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Contents

Guide to contributors

The *Namibia Law Journal* (NLJ) is a joint project of the Supreme Court of Namibia, the Law Society of Namibia and the University of Namibia.

The Editorial Board will accept articles and notes dealing with or relevant to Namibian law. The discussion of Namibian legislation and case law are dealt with as priorities.

Submissions can be made by E-mail to namibialawjournal@gmail.com in the form of a file attachment in MS Word. Although not preferred, the editors will also accept typed copies mailed to PO Box 27146, Windhoek, Namibia.

All submissions will be reviewed by one of the Advisory Board members or an expert in the field of the submission.

Submissions for the January 2010 edition need to reach the editors by 15 September 2009. Contributions with a constitutional theme are encouraged for the next edition.

All submissions need to comply with the following requirements:

- Submissions are to be in English.
- Only original, unpublished articles and notes are usually accepted by the Editorial Board. If a contributor wishes to submit an article that has been published elsewhere, s/he should acknowledge such prior publication in the submission. The article should be accompanied by a letter stating that the author has copyright of the article.
- By submitting an article for publication, the author transfers copyright of the submission to the Namibia Law Journal Trust.
- For the "Articles" section, submissions should be between 4,000 and 10,000 words, including footnotes.
- The "Judgment Notes" section contains discussions of recent cases, not merely summaries of them. Submissions in this category should not exceed 10,000 words.
- The "Notes and Comments" section is for shorter notes, i.e. not longer than 4,000 words.
- The "Recent Cases" section contains summaries of no longer than 4,000 words.
- In the "Book Reviews" section, submissions on Namibian or southern African legal books should not exceed 3,000 words.

The *NLJ* style sheet can be obtained from the Editor-in-Chief at namibialawjournal@gmail.com or on the website <http://www.namibialawjournal.org/>.

Introduction

Nico Horn*

The first edition of the second volume of the *Namibia Law Journal* marks the beginning of its second year in existence. This is good news for a small country like Namibia. From the letters and proposed articles on the Editor-in-Chief's table, it is clear that the *NLJ* is becoming a household name in African legal circles and well known internationally.

This edition expresses these sentiments. **Judge (Dr) Onkemetse Tshosa** of the Southern African Development Community (SADC) Tribunal and Visiting Scholar at Fordsham Law School, New York, contributes to the debate on the incorporation of international law in Namibian domestic law; **Dunia Prince Zongwe,** an LLB cum laude University of Namibia (UNAM) alumnus currently doing his doctorate at Cornell, contributes an article on the *Campbell* case decided by the SADC Tribunal; while **Francois Bangamwabo** and **Clever Mapaure** weigh the controversial section 66(1) of the Magistrates' Courts Act, 1944 (No. 32 of 1944) against the Namibian Constitution. There is also an article on migration policies in the United Kingdom and the European Union by **Prof. Virginia Mantouvalou** of Leicester University (with a postscript by the Editor-in-Chief on the Zimbabwean issue), whereas **Prof. Manfred Hinz** uses the recent German elections to look at the changed responsibility the German Constitutional Court assigns to the Government to take care of its subjects. Comparing South Africa and Namibia with Germany, Hinz alerts us that the development of social rights has just begun.

While the journal is brimful of interesting articles, it remains a concern for the Editorial Board that the contributors are still legal scholars. While we have already received several articles for the next edition, the practitioners remain silent. I trust that 2010 will be flooded with articles written from the point of view of practical experience in the field.

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ARTICLES

The status of international law in Namibian national law: A critical appraisal of the constitutional strategy

Onkemetse Tshosa*

Introductory remarks

The Republic of Namibia, formerly South West Africa, attained independence in 1990.[1] Thereupon Namibia adopted a national Constitution that not only embraces general international law – or, rather, is international-law-positive[2] – but also regulates the relationship between international law, both customary and conventional, within the national legal sphere.[3] In a broader sense, the Constitution lays down conditions and circumstances under which international legal rules may operate within Namibian municipal law. The aim of this article is to examine the position of international law in Namibian municipal law in light of the country's Constitution and the general role of international law in the national legal system.

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[1] The Republic of Namibia attained its independence on 21 March 1990. For a discussion of the historical developments leading up to this historical change, see generally Cliffe, Lionel, Ray Bush, Jenny Lindsay & Brian Mopokagkosi. 1994. *The transition to independence in Namibia*. Boulder: Lynne Reinner Publishers; Cottrell, Jill. 1991. "The Constitution of Namibia: An overview". *Journal of African Law*, 35:56; Katjavivi, H Peter. 1988. *A history of resistance in Namibia*. Paris: United Nations Educational, Scientific and Cultural Organisation; Van Wyk, Dawid. 1991. "The making of the Namibian Constitution: Lessons for Africa". *Comparative and International Law of Southern Africa*, 24:341.

[2] Erasmus, Gerhard. 1989/1990. "The Namibian Constitution and the application of international law". *South African Year Book of International Law*, 15:81. See also Maluwa, Tiyanjana. 1993/1994. "International human rights norms and the South African Interim Constitution". *South African Year Book of International Law*, 19:14. For a general discussion of the interrelationship between international law and Namibian national law, see Mtopa, Arnold M. 1990/1991. "The Namibian Constitution and the application of international law – A comment". *South African Year Book of International Law*, 16:105.

[3] Constitution of the Republic of Namibia, Article 144. This provision is discussed in detail below.

In order to place the discussion in its proper historical context, the enterprise examines both the pre-independence and post-independence positions in order to find out whether the legal position has undergone any fundamental changes at independence and, therefore, has thereby been made clearer. The paper also examines the role of international law in Namibian national legal sphere. Furthermore, the article investigates the extent to which the Namibian judiciary has given effect to the constitutional clause domestically incorporating international law. It is argued that assigning international law in the Constitution is just one step in the domestic translation process. Thus, the judiciary plays a major role not only in the application of international normative standards in national law, but also in their domestication. The judiciary also determines the length and breadth if not even the contours of the application of international legal rules and principles in national law.

