
Drafting of Namibia's Constitution*

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Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law. In modern times the growth of political responsibility has been added to this through the winning of initiative in the discretionary matters of national policy by people's representatives; but the most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.

Charles Grove Haines¹

Introduction

The evolution of constitutionalism has been the process of limiting the power of the state. In that sense, Paine's dictum that "a constitution is not the act of a government but of a people constituting a government"² is fully valid. Commenting on this dictum, McIlwain³ observes that the consequence of the validity of Paine's dictum is that the forms and limits followed in this 'constituting' become the embodiment of a 'constitution', superior in character to the acts of any 'government' it creates. He further argues that if this constituent act of the people entrusts certain definite powers to their government, 'enumerated powers,' as we term them, it is a necessary inference that this government cannot exercise any powers not so 'enumerated.' Thus, all constitutional government is by definition limited government or limiting of government. As noted above, Haines, too, emphasizes that "constitutionalism has one essential quality: it is a legal limitation on government."⁴ Legal limitations on the government are, however, not arbitrary. They are or should be based on certain fundamental values, unalterable by ordinary legal process. These fundamental values are an inheritance of the long history of human thought and specific national history and context. Preambles to most of the constitutions acknowledge and recognize these values. Fundamental values based on

* This chapter is cited verbatim, with permission, from Geingob, HG. [n.d.]. *State formation in Namibia: Promoting democracy and good governance*. Windhoek: Trustco Group International (Pty) Ltd.

1 Charles Grove Haines, *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law* (Cambridge, Massachusetts, Harvard Univ. Press, 1930).

2 Thomas Paine, *Rights of Man*, <http://www.ushistory.org/paine>, accessed 1 December 2002.

3 Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, N.Y., Cornell Univ. Press, 1947), <http://www.constituion.org/cmt/mcilw/mcilw.txt>, accessed 25 January 2001.

4 Haines, *The Revival of Natural Law Concepts*.

the inheritance of the long history of human thought include democracy, freely elected representatives of the people, rights of man, sovereignty, and liberty.⁵ Similarly, certain values are driven by a national context. Namibia's Constitution talks about "the rights that have for so long been denied to the people;"⁶ the Preamble to the United States Constitution refers to the need for domestic tranquillity and common defence;⁷ the Preamble to the Japanese Constitution stipulates "that never again shall we be visited with the horrors of war through the action of government;"⁸ and the French Preamble states: "The French people hereby solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty By virtue of these principles and that of the free determination of peoples, the Republic offers to the Overseas Territories expressly desiring this to adhere to them new institutions based on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic evolution."⁹

Specifically, the Namibian Constitution's Preamble states as follows:

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;

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

Whereas we the people of Namibia:
have finally emerged victorious in our struggle against colonialism, racism and apartheid;
are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle;

desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world;

will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state; committed to these principles, have resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity.

Compromising of Vision by Different Interest Groups

The process of constitution making is influenced by the vision and self-interest of various interest groups, parties, classes, sectoral interests, and individuals participating in the process. Self-interest is invariably cloaked in phrases, such as 'public good,' 'essential for stability,' and so forth. Consequently, the final draft of a constitution is always a

5 See for instance, preambles to the constitutions of France, Namibia, South Africa, the United States, and Zambia.

6 Namibia, *Constitution of the Republic of Namibia*, Preamble.

7 United States, *Constitution*, Preamble.

8 Japan, *Constitution*, Preamble.

9 France, *Constitution*, Preamble.

compromise. As an illustration, during the discussion on the text of the Preamble to the Namibian Constitution, one of the members of the Constituent Assembly, Mr de Wet of ACN, was particularly concerned about the Preamble. Reflecting on what he thought were biases, he had said:

Although we accept as resolved by the Standing Committee, that the Preamble should reflect the historical context of the birth of the new state of Namibia and the aspirations of its nation, we do not accept, as it is partly done in the draft, that the Preamble is the place where political views or bitterness of only one of some of the political parties or disputable historical facts are reflected, such as the rights which the inhabitants, or some of them, have allegedly been denied, those who have struggled against whom and who were victorious in such struggle.¹⁰

The victims of apartheid saw this statement as an attempt at clouding the realities of apartheid, and denying its impact on the lives of the majority in Namibia. His comment focused entirely on the self-interest of the whites. However, such statements were rare and should not be taken as a general view of the whites or their representatives at the Constituent Assembly.

As the United Nations had played a significant role in the process of Namibia's nationhood, considerable influence was also wielded by some of the members of the international community on the outcome of the final document. Various parties involved in addressing the Namibian question, i.e., South Africa, the Western Contact Group, ethnic parties and the liberation movement, tried to influence the ultimate outcome of the nature of the Namibian state to suit their own vision or interests. The important provisions of the constitution, the Constitutional Principles, were 'imposed' on the Constituent Assembly because the West wanted to ensure that the liberation movement did not opt for socialism that might compromise the interests of the settlers.

This interplay of conflicting interests has a sociological aspect – of how we view human nature. The processes of constitution making at the Federal Convention in Philadelphia in 1776, and at the Assemblée Constituante in Paris in 1789, also provide examples of the interplay of conflicting interests in the shaping of the final document. For instance, at the Federal Convention, the participants held a "generally dismal view of human nature." Alexander Hamilton had argued, "Men are ambitious, vindictive, and rapacious." Echoes of Machiavelli were clearly discernible in his statement. That is why James Madison preferred a 'republic' in which whims of masses are filtered through their representatives and agents, to direct 'democracy.'¹¹ However, it would be a fallacy to believe that the representatives and agents can be expected to be any less ambitious, vindictive and rapacious. That is why the rule of law instead of the rule of will is so important.

In Windhoek, the situation was similar to the one that prevailed in Philadelphia. 'Dismal view of human nature,' or of the nature of politicians or power-holders also could be

10 Windhoek Constituent Assembly, Standing Committee on Standing Rules and Orders and Internal Arrangements, *Minutes of the Meeting of 30 January 1990*.

11 Robert D. Kaplan, *Warrior Politics: Why Leadership Demands A Pagan Ethos* (New York, Random House, 2002)1, p. 63

sensed in the interplay of the self-interest of communities represented by the participants in the Constituent Assembly and their desire for 'safeguards'. The Windhoek Assembly in fact reflected the racial and ethnic nature of the Namibian society divided by long years of apartheid.

The impact of this racial and ethnic nature will be highlighted in this, and the next two chapters.

Politics being largely about images, especially in the public sphere, various representatives at the Windhoek Assembly were concerned about how their constituencies would perceive their interests being addressed by their elected representatives. White representatives were concerned about protecting property rights of the whites and special privileges enjoyed by them. These included exclusive schools; the position enjoyed by their languages, namely, German and Afrikaans; representation in the parliament; and civil service job and pension guarantees. In this effort, their demands had already received a boost from the Western Contact Group and the Constitutional Principles espoused by them. Other parties that relied on their ethnic constituencies also sought to ensure representation in the parliament by arguing in favour of a bicameral parliament. Still others argued for the inclusion of tribal authority structures within the framework of the constitution, as has been the case in Botswana and Zimbabwe.¹²

Thus, events leading to the framing of Namibia's constitution had many variables, often conflicting, with different interests and parties trying to influence the clauses in the constitution that rule the machinery of government, the assignment of rights, and the procedures for amending the constitution.

