from the application of the invalid law will be affected. The law did not have legal existence, but it nevertheless existed as a fact and the legal system cannot but give effect to that reality if chaos is to be avoided. However, the invalid law may not govern or influence transactions or situations not already closed or spent.

The Canadian courts have identified factors which must be assessed in deciding on the appropriate time frame of a constitutional remedy.<sup>114</sup>

Namibia is, in contrast, currently in something of a jurisprudential bind, without the ability to harmonise the timing of the invalidity of findings on the unconstitutionality of different forms of law, and with (as yet) no discussion of any principles for preventing the retrospective invalidity of common law or customary law from upending transactions which have long been regarded as settled.<sup>115</sup>

### **“Value judgments”**

Namibia’s equality jurisprudence has suggested that there are two different approaches to constitutional interpretation, depending on whether the rights in question are absolute or whether they require a value judgment to supply specific meaning.

---

114 Canadian law on this issue is discussed at length by the Canadian Supreme Court in *Canada (Attorney General) v Hislop* [2007] SCJ No. 10 at paragraphs 78–108, per LeBel and Rothstein JJ. This case notes the following at paragraph 103:

“People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what the Constitution requires. Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments. But where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interests of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other”.

115 The Myburgh case simply concludes at 266I–J that the common law rules that were the subject of the case “are in conflict with the provisions of the Constitution and that they ceased to exist when the provisions of the Constitution took effect on Independence, i.e. 21 March 1990”.

In *Frans*, the court rather poetically responded to the assertion that such a declaration of invalidity would open “possible floodgates of litigation” by saying the following at 529I–530E, per Heathcote AJ:

“Floodgate-litigation arguments cannot cause an unconstitutional rule to survive. Sometimes, as in this case, it is indeed necessary to open the floodgates to give constitutional water to the arid land of prejudice upon which the common-law rule has survived for so many years in practice”.



In *Myburgh*, the court noted that this was “not an instance where meaning and content must still be given to the provisions of the Constitution”, stating that “no value judgement is necessary” to see that the common law rules on marital power are discriminatory and unconstitutional.<sup>116</sup> The *Frank* case applied an extensive value judgment, giving the prohibition of the death penalty as a contrasting example of a fundamental right which is absolute and requires no value judgment.<sup>117</sup> This example makes sense as it should not involve much in the way of interpretation to see whether a particular law provides for the death penalty or not.<sup>118</sup> However, it is hard to see how the tests developed by the courts for the application of either Article 10(1) or (2) could be applied in an absolute manner. Assessing the factors which argue for or against a rational connection to a legitimate government objective is not a mechanical exercise, and deciding when discrimination is “unfair” would seem to involve a value judgment by the very nature of the question. In fact, even the *Myburgh* case which purported not to require a value judgment on the question of sex discrimination supported its finding that the sex discrimination in question was unfair with reference to women’s prior discrimination, and to stereotyping which denied women’s equal worth and impaired the dignity of women.<sup>119</sup> But if *Myburgh* had, like *Frank*, turned to Parliament on this issue or even taken an opinion poll, it would have found significant support for the proposition that men should be recognised by law as the heads of households.<sup>120</sup>

This highlights a second problem with the approach taken by Namibia’s equality jurisprudence to the analysis of “Namibian values”. The *Frank* case stands at the centre of this concern.

As a starting point, if *Frank* had followed the line of other equality jurisprudence more closely, it would have started by noting that the alleged discrimination affected a previously disadvantaged group,<sup>121</sup> which (even more seriously) is also currently

---

116 At 266B–I and 268D–E, referring to the portion of Article 6 which states that “[n]o law may prescribe death as a competent sentence”.