International law in Namibian national law

Conceptual context: Monism and dualism

At a theoretical level, the interrelationship between international law and municipal law is regulated by two rival theories: monism and dualism.[4] According to monism, international law and national constitute aspects of a single universal system. The theory posits that all rules of law ultimately regulate the behaviour of the individual, whether those rules emanate from international or national law. Thus, the two systems are interrelated parts of a single legal structure. The monists, most of whom belong to the natural law school, include Hugo Grotius, a Dutch scholar and diplomat who is generally regarded as the father of the

[4] Early treatises on these theories include Brierly, JL. 1935. "International law in England". *Law Quarterly Review*, 51:24; Kelsen, Hans. 1945. *General theory of law and state*. Cambridge: Harvard University Press; Kelsen, Hans. 1966. *Principles of International law* (Second Edition). New York: Holt, Rinehart & Winston; Kunz, L Joseph. 1953. "The nature of customary international law". *American Journal of International Law*, 47:662; O'Connell, Derek. 1970. International law (Second Edition). London: Steven & Sons; and Starke, JG. 1936. "Monism and dualism in the theory of international law". *British Year Book of International Law*, 16:66. For the more recent discussion of the theories, see Brownlie, Ian. 1990. *Principles of public international law* (Fourth Edition). Oxford: Clarendon Press; Butler, WE. 1985. "Comparative approaches to international law". *Recueil Des Cours*, 190:9; Cassese, A. 1985. "Modern Constitutions and international law". *Recueil Des Cours*, 192:331; and Dugard, John. 2006. *International law: A South African perspective* (Third Edition). Kenwyn: Juta.

rationalist school of natural law;[5] Hans Kelsen; and Hersch Lauterpacht – all of whom have argued that the international legal order is significant only as part of a universal legal order which comprises the national legal order as well.[6] The monist school argues that not only do international legal rules and various national legal orders constitute a single universal system, but, in cases of conflict, national legal orders take a subordinate position.[7]

Dualism – or, rather, the doctrine of transformation – for its part perceives international aw and national law as two distinct and independent legal orders, each having an intrinsically and structurally distinct character.[8] The two legal orders are separate and self-contained spheres of legal action, and theoretically there should be no point of conflict between them. Since they are separate legal systems, international law would as such not form part of the municipal law of the State. This view has been propounded by positivist theorists such as Hegel, Anzilotti and Triepel, who have invoked a consensual approach to international law to argue that the two legal systems are distinct in nature. Firstly, the two legal systems are different in the particular relations that they govern: State law deals with the social relations between individuals, and international law regulates the social relations between States, who alone are subject to it.[9] In the second sense, Triepel argues – and is widely supported by other dualists – that the two systems have different juridical origins. The source of municipal law is the will of the State itself, while the source of international law is the common will of States (*Gemeinwille*).[10]

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[5] Dugard (2006:53–58).

[6] Kunz (1953:662–669); see also Kelsen (1945, 1966) and Tshosa, Onkemtse. 2001. *National law and international human rights law: Cases of Botswana, Namibia and Zimbabwe*. Aldershot: Ashgate.

[7] Brownlie (1990:33); Shaw, Malcolm. 2003. "Sources". *International law* (Fifth Edition). Cambridge: Cambridge University Press, pp 100–101.

[8] Generally, see Maluwa, Tiyanjana. 1996. "The role of international law in the protection of human rights under the Malawian Constitution". *African Year Book of International Law*, 53; Morgenstern, Felice. 1950. "Judicial practice and the supremacy of international law". *British Year Book of International Law*, 27:42; O'Connell (1970); Shaw (2003:102).

[9] Lindholt has noted that the classical dualist theory is "based on the perception that the two types of law regulate different subjects, where national law operates with individual subjects while international has the states as its subjects"; see Lindholt, Lone. 1997. *Questioning the universality of human rights: The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique*. Dartmouth: Ashgate, pp 84–85.

[10] Starke, JG & Shearer, IA. 1994. *Starke's* International Law. London: Butterworths, p 64.

Thirdly, according to Anzilloti, the two legal systems are differentiated by the fundamental principles by which each is conditioned.[11] Municipal law is conditioned by the norm that legislation is to be obeyed, whereas international law is conditioned by the pacta sunt servanda principle.[12] The latter principle commands that agreements between States are to be respected. This principle is at the heart of modern international law, especially treaty law, and underlies the basis for performance of treaty obligations. Because of this conditioning factor, Anzilloti concludes that the two systems are so distinct that no possible conflict is possible. In case of any conflict, national law prevails; this is predicated on State sovereignty, which gives the right to the State to determine which rules of international law are to have effect in a municipal sphere.[13]

However, these theories need to be approached with caution. This is because, in practical terms, they may not purely determine the relationship between national and international law. This is posited on a number of reasons. Firstly, the internal application of international law in general and treaties in particular is always conditioned by a rule of municipal law. The basic principle in most legal systems is that the internal application of treaties is governed by domestic constitutional law.[14]

Second is the practical approach of national courts. Even in monist countries, courts sometimes fail to effectuate treaties which are binding under international law; an example of this is the non-self-executing treaties in United States law. Conversely, in dualist systems, the courts may sometimes give limited effect even to unincorporated treaties, for example, British courts' use of the European Convention on Human Rights (ECHR) before its incorporation into United Kingdom (UK) law. In countries like the UK, courts rely on the principle that legislation should, wherever possible, be so interpreted as not to conflict with the international obligations of the State.[15]

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[11] (ibid.).

[12] (ibid.).

[13] (ibid.).

[14] Maluwa (1996); see also Dugard, John. 1983. "International human rights norms in domestic courts: Can South Africa learn from Britain and the United States?". In Kahn, E (Ed.). *Fiat iustitia: Essays in memory of Oliver Deneys Schriener*, Cape Town: Juta, pp 983:221, 223–224).

[15] Collier, JG. 1989. "Is international law really part of the Law of England?". *International Law and Comparative Law Quarterly*, 38:924–925; Jackson, H John. 1992. "Status of treaties in domestic legal systems: A policy analysis". *American Journal of International Law*, 86:310; Erasmus (1989/1990:91–

In the final analysis, the theories are relevant only in the specific context of customary, but not conventional, international law. The real concern, it is submitted, is how international law standards can be infused or, rather, incorporated into State law to reinforce the effectiveness of the national legal system. Oftentimes, national legal rules are not well-defined and are sometimes inadequate in respect of addressing practical legal questions. But this is not to say the theories are insignificant: indeed, on the contrary, they are important. They continue to illuminate the interaction between international law and municipal law. Most importantly, they will increasingly have some impact on efforts to find practical solutions on the role of international law in the municipal legal sphere.

The Namibian Constitution and international law

The pre-1990 Constitution situation

Prior to the adoption of the Namibian Constitution, the country went through German colonial rule from 1884 to 1915, after which it was occupied by the Union of South Africa at the beginning of the First World War (WWI).[16] Consequently, Germany's contribution to the development of the Namibian legal system was very insignificant, if at all.