In this chapter, some aspects of the emergence of the Namibian constitution have been compared with those of the French and U.S. constitutions, because they were two important countries known to have held conventions or conferences to draft their constitutions. Namibia, followed later by South Africa, was the only country in Africa at that time that drafted its own independence constitution through a Constituent Assembly. Many other African constitutions were drafted in Europe.

Drafting of Namibia's Constitution

The primary purpose of United Nations Resolution 435 was to hold free and fair elections for electing the Constituent Assembly that would draft the constitution of independent Namibia. It was not intended to hold elections for an independent Namibia. This was in compliance with the agreed Constitutional Principles.

12 For instance, in Botswana, the Tribal chiefs are represented at the highest level in the House of Chiefs, and District Councils Chiefs are non-elected members of the Councils, http://www.locgovinfo.co.zw/Mozambique__Study_Tour_to_Botswana.htm, accessed 3 November 2003.

Ten political parties had qualified to participate in the United Nations supervised Constituent Assembly elections of 1989.¹³ These included Aksie Christelik Nasionaal (ACN), Christian Democratic Action for Social Justice (CDA), Democratic Turnhalle Alliance of Namibia (DTA), Federal Convention of Namibia (FCN), Namibia National Democratic Party (NNDP), Namibia National Front (NNF), Namibia Patriotic Front (NPF), SWAPO-Democrats (SWAPO-D), SWAPO of Namibia (SWAPO), and United Democratic Front of Namibia (UDF). However, only seven parties won seats: SWAPO 41, DTA 21, UDF 4, ACN 3, and NPF, and FCN and NNF 1 each.

The first meeting of the Constituent Assembly took place on 21 November 1989, at Tintinpalast, which is now the seat of parliament in Windhoek. The leader of the majority party, Mr Sam Nujoma, chaired this meeting. "A number of procedural issues had already been agreed to through consultation and published as the Constituent Assembly Proclamation of 6 November 1989."¹⁴ First order of business was the election of the chairman of the Constituent Assembly. There were two nominations, Mr Hage Geingob of SWAPO and Mr Andrew Matjila of DTA. After voting, I (Hage Geingob) was elected chairman.

I knew well, as did the rest of the SWAPO leadership, that the Namibian society was divided because of years of apartheid and racial stratification in the provision of services and opportunities. During campaigns for elections it was clear that the Namibian society had remained divided. Therefore, the first job for me was to promote a spirit of consultation, mutual respect and reconciliation. In my opening remarks, I emphasized:¹⁵

The people of Namibia ... have given us a mandate to hammer out and adopt in a spirit of compromise, a spirit of give and take, a constitution that will launch our country and people into nationhood. This is a trust we dare not betray Obviously there will be differences of opinion on very vital matters, but through debate and consultation we should be able to find solutions and move forward. As chairman I will try my level best to be as impartial as is humanly possible. Towards all the political parties I will endeavour to be courteous and expect that the same spirit will prevail in this house.

Immediately thereafter, Mr Sam Nujoma said, "Namibia is a huge country with a small population. Therefore all Namibians, regardless of colour, creed or place of origin, have a place in our beautiful country. It is for us only to reach out to one another and mould a new nation out of diversity."¹⁶

These two speeches set the tone for the things to come. Leaders of some other parties also made statements of reconciliation.

13 *Democracy Factfile*, http://www.sardc.net/sd/sd_factfile_namibia.htm, accessed 3 November 2003.

14 Sam Nujoma, *Where Others Wavered: The Autobiography of Sam Nujoma* (London, Panaf, 2001), p. 424.

15 Windhoek Constituent Assembly, *Minutes of the Meeting of 21 November 1989*.

16 *Ibid.*

Acceptance of Constitutional Principles

Prior to the convening of the Constituent Assembly, suspicions had run high. Non-SWAPO parties knew little about SWAPO and were suspicious that it would want socialism in Namibia. Furthermore, some of the non-SWAPO parties having close links with the South African apartheid regime were suspicious of any government dominated by blacks. I sensed their suspicions and sought to build confidence by alleviating the fears of various ethnic groups. Towards that end, I decided to have one-on-one informal meetings with many of the Constituent Assembly members even prior to the first meeting of the assembly. Such interactions that emphasized a shared vision for a new Namibia helped create a favourable climate for the work of the Constituent Assembly.

During the confidence-building period before the drafting of the constitution started, I discovered that some whites would seek to reserve some of the privileges they had enjoyed during the apartheid era. This came out during a courtesy call I paid on Mr Jannie de Wet of ACN with a view to getting to know what his fears were. Mr de Wet was very happy to meet with me. He told me that the whites would be happy if the education system and standards were maintained. He identified fifteen schools that he would like to be reserved for the whites. If that could be given to whites there would be no problem, he said. I listened and said that I would report to the committee for the drafting of the constitution to see how they could deal with this issue.

White parents, with whom Mr de Wet had talked, took this issue further to Administrator General Mr Pienaar's attention. Mr Pienaar then brought it to the attention of the Drafting Committee of 21. What the parents, led by Ms Dominee de Klerk, demanded were three conditions: Christian character of education (that had characterised education in this country for years), maintenance of the standard of education, and instruction in mother tongue, especially in Afrikaans and German medium schools.¹⁷ Perhaps it should be mentioned that the administrator general did not seek to influence the proceedings of the Constituent Assembly, nor would he have been allowed to do so by me as the chairman because the work of the Constituent Assembly had nothing to do with him.

In any case, demands of whites brought to the attention of the Drafting Committee by Mr Pienaar were rejected as they were aimed at perpetuating white privileges. At this time, Mr Dirk Mudge made a very profound statement, "The impression must not be created that it is now only black people who are opposed to privatisation [of schools]. There are hundreds of white people who are opposed to that; for, privatisation would be a sort of 'rykmansapartheid' (meaning rich man's apartheid)."¹⁸

There was also a perception in some speeches at the first Constituent Assembly meeting that SWAPO lacked commitment to democracy, as almost all the leaders of the opposition referred to the importance of the 1982 Constitutional Principles. Mr Sam Nujoma observed: "Before and during the elections, certain perceptions had been

17 Windhoek Constituent Assembly, Standing Committee on Standing Rules and Orders and Internal Arrangements, *Minutes of the Meeting of 11 Dec. 1989*.

18 *Ibid.*

created that SWAPO was a socialist organization and was not committed to such ideals as democracy, right to property, etc.”¹⁹

This perception was propagated by ‘instant’ democrats, i.e., white oppressors who denied Namibians their human rights including democracy, who were second-guessing SWAPO’s democratic credentials. They believed that SWAPO would reject the Constitutional Principles proposed by the Western Contact Group and by so doing incur the wrath of the West. Instead, SWAPO pulled the rug from under their feet by adopting the Constitutional Principles. There were no disagreements within SWAPO about the acceptance of these principles. SWAPO agreed in its caucus that we propose to accept the Constitutional Principles at the very first sitting of the Constituent Assembly. These Constitutional Principles²⁰ included the provision that:

Namibia would be a sovereign, unitary, and democratic state with a constitution that provided for a system of government with three branches, an elected executive branch elected by universal and equal suffrage which will be responsible to the legislative branch; a legislative branch to be responsible for the passage of all laws; and an independent judicial branch which will be responsible for the interpretation of the constitution and for ensuring its supremacy and the authority of law. In addition, the constitution was to include a declaration of fundamental rights including right to life, personal liberty and freedom of movement; to freedom of conscience; to freedom of expression, including freedom of speech and 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 was to be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals would have the right to have the courts adjudicate and enforce these rights.

