

Namibia's constitution, democracy and the electoral process

Gerhard Töttemeyer

Introduction

The electoral process is fundamental to democracy and an integral part of it. Elections have fascinated political analysts for a long time, and with good reason. They determine who is to take control of government.

Namibia has constitutionally committed itself to a multiparty democracy and free elections, which guarantee each voter a free and independent choice. Since the Constitution commits Namibia to multiparty democracy, elections remain an important exercise in pluralism and, as such, an essential element in democratisation.

Namibia's electoral process has a long history, which is etched in the country's narrative of colonial rule and the consequent struggle for liberation. The country gained its independence on 21 March 1990, which was preceded by the first democratic elections for the Constituent Assembly as supervised by the United Nations Transition Assistance Group (UNTAG). At Independence, the Constituent Assembly was converted into the first National Assembly.

With the promulgation of various pieces of legislation,¹ the first Regional and Local Authority Council elections took place in 1992. The Presidential and National Assembly elections followed two years later, during which the first President of Namibia, Dr Shafiqhuna Nujoma, was popularly elected for the first time since independence.

As the first President was not elected when the members of the Constituent Assembly were elected in 1989, it became an issue when President Sam Nujoma was nominated for a third term of office. It was argued that the Constituent Assembly was converted into the first National Assembly in 1990, and not elected. It was further held that the President had only been elected for the first time in the Presidential and National Assembly elections in 1994; in other words, by 1994, he had only been nominated once and popularly elected once.

To play it safe, Article 134 of the Constitution was amended in 1998 to the effect that "notwithstanding Article 29(3), the first President of Namibia may hold office as President for three terms". After President Nujoma had served his third term, Article 134 was again amended to provide that any future President could only serve two terms in office.

1 The Regional Councils Act, 1992 (No. 22 of 1992); the Local Authorities Act, 1992 (No. 23 of 1992) and the Electoral Act, 1992 (No. 24 of 1992).

The first elections after independence – electing regional councillors according to the winner-takes-all (first-past-the-post) electoral system, and local authority councillors on a list, thus applying the proportional electoral system – had a very confident start. The Electoral Act² was hurriedly drawn up before the Regional and Local Authority Council elections commenced. The South African electoral law was simply adapted to suit Namibia.

Elections became a learning process. Mistakes were made and shortcomings identified. Over the years, several amendments have been made to the Electoral Act. Nonetheless, some parties have found it hard to stick to some of the prescribed rules and practices.

Time and again, the Electoral Commission has been accused of having transgressed certain rules and regulations and has been taken to court by opposition parties. The latter parties were usually defeated in court, the judges having been of the opinion that the outcome of the elections would not have been affected by the issue in question or at least not to the effect that the elections should be rerun or could be discredited. The outcome of the most recent case against the Commission, initiated in 2009 by nine opposition parties who accuse it of not complying with all the rules of the Electoral Act, is still awaited.

Except for minor flaws such as the alleged poor handling of tendered votes and the lapse of too much time between elections and the announcement of election results, most international observers have judged that, in general, elections in Namibia have been run in an honest and transparent way and that they have been peaceful – despite some criticism having been expressed on the fairness of some of the elections in the past.

Such positive verdicts do not imply that there is no room for improvement on a number of issues and aspects to which the Electoral Commission and the Directorate of Elections can fruitfully attend. It is an opportune time to review the Electoral Act in its totality, for example, in cooperation with all the stakeholders involved in the electoral process. To a large extent, the Act has served its purpose reasonably, but it is not perfect. For this reason it is still not easy for the Electoral Commission and the Directorate of Elections to fully satisfy all the stakeholders in an election.

One day, while I served as Director of Elections between 1992 and 1998, one of the Ministers – a certain H Pohamba³ representing the SWAPO Party of Namibia⁴ – burst into my office and accused me of favouring the opposition party. The very next day, the Afrikaans daily, *Die Republikein*, which supported the official opposition party, the DTA of Namibia,⁵ accused me of siding with the SWAPO Party. It was then that I knew the Directorate of Elections was on the right track!