117 At 137E.

118 However, even this is not necessarily the case. In the unreported case of *S v Tjijo*, High Court, 4 September 1991, Levy J stated that life imprisonment was tantamount to a sentence of death; quoted in *S v Tcoelib* 1992 NR 198 (HC) at 200E–F. However, *S v Tcoelib* held at 205G and 205H–213H, per O’Linn J, that Article 6 surely referred to the death sentence as understood in its ordinary meaning, but applied a value judgment to see if life imprisonment was unconstitutional as cruel, inhuman or degrading punishment (concluding that it was constitutional).

119 At 266C–G.

120 See the summary of the Parliamentary debate on the Married Persons Equality Act in Hubbard (2007:101–104) and LeBeau & Spence (2004:33).

121 See *National Coalition* at paragraph 42, per Ackermann J, for a discussion of past discrimination against gays and lesbians in South Africa which is equally applicable to Namibia: “Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do [Continued overleaf]

disadvantaged.<sup>122</sup> The court would have then assessed the impact of the discrimination, perhaps noting (as in South Africa) that past patterns of disadvantage and stereotyping give rise to vulnerability, and the more vulnerable the group adversely affected by the discrimination, the more likely that the discrimination will be unfair.<sup>123</sup>

However, without considering these factors, *Frank* proffered a long list of potential sources of information on values: Parliament, courts, tribal authorities, common law, statute law, tribal law, political parties, news media, trade unions, “established Namibian churches”, and other “relevant community-based organisations”.<sup>124</sup> This list is problematic for several reasons. Firstly, all of these institutions are male-dominated and rooted in a patriarchal past – hardly the best place in Namibia to look for a holistic expression of values on sex discrimination. Secondly, all of these sources of information on values would be likely to give expression to mainstream, majority values only. Does this mean that minority views are not entitled to any respect? In a country as diverse as Namibia, this would be highly problematic. In South Africa, it has been pointed out that

the impact of discrimination on gays and lesbians “is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves”, while in contrast, other traditionally disadvantaged groups such as blacks and women form a majority in society.<sup>125</sup>

---

not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays”.

122 For example, in 1997 then President Sam Nujoma was quoted as referring to homosexuality as “a hideous deviation of decrepit and inhuman sordid behaviour” which “deserves a severe contempt and disdain from the Namibian people and should be uprooted totally as a practice”; *Mail and Guardian*, 14–20 February 1997. On another occasion he reportedly said that “[h]omosexuals must be condemned and rejected in our society”; *Windhoek Advertiser*, 12 December 1996. A Deputy Minister is quoted as saying that “[h]omosexuality is like cancer or AIDS and everything should be done to stop its spread in Namibia”, urging that gays and lesbians be “operated on to remove unnatural hormones”; *New Era*, 5–11 October 1995. One government Minister referred to homosexuality as an “unnatural behavioural disorder” (“Homosexuality is a mental disorder which can be cured”, *The Namibian*; three-part article by Helmut Angula, appearing on 10, 17 and 24 November 1995), and another said that gays and lesbians should be “eliminated” from the face of Namibia (*The Namibian*, 2 October 2000). See also Human Rights Watch & Gay and Lesbian Human Rights Commission (2003:24ff); Reddy (2001:83–87).

123 *National Coalition* at paragraph 44.

124 *Frank* at 150E–G.

125 *National Coalition* at paragraph 25 and note 32.

Despite quoting a large number of potential sources of information on Namibian values, the *Frank* judgment actually relied on only two Namibian sources on the issue of sexual orientation: separate statements by the Namibian President and the Minister of Home Affairs to the effect that homosexual relationships were against Namibian traditions and values (combined with the failure of any other Member of Parliament from the ruling party to make any comment to the contrary when the matter was raised in the house).<sup>126</sup> As has been pointed out elsewhere, there are many reasons (other than tacit agreement) why Parliamentarians might have remained silent, such as party loyalty or respect for the speakers – and opposition MPs as well as civil society groups *did* speak out in opposition to the views of the two persons mentioned.<sup>127</sup> The *Frank* judgment might just as easily have pointed to the fact that the entire Parliament had already recognised the need to protect persons against discrimination on the basis of sexual orientation by making this a prohibited basis for discrimination in the 1992 Labour Act, which was still in force at that time.<sup>128</sup> It might also have cited, as “relevant community-based organisations”, two Namibian groups already active for several years in working for the advancement of the rights of gay and lesbian Namibians.<sup>129</sup>