Adherence to the Constitutional Principles was in keeping with the essential requirement that the final constitution had to be approved by the United Nations Security Council. Unanimous adoption of this suggestion by all participants in the Constituent Assembly removed doubts harboured by many and warmed the different parties towards each other, thus making the work of the Constituent Assembly go much more smoothly.

Acceptance of SWAPO’s Draft Constitution as the Working Draft

The same afternoon, a Committee on Rules and Standing Orders was established.²¹ The committee did most of the work and quickly. A week later, on 28 November, it presented

19 Nujoma, *Where Others Wavered*, p. 425.

20 United Nations. *Yearbook of the United Nations* (New York, U.N. Dep. Of Public Inf.), p. 1292.

21 Members of the committee were Mr Hage Geingob (Chairman), Mr E. Tjiriange, Mr H. Ruppel, Mr Hidipo hamutenya, Mr Theo-Ben Gurirab, Mrs P. Ithana, Mr N. Iyambo, Dr M. Tjitendero, Mr N. Angula, Dr P. Katjavivi, Mr N. Bessinger and Mr B. Amathila (all from SWAPO), Mr J. Gaseb, Mr P.M. Junius, Mr H.E. Staby, and Mr A. Matjila (all from DTA), Mr V. Rukoro (from NNF), Mr J.G.A. Diergaardt (from FCN), Mr M.K. Katjuongua (from NPF), Mr J.W.F. Pretorius (from ACN), and Mr R.R. Diergaardt (from UDF).

its report containing draft standing rules and orders to the Constituent Assembly. After a few minor corrections, the report was accepted and the assembly proceeded to appoint a Standing Committee on Standing Rules and Orders and Internal Arrangements to address any new issues arising in the process of deliberations of the assembly. Membership of the new committee was the same as that of the Committee on Rules and Standing Orders that it replaced.

Various political parties had their own draft constitutions for independent Namibia with diverse positions on many of the constitutional elements. The Constituent Assembly reflected on various procedures for considering and reconciling the different drafts. I was not averse to resolving differences clause by clause, but there was unanimous concern that such a process could be time-consuming, time that the Namibians did not have, for, it was imperative that they wrested reins of power from South Africa as soon as possible.

The process was, however, speeded up when, at its 30 November meeting, the assembly adopted a motion by Mr Nahas Angula of SWAPO, as amended by the proposal of Mr Rukoro of NNF. The motion adopted stipulated that various parties represented at the assembly would submit their constitutional proposals or ideas to the acting secretary of the assembly no later than 4 December 1989. It was also agreed that each party would have the right of introducing their proposals by way of statements to the assembly on 4 December. The motion further mandated and instructed the Standing Committee to receive and consider other proposals regarding the future of Namibia, identify and formulate working categories for a future constitution or areas of material dispute in various proposals, and to make proposals for establishing committees to deliberate and negotiate on the above. The Standing Committee was asked to report back to the assembly on or before 12 December.

On 4 December, each party introduced its own version of a constitution for independent Namibia, and its constitutional ideas. Debates on various ideas continued in the Constituent Assembly for the next two days. DTA President, Mr Muyongo, stated, "Namibia is a state that abides by the principles of territorial integrity and rejection of secession."²²

A spirit of give and take, of confidence building, also spilled over in the work of the Standing Committee. Occasionally, there were lighter moments to break the monotony. During the 8 December 1989 meeting, during our discussion on fair trial, I suggested that the two proposals be married. Mr Ruppel broke into laughter, "Marry the DTA! Who would have thought we would marry the DTA!" Mr Barnes, too, joined in, "Who would have thought we would take up such a marriage!"²³

22 Windhoek Constituent Assembly, *Minutes of the Meeting of 4 December 1989*. Ironically, nine years later he led an armed rebellion against the state for the secession of the Caprivi Region.

23 Windhoek Constituent Assembly, Committee on the Rules and Standing Orders, *Minutes of the Meeting of 8 December 1989*.

SWAPO's suggestion that the Assembly adopt the 1982 Constitutional Principles as the starting point had already created a favourable climate for working together. The committee's work was made easier still as a result of a suggestion from Mr Dirk Mudge of DTA. He recognized that SWAPO was in the majority, and suggested that SWAPO's draft constitution be adopted as a working draft, and discussions could take place around it on issues where different drafts were at variance with it. Mr Mudge stated, "We did spend many hours together and we have, and I am not apologizing for that, taken your proposal as the basis for our discussion, not because it is the best proposal but because it represents the views of the majority and we have to take that into account."²⁴ All members of the committee unanimously accepted this suggestion, and it set the stage for addressing specific issues.

The Constituent Assembly provided an opportunity of free and unfettered expression of opinions by members on each and every paragraph of the draft constitution until consensus was reached. In fact, the Drafting Committee of 21 persons never had to vote on any issue during its meetings. My approach was not to curtail filibustering but to allow debate to go on until late hours. The end result was that various members would eventually agree on the issue at hand, often without making any change to the original proposal. On the other hand, if I sensed that the views of the members were so strong and the debate was becoming acrimonious, I would call for a tea break to cool off the atmosphere. During the tea-break, I would consult with key players, such as Mr Dirk Mudge, Mr Rukoro, and others from non-SWAPO parties, and Mr Theo-Ben Gurirab, Mr Hidipo Hamutenya, Dr Mose Tjitendero, Mrs Pendukeni Ithana, Mr Nahas Angula, Mr Hartmut Ruppel and others from SWAPO's side to bring the discussions on track.

The Standing Committee submitted its first report to the assembly at its 12 December meeting. As I was the chairman of the committee as well as the chairman of the assembly, Mr Ruppel of SWAPO introduced the report. He reported that:²⁵

1. There was a unanimous agreement to employ the constitutional proposals submitted by the majority party elected to the Constituent Assembly as a working document.
2. There was a broad agreement between parties on a number of issues and therefore only minor amendments and discussions were required. These issues included the preamble, general provisions of the constitution, citizenship, fundamental rights, the electoral system, procedure to amend the constitution, the environment, the language issue, definition of the territory, education, and local government and/or regional councils.
3. There were a number of issues that needed further discussions but in respect of them there was no material dispute. These included: State organs including, *inter alia*, the police, the defence force, prisons and the ombudsman, the economic system and its institutions, land reform, state succession, and transitional provisions.
4. There were two important areas requiring further deliberations, namely the executive and specifically the role of the president within the executive, and the composition of the legislature.

24 *Ibid.*

25 Windhoek Constituent Assembly, *Minutes of the Meeting of 12 December 1989*.

The report also recommended that the Standing Committee be allowed to continue with its deliberations and negotiations with a view to reaching agreement or to identifying constitutional issues in respect of which material disputes existed.