In 1919 the Allied Powers placed Namibia under an international mandate through the mandate system.[17] The mandate system meant that the country had to be administered under the laws of the mandatory as an integral part of it territory.[18] The mandate for South West Africa was conferred on His Britannic Majesty – but to be exercised on his behalf by the government of the Union of South Africa, as a mandatory. A mandate agreement concluded between the Union of South Africa and the Council of the League of Nations empowered the mandatory to, inter alia, apply its laws to South West Africa,

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97). See also the jurisprudence from southern Africa, such as *Unity Dow v Attorney General of Botswana* (1992) LRC (Const), at 623; *Mharapara v The State* (1986) LRC (Const), at 234.

[16] For a general discussion of the German occupation of South West Africa, see Cliffe (1994); Cockram, G Gail-Maryse. 1976. South West African mandate. Cape Town: Juta; Imishue, RW. 1965. South West Africa: An international problem. London: Pall Mall.

[17] Imishue (ibid.:2–3).

[18] The League of Nations provided for three types of mandates – A, B or C – based on the stage of development of the inhabitants, economic conditions and geographical location. The C mandates were to be administered under the laws of the mandatory as integral parts of its territory. South West Africa fell into this category. See Imishue (ibid.:3–5).

subject to the mandate and such local codifications as the circumstances required.[19] Consequently, the Union of South Africa issued the 1919 Proclamation, which introduced a formal legal order into South West Africa.[20] This marked an important watershed in the legal system of South West Africa by explicitly and clearly transposing the Roman–Dutch law of the Cape of Good Hope into South West Africa.[21] In *R v Goseb*,[22] Claassen, JP, as he then was, observed and acknowledged that the Roman–Dutch law reception instrument also introduced, albeit implicitly, the English common law in South West Africa.

According to the Roman–Dutch law, treaties required legislation to be part of the national law of South West Africa. The position was confirmed in *Binga v Administrator-General, South West Africa & Others*, in which Justice Strydom said the following:[23]

> Obligations incurred by international treaty and resolutions by international organisations such as the United Nations stand on a different footing from customary law and generally speaking a court in South Africa, and for that matter a court in this country will only give effect thereto if such a treaty or resolution was incorporated by legislative act into the laws of the land.

As regards customary international law, the legal position was that rules of customary international law were regarded as part of the national law of South West Africa. The position was endorsed by the courts. In the fore-cited *Binga* case, the Court observed the following:[24]

> Although it was accepted by Rumpff CJ in *Nduli and Another v Minister of Justice and Another* (supra at 906) that the *rules of customary international law are to be regarded as part of our law "as are either universally recognised or have received the assent of this country,"* it follows that the decisions of the United Nations, of the nature here under discussion, are not part of customary international law. [Emphasis added]

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[19] Article 2.

[20] Administration of Justice Proclamation No. 21 of 1919 (South West Africa). For a discussion of the Proclamation, see Imishue (ibid.).

[21] Proclamation No. 21 of 1919, section 1(1). According to this clause, "The Roman–Dutch law as existing and applied in the province of the Cape of Good Hope at the date of the coming into effect of this proclamation shall, from and after the said date, be the common law of the Protectorate, and all laws within the Protectorate in conflict therewith shall, to the extent of such conflict and subject to the provisions of this section, be repealed". For an analysis of this clause, see *Tittel v R* 1921 (2) SA (SWA) at 58.

[22] *R v Goseb* 1956 (1) SA (SWA) at 666.

[23] 1984 (3) SA 949 (SWA) at 968–969.

[24] (ibid.).

Thus, customary international law was treated as part and parcel of the national law of South West Africa. This position was influenced by the South African position, where customary international law was directly and automatically applicable in the municipal law of South Africa. The position was authoritatively confirmed in *Nduli & Another v Minister of Justice & Another* in which Rumpff, CJ, noted the following: [25]

> It is too obvious that international law is to be regarded as part of our law, though the fons et origo of this proposition must be found in Roman–Dutch law … [O]nly such rules of international law are regarded as part of SA law as are either universally recognised or have received the assent of this country.

However, as in the Union of South Africa,[26] the automatic reception of international customary law in South West African national law could be excluded by clear and unambiguous legislation, the act of State doctrine, and the stare decisis rule.[27]

The legal position in the 1990 Constitution

A GENERAL REMARK

It is worth noting that the Namibian Constitution has adopted a positive approach towards international law.[28] A number of clauses in the Constitution deal with or, rather, relate positively to international law. The Preamble to the Constitution declares that the people of Namibia desire to promote among themselves the dignity of the individual and the unity and integrity of the Namibian nation "among and in association with the nations of the world". The Constitution also declares that the national territory of Namibia consists of the whole of the territory "recognised by the international community through the organs of the United Nations".[29] Furthermore, in terms of Article 95 of the Constitution, one of the principles of the State is to –

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[25] 1978 (1) SA 893 at 897. For a discussion of this case, see Erasmus (1989/1990).

[26] Erasmus (ibid.).

[27] *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* 1977 (1) ALL ER at 881.

[28] Some legal scholars have described the Namibian Constitution as international-law-friendly. See, for instance, Devine, J Dermont. 1995. "The relationship between international law and municipal law in light of the Interim South African Constitution 1993". *International Law and Comparative Law Quarterly*, 44:1; Maluwa (1996).

[29] Constitution of the Republic of Namibia, Article 1(4).

> … actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:
>
> …
>
> (d) membership of the International Labour Organisation (ILO) and, where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO; …

Also, Article 96, which deals with Namibia's foreign relations, declares, inter alia, that –

> [t]he State shall endeavour to ensure that in its international relations it:
>
> (a) adopts and maintains a policy of non-alignment;
>
> (b) promotes international co-operation, peace and security;
>
> (c) creates and maintains just and mutually beneficial relations among nations;
>
> (d) fosters respect for international law and treaty obligations;
>
> (e) encourages the settlement of international disputes by peaceful means.

Furthermore, in terms of Article 99 dealing with foreign investments, –

> [f]oreign investments shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament.

The positive outlook of the Constitution to international law is predicated on a variety of factors. In the first instance, the experience of a long period of apartheid colonial rule in total disregard of international law and defiance of the international community reminded the architects of the Constitution that they had to ensure that the legal system of Namibia was anchored on firm principles of international law. Furthermore, the founding fathers of the Constitution felt that the intent to introduce the minimum democratic values in the territory long denied by the South African apartheid regime to the great majority of Namibian people did not stop at the country's national boundaries, but were to be extended to Namibia's international conduct – hence the proclaimed adherence of the newly constituted Namibian State to the general standards of behaviour agreed upon by the vast majority of members of the international community.[30] Therefore, it was reasonable that, upon attaining independence, the framers of the Constitution had to anchor it firmly on international law.

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[30] For instance, the Preamble to the Namibian Constitution states that "… these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid". For an analysis of this clause, see Erasmus (1989/1990:81–82).