2 No. 24 of 1992.

3 Today, President of the Republic of Namibia.

4 Formerly the *South West Africa People's Organisation* (SWAPO).

5 Formerly the *Democratic Turnhalle Alliance* (DTA).

The nexus between democracy and elections

An electoral process in a democracy, culminating in the holding of elections, cannot be separated from the political empowerment of the electorate exercising their constitutionally secured right to vote. The democratic electoral process also cannot be separated from the observance of fundamental human rights and freedoms as enshrined in the Constitution: the promotion of equality, mutual security, and respect for human dignity.

The electoral process is fundamental to any competitive democracy. It is a process whereby eligible voters are mobilised to express their political will and choice. Elections themselves are a mandate for voters to exercise their influence over the orderly and responsible running of the state. The freely elected government is expected to represent the will of the people in the way in which public power is distributed in the common interest. In terms of the doctrine of the sovereignty of the people, government remains answerable to the people at all times. Elections held at regular intervals are intended to provide a principal link between the rulers and the ruled. Hence, a great many questions can and should be asked about voting in elections. Among those that are of vital importance in a representative democracy are the following:

- What is the best way in which to organise democratic elections?
- What is the most efficient voting system?
- Have voting patterns been transformed by recent social, economic or political change?

As Namibia is committed to a multiparty democracy, elections have become an important exercise in pluralism and, as such, an essential element in the democratic process. An electoral process cannot be separated from capacitating and empowering voters: it is only successful and meaningful when people have taken ownership of it. It is a self-identification process with a democratic political system, its structures and institutions. It is the duty of the electoral bodies concerned to ensure that the electoral process is people-friendly and internalised. Nobody should feel marginalised – and this includes physically incapacitated people, as well as voters in old age homes, hospitals, prisons, and at sea, or citizens that find themselves outside the country at election time. Democracy presupposes each citizen has equal value, there is a committed and affirmative state, and that a freely elected, people-driven government exists.

The electoral process is at the heart of democratic capacity-building and involves the whole of society. In the case of Namibia, with its suppressive colonial past, the building and proper functioning of democratic institutions has taken root, but needs constant attention. Although already 20 years old, independent Namibia is still relatively young and it may take time before it is fully mature. Its democracy is still fledging and must be constantly tested. This can be executed through free, transparent, responsible and fair elections at all three levels of governance: national, regional and local.

The building of democracy includes not only the pursuance of political values and political attitudes that uphold democracy, but also the conducting of comprehensive voter

registration, effective electoral campaigns, and proper voter education as an integral part of the electoral process. An electoral process can only be meaningful if voters understand the essence and consequence of democracy as being related to elections.

It is claimed that democracy would be better understood if people could ‘eat it’, in other words if it would deliver tangible benefits such as employment, adequate social care, eradication of poverty, sufficient food, comprehensive medical services, quality education, and other benefits. Namibia, 20 years after independence, is still challenged by principle issues, some of which concern how to fully actualise democracy and to make it optimally credible.

It cannot be denied that a conceptual linkage exists between socio-economic rights, cultural rights and democracy, as it does between a functioning democracy and electoral processes: both are expected to foster and strengthen stability, prosperity, security, and peace in society. It is not only the government that is called upon to foster such rights, but also civic society – through its agencies and organisations, including educational institutions, religious entities, labour unions, peer groups, gender equality organisations, and other non-governmental and community-based organisations.

The preparation for elections includes a process of civic education for democracy. The task is to make the electoral process better known and comprehensible for everyone who lives or wishes to live in a democratic environment. Voters need to be taught the relevance of regular elections in a democracy and what an electoral process entails. The preconditions for transparent and fair democratic elections are demanding, and one should not take them for granted – even in advanced democracies.

The electoral framework in Namibia

The Namibian Constitution is very explicit on a number of issues related to elections. Already in the Preamble, reference is made to “freely elected representatives of the people”. In addition, Article 17(1) states that –

[a]ll citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of Government. All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.

The latter should be done via free, fair, transparent and credible elections.

Also very important is Article 17(2), which says that –

[e]very citizen who has reached the age of eighteen (18) years shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein.⁶

6 For example, presidential candidates are to be at least 35 years of age.

The implication of sub-Article 17(2) is that the state is compelled through its agency, the Electoral Commission, to ensure that all persons 18 years and older are given the opportunity to register as a voter and to vote. The same Commission is also required to enforce the age requirement for political candidates during Presidential as well as national, regional and local government elections.