This report was adopted unanimously.²⁶

Executive vs. Ceremonial Presidency

There was general agreement between the framers of the Constitution at Windhoek that executive power should not be unchecked. There were, however, differing views on how these powers could be subjected to oversight. DTA members concentrated on arguing that Namibia should have a constitutional or ceremonial presidency as against executive presidency. At the 8 December 1989 meeting of the Standing Committee, Mr Mudge had stated:

We know that you also agree with a democratic society. So it is just a matter of finding a solution to a problem which has been worrying us for a long time, the fear of dictatorship, the fear of concentrating power in one person, our fear that we might end up with an undemocratic society, the fact that things can get out of hand and it is now for us to discuss this problem. You must explain to us now how you see that there could be some restrictions, some restraints placed on the state president so that he cannot do things on his own.

Mr Ruppel elaborated on SWAPO's position and in response, Mr Mudge stated:²⁷

We feel very strongly about the concentration of power, because as we see it, power corrupts and absolute power corrupts absolutely. The proposals in the working document, as I see it, have the inherent danger of establishing the system whereby the head of state exercises absolute power. We have listened to Honourable Ruppel only now, we will consider the proposals. In the meantime, we are of the opinion that the head of state in this proposal will exercise absolute power.

DTA had argued that providing for a constitutional head of state would be in line with the Westminster type of democracy. It was interesting that they opposed executive presidency despite the fact that in South Africa, with whom DTA had longstanding relations, there was an executive state president. Concern was also expressed that executive presidencies in Africa were not on the whole successful.

SWAPO, on the other hand, viewed the African experience in a different light. Problems of many African countries were not a result of executive presidencies, but of inadequate constitutional checks and balances. In the absence of checks and balances, trouble could come from wherever the executive power rested. SWAPO did not share the concern of non-SWAPO parties about executive presidency. It therefore argued strongly in favour of executive presidency, subject to appropriate constitutional checks and balances.

26 *Ibid.*

27 Windhoek Constituent Assembly, Committee on the Rules and Standing Orders, *Minutes of the Meeting of 18 December 1989*.

SWAPO members were also unanimous in their belief that executive presidency was essential for building a unified state – Namibia needed a leadership structure that would promote cohesiveness by bringing together various ethnic and racial groups that had been divided under apartheid rule. Anything short of that structure had the potential of undermining the fragile unity of the society. Therefore, SWAPO argued for a strong central government and against Namibia's becoming a federal state.

One finds evidence of similar concerns during the constitutional debates at the Federal Convention in Philadelphia. "The decision to establish the office of the president caused 'considerable pause', according to James Madison. Virginia's George Mason feared that the office would create a "foetus of a monarchy." But with Congress and the Court holding sufficient countervailing power, the framers were able to establish an office that was powerful yet under control."²⁸

At the Windhoek Constituent Assembly, the framers of the Constitution agreed to make the president the head of state and of government, provided that he or she shall share executive power with the cabinet comprising the prime minister and ministers. In fact, the final document emphasized: "The President shall in the exercise of his or her functions be obliged to act in consultation with the Cabinet."²⁹

Some of the non-SWAPO members of the assembly also argued that the terms of office of the president should be limited to two, five-year terms. The United States example was quoted very often, despite the fact that when the framers of the constitution in Philadelphia had established the presidency

they did not limit the terms of office. They felt that a democracy did not need artificial limits, that there might indeed be situations where the country needed continuity and leadership of an established president. One of the reasons the Framers were able to write a strong executive into the constitution was that they knew who was going to be the first president and trusted him with such authority. And George Washington did not let them down.³⁰

Despite the fact that no term limits were set at the Philadelphia Convention, George Washington had set a precedent by stepping down after his second term, a standard that became firmly established when Thomas Jefferson stepped down after his second term in 1808.

Similarly, in Namibia, by the time the Constituent Assembly met for the first time, it was already known that Mr Sam Nujoma had led SWAPO to victory and would be the first head of state. Therefore, the debate regarding the presidency was not just at an ideological level, it was very much about the personality they knew.

28 Victor Camber, *Giving up on Democracy: Why Term Limits are Bad for America* (Washington, DC, Regnery Publishers, 1995), p. 119.

29 Namibia, *Constitution of the Republic of Namibia*, Article 27.

30 Camber, *Giving up on Democracy*, p. 120.

However, in the spirit of give and take, SWAPO agreed to the provision of a two-term presidency but remained unconvinced by the reasoning given to justify it. SWAPO members felt that limiting the terms was unnecessary and undesirable. First, dictating that a person cannot contest elections for the third term, and dictating that the citizens cannot vote for that person was tantamount to abridging the person's and voters' natural rights. Many of them also felt that elections themselves provided term limits. If citizens did not wish a person to continue in office, they could vote him/her out. Further, limiting terms denied the country access to an experienced office holder.

Diffusion of the executive power of the president as a result of his/her sharing executive power with the cabinet, and limit on the number of terms the president can serve, helped alleviate the concerns of the opposition parties. Time will tell if such an arrangement is successful in protecting Namibia from the possibility of any dictatorial tendencies.

The issue dealing with the nature of presidency was resolved within a week and, on 20 December, the Standing Committee was able to present its second report informing the Constituent Assembly that the committee had succeeded in resolving all the substantive issues in principle, subject only to technical and minor further amendments and discussions on details regarding the system of proportional representation and a second house of parliament.

At this stage, the committee also agreed that the draft constitution and the principles agreed on should be referred to a panel of three eminent lawyers³¹ who were to be instructed to finalize the draft incorporating the said principles for submissions to the Standing Committee for further deliberations. The committee also resolved that the three lawyers should have had no previous involvement in the drafting of the proposals for any of the parties elected to the Constituent Assembly and that they should receive instructions from the Constituent Assembly.

This report was also adopted with considerable satisfaction. In their comments, various members of the Constituent Assembly applauded the spirit of cooperation that existed between various parties. Mr Dirk Mudge said, "Our party wants to put it on record that if deliberations in a future government would take place in the same spirit of goodwill, understanding, in the same spirit of give and take, the people of this country need not fear the future, but they can look forward to the future with confidence."³² Mr Moses Garoeb of SWAPO commented: "The responsibility is ours as leaders to ensure that this infant democracy that we are in the process of establishing, will not only be born, but will be institutionalised and stabilized."³³ Mr Katjiuongua of NPF said, "Let's hope that this is

31 Lawyers recommended by the committee were Adv. Arthur Chaskalson, Prof. Marinus Wiechers and Prof. Gerhard Erasmus. The appointed lawyers were invited to sit in the Constituent Assembly and Standing Committee meetings to get a feel of the political context of the discussions. They did not participate in any discussions unless specific questions were directed to them.

32 Windhoek Constituent Assembly, *Minutes of the Meeting of 20 December 1989*.

33 *Ibid.*

the first important sign of many good things to come our way.”³⁴ Similarly, Mr Justus Garoeb of UDF said, “The elected representatives of the Namibian people have come to the unanimous consensus to bury the past, to get rid of all factors threatening confidence and cooperation to work out a formula for lasting peace and prosperity for our people.”³⁵

Organization of the Legislature

Organization of the legislature differs a great deal from state to state. Elster³⁶ identifies three stages in the process of evolution of the legislature:

In the first stage, there is a strong monarchy which is perceived as arbitrary and tyrannical. In the second stage, this monarchy is replaced by a parliamentary regime. In the third stage, when it is discovered that parliament can be just as tyrannical and arbitrary as the king, some form of checks and balances is introduced.