INTERNATIONAL LAW CLAUSE – ARTICLE 144

The extant status and role of both customary and conventional international law in the municipal law of Namibia are now regulated by the Constitution. The latter explicitly recognises international law and its role and function in Namibian municipal law. The relevant Article 144 of the Constitution explicitly and unequivocally declares the following:

> Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

The effect of this provision is to accord both the general rules of public international law and international agreements direct and automatic application in Namibian municipal law, subject to two main qualifications. Firstly, the general rules of international law and international agreements may be excluded from applying directly in municipal law by the Namibian Constitution itself. Secondly, they may be excluded by an Act of Parliament.[31] But for these two qualifications, the general rules of international law and treaties are directly incorporated into Namibian municipal law. These rules are directly enforceable by municipal institutions, particularly the courts. Likewise, individuals can directly invoke and rely on these rules in municipal legal proceedings. As alluded to above, the Namibian international law clause is also a clear indication of the proactiveness or friendliness of the Constitution to international law.[32] Moreover, the inclusion of an international law clause in the Constitution effectively accords rules of international law a constitutional status. The clause is similar to section 231(4) of the 1996 Constitution of the Republic of South Africa which provides as follows:

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

It is also worth noting that, in terms of Article 66(1) of the Namibian Constitution, the common law of Namibia in force on the date of independence remains valid to the extent to

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[31] For a detailed analysis of these exceptions, see above.

[32] According to Devine (1995:17), the Constitution of the Republic of Namibia can be described as 'international-law-friendly' because it incorporates a number of the provisions which create this effect. For example, see Article 143, which deals with Namibia's succession to international agreements. See also Erasmus (1989/1990:93).

which such common law does not conflict with the Namibian Constitution or any other statutory enactment. This clause ensures continuity of legal rules from the period of South African rule to the independence period and beyond. It introduces a possibility, it is submitted, of considering the status and role of international law in Namibian municipal law on the same basis as it is under the South African Roman–Dutch common law.[33] Thus, Article 66(1) complements Article 144 of the Constitution, and reinforces the status of international law in Namibian municipal law.

Therefore, since general rules of public international law and international agreements are part of municipal law, that is, they have direct and automatic application in Namibian national law, the Namibian courts are obliged to take judicial notice of them. The Namibian courts are enjoined to have recourse to these rules as a source of national law. In essence then, the Namibian Constitution has adopted a monist approach regarding the relationship between international law and Namibian national law. It is important, thus, to distinguish between general rules of international law and international agreements or treaty rules.

(a) General rules of international law

The Namibian international law clause, Article 144, directly incorporates "general rules of public international law" into Namibian municipal law. It is significant to emphasise that this provision is a constitutional confirmation of the previous Roman–Dutch common law position, that general rules of public international law binding upon Namibian law have always been part of the country's municipal law.[34]

However, the phrase *general rules of public international law* raises several fundamental questions. Firstly, what do these general rules really entail? The reference in Article 144 to "general rules of public international law" should obviously refer to customary international law. The term *general* in this context means rules widely supported and accepted by the representatively large number of States. It denotes clear and certain rules that have attracted widespread support from the international community. It effectively makes all kinds

[33] For a detailed discussion of Article 66(1) of the Namibian Constitution, see Cottrell (1991:56) and Erasmus (ibid.).

[34] *Binga v Administrator-General, South West Africa & Others* 1984 (3) SA at 949. See Maluwa (1996:69).

of rules of customary international law part of municipal law, except those specifically and expressly excluded by the Namibian Constitution or an Act of Parliament.[35]

This interpretation has been placed on similar provisions found in other national Constitutions. The Basic Law of the German Federal Republic, which provides at Article 25 that "the general rules of public international law are an integral part of the federal law", is widely understood to refer only to the rules of customary international law, not the rules embodied in international treaties or agreements.[36] Similarly, paragraph 1 in Article 10 of the Italian Constitution, which provides that "[t]he Italian legal order shall conform with the generally recognised rules of international law", has been interpreted to refer to customary international law.[37]

The second inquiry that emerges from Article 144 is whether *general rules of public international law* implies an automatic exclusion of regional or particular rules of customary international law. This is because the rights and obligations of States in the international plane may be of a general or particular character.[38] In this regard, this provision may be contrasted with Section 211(3) of the Constitution of the Republic of Malawi which declares that –

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[35] Erasmus (1989/1990:98).

[36] Rupp, G Hans. 1976. "International law as part of the law of the land: Some aspects of the operation of Article 25 of the Basic Law of Germany". *Texas International Law Journal*, 11:541; Rupp, G Hans. 1977. "Judicial review of international agreements: Federal Republic of Germany". American Journal of International Law, 25:286; Vitanyi, Bela. 1977. "Some reflections on Article 25 of the Constitution of Germany". *Netherlands Journal of International Law*, 24:578.

[37] Cassese (1985:370). A similar construction has been given to the provision in the French Constitution that general rules of international law are part of French municipal law. See Preuss, Lawrence. 1950. "The relation of international law to internal law in the French Constitution". *American Journal of International Law*, 44:641.

[38] *The Asylum Case ICJ Reports*, 1950 at 266. The case of Peru and Colombia involved a local custom among the Latin American States relating to diplomatic asylum. Colombia wanted to invoke the custom in the case against Peru to justify its refusal to allow a safe conduct of the rebel leader, Haya Dela Torre, out of Peru. The court held that such a custom was not proven because the alleged practice between the States involved was inconsistent and uncertain. Nonetheless, the case establishes that customary international law may emerge from a local custom. See, generally, Brownlie (1990:4–11); Kopelmanas, Lazare. 1937. "Custom as a means of creation of international law". *British Year Book of International Law*, 18:127–151; Kunz (1953:69); Shaw (2003:60–79).

> [c]ustomary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application in Malawi.

This clause ensures the incorporation of customary international law in Malawian municipal law in its entirety.[39]

It is submitted that, in line with the general positive attitude of the extant Namibian normative regime to international law, the local or regional customary rules, that is, rules developed in a particular region, should necessarily be included in the general rules of international law. This means that local or particular custom based on a proven constant and uniform practice should be captured under Article 144.[40] Commenting on the new South African Constitution, which has similarly adopted rules of customary international law binding upon the Republic of South Africa as part of South African municipal law, Devine has argued that –[41]

> [i]t does not matter what kind of international customary law is under consideration, whether it be universal, general, local or particular. All kinds are in principle incorporated. There is no distinction as to the types of international law. This is a satisfactory provision.