The Electoral Act, as amended, provides the primary legislative framework for the Presidential and National Assembly elections, as well as the election of members to Regional and Local Authority Councils. The Electoral Commission and its executing agency, the Directorate of Elections, are provided for in sections 3 to 12 of Part II of the Electoral Act and its subsequent amendments, as well as in the Electoral Amendment Act.⁷

The most important stakeholders in an election in the Namibian context are the governing electoral bodies – the Electoral Commission and the Directorate of Elections, along with political parties, the associations and organisations participating in elections, and civic society, particularly the electorate.

Electoral bodies can only operate successfully in an atmosphere that is conducive to a democratic electoral process. It is for the Electoral Commission, in consultation with its executing agency, to determine the presence and nature of any distracting or disturbing factors and report the same to government. Equally important is that electoral bodies play a constructive and supportive role in establishing a free election atmosphere and to make a meaningful contribution towards a credible and lasting election culture devoid of fraud and suspicion. The clientele which the election bodies serve, be they political parties or the electorate, is composed of individuals with their own and often conflicting opinions, feelings, attachments and choices. They all need to be duly respected and accommodated. This is what a democracy demands.

Political parties determine the governance of Namibia, that is, who will rule and who is in opposition. The function of an opposition party in a democratic political system is as important as that of the ruling party. The Namibian Constitution sets no limits to the role opposition parties play. However, it is vital that both the ruling and opposition parties operate and function within the parameters of responsibility and accountability, and within the Constitution and the Electoral Act.

Civil society needs to exercise a control function and ensure that all the stakeholders in an electoral process adhere to the rules of the game. Civil society is also obliged to ensure that the electoral bodies and the political parties adhere to the principles of fairness, equality, transparency, impartiality and accountability.

There was a time when the majority of Namibians were excluded from exercising their democratic rights, when participative democracy was non-existent, and top-down, dictatorial governance prevailed. Today, Namibians live in a dominant-party state –

7 No. 30 of 1998.

which may be tempted to practise democratic centralism and autocratic modernisation. Therefore, it is important that the control function of the electorate is never in doubt, weakened or undermined. The very opposite – the strengthening of democracy – should constantly be adhered to. A working democracy needs proper checks and balances, and a healthy electoral process is one of them.

The state of elections in Namibia: The challenges

Impartiality, efficiency, competency and trustworthiness should be the hallmarks of electoral bodies. This includes the absolutely neutral and independent role the Electoral Commission and its executing agencies are to play in the electoral process. In the past, the Electoral Commission was solely responsible to the President, who appointed its members. The Directorate of Elections, on the other hand, was accountable to the Office of the Prime Minister. After many public complaints, the Electoral Act was amended in order to make the Directorate of Elections accountable to the Speaker of the National Assembly because the Speaker's Office was considered more neutral. Thus, the Speaker is responsible for introducing and defending the Electoral Commission's annual budget in the National Assembly, and tables its annual report in that august house. The disadvantage of this arrangement is that the Speaker is not allowed to table amendments to any Act or to introduce any Bill to the National Assembly: by law, only a Ministry is allowed to perform these two types of tasks. In the case of the Electoral Commission, Cabinet assigned these two tasks to the Ministry of Regional and Local Government, Housing and Rural Development.

One weakness of this arrangement is that the Ministry may be tempted to have a say in electoral matters, which can affect the independence and effectiveness of an electoral body. For example, the Ministry might try to exercise control over what should be amended in an Electoral Act, and when such amendments should be tabled in Parliament. As long as the supreme electoral bodies are dependent on the financial resources allocated to them by the National Assembly, the temptation to exploit such dependency cannot be totally excluded.

Opinions still differ on the composition and the duration of office of the Electoral Commission. Namibia has changed to a system of advertising the five positions in the Electoral Commission publicly. A Selection Committee, appointed by Parliament, selects the eight most suitable candidates via a public hearing process. The names of these candidates are then submitted to the President, who chooses five of them. The Chairperson of the Electoral Commission is elected by its members. One weakness of this system of composing the Commission is that there is presently no provision that a High Court judge should be a member. For that reason, and for immediate decisions to be taken – particularly during the registration, voting and counting processes, it is important that Namibia institutes an Electoral Court. Such courts are standard practice in many other African countries.