As the Constituent Assembly turned its attention to working out details about the nature of the legislature, some of the concerns of the members of the assembly were to bring about accountability and establish a system of checks and balances. However, at the same time, one could see that the reasoning behind non-SWAPO parties arguing for a bicameral parliament was informed not just by their desire to enhance accountability. They believed that under proportional representation, with the whole of Namibia as one constituency, SWAPO would continue to secure a majority in the National Assembly for years to come. However, if a second house were created with equal representation from various regions, with elections based on a constituency system, SWAPO would fail to gain a majority in the second house.

Non-SW APO parties' thinking was based on the belief that the composition of regions would remain the same as that prevailing in the pre-independence era irrespective of their population sizes. As SWAPO's power base was perceived to be restricted to one northern region where most of the Oshiwambo speaking people lived, non-SWAPO parties felt that they stood a good chance of controlling the second house as they could gain majorities in many other regions.

Arguing in favour of a bicameral parliament, Mr Katjiuongua appealed:³⁷

Chairman said the first day when he became chairman that it was a process of give and take. Now, I think I have been giving (laughter) and I don't want the people to break the part of their deal. I have been giving and so far I have not scored any point. So really brothers and sisters I must report back home. So, I take it here you will not die here if you do compromise ... to provide mechanisms by which all of us in bigger or smaller numbers feel that we are part of

34 *Ibid.*

35 *Ibid.*

36 Jan Elster, *Arguing and Bargaining in Two Constituent Assemblies*, <http://www.law.upenn.edu/conlaw/issues/vol2/num2/elster.htm>, accessed 19 July 2001.

37 Windhoek Constituent Assembly, Committee on the Rules and Standing Orders, *Minutes of the Meeting of 18 December 1989*.

the same process That is one reason why I feel strongly that we must have a bicameral legislature.

What the non-SWAPO parties did not realize was that the situation was bound to change once the constitutionally established Delimitation Commission completed its task of redrawing regional boundaries. When the Delimitation Commission created new regions with approximately equal populations, the old Ovamboland was divided into four regions, Otjikoto, Ohangwena, Oshana, and Omusati. This development was sure to change the composition of the second house. In a sense, population concentration in the afore-mentioned regions could ensure SWAPO majority in the house by virtue of the fact that there were to be four times the number of representatives from former Ovamboland. Under the old arrangement, only two candidates could be sent to the National Council from former Ovamboland, but under the new delimitation arrangement, eight could be sent from the same area that had been divided into four regions. However, it needs to be mentioned that it was not clear at the time what the outcome of the work of the yet to be established Delimitation Commission would be. Nevertheless, SWAPO was sure of its popularity in the different regions, but the non-SWAPO parties underestimated its popularity.³⁸ SWAPO, therefore, had no difficulty accepting the non-SWAPO parties' proposal of a bicameral parliament.

The concept of bicameralism, as sought and secured by non-SWAPO parties, was ill conceived for various reasons. First, Namibia was conceived to be a unitary state and not a federal state, and regions were administrative rather than political units. Second, as in the United States, this was an attempt to balance rights attached to individuals with rights attached to regions. In Philadelphia, James Wilson had argued against rights attached to states, "Can we forget for whom we are forming a Government? Is it for men or for the imaginary beings called States?"³⁹ Advocates of individual rights had argued, "States ought to be represented in the federal assembly proportionally to their population, whereas those who believed in the rights of states argued for equal representation In the United States the compromise was equal representation in the upper house and proportional in the lower."⁴⁰

In Paris, on the other hand, the principle of bicameralism was rejected after debate. However, with the later addition of a senate to the legislature, France today has a bicameral parliament.

Bicameralism was adopted in Namibia, a unitary state, in the spirit of compromise by SWAPO. However, the attempt of the non-SWAPO parties was to curtail the power of the head of state, and that of the ruling party represented in the National Assembly. In the end, little purpose was served by this provision as short-term expectations of the non-SWAPO parties to control the second house failed to materialize. In future, however,

38 After the first Regional Council elections held in 1992, SWAPO's control of the National Council was assured with an enlarged majority.

39 Elster, *Arguing and Bargaining in Two Constituent Assemblies*.

40 *Records of the Federal Convention of 1786*, p. 483.

it is entirely possible that two different political parties could control the two houses. SWAPO also accepted the concept of bicameral parliament, because it considered that the regional aspect of the second house would be very useful in bringing democracy closer to the people. This thinking was in tandem with SWAPO's belief in the de-concentration of power from the centre to the periphery to make decisions more relevant to the developmental needs of the regions.

Bicameralism was accepted by the Constituent Assembly with 72 members of the National Assembly elected on proportional representation basis, and 26 members of the National Council elected, two from each of the thirteen regions, by the regional councillors who themselves had been elected from their constituencies.⁴¹

However, in stipulating the administrative working of the two houses, legal draftsmen created a serious mistake in drafting the relevant provisions by largely sticking to the SWAPO draft that provided only for a unicameral parliament. They drafted the article envisaging two houses, but overlooked making the necessary provision for staffing. Article 51(1) of the Constitution provides that the speaker shall appoint a person as the Secretary of the National Assembly. However, no such provision exists for the National Council. This error has come to haunt the executive and the legislature, making it necessary to amend the Constitution in the near future or to seek an interpretation by the Constitutional Court.

Bill of Rights

A Bill of Rights is enshrined in Namibia's constitution. Though inclusion of the Bill of Rights in constitutions, as an element for curtailing the power of the state over citizens, has a relatively long history, it is a new idea in Africa. Subsequent to Namibia's including the Bill of Rights in the Constitution, most other countries in Africa that made transition to democracy during the last decade, including South Africa, incorporated some form of Bill of Rights in their new constitutions.

In the case of Namibia, impetus for the inclusion of the Bill of Rights in the Constitution came from the Constitutional Principles. Furthermore, recognizing that the United Nations had played a very important role in the Namibians' struggle for liberation, it would have been ironic for the new state not to value the provision of human rights. These were also the very principles Namibians had fought for. In fact, the basic rights and freedoms in the Namibian constitution are largely, but not exclusively, derived from the Universal Declaration of Human Rights (1948).⁴²

Even if these outside influences were not there, and the constitution did not enshrine human rights provisions, Namibia would certainly have become signatory to the two

41 Namibia, *Constitution of the Republic of Namibia*, Chapter 8.

42 A useful source on the human rights provisions in the constitution is: Gino J. Naldi, *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (Cape Town, Juta, 1995).

conventions of the Universal Declaration of Human Rights as it did soon after securing independence. In 1992, Namibia also ratified the OAU's African (Banjul) Charter on Human and People's Rights. However, the framers of the Constitution felt so strongly about human rights that they decided to include them in the Constitution⁴³ and protect them against any dilution by providing that:

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.⁴⁴

This provision, however, does not stop the legislature from enhancing fundamental rights provisions.

Framers of American and French Constitutions had, however, thought very differently about human rights, despite the fact that they considered these rights to be important in some ways:

Some of the American delegates thought a Bill of Rights would be dangerous, as it might suggest that every right not included in the enumeration could be freely violated by the government. Because the Constitution restricted the powers of the government by enumerating them, it was felt that enumerating the rights might similarly be viewed as restrictive.⁴⁵

Further, C.C. Pinckney of the South Carolina House of Representatives took a different approach but towards the same end. He argued that a Bill of Rights generally begins "with declaring that all men are by nature born free. Now, we should make that declaration with a very bad grace, when a large part of our property consists in men who are actually born slaves."⁴⁶ A Bill of Rights was consequently left out of the American Constitution.