The real problem seems to be that the *Frank* case looks to values of the wrong order. There is a long line of cases which posit that the Constitution must be interpreted in accordance with Namibian values.<sup>130</sup> This is true in any democratic society, and especially in a country like Namibia, where the majority was for so long oppressed and suppressed. But the values which should guide constitutional interpretation are the core values which inform the new constitutional order, rather than the political views of the majority of the moment.

If the values in question were simply those which reflected majority opinion, the court would be little different from the legislature. Indeed, it was posited in the *Frank* case that “Parliament has the last say”, with power to overrule court judgments.<sup>131</sup> The *Frank* judgment goes on to note that Article 1(2) of the Namibian Constitution states that “[a]ll

---

126 *Frank* at 150E–G.

127 Cassidy (2000:186).

128 There has been a changing tide in Parliament since the time when the *Frank* case was decided. The Combating of Domestic Violence Act, 2003 (No. 4 of 2003) covers romantic relationships, but only between people “of different sexes” – a wording specifically included to exclude gay and lesbian relationships from the protections of this law. Similarly, the reference to sexual orientation was dropped from both the Labour Act, 2004 (No. 15 of 2004) and the Labour Act, 2007 (No. 11 of 2007). However, it should be noted that the judgment in the *Frank* case was cited in support of the exclusion of gays and lesbians from the Combating of Domestic Violence Act; see Hubbard (2007:121).

129 Sister Namibia, founded in 1989, and the rainbow project, founded in 1997.

130 See Amoo (2009); Horn (2009).

131 At 141B–F, which reads as follows:

“In regard to the judicial authority, the Namibian Constitution is ambiguous. The judicial authority is vested in the Namibian Courts by Article 78(1). But 78(2) makes their independence subject to the Constitution and the law. Although Article 78(2) provides that the Cabinet or Legislature or any other person may not interfere with the Courts in the exercise of their judicial [Continued overleaf]

power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State”.<sup>132</sup> But this argument seems to misunderstand the role of the Constitution and the courts as a check on the power of the majority of the day, and as *part* of the democratic institutions referred to in Article 1.

There is a deeper level of values which is inherent in the very structure of the Constitution. The totality of the constitutional framework clearly shows that democracy entails more than unqualified majority rule;<sup>133</sup> guaranteeing the equality of “all persons” implicitly promises protection for minorities and those with unpopular views or lifestyles.

This has been clearly articulated by the South African courts, which are also situated in a historical context where the majority was denied the right to determine their own fate for a long and painful time. For instance, it was stated in *S v Makwanyane* that the key purpose of judicial review is “to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process”:<sup>134</sup>

Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected. This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.

In the same vein, the 2006 *Fourie* case in South Africa stated the following:<sup>135</sup>

---

functions, Article 81 provides that a decision of the Supreme Court is no longer binding if reversed by its own later decision or if contradicted by an Act of Parliament. This means, so it would appear, that Parliament is not only the directly elected representative of the people of Namibia, but also some sort of High Court of Parliament which[,] in an exceptional case, may contradict the Supreme Court, provided of course that it acts in terms of the letter and spirit of the Namibian Constitution, including all the provisions of Chapter 3 relating to fundamental human rights”.

This stance misses the point that Parliament can “overrule” the courts only by legislation “lawfully enacted”, which must also mean constitutionally valid, since the Constitution is the “Supreme Law” (Article 1(6)). For a discussion of how the Namibian system contrasts with the British system on this point, see Okpaluba (2000:112).

132 At 141F–G. The judgment concludes at 141G–H that the Namibian courts are in a much weaker position than their counterparts in South Africa.