The necessity for the inclusion of regional (local) rules of international law in Article 144 of the Namibian Constitution serves the significant purpose of broadening the scope of this provision. It ensures that, in discharging their interpretative role, courts should be free to invoke and apply customary international law in its totality. It avoids the adoption of a narrow construction of Article 144. The basic objective of this clause is to incorporate customary international law in general – except that which is expressly excluded for being incompatible with the Namibian Constitution or an Act of Parliament.

The Namibian Constitution does not, however, make all general rules of international law part of national law: it does so only for those rules which are "binding upon Namibia". It is submitted that any determination of whether or not general rules of international law bind

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[39] See Maluwa (1996:70–71). The Malawian Constitution is reprinted in Flanz, Gisbert H Ed). 1995. *Constitutions of the countries of the world*. Dobbs Ferry, NY: Oceana.

[40] Erasmus (1989/1990:98–99). For example, it is important to note that, within the southern African regional context, there is SADC, an organisation established in 1980 by southern African States to regulate and coordinate their economic, social and other affairs in what then became known as the *SADC region*. Namibia acceded to SADC on 17 August 1992, and is therefore bound by the organisation's normative regional rules.

[41] Devine (1995:12).

Namibia should meet the criteria set by international law itself. Certain rules of customary international law may not bind Namibia in international law where, for example, there is evidence that it has opted out of the rule during its formation due to its persistent objection.[42]

(b) The Namibian courts and customary international law

One of the first cases that came before the Namibian courts after the Constitution was adopted – in which rules of international law and, implicitly, the monist theory emerged – was *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*.[43] The case involved a petition by the Attorney-General to the Chief Justice of Namibia in terms of section 15(2) of the Supreme Court Act,[44] in which the Attorney-General sought the consent of the Chief Justice, or such other judge designated for the purpose by the Chief Justice, for the Supreme Court to exercise its jurisdiction to act as a court of first instance in hearing and determining a constitutional question which the Attorney-General sought to refer to the Supreme Court under the powers vested in him/her by Article 87(c) as read with Article 79(2) of the Namibian Constitution. The relevant question was whether corporal punishment by or on the authority of the organ of State contemplated in legislation was per se; or in respect of certain categories of persons; or in respect of certain offences or misbehaviours; or in respect of the procedure employed during the infliction thereof in conflict with any provisions of Chapter 3, entitled "Fundamental human rights and freedoms", of the Constitution of the Republic of Namibia, particularly Article 8 thereof; and, if so, to deal with such laws as contemplated in Article 25(1) of the Constitution. The latter clause deals with the enforcement of fundamental rights and freedoms. The material Article 8(2)(b) of the Constitution provides that "No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment". The corporal punishment in question fell into two categories: (1) legislation permitting judicial and administrative corporal punishment; and (2) corporal punishment in schools.

In examining whether or not the institution of corporal punishment as embedded in Namibian law was repugnant to the type of treatment or punishment outlawed by the Constitution, the court, per Mahomed AJA, began by analysing Article 8(2)(b). The court interpreted this

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[42] Brownlie (1990:10); Kunz (1953:662–669). See also *Anglo-Norwegian Fisheries Case ICJ Reports*, 1969 at 3; *Asylum Case ICJ Reports*, 1950 at 266.

[43] 1991 (3) SA 76 (Nm SC). Generally see Naldi, J Gino. 1994. "Some reflections on the Namibian Bill of Rights". *African Journal of Comparative and International Law*, 6:45, 54–56.

[44] No. 15 of 1990.

provision disjunctively in relation to seven distinct conditions, namely torture, cruel treatment, cruel punishment, inhuman treatment, inhuman punishment, degrading treatment, and degrading punishment, and held that the imposition of any corporal punishment by any judicial or quasi-judicial authority, or directing any corporal punishment upon any person, was unlawful and in conflict with Article 8 of the Namibian Constitution. In the process, the court had recourse to, and relied upon, international human rights norms embodied in treaties such as the ECHR.[45] Finally, the court held that whipping, whether by organs of State or in respect of certain offences or persons, constituted degrading and inhuman treatment.

However, the court did not expressly affirm that the prohibition of whipping had matured into customary international human rights law, which forms part of Namibian municipal law. It also did not make any specific reference to Article 144 of the Namibian Constitution. It is submitted that this case presented the court with an opportunity to positively and expressly confirm the status of customary international law in Namibian municipal law, and allowed it to give effect to and define the exact parameters of Article 144.

By contrast, specific and express reference to the Namibian international law clause was made in *Government of the Republic of Namibia & Another v Cultura 2000 & Another*.[46] The Namibian High Court had to determine the constitutionality of domestic legislation in relation to Article 16 of the Constitution protecting the right to culture. Cultura 2000, the first respondent, and the Chairman of its Board of Directors, the second respondent, brought an application against the appellants, the Government of the Republic of Namibia and others, for an order, inter alia, declaring the State Repudiation (Cultura 2000) Act[47] – which authorised the repudiation of the loans granted to them, the respondents, by the association called the *Administration for Whites*, a body established for the cultural activities of the 'whites', and divesting them to the State – to be unconstitutional.

The first respondent was an association incorporated under the Companies Act.[48] The association's main object was the preservation of the culture of the Afrikaans, English, German, Portuguese, and other communities of European descent. In his founding affidavit, the second respondent alleged that the main object in forming the first respondent was the

[45] 1991 (3) SA 75 (Nm SC) at 87.

[46] 1994 (1) SA 407 (Nm SC).

[47] No. 32 of 1991.

[48] No. 61 of 1973 (Republic of South Africa).

maintenance, development and promotion of the culture of the West European cultural groups. In furtherance of its proclaimed objective, the first respondent solicited and obtained funds from the pre-Independence second-tier government structure known as the *Administration for Whites*.[49] In March 1989, just one year before Namibia's independence and during the transitional period leading up to it, the first respondent received valuable assets from the Administration for Whites. On 28 March 1989, Cultura 2000 also received a donation of R4 million[50] from the same authority. On the same date, a further sum of R4 million was paid by the same authority to the first respondent as a loan, bearing interest of 1% per annum, and repayable in 76 instalments half-yearly. On 28 February 1990, approximately three weeks prior to Namibia's formal independence, the R4 million donated on 28 March 1989 was converted into a loan by the then Administrator-General, appointed by the South African Government to do its bidding in the colony.

In court, the appellants argued that the payments to the first respondent were made as a deliberate stratagem to support the operation of Cultura 2000 in order to frustrate the anticipated results of the election, and "because of the apprehension of a new democratic society in which privilege on a racial basis would not be permitted". They further argued that the funds had been allocated in pursuance of a policy of compulsory, pseudo-ethnic and racial classification. They argued, therefore, that it was perfectly in order for the Namibian Parliament to pass legislation (the said State Repudiation [Cultura 2000] Act) repudiating the loans and divesting them to the Namibian Government.