However, the issue of human rights was not to go away so easily. Just five days before the Philadelphia Convention adjourned, George Mason and Elbridge Gerry raised the question of adding the bill of rights to the constitution. Again, just three days before the convention adjourned, Pinckney and Gerry sought an addition of a clause regarding the liberty of the press. This provision, too, was rejected because "the power of Congress does not extend to the Press."⁴⁷ It has been suggested that "perhaps the lateness of the Convention, perhaps the desire not to present more opportunity for controversy when the document was forwarded to the States, perhaps the belief, asserted by the defenders of the Constitution when the absence of a bill of rights became critical, that no bill was needed because Congress was delegated none of the powers which such a declaration

43 Namibia, *Constitution of the Republic of Namibia*, Chapter 3.

44 *Ibid.*, Article 131.

45 Elster, *Arguing and Bargaining in Two Constituent Assemblies*.

46 See the *Records of the Federal Convention of 1786*.

47 United States, *Amendments to the Constitution: First Through Tenth Amendments*, <http://www.frwegate4.access.gpo.gov>, accessed 15 December 2002.

would deny, perhaps all these contributed to the rejection.”⁴⁸ Soon thereafter, however, many of the founding fathers urged an amendment to the constitution to include a declaration of rights and consequently, ten amendments were ratified.⁴⁹ As regards rights not enumerated in the constitution, the Ninth Amendment stipulates: “The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” This amendment is thus a positive affirmation of the rights that are not enumerated but are protected by other provisions.

In Paris, at the Assemblée Constituante, arguments against the inclusion of the Bill of Rights in the constitution reflected the fear of granting too many rights rather than too few. “Two of the most prominent moderates, Lally-Tolendal and Malouet, argued that a Bill of Rights might give the people exaggerated, confused, and dangerous ideas about their liberties, and argued for a postponement.”⁵⁰

In Windhoek, despite the international character of Namibia’s struggle for independence, and despite the framers’ commitment to human rights, various political parties had very different purposes for seeing the enshrining of the Bill of Rights in the constitution. SWAPO was concerned with ensuring that apartheid did not re-emerge, and that adequate provision existed to reverse the wrongs of apartheid. It therefore argued in favour of Article 23 dealing with apartheid and affirmative action. DTA, on the other hand, strove to ensure that property acquired by the whites was protected against appropriation. However, partly because of the provisions stipulated in the Constitutional Principles and partly because the provisions sought by various parties were within the framework of the Universal Declaration of Human Rights, general consensus ensued fairly quickly for the inclusion of a Bill of Rights in the constitution.

The Electoral System

The nature of democracy depends on, *inter alia*, the type of representation achieved. As John Stuart Mill pointed out,⁵¹

Two very different ideas are usually confounded under the name democracy. The pure idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practised is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens; the latter, strangely confounded with it,

48 *Ibid.*

49 These amendments deal with freedom of religion, speech, press, assembly, freedom to bear arms; protection against unreasonable searches and seizures, protection against being held answerable for any crime unless on presentment or indictment by a grand jury, speedy and public trial by an impartial jury, and protection against excessive bail, excessive fines, and cruel and unusual punishment.

50 *Archives Parlementaires de 1787 a 1860 Premiere Serie* (1789 a 1799)(1875-1888), pp. 222-23, 320 and 322-23. Quoted in Elster, *Arguing and Bargaining in Two Constituent Assemblies*.

51 John Stuart Mill, *Considerations on Representative Government* (Buffalo, Prometheus Books, 1991).

is a government of privilege, in favour of the numerical majority, who alone possess practically any voice in the State ... to the complete disenfranchisement of minorities.

In pre-independence Namibia, “government of privilege, in favour of numerical majority” was denied in favour of government of privilege, in favour of the white minority. As majority rule was sure to follow at the time of independence, members of the Windhoek Constituent Assembly, knowing that the choice of electoral system can influence representation greatly, focused on their own parties’ chances in the parliament.

An understanding of the pros and cons of different electoral systems was therefore important. The United Nations Institute for Namibia had done extensive work on comparative electoral systems,⁵² and its work was available to the members of the Constituent Assembly.

This work outlined all the different electoral systems and provided pros and cons for each. Rather than making specific recommendations, the study sought to outline the implications of various electoral systems *vis a vis* the philosophy and theory of representation, the franchise, the administrative machinery for elections, determination of results, nature of constituencies, voter registration, election campaigns, voting and voter security, ballot security and counting of votes, and the treatment of results.⁵³

Members of the Constituent Assembly also had first-hand knowledge of elections, because elections for the Constituent Assembly had just ended. As the campaign and elections for the Constituent Assembly proceeded, various implications outlined in the United Nations Institute for Namibia study also became clear. Illustrations of some of these implications are outlined in Chapter 3. Because of these experiences and the information available to the members of the Constituent Assembly, there was considerable debate in the Constituent Assembly on the choice of electoral systems.

In considering the choice of an electoral system for Namibia, a consensus had emerged that National Assembly elections should be held on proportional representation basis. Different parties in the Windhoek Assembly had, however, favoured proportional representation for different reasons. SWAPO members had agreed to this system because they felt that they, having spent decades out of the country, might not do so well if elections were held on a constituency basis which tends to favour local personalities. SWAPO was also pleased with the proportional representation system used for the election of the Constituent Assembly as it had allowed it to gain a majority in the assembly. Non-SWAPO parties, on the other hand, supported the proportional representation system as it favoured smaller parties’ representation in the National Assembly. Thus, the proportional representation system offered something to every party. As the proportional representation system allowed better opportunities for smaller parties to gain seats in

52 Ncube and Parker, *Comparative Electoral Systems and Political Consequences*; and Dieter, *Elections and Electoral Systems*. Both of these documents provide a comprehensive overview of types of electoral systems, as well as of their respective advantages and disadvantages.

53 Ncube and Parker, *Comparative Electoral Systems and Political Consequences*, p. 201.

the parliament, it was considered a more democratic system than the first-past-the-post system.

Although the framers of the constitution were unanimous in their choice of the electoral system for the National Assembly, there was considerable disagreement in the choice of electoral system for electing members of the National Council. The thinking of various non-SWAPO parties favouring a constituency-based system for electing regional councillors was very similar to their thinking on having a bicameral parliament. They had thought that SWAPO's power base would be eroded with the creation of a second house, and once again they thought that they, being strong in many regions, would do better in elections based on a constituency system. As already explained in this chapter, SWAPO was happy to oblige, knowing well that the delimitation of constituencies would contradict some of the assumptions of the non-SWAPO parties.

Regrettably, in this debate, the most important aspect of proportional representation was completely lost, that "rational underpinning all proportional representation systems is to reduce the disparity between a party's share of the national votes and its share of the parliamentary seats."⁵⁴ Reynolds⁵⁵ notes, "For ethnically divided states, the prevailing academic wind clearly blows in favour of proportional representation and against plurality." Lijphart⁵⁶ also supports the view that divided societies need a proportional representation system to protect the interest of the minorities. According to him, the proportional representation system in such societies has consistently posted the best records.