President H Pohamba expressed thoughts along these lines on 12 November 2008, when he stated that an independent panel should be set up for future elections to which

political parties could turn if grievances arose during the electoral process.⁸ However, such a panel has not yet materialised.

Some recommendations

In the Namibian context, it would be helpful if the respective Electoral and Delimitation Commissions, which are currently totally independent of each other, could amalgamate into one body. The Delimitation Commission determines Namibia's borders, as well as the number of Regions in the country and their various constituencies. This Commission is only appointed for a short period every six years. In the interim, any complaints and suggestions from Regions, constituencies, civic bodies or individuals cannot be attended to. This is a dysfunctional situation.

In Namibia, the proportional electoral system is applicable at national and local level. At regional level, however, the constituency-based first-past-the-post system is applied. Both systems have their advantages and disadvantages. For example, the advantage of applying the proportional party-list system at local level is that, by law,⁹ at least 40% of all candidates are required to be female – a principle that cannot be applied in the winner-takes-all electoral system. Thus, at local government level, more than 40% of all mayors in Namibia at present are women. In addition, political parties have been called upon to apply the 'zebra' method when compiling their lists of candidates, meaning that if the first person on the list is a male, the following person has to be female; if the first is female, the next one must be male. The 'zebra' system has to be applied to the entire list of members each party is allowed to nominate. The same approach has not yet been applied at national level, however.

The disadvantage of the proportional electoral system, as applied at national and local level in Namibia, is that an elected councillor or Member of Parliament is not responsible for a particular ward or constituency and can, as such, not be made accountable to the voters. It would be to the advantage of democratic governance if a mixed electoral system were to be introduced, i.e. where candidates are partly directly elected and partly nominated – at least at national level.

The Electoral Act stipulates that each voter is required to vote in the constituency where s/he was registered. This is relevant to Regional Council elections in particular, where the first-past-the-post electoral system applies. During Presidential and National Assembly elections, on the other hand, the whole of Namibia is one electoral entity.

During any elections, particularly in the rural areas, the general rule applies that no polling station should be further away from a voter than a two-hour walk. Therefore, Namibia makes extensive use of mobile polling stations during voter registration and elections.

8 *The Namibian*, 13 November 2008.

9 Local Authority Act, 1992 (No. 22 of 1992).

The tendered vote system was introduced in consideration of the high mobility of voters in Namibia. A tendered vote makes it possible for any voter to vote from wherever s/he happens to be on election day. In other words, a voter can cast a tendered ballot when outside the constituency in which s/he was registered to vote. One ballot box is assigned to ordinary votes by voters voting inside their registered constituency and one to tendered votes for voters voting outside their registered constituency. Elections in the past have shown that, on average, 25% of all voters have cast their vote via the tendered vote system. Thus, most of the 25% may have been lost if voters had been compelled to vote in their registered constituencies. The tendered vote also has its flaws, however, particularly on the technical and organisational side. If, as an alternative, a postal or special vote or any other absentee voting system is identified as a better system, then it should be considered.

Accountability and transparency are not only applicable to the Electoral Commission and the Directorate of Elections, but also to the contesting parties in an election. All registered and participating parties are legally obliged to sign a Code of Conduct. The weakness of such Code of Conduct is that it lacks enforceability: its application relies on ethical and voluntary principles, and acceptance by the signatories.

One further issue is the financing of political parties, the sources of their income, the amount of income – including donations, how these finances are spent, and how and by whom they are audited. Such issues remain unknown despite public accountability being at stake. Although legal provisions are in place in Namibia to make funding derived from external sources publicly known, political parties do not adhere to them. Political parties should be obliged, if not enforced, to stick to the rules and legal provisions.

Airtime allocation on radio and TV during the electoral process is another burning issue which should best be amicably solved through negotiation between the Electoral Commission and political parties. Some political parties argue that the time allocations should be the same for all parties participating in the elections. Others opine that airtime should be granted according to the representation of parties in the National Assembly.