In holding that the State Repudiation (Cultura 2000) Act violated the respondents' cultural rights and was as such unconstitutional, the Namibian High Court made the following remark concerning Article 144, and particularly in respect of general rules of international human rights law:[51]

> It is manifest that the constitutional jurisprudence of a free and independent Namibia is premised on the values of a broad and universalist human rights culture which has began to emerge in substantial areas of the world in recent times. *Article 144 of the Constitution* sought to give expression to the intention of the Constitution to make Namibia part of the international community. [Emphasis added]

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[49] There were a number of such bodies under the former apartheid administration, the rest of which targeted other groups in the country based on their ethnicity.

[50] 1 South African Rand = 1 Namibia Dollar.

[51] No. 61 of 1973 (Republic of South Africa), at 412.

The court's remark confirms the significance of universal human rights norms in Namibian municipal law. The pronouncement also represents a firm judicial recognition that universal human rights norms and values are part of Namibia national law. This means that, as a member of the international community, Namibia should abide by these norms. Most importantly, the pronouncement underlines the effect of the Namibian international law clause being to make these norms part of national law. It creates unity between these norms and the Namibian legal order. The pronouncement clearly demonstrates that, in line with the classical monist theory, Namibian courts have begun to explicitly act upon the international law clause in the Constitution. This clause provides a platform for the courts to give life, value and substance to the automatic incorporation of customary international law in national law.

It is submitted, however, that more and more regular judicial activity is necessary if these norms are to be firmly secured, and if Article 144 is to be given substantial effect in Namibian municipal law insofar as it domestically incorporates customary international law.

(c) International agreements

According to Article 144 of the Namibian Constitution, "international agreements binding upon Namibia ... shall form part of the law of Namibia". This provision assigns all international treaties that are binding upon Namibia automatic operation in Namibian domestic law. It effectively means that national institutions, and courts in particular, can directly apply and enforce international treaties that are binding on Namibia without having been translated into municipal law by legislative and other mechanisms to the same effect. It similarly means that such treaties can be directly relied upon by individuals before national courts and other related institutions.

The provision, however, raises two main questions. The first of these concerns when treaties become binding on Namibia, while the second concerns when such binding treaty becomes part of Namibian municipal law. These questions require Article 144 to be reconciled with other provisions of the Constitution, especially those concerning Namibia's participation in international agreements.

As regards the first question, that is, when treaties become binding on Namibia, in terms of the 1969 Vienna Convention on the Law of Treaties, a treaty is binding on a State once it

has expressed consent to be bound by the treaty.[52] This constitutes international ratification, whereby a treaty is binding between one State and others. Thus, for a treaty to become binding on Namibia at international level, it would have to comply with the requirements laid down in Namibian municipal law, particularly the Constitution. Article 32(3)(e) of the Constitution empowers the President of Namibia to "negotiate and sign international agreements, and to delegate such power". The meaning of this provision is not entirely clear. Read in isolation, it conveys the impression that the President can, following negotiation, sign treaties that enter into force upon signature and bind Namibia without the approval of Parliament. This, however, is not the case because, according to Article 63(2)e) of the Constitution, the National Assembly of Namibia –

> … shall agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) hereof.

Thus, for treaties that have been negotiated and signed by the President or his/her delegate or representative in terms of Article 32(3)(e) to be binding on Namibia externally or at international level they require parliamentary approval.[53] These treaties can only be binding on Namibia internationally once they have been ratified or acceded to by the Namibian Parliament. It is the latter body that expresses consent to be bound by treaties on the international plane. In other words, the signature of the President or his/her delegate alone is not sufficient for a treaty to bind Namibia externally. Additional parliamentary approval is necessary for such a treaty to bind Namibia in relation to other States that are parties to the treaty. This situation may be compared with the position in South Africa, for example. Section 82(1(i) of the South African Constitution grants the South African President the power to "negotiate and sign" international agreements. However, this power is subject to approval by Parliament – both in the international and constitutional senses. In terms of section 231(2) of the South African Constitution, –

> … an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

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[52] Article 11. The Vienna Convention was adopted on 23 May 1969, and entered into force on 27 January 1980. See United Nations. 2009. *Multilateral treaties deposited with the Secretary General of the United Nations*. New York: United Nations, 1155:331.

[53] Erasmus (1989/1990:103); Mtopa (1990/1991:109-110).

Subsection (3) provides as follows:[54]

> An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

The second question, that is, regarding when international treaties really become part of Namibian municipal law, depends upon whether a treaty enters into force upon mere signature or by ratification. A treaty that enters into force upon ratification becomes part of Namibian municipal law as soon as the legislature ratifies it or expresses its consent to be bound thereby by a resolution in Parliament. However, a treaty that enters into force on mere signature is not automatically part of Namibian law. The treaty requires enabling legislation for it to become part and parcel of Namibian municipal law.[55] The signature of the President or his/her delegate is not enough to translate it into Namibian law.

It essentially means that, although the Namibian international law clause, that is, Article 144, purports to make all international treaties automatically effective in Namibian municipal law, it does not completely erode the sovereign power of the Namibian legislative authority to transform treaties. In fact, provisions similar to that found in the Namibian Constitution appear in the Constitutions of other countries. The interpretation that has been posited to these provisions is that they do not take away the sovereign power of Parliament to enact treaties into municipal law.[56]

Moreover, it is submitted that the automatic application of treaties in the Namibian national legal order does not apply to all sorts of treaties, i.e. irrespective of the nature and purposes of the treaty involved. The role of the Namibian Parliament to transform treaties, at least in relation to some categories of treaties, has not been completely withered away. The argument advanced here is not that Namibia should fall back to the pre-existing legal position in terms of which all treaties required parliamentary approval. Quite the contrary: the argument is mainly that a distinction could be made between those treaties requiring

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[54] For a detailed discussion of section 231(2) and (3), see Devine (1995) and Maluwa (1993/1994:72–73).

[55] See Mtopa (1990/1991:111–112).

[56] See Cassese (1985:370); Preuss (1950:641–669; 888–899).

legislative incorporation, and those which do not. The obvious example of treaties requiring parliamentary approval would be those affecting the liberties and duties of private citizens. Treaties of this kind would in most cases require legislation to implement them, given that international treaties are largely drafted in vague and general terms. The specific details on the modes of implementation would require special legislation.[57]

Thus, although the Namibian international law clause may attract commendation for making treaties a source of municipal law, problems abound as to whether all treaties of a wide-ranging variety should be treated as part of the law of the land. It is entirely possible that Namibia will continue to ratify and incorporate treaties notwithstanding Article 144 of the Constitution in order, for instance, to ensure democratic control of the nation's conduct of its foreign relations, and also make possible the implementation of treaties. Hence, it is necessary to distinguish between those treaties which require parliamentary approval and those which do not.