As regards presidential elections, there was unanimity that the president should be elected by direct, universal and equal suffrage, with Namibia as one constituency. Further, the elected candidate must receive over 50% of the votes cast. If necessary, a number of ballots should be conducted until such a result is achieved. This provision was included in the constitution.⁵⁷ So far, however, outcome of the first round has resulted in meeting this requirement.

Thus, because of the interplay of the interests of various political parties represented in the Constituent Assembly, Namibia ended up with three electoral systems.

The president is elected based on first-past-the-post system with the condition that the candidate must secure at least 50% of the votes cast. He/she does not have to be the leader of the political party with a majority in the parliament. The president is directly accountable to the people every five years but is not accountable to the parliament. He/she does not sit in the parliament. His/her powers are thus defined and limited only by the constitution that provides for the sharing of executive power with the cabinet.

54 Andrew Reynolds, *Electoral Systems and Democratization in Southern Africa* (Oxford, Oxford Univ. Press, 1999), p. 90.

55 *Ibid.*, p. 93.

56 A. Lijphart, "Democracy in Divided Societies" in *Journal of Democracy*, Vol. 4, No. 4 (1993) pp. 18-38.

57 Namibia, *Constitution of the Republic of Namibia*, Article 28.

Members of the National Assembly are elected on a proportional representation basis, based on party list. The party determines the order in which names of candidates appear on the list. Finally, members of regional councils are elected from constituencies on a first-past-the-post system. Regional councillors from each region, in turn, elect two representatives from within themselves to the National Council.

Thus, Namibia's electoral system allows for the possibility that the president is an independent candidate or candidate of one party, and the majority in the National Assembly, and therefore members of cabinet are from another party. This would be similar to the situation in France and Russia. If such a situation prevailed in the distant future, it could curtail the president's powers considerably as he/she would be required to exercise his/her powers in consultation with the cabinet with a majority from a different party.

Procedure for Amending the Constitution

Constitutions should strike the right balance between rigidity and flexibility. It should neither be easy nor impossible to change them.⁵⁸

On the one hand, 'Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy.' On the other hand, we should keep in mind the dictum of constitutional lawyers, ascribed to Justice Robert Jackson: the Constitution is not a suicide pact. It must be possible to unbind oneself in an emergency. Society must not be confined too tightly.⁵⁹

Mechanisms for amending constitutions should strike the right balance between rigidity and flexibility. The Windhoek Assembly opted to entrench fundamental rights and freedoms.⁶⁰ Further, the article stipulating specific majorities required in parliament or in a referendum for amending the constitution may not be repealed.⁶¹ Any other provisions of the constitution can be repealed or amended by a majority of two-thirds of all the members of the National Assembly and two-thirds of all the members of the National Council. In case an amendment or repeal of any of the provisions of the constitution secures a majority of two-thirds of the members of the National Assembly, but fails to secure such majority in the National Council, the president has the option of subjecting the amendment or repeal of the relevant provision of the constitution to referendum.⁶²

Mechanisms for amending the constitution chosen by the Windhoek Assembly seem to be very adequate. This standard clause was in fact lifted from the existing constitutions – indeed, similar provisions exist in almost all the constitutions. If anything, Namibia's constitution is slightly harder to change than most. This provision was also in SWAPO's

58 *Archives Parlementaires de 1787 a 1869 Premiere Serie (1789 a 1799)(1875-1888)*, p. 517.

59 Elster quoting John E. Finn, *Constitutions in Crisis* 5 (1991); *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949).

60 Namibia, Constitution of the Republic of Namibia, Article 31.

61 *Ibid.*, Article 132.

62 *Ibid.*

original draft that was adopted as a basis for drafting the Namibian Constitution. This provision guards against instability so that the constitution remains unaffected even when majorities fluctuate between forty-nine and fifty-one percent.⁶³ Furthermore, the requirement of a two-thirds majority of all members in both houses ensures serious consideration of the issue.

Adoption of the Constitution

On 25 January 1990, I, as the Standing Committee chairman, tabled the draft constitution of the Republic of Namibia at the Constituent Assembly meeting. Debate of the draft started on 29 January. For the next one and a half days statements were made by different parties, and on 30 January the assembly started considering the draft clause by clause. This debate continued the next day, but before adjourning, Mr Theo-Ben Gurirab moved that independence day should be determined to be 21 March 1990. This motion was carried unanimously. The country was to become independent on the midnight of 21 March 1990.⁶⁴

Work on the finalization of the constitution continued until 6 February when the draft was finalized. The stage was now set for the adoption of the constitution. One of my concerns was whether the constitution would be adopted by consensus or by majority vote. So far the Constituent Assembly had done everything by consensus; thus, I felt that we should adopt the constitution by consensus as well. Adoption of the constitution by consensus would also send a message of unity and oneness at this historic moment. Therefore I lobbied all members to endorse the constitution by consensus first, and then to enter reservations if any. I feared that if reservations were entered before the adoption of the document, it could have diluted the unanimity that was being sought. All, even by Mr Pretorius, former National Party stalwart, accepted this proposal. In pursuit of this ideal, I also made a last minute dash to see the Baster Kaptein, Mr Hans Diegaard, to persuade him, and he agreed by stating that he had no quarrel with the constitution or the incoming SWAPO government, but had a quarrel with Mr Pik Botha, the then Minister of Foreign Affairs of South Africa, who had told him that he would not have to abdicate his position if he were to join the Security Council Resolution 435 process.

On the morning of 9 February 1990 in front of the current parliament building, I declared, "We therefore adopt this constitution by consensus. Any objection? No objection," and brought down the gavel quickly. The constitution was adopted unanimously.⁶⁵ It must have seemed to those who were not insiders, and who were not aware of behind-the-scene consensus building efforts, that I brought the gavel down quickly so as not to give anybody a chance to change their mind. May be so - but not really.

The miracle of 80 days was accomplished. As the day of independence was set to be 21 March 1990, work on the process of nation building had to start. At the time of adoption

63 Elster, *Arguing and Bargaining in the Two Constituent Assemblies*.

64 Windhoek Constituent Assembly, *Minutes of the Meeting of 31 December 1989*.

65 Windhoek Constituent Assembly, *Minutes of the Meeting of 9 February 1990*.

of the constitution, I had compared nation building with the building of a house – the Namibian House. I had said that the foundation for that house was the constitution. The building blocks, the different ethnic groups: Damaras, Ndongas, Afrikaners, Hereros, Germans, Ovambos, etc. Mortar to hold these different bricks was composed of the laws passed by the parliament. When one finalises the laying of the bricks, one plasters the wall, paints it with colours. I further said, “We painted out house with the blue, white, yellow sun, green and red, our national colours. Once the house is painted, no one would see the bricks or different ethnicities. All that everyone would see is a strong house in which the children of Namibia will be able to live in peace, security and harmony.”

All the members of the Constituent Assembly signed the constitution on 16 March 1990.⁶⁶ In his 16 March 1990 report, the United Nations Secretary General transmitted to the Security Council the full and definitive text of the Constitution of Namibia, together with a comparison between the new constitution and the 1982 Constitutional Principles.⁶⁷ The Constitution duly met the Security Council’s approval.