133 See Erasmus (2000:13).

134 *S v Makwanyane & Another* 1995 (3) SA 391 (CC) at paragraphs 88–89, per Chakelson P (citations omitted).

135 *Minister of Home Affairs & Another v Fourie & Another* 2006 (1) SA 524 (CC) at paragraph 95, per Sachs J (citations omitted). This case also stated the following at paragraph 94 (citations omitted):

“Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom”.

The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.

The *Fourie* case concluded that an egalitarian society “embraces everyone and accepts people for who they are”, saying that equality means “equal concern and respect across difference” rather than “the elimination or suppression of difference”:<sup>136</sup>

At the very least, it [equality] affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society ... The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage ... The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation ... At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

There is support for this view from a range of sources all over the world, from different periods of history. For example, James Madison said in respect of the United States Constitution that part of the role of a constitution was to prevent the majority from being able to “carry into effect schemes of oppression”,<sup>137</sup> while English philosopher John Stuart Mill spoke of the need for “constitutional checks” to protect against the “tyranny of the majority”.<sup>138</sup> A 1998 judgment of the Canadian Supreme Court made the following statement about equality:<sup>139</sup>

It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.

---

136 (ibid.:paragraph 60; citations omitted).

137 Madison (1787:81).

138 Mill (1859). He also said the following (ibid.):

“The will of the people, moreover, practically means, the will of the most numerous or the most active part of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, may desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power”.

See also Erasmus (2000:11–12).

139 *Vriend v Alberta* [1998] 1 SCR 493 at paragraph 69.

Closer to home, the African Charter of Human and People's Rights couples non-discrimination with the duty of mutual respect and tolerance for all fellow beings:<sup>140</sup>

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

These higher-level values like mutual respect and tolerance for all are also at the heart of the Namibian Constitution. It is this level of values which was articulated in several early cases involving other aspects of the Constitution. For instance, the 1991 *Acheson* case speaks of the Constitution as "the articulation of the values bonding its people and disciplining its Government".<sup>141</sup> The 1991 *Corporal Punishment* case stated the following:<sup>142</sup>

The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty

and the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.

The 1993 *Cultura 2000* case stated that various constitutional provisions made it manifest –<sup>143</sup>

---

140 Article 28.

141 *S v Acheson* 1991 NR 1 (HC) at 10A–B, per Mahomed AJ.

142 *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC) at 179E–G, per Mahomed AJA. The concurring judgment by Berker CJ discusses the evolving nature of values at both national and international level, but concludes at 197G–198I that – "… the making of a value judgment is only possible by taking into consideration the historical background, with regard to social conditions and evolutions, of the political impact on the perceptions of the people and a host of other factors, as well as the ultimate crystallisation of the basic beliefs and aspirations of the people of Namibia in the provisions in the Bill of Fundamental Human Rights and Freedoms".

The South African Constitutional Court (in *Shabalala & Others v Attorney-General of the Transvaal & Another* 1996 (1) SA 72 (CC) at paragraph 26, per Mahomed DP; footnotes omitted) has similarly discussed how the South African Constitution –

"… retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment".

143 *Government of the Republic of Namibia & Another v Cultura 2000 & Another* 1993 NR 328 (SC) at 333H–I, per Mahomed CJ.

... that the constitutional jurisprudence of a free and independent Namibia is premised on the values of the broad and universalist human rights culture which has begun to emerge in substantial areas of the world in recent times and that it is based on a total repudiation of the policies of apartheid which had for so long dominated lawmaking and practice during the administration of Namibia by the Republic of South Africa.

These cases did not refer to the kind of values one would find in opinion polls,<sup>144</sup> but to the deeper formational values which must underlie a democratic government premised on dignity and equality for all.