In this regard it is worth noting that, even after the Namibian Constitution's adoption in 1990, Article 144 has been reinforced by the country's participation in international conventions. Since becoming an independent State, Namibia has ratified and acceded to a number of international conventions. These include ratification of the United Nations Charter on 23 April 1990, the Organisation of African Unity Charter (now the *African Union Constituent Instrument*), and the SADC Treaty.[58] Treaties to which Namibia has acceded include –

- the Convention on the Prevention and Punishment of the Crime of Genocide, 1948
- the Convention relating to the Status of Refugees, 1951[59]
- the International Covenants, 1966[60]
- the International Convention on the Elimination of All Forms of Racial Discrimination, 1966
- the Convention on the Suppression and Punishment of the Crime of Apartheid, 1973
- the Convention on the Elimination of All Forms of Discrimination against Women, 1979
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

[57] Maluwa (1993/1994:36–37).

[58] Namibia was admitted to SADC on 17 August 1990, the same day on which it acceded to the SADC Treaty.

[59] (ibid.).

[60] Namibia acceded to both Covenants on 29 November 1991. See United Nations (2009).

- the Convention on the Rights of the Child, 1989
- the Optional Protocol to the International Covenant on Civil and Political Rights, 1966, and
- the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1989.[61]

However, Namibia has not acceded to the 1967 Protocol Relating to the Status of Refugees, or to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Thus, Namibia has become party to all these international agreements despite the international law clause.

(d) The Namibian courts and international agreements

The significance of Article 144 of the Namibian Constitution, insofar as it makes international agreements part of Namibian municipal law, has received positive confirmation and reinforcement from Namibian courts. It was reinforced in *Kauesa v Minister of Home Affairs & Others*.[62] Commenting on the domestic status of the African Charter on Human and Peoples' Rights (ACHPR), 1981, the Supreme Court of Namibia noted the following:[63]

> The Namibian Government has, as far as can be formally established[,] recognised the African Charter in accordance with art 143 read with art 63(2)(d) of the Namibian Constitution. The provisions of the Charter have therefore become binding on Namibia and form part of the law of Namibia in accordance with art 143, as read with art 144 of the Namibian Constitution.

In other words, according to the court, Namibia's ratification of the ACHPR meant that the Charter was directly applicable in Namibian national law. It directly created rights and duties for individuals in municipal law. It could, therefore, be given domestic effect by Namibian courts.[64] Similarly, in Government of the *Republic of Namibia & Another v Cultura 2000 & Another*, the Namibian Supreme Court emphasised that –[65]

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[61] Generally, see United Nations (ibid.).

[62] 1995 (1) SA 51 (Nm SC). This case is discussed in detail below.

[63] (ibid.:86).

[64] Although the court opined that the ACHPR formed part of Namibian municipal law, it is significant to emphasise that the Namibian Parliament has yet to pass legislation making the ACHPR part of Namibian national law.

[65] 1994 (1) SA 407 (Nm SC) at 412.

> Article 144 of the Constitution sought to give expression to the intention of the Constitution to make Namibia part of the international community by providing that ... international agreements binding upon Namibia ... shall be part of the law of Namibia.

Furthermore, in *S v Mushwena & Others*[66] involving the apprehension, abduction and deportation of 13 respondents from Botswana and Zambia by security and immigration officials from both countries to Namibia where they were charged, inter alia, with treason and murder allegedly committed in Namibia, reference was made to international agreements such as the International Covenant on Civil and Political Rights, 1951; the Convention Relating to the Status of Refugees, 1951; and the 1967 Protocol Relating to the Status of Refugees, and to Article 144 of the Namibian Constitution. The court stated that –

> [a]s a matter of fact, as I have shown ... the [International Convention on Civil and Political Rights] and the UN Covenant and the Protocol Relating to the Status of Refugees have become part of public international law and by virtue of art. 144 have become part of the law of Namibia.

According to the court, these instruments had not only "become part of Namibian domestic law by virtue of the Namibian Constitution", but some of their basic principles have been incorporated into the Namibian laws.

As with customary international law, it is clear that, since the adoption of the Namibian Constitution, the judiciary has given domestic effect to its international law clause in relation to international agreements. In so doing, the judiciary has affirmed its significance and role in Namibian national law. Importantly, however, this has only occurred in relatively few cases. Moreover, no judicial decision has so far attempted to critically analyse Article 144 of the Namibian Constitution insofar as it makes treaties self-operative in municipal law in order to define its scope and precise parameters. It is submitted that the Namibian courts have a pivotal role to play in domestically effectuating Article 144. This clause enables the courts and similar tribunals to enrich national law and jurisprudence with international standards. It also provides an opportunity for the judiciary to take international normative standards into account in developing national law.

Exceptions to direct incorporation of international law

[66] SAFLII 2004 (SC).

According to Article 144 of the Namibian Constitution, general rules of public international law and international agreements form part of the law of Namibia unless otherwise provided by the Constitution or an Act of Parliament. Thus, Article 144 creates two main exceptions to direct and automatic application of customary and treaty rules in Namibian municipal law: constitutional supremacy and legislative sovereignty.

Constitutional supremacy

Article 144 recognises that automatic and direct application of international law, customary and conventional, in Namibian municipal law may be excluded by the Namibian Constitution itself. Thus, a clear and unambiguous clause in the Constitution overrides or, rather, limits the direct operation of international law in municipal law.[67] In *Kauesa v Minister of Home Affairs & Others*, Justice O'Linn, commenting on this exception, aptly observed the following:[68]

> The specific provisions of the Constitution of Namibia, where specific and unequivocal, override provisions of international agreements which have become part of Namibian law.

The conditioning of the automatic application of international law by the doctrine of constitutional supremacy underscores the predominant nature of the Namibian Constitution. It further underlines the significance attached by the Namibian people to the Constitution as a compact that enshrines their goals and aspirations.

However, the Constitution does not provide guidelines on how it or a provision therein may exclude the operation of customary and treaty rules in Namibian municipal law. This means that all sorts of possible situations may be invoked to exclude the operation of customary international law and treaties in Namibian municipal law on the basis that the Constitution provides otherwise. For instance, if an international agreement were in conflict with any clause in the Constitution, then the treaty in question would not form part of municipal law. Thus, if a treaty duly entered into or executed by the relevant executive authority and confirmed by the Namibian Parliament conflicted with the substantive provisions of the Constitution, it would be possible to challenge it in municipal courts. In other words, it would

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[67] This exception is almost similar to that found in the South African Constitution of 1996; see section 213(4). For the discussion of the South African provision, see Devine (1995:11).