For Namibia, constitutional democracy is a new concept, and its success will largely depend on Namibian society’s ability and willingness to internalise the constitution. First steps in this process of internalisation were taken in 1989 when the elected Constituent Assembly comprising citizens of Namibia met within the country in Windhoek⁶⁸ to draft the constitution, decide on the day of independence and also to elect the first president as a transitional measure, and deem him to have been elected under Article 28 of the constitution.

Furthermore, the way in which the constitution was to be implemented was prescribed in Article 135 which stated that: “This Constitution shall be implemented in accordance with provisions of Schedule 7 hereof.” Important provisions of Schedule 7 include the president’s appointing the prime minister and administering to him or her the oath or affirmation set out in Schedule 2 of the Constitution; the Constituent Assembly’s deciding the day on which the National Assembly would meet, at a time and at a place specified by the prime minister; the members of the National Assembly, with the prime minister as the chairperson, would take the oath/affirmation prescribed by Article 55 before the judge-president or a judge designated by the judge-president for this purpose, and elect the speaker of the National Assembly.⁶⁹

Constitutional Provisions and Personality Issues

The constitution stipulates in Article 32 (3)(i)(aa) that the president appoints a prime minister. In terms of Article 36, the prime minister is the key advisor and assistant to the president in his execution of the functions of the government.

66 Windhoek Constituent Assembly, *Minutes of the Meeting of 16 March 1990*.

67 United Nations, *Yearbook of the United Nations 1990*, Vol. 44 (New York, U.N. Dep. Of Public Info., 1999) p. 950.

68 Most of the African countries’ constitutions were drafted outside the countries and by people comprising the citizens and representatives of the colonizing states. In Namibia, on the other hand, constitution was drafted by Namibians in Namibia.

69 Namibia, *Constitution of the Republic of Namibia*, Schedule 2.

Although the Constitution is not explicit on the number of cabinet members, it mentions functions of a finance minister, a defence minister and a foreign minister. Therefore the size of the cabinet depends on the president, and, in the carrying out of this function, he consults with the prime minister as the primary constitutional assistant and advisor to him/her.

Consultations between the president and the prime minister were routine and very useful during the first term and during half of the second term, and executive relations were close. However, after the second elections (1994) when, for the first time, the president was elected directly by the people (as per the constitutional requirement) and received 72% of the votes, relations between the president and the prime minister changed. Perhaps, the president, now having been elected directly by the people, thought that he was mandated to rule and was accountable only to the people.

However, a brave cabinet and also the last SWAPO Party Congress held in August 2002 proved that the president could still be called to order in Namibia.⁷⁰ There can nevertheless be attempts by presidential coteries to encourage the president to be 'presidential'. These sycophants, who surround the president, are interested in their own survival and seek to please the president by 'informing' him that he was very popular with the people. This sycophancy may be reflected in their behaviour of promoting omnipotence of the presidency. It can take many forms; such as the way the president is addressed (head of state and head of government, commander in chief, tatekulu, revolutionary, founding father, etc.), as had been the case in Zaire under President Mobutu, and in Malawi under President Banda. As Bratton and Van de Walle⁷¹ put it: "Presidentialism implies systematic concentration of political power in the hands of one individual, who resists delegating all but the most trivial decision-making tasks."

Such a trend seems to be emerging in Namibia. For instance, in 2003, President Nujoma issued a circular stating that all members of government including leaders of the legislative organ should obtain permission from the 'appointing authority', i.e. from him, to travel out of the country. This authority was in the past delegated to the prime minister as the head of government administration. There has been an attempt or desire to take all decisions at the head of state level. In the same year, the president also assumed the responsibility of the portfolio of information and broadcasting as he wanted to "put that house in order" which presumably no minister could do. Such attempts at micromanagement are the beginning of presidentialism. As Kamuzu Banda of Malawi put it in 1972, "Nothing is not my business in this country: Everything is my business, everything. The state of education, the state of our economy, the state of our agriculture, the state of our transport, everything is my business."⁷²

However, in Namibia we have not yet reached that level of assumption of power over everything by one person. At the last SWAPO Congress, many of the 'impositions' by

70 Members of the Cabinet often disagreed with the president's views.

71 Michael Bratton and Nicolas van de Walle, *Democratic Experiments in Africa: Regime Transition in Comparative Practice* (Cambridge University Press, 1998), p. 65.

72 *Ibid.*, p. 65.

the president were resisted and the president, although not happy, had to live with the objections.⁷³ We are thus at the crossroads of presidentialism. Time will tell which way Namibia will go.

The next two chapters deal with some of the specific aspects of state formation that provide a glimpse of the direction Namibia might take.

Conclusion

Events leading to the adoption of the constitution of Namibia show interplay between the self-interests of various players. As mentioned in Chapter Three, there were many players attempting to manage transition to Independence in Namibia in a way that furthered their own interests. Influencing change by influencing the provisions of the constitution was an important aspect of this process. Positions were taken by the Western Five to ensure that Namibia became a liberal democracy with all the attendant rights provisions in its constitution; and almost all the parties drew on the 1982 Constitutional Principles to ensure that their interests were protected. However, it was the spirit of compromise that eventually resulted in achieving an outcome satisfactory to all: (1) Namibians were happy with the independence of their country; SWAPO was happy that its many years of struggle had at last borne fruit; and even non-SWAPO parties were happy with the process of reconciliation and inclusivity; (2) at a time when the United Nations was coming under increasing pressure for its alleged ineffectiveness, it was glad to see the culmination of a successful mission; (3) the Organisation of African Unity, the Frontline States and members of the Non-Aligned Movement were happy to see the last colony in Africa become independent; (4) the United Kingdom, France, and Germany managed to protect their economic and settler interests in the region; (5) the United States of America secured its economic and geopolitical interests in the region, and (6) South Africans were glad to see the end of pariah status in the community of nations; and (7) Angola and Cuba were happy to see the end of South African incursions and clandestine support for UNITA.

Keeping in mind that the constitution has been in existence for the last thirteen years, it has proved its value on all fronts. It has ensured fundamental human rights of the citizens, and its provisions for constitutional amendment have worked effectively. Its provisions are enforceable – though time will tell whether Namibia succeeds in meeting this condition. One thing is sure, if attempts are made by influential persons to undermine the constitution, backed by the ruling party having two-thirds majority in the

73 At the Third SWAPO Congress, the president insisted that certain number of women be declared elected without following the laid-down procedure. He insisted on this action as he wanted the women to believe that he cared for them though no woman had been appointed to the top four positions. To make up for that discrepancy, the president sought to increase women's representation through unconstitutional means. At the Central Committee meeting held in August 2002 the president also tried to endorse four candidates for unopposed acceptance but there was resistance and other nominations were made. The president accepted the decision but other nominees lacked the courage to accept the nominations.

National Assembly, the constitution can be wrecked. So, at present, the integrity of the constitution depends on SWAPO's commitment to it. Survival of the constitution and its effectiveness would depend not just on individuals internalising the constitution but also on the evolution of society and social groups, and, in turn, civil society, that is ready to defend the constitution.

Such developments are already taking place as discussed in Chapters Five and Six. However, the western nations continue to demand from the African states what does not even prevail in their own countries. For example, no elections are perfect – problems arose in the U.S. presidential elections of 2000 as mentioned in Chapter Six. Had that happened somewhere in Africa, elections would have been subjected to considerable criticism.