The issue of equality has also been raised with regard to the annual financing of political parties via public funds, as determined by Parliament. Should such financing be the same for all parties, or according to their representativeness in the National Assembly? Resolving this problem should not be the task of the Electoral Commission but the sole responsibility of Parliament. The Electoral Commission could, however, act in an advisory capacity.

Other considerations

The presence of observers and monitors during elections is an issue that has been intensively debated, particularly by civic organisations. An adjudicating function is allocated to election observers, whose responsibility is to testify and report whether the elections were conducted according to the stipulations of the Electoral Act and the

different codes of conduct for parties and organisations/associations, as well as for electoral officials. Government favours observers only, while some civic organisations insist on the presence of monitors as well.

Monitors are individuals or organised groups mandated to monitor, investigate, report on, and frequently pronounce judgment on the actions of the participants in the electoral process (e.g. voters, political parties, and electoral officials). Although monitors are not able or expected to enforce compliance with accepted standards of conduct, they do play a more activist and interventionist role than observers. Observers are authorised to observe, but cannot intervene in an electoral process. However, both monitors and observers are expected to ensure that the integrity of the electoral process is respected.

In recent amendments to the Electoral Act, provision was made for the duties and responsibilities of observers only, their registration with the Electoral Commission, and their Code of Conduct. Interfering with the electoral process is taboo to election observers.

Namibia has yet to decide whether an electronic voting system should be introduced. The Cabinet has felt that its introduction during the 2009 Presidential and National Assembly elections was not opportune. The consensus was that such a system should be first tested during by-elections for Regional Councils before being rolled out nationwide.

The Electoral Commission and the Directorate of Elections are conscious that they operate in a dominant-political-party system, which characterises the governance of Namibia. Nonetheless, neither this or any other fact should prevent the Electoral Commission from expressing itself on the behaviour or misbehaviour of political parties during the electoral process, and on when the principles of democratic elections are not adhered to. Electoral bodies are independent and should not be dictated to by any political party. Indeed, undermining the authority of electoral bodies would contradict constitutional principles.

Political stakeholders in an electoral process are obliged to respect electoral bodies as non-political institutions – a principle to which electoral bodies are also required to adhere to respect themselves as non-political institutions. Electoral bodies must always remain neutral. They are solely the executor of laws which direct and guide the electoral process. They can, however, also make rules and regulations pertaining to electoral matters. In addition, policymakers can benefit from the experience of electoral bodies and consult them. Moreover, they can make use of the experience electoral bodies gain in the exercise of their duties, particularly when amendments to the Electoral Act are considered.

Accusations against the electoral bodies, such as their being partial, exercising foul play or being incompetent, are well-known phenomena internationally before, during and after elections. These bodies are often used as scapegoats for the failures, faults and frustrations of political stakeholders. A culture of losing an election – and, thus, unconditionally accepting defeat – is still underdeveloped in Namibia.

Electoral bodies are fully aware that they need to guarantee equal rights to all political role players and to all voters. One of the Election Commission's most important tasks, therefore, is to contribute to civil responsibility and civic awareness, while constantly reminding the people of their democratic right and duty to vote.

Electoral bodies are not infallible. For this reason, communication and dialogue are extremely important before, during and after elections, as are understanding and trust between all the stakeholders in an election. Trust rests on confidence, honesty and tolerance.

The binding guideline for both the electoral bodies and the stakeholders in an electoral process is to be totally committed to democratic norms, values and practices. One can state with confidence that Namibia has, since its independence, developed a culture of democratic elections – although, of course, there is always room for improvement.

Shortcomings that require attention

The most recent elections in 2009, namely for the Presidency and National Assembly, are an example of certain shortcomings that continue to exist in the management and administration of elections. These include shortcomings in –

- the accuracy of voters' rolls
- the time management associated with making voters' rolls publicly available before the election date
- compliance with the Electoral Act, such as –
 - » making the results publicly known at each polling station
 - » the electoral efficiency and literacy of election officials
 - » the speed of counting tendered votes
 - » the length of the voting period (one day)
 - » the communication between election officials and the electoral headquarters
 - » mediating and conflict resolution facilities at the office of the Electoral Commission, and
 - » the degree of transparency as regards the whole electoral process.

Another consideration should be to revisit the representativeness of the National Assembly by introducing a mixed electoral system, making provision for both the proportional and the constituency-based first-past-the-post electoral system.