[68] 1995 (1) SA 51 (Nm HC) at 86.

be argued that, since the treaty in question conflicted with some substantive clause(s) of the Constitution, such treaty would be overridden by the Constitution – notwithstanding the treaty being binding on Namibia under international law.[69] There is an example of this situation arising from Ireland. In *Christopher McGimpsy & Michael Mcgimpsey v Ireland & Others*,[70] it was held that the treaty – which was fully binding at international law – could be challenged on the grounds of conflict with a substantive constitutional provision. But the Court proceeded to warn that such a challenge would not be lightly entertained by the courts since there was a presumption in favour of the constitutionality of treaties in particular, and of international law in general.

Whether or not the Namibian Constitution or a provision thereof is in conflict with an international law rule will depend on each case, and the issue will have to be decided by the Namibian courts.[71] Significantly, in effectuating this exception, it is submitted that Namibian courts will have to bear in mind the responsibility incumbent upon the country not to violate its international obligations. They will have to construe Namibian law – particularly a constitutional rule – so as not to be in conflict with Namibia's international obligations. After all, as stated elsewhere in this discussion, the Constitution provides that the Republic of Namibia is committed to international law and to fulfilling its international obligations.

Legislative sovereignty

The new municipal legal order of Namibia also recognises that an Act of Parliament may operate to exclude the application of international law in municipal law. According to Article 144 of the Constitution, –

> [u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

This provision conditions the automatic municipal application of international law on the doctrine of legislative sovereignty. It recognises the sovereign power of the National Assembly of Namibia to override direct application of international law in the domestic legal scene.

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[69] Devine (1995:10).

[70] (1988) 1 R 567.

[71] Erasmus (1989/1990:103); *Kauesa v Minister of Home Affairs* 1994 (3) SA at 76; Naldi (1994:29).

It should be noted that this exception existed in the pre-Independence legal dispensation and was endorsed by the judiciary at the time.[72] However, unlike in the previous Namibian law where legislative sovereignty only excluded the domestic operation of rules of customary international law, the present Namibian law has extended it to exclude treaty rules as well. Article 144 empowers the Namibian Parliament to pass legislation overriding the direct automatic operation of international law – both customary and conventional – in Namibian municipal law. Significantly, the provision not only makes the new legal position clearer: it also elevates Namibian legislative supremacy in this regard to a constitutional status. In other words, when it comes to excluding the direct operation of international law in national law, both the Constitution and legislation are at par.

Exclusion of the automatic application of international law in municipal law by legislative sovereignty may arise where, for instance, an international law rule embodied either in a treaty or custom is inconsistent with an Act of Parliament. Under these circumstances, an Act of Parliament predominates and the operation of an international law rule in Namibian municipal law is excluded. The *legislative sovereignty* qualification serves to underscore the sovereignty of the Namibian Parliament, and signifies the supremacy of the will of the legislature within the Namibian municipal legal sphere.[73]

Notably, qualifying the incorporation principle with the will of Parliament entails that the adoption of international law in Namibian municipal law is not radical, but cautious. It is a manifestation of a moderate submission to the will of the international community. The enactment of a statute to exclude a rule of international law from operating in municipal law may in certain instances amount to an implied opposition to a rule of international law. Thus, if it is obvious that legislation may operate to exclude a rule of international law from operating in municipal law, it means that national legislation is higher in rank. The effect of this ranking would be to lessen the effectiveness of international law in national law. On the other hand, an unqualified domestic application of international law does not seem to be a

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[72] It was affirmed in *Binga v Administrator-General, South West Africa & Others* 1984 (3) SA at 949. In determining whether the League of Nations Mandate, as a treaty, formed part of Namibian municipal law, Justice Strydom noted that rules of customary international law were subject to the will of the Namibian Parliament. See also *S v Acheson* 1991 (2) SA 805 (Nm HC).

[73] Lauterpacht, Hersch. 1973. "Is international law a part of the Law of England?". *Transactions of the Grotius Society*, 1939 at 23, 51.

preferable option, since that would undermine State sovereignty by allowing rules of international law to operate unsupervised in the municipal law of Namibia.

However, it is not abundantly clear whether the limitation applies to earlier or later statutes, or both. It is submitted that, as regards earlier statutes that are inconsistent with a rule of international law binding on Namibia, the effect of Article 144 is to accord international law a predominant position. Statutes falling under this category are superseded by a rule of both customary and conventional international law. But certainly, a later unambiguous and clear statute duly passed by the Namibian Parliament would override a rule of both customary and conventional international law that has become part of the law of Namibia. This is in accordance with the lex posterior derogat priori principle.[74] Parliament's intention to violate a rule of international law in question should be manifestly clear and unequivocal. However, the presumption that the legislature will not violate the State's obligation in international law will continue to apply. Courts will have to construe a municipal law provision in order to give domestic effect to Namibia's international legal obligations.

The rationale for this presumption is that Namibia will in any case remain bound by its international obligations, irrespective of whether or not a treaty provision fails to be given effect because of its inconsistency with municipal legislation. A State cannot invoke its municipal law as a defence for an inability to perform its international obligations.[75] This was specifically enunciated in the *Greco-Bulgarian Communities* case, in which the Permanent Court of International Justice noted the following:[76]

> [I]t is a generally accepted principle of international law that[,] in the relations between Powers who are Contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.

The important point to note, however, is that the effectiveness of this exception will largely depend on the approach of the judiciary. In practice, domestic courts endeavour as much as is practicably possible to reconcile domestic legislation with a treaty or customary rule in

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[74] Cunningham, J Andrew. 1994. "The European Convention of Human Rights, customary international law and the Constitutions". *International and Comparative Law Quarterly*, 43:537–567).

[75] Brownlie (1990:35); *Advisory Opinion on Treatment of Polish Nationals in Danzig* 1932 PCIJ Reports Series A/B, No. 44 at 22; Erasmus (1989/1990:95); Vitanyi (1977:580).

[76] (1930) PCIJ Series B, No. in order 17 at 32. See also *Free Zones of Upper Savoy and the District of Gex* 1932 PCIJ Series A/B, No. in order 46.

question with a view to ensuring that the international obligation of the State is fulfilled.[77] The intention to repudiate a treaty must be clear and unequivocal, although the courts would have to try to harmonise the treaty with municipal law.[78] It is only where it is explicitly clear that