If we go back to the Preamble to the Constitution, where this chapter began, we are reminded that the most effective way to maintain and protect the rights of dignity and equality so long denied to the people of Namibia is through a system where the democratic government operates “under” a sovereign Constitution and a free and

---

144 Contrast the *Frank* case at 138C–D, which refers to “properly conducted opinion polls” as one of many possible sources of values to guide constitutional interpretation. The role of current public opinion is confusingly presented here in any event, as the judgment goes on to quote part of a passage from *S v Vries* 1998 NR 244 (HC), which emphasises that the value of public opinion will differ in different cases. The quoted passage reads as follows in full at 265A–G, per O’Linn J:

“There can be no quarrel at all with the principle that public opinion is not a substitute for a duty vested in the Courts to interpret the Constitution and uphold its norms. One can also agree that public opinion cannot be decisive. It seems to me, however, with great deference to the learned and eminent Judges [referring to a quoted passage from the South African case of *S v Makwanyane & Another*], that the statement ‘may have some relevance’ is putting the value of public opinion too low. In my respectful view the value of public opinion would differ from case to case, from fundamental right to fundamental right and from issue to issue. In some cases public opinion should receive very little weight, in others it should receive considerable weight. It is not a question of substituting public opinion for that of the Court. It is the Courts that will always evaluate the public opinion. The Court will decide whether the purported public opinion is an informed opinion based on reason and true facts; whether it is artificially induced or instigated by agitators seeking a political power base; whether it constitutes a mere ‘amorphous ebb and flow of public opinion’ or whether it points to a permanent trend, a change in the structure and culture of society; whether it is a cry for help and protection by the law-abiding majority that live in fear and uncertainty amid a growing culture of lawlessness and violence threatening the whole fabric of society and the Constitution. The Court therefore is not deprived of its role to take the final decision whether or not public opinion, as in the case of other sources, constitutes objective evidence of community values. It is the current community values which must be established by this and other means”.

The South African case referred to articulates what I respectfully assert to be the more reasoned view (*S v Makwanyane & Another* 1995 (3) SA 391 (CC) at paragraph 88, per Chaskalson P): “Public opinion may have some relevance to the enquiry, but in itself it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were decisive, there would be no need for constitutional  
Continued overleaf]

independent judiciary.<sup>145</sup> One of the core values of the Constitution is its role as a check on majority rule to ensure that the dignity and equality of all persons remains inviolate.

Equality applies to the minority as well as to the majority, to those with unpopular views, to those who are marginalised. The promise of Namibian independence is that the dignity and equality of *all persons* will henceforth be respected. Those who are vulnerable in society and those who lack political power are the people who most need the fundamental protection against discrimination which only a Constitution can provide. These are the values which should guide the application of the principle of equality, which is the foundation of Namibia's freedom.

## References

- Amoo, SK. 2009. "The constitutional jurisprudential development in Namibia since 1985". In Horn, Nico & Anton Bösl (Eds). *Human rights and the rule of law in Namibia* (Second Edition). Windhoek: Konrad-Adenauer-Stiftung.
- Bonthuys, E. 2000. "Deny thy father and refuse thy name: Namibian equality jurisprudence and married women's surnames". *South African Law Journal*, 117:464.
- Cassidy, EK. 2000. "Article 10 of the Namibian Constitution: A look at the first ten years of the interpretation of the rights to equality and non-discrimination and predictions of the future". In Hinz, Manfred O, Sam K Amoo & Dawid van Wyk (Eds). *The Constitution at work: 10 years of Namibian nationhood*. Windhoek: University of Namibia.
- Erasmus, MG. 2000. "The impact of the Namibian Constitution on the nature of the state, its politics and society: The record after ten years". In Hinz, Manfred O, Sam K Amoo & Dawid van Wyk (Eds). *The Constitution at work: 10 years of Namibian nationhood*. Windhoek: University of Namibia.
- Horn, N. 2009. "International human rights norms and standards: The development of Namibian case and statutory law". In Horn, Nico & Anton Bösl (Eds). *Human*

---

adjudication. The protection of rights can then be left to Parliament which has a mandate from the public, and is answerable to the public for the way in which its mandate is exercised, but this would be a return to parliamentary sovereignty and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected".