An anomaly that could also be looked at is that the President and the newly elected members of the National Assembly are only sworn into office nearly four months after having been elected. Meanwhile, the previous National Assembly continues to govern the country.

Another issue of concern relates to Article 28(2)(b) of the Constitution, which stipulates that –

... no person shall be elected as President unless he or she has received more than fifty (50) per cent of the votes cast and the necessary number of ballots shall be conducted until such result is reached.

In the worst case, this could lead to elections ad infinitum if no candidate is able to obtain the 50% plus 1 vote. A better arrangement would be that only the two strongest candidates contest the next round of presidential elections if neither of the two were able to achieve the prescribed minimum during the first round.

Legal attention should also be given to whether the National Assembly and the President can be inaugurated if there is still a court case pending on the validity of the elections. A prolonging of the office of both the President and the National Assembly in such a case is not provided for in the Constitution or the Electoral Act. Article 57 of the Constitution, which makes provision for a new election, only applies if “the Government is unable to govern effectively” and the Cabinet so advises the President to that effect.

The Constitution is not absolutely clear on who will govern the country once the National Assembly has been dissolved and when the President has simultaneously vacated his/her office. Article 29(1)(b) states that “[i]n the event of the dissolution of the National Assembly in the circumstances provided for under Article 57(1) hereof, the President’s term of office shall also expire”. Article 57(2) of the Constitution says the following:

Should the National Assembly be dissolved a national election for a new National Assembly and a new President shall take place within a period of ninety (90) days from the date of such dissolution.

The implication of Article 29(1)(b) is seemingly that, during the 90-day period until the elections for a new National Assembly and a new President, the country will be without governance – i.e. without a National Assembly, an Executive, or a President.

What makes the situation ambivalent is that Article 58(a) and (b) state that every member of the National Assembly is required to remain in his/her office until the round of elections following such dissolution, and that the President has the power to summon Parliament. The question arises as to how the President can summon Parliament. It is also not clear from the Constitution whether this summons includes the National Council – since Article 29(1)(b) states that the offices of the President and the National Assembly expire simultaneously. Who, in the interim period leading up to the new elections, will govern the country? Who will be entitled to issue and sign government proclamations such as the date of the next round of elections and other possible issues related to the electoral process? Should the Judiciary perform these functions in the interim period?

It seems obvious that these matters, as well as the prevailing contradiction between Articles 29, 57 and 58, should be addressed.

Concluding remarks

Finally, – and this is crucial for the credibility of elections – the Electoral Commission and the Directorate of Elections need to guarantee the secrecy of the vote. This reminds one of the elderly lady down in Keetmanshoop, who voted for the first time. She entered the polling station, went through all the formalities, made her cross on the ballot paper and, instead of depositing it into the ballot box, she put it under her blouse. The presiding officer intervened. “Excuse me, Madam,” he said, “That is not the right place to put a ballot paper.” She looked at him seriously and said, “Have a look at the poster on the wall. It says ‘Your vote is Your Secret’ – and that is exactly how I’m going to keep it!”

References

- Lodge, T. 1999. *A handbook of Namibian laws and regulations*. Johannesburg: Electoral Institute of Southern Africa.
- Melber, Henning. 2010. “Namibia’s National Assembly and Presidential Elections 2009: Did democracy win?”. *Journal of Contemporary African Studies*, 28(2), April:203–214.
- Töttemeyer, G. 2000a. “Reflections on the Namibian electoral system and practices”. Unpublished paper presented at the Electoral Workshop, Mombasa, 15 June 2000.
- Töttemeyer, GKH. 2000b. “Constitutional and legal framework for elections in Namibia”. Unpublished paper presented at the Debriefing and Briefing Workshop for the Outgoing and Newly Appointed Electoral Commission, Windhoek, 4 August 2000.
- Töttemeyer, GKH, A Wehmhörner & H Weiland (Eds). 1996. *Elections in Namibia*. Windhoek: Gamsberg Macmillan Publishers.
- Wall, A, A Ellis, A Ayoub, CW Dundas, J Rukambe & S Staino. 2006. *Electoral management design: The International IDEA Handbook*. Stockholm: International Institute for Democracy and Electoral Assistance.