145 Preamble, clause three. See *Afshani & Another v Vaatz* 2006 (1) NR 35 (HC) at 48A–C, per Maritz J:

"One only has to refer to . . . the first paragraph of the Preamble to the Constitution to understand why human dignity is a core value, not only entrenched as a fundamental right and freedom in ch 3, but also permeating all other values reflected therein".



- rights and the rule of law in Namibia* (Second Edition). Windhoek: Konrad-Adenauer-Stiftung.
- Hubbard, D. 2007. "Gender and sexuality: The law reform landscape". In LaFont, S & D Hubbard (Eds). *Unravelling taboos: Gender and sexuality in Namibia*. Windhoek: Legal Assistance Centre.
- Human Rights Watch & Gay and Lesbian Human Rights Commission. 2003. *More than a name: State-sponsored homophobia and its consequences in southern Africa*. New York: Human Rights Watch.
- LAC/Legal Assistance Centre. 1999. *Proposals for law reform on the recognition of customary marriages*. Windhoek: LAC.
- LAC/Legal Assistance Centre. 2000. *Proposals for divorce law reform in Namibia*. Windhoek: LAC.
- LAC/Legal Assistance Centre. 2005a. *Customary laws on inheritance in Namibia: Issues and questions for consideration in developing new legislation*. Windhoek: LAC.
- LAC/Legal Assistance Centre. 2005b. *Inheritance Issues: Information and feedback from community consultations on inheritance law reforms*. Windhoek: LAC.
- LAC/Legal Assistance Centre. 2005c. *Marital property in civil and customary marriages: Proposals for law reform*. Windhoek: LAC.
- LRDC/Law Reform and Development Commission. 2003. *LRDC 11: Report on uniform consequences of common law marriages (Repeal of section 17(6) of Native Administration Proclamation, 1928 (Proclamation 15 of 1928)*. Windhoek: LRDC.
- LRDC/Law Reform and Development Commission. 2004a. *LRDC 12: Report on customary law marriages*. Windhoek: LRDC.
- LRDC/Law Reform and Development Commission. 2004b. *LRDC 13: Report on divorce*. Windhoek: LRDC.
- LeBeau, D & GJ Spence. 2004. "Community perceptions on law reform: People speaking out". In Hunter, Justine (Ed.). *Beijing +10 – The way forward: An introduction to gender issues in Namibia*. Windhoek: Namibia Institute for Democracy.
- Mill, JS. 1859 [edited by E Rappaport, 1978]. *On liberty*. Indianapolis: Hackett Publishing Company; also available at <http://www.bartleby.com/130/>; last accessed 9 February 2010.
- Madison, J. 1787. *The Federalist No. 10*. Available at <http://federali.st/10>; last accessed 9 February 2010.
- Okpaluba, C. 2000. "Constitutionality of legislation relating to the distribution of governmental powers in Namibia: A comparative approach". In Hinz, Manfred O, Sam K Amoo & Dawid van Wyk (Eds). *The Constitution at work: 10 years of Namibian nationhood*, Windhoek: University of Namibia.
- O'Regan, Kate. 1999. "The best of both worlds? Some reflections on the interaction between the common law and the Bill of Rights in our new Constitution". *Potchefstroom Electronic Law Journal*; available at <http://ajol.info/index.php/pelj/article/viewFile/43507/27042>; last accessed 10 February 2010.
- Reddy, V. 2001. "Homophobia, human rights and gay and lesbian equality in Africa". *Agenda*, 50.
- Wiechers, M. 1991. "Namibia: The 1982 Constitutional Principles and their legal significance". In Van Wyk, Dawid, Marinus Wiechers & Romaine Hill (Eds).

*Namibia: Constitutional and international law issues.* Pretoria: University of South Africa.

**Cases cited**

- Afshani & Another v Vaatz* 2006 (1) NR 35 (HC)  
*Berendt & Another v Stuurman & Others* 2003 NR 81 (HC)  
*Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC)  
*Canada (Attorney-General) v Hislop* [2007] SCJ No. 10  
*Canada (Attorney-General) v Mossop* (1993) 100 DLR (4<sup>th</sup>) 658  
*Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC)  
*Council of the Municipality of Windhoek v Petersen* 1998 NR 8 (HC)  
*Detmold & Another v Minister of Health and Social Services & Others* 2004 NR 174 (HC)  
*Deysel v Truter & Another* 2005 (5) SA 598 (C)  
*Ditedu v Tayib* 2006 (2) SA 176 (W)  
*Du Toit v Office of the Prime Minister* 1996 NR 52 (LC)  
*Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC)  
*Ex Parte Attorney-General: In Re The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1998 HR 282 (SC)  
*Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC)  
*Frans v Paschke & Others* 2007 (2) NR 520 (HC)  
*Government of the Republic of Namibia & Another v Cultura 2000 & Another* 1993 NR 328 (SC)  
*Grobbelaar & Another v Council of the Municipality of Walvis Bay* 1997 NR 259 (HC)  
*HKSAR v Hung Chan Wah; HKSAR v Asano Atsushi*, Criminal Appeal No.'s 411 of 2003 and 61 of 2004 in the High Court of the Hong Kong Special Administrative Region, Court of Appeal, 26 January 2006; available at [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_frame.jsp?DIS=51417](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=51417); last accessed 27 September 2009  
*Jacobs v Adonis* 1996 (4) SA 246 (C)  
*Kauesa v Minister of Home Affairs & Others* 1994 NR 102 (HC)  
*Kauesa v Minister of Home Affairs & Others* 1995 NR 175 (SC)  
*Meintjies v Joe Gross t/a Joe's Beerhouse* 2003 NR 221 (LC)  
*Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC)  
*Minister of Home Affairs v Majiedt & Others* 2007 (2) NR 475 (SC)  
*Minister of Home Affairs & Another v Fourie & Another* 2006 (1) SA 524 (CC)  
*Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 1288 (CC)  
*Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC)  
*Müller v President of the Republic of Namibia & Another* 1999 NR 190 (SC)  
*Mwellie v Minister of Works, Transport and Communication & Another* 1995 (9) BCLR 1118 (NmH)  
*Mwilima v Government of the Republic of Namibia* 2001 NR 307 (HC)  
*Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC)

- Namibia Insurance Association v Government of Namibia* 2001 NR 1 (HC)  
*National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC)  
*National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC)  
*Nationwide Detectives CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 (SC)  
*President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)  
*Poolman & Others v Transnamib Ltd* 1997 NR 89 (HC)  
*S v Acheson* 1991 NR 1 (HC)  
*S v Dameseb & Another* 1991 NR 371 (HC)  
*S v Ganab* 2001 NR 294 (HC)  
*S v Heita & Another* 1992 NR 403 (HC)  
*S v Luboya & Another* 2007 (1) NR 96 (SC)  
*S v Makwanyane & Another* 1995 (3) SA 391 (CC)  
*S v Nassar* 1994 NR 233 (HC)  
*S v Scholtz* 1998 NR 207 (SC)  
*S v Smith NO & Others* 1996 NR 367 (HC)  
*S v Tcoeib* 1992 NR 198 (HC)  
*S v Tjijo*, High Court, 4 September 1991 (unreported)  
*S v Van den Berg* 1995 NR 23 (HC)  
*S v Van Wyk* 1993 NR 426 (SC)  
*S v Vries* 1998 NR 316 (SC)  
*Shabalala & Others v Attorney-General of the Transvaal & Another* 1996 (1) SA 72 (CC)  
*Toonen v Australia* Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994)  
*Vriend v Alberta* [1998] 1 SCR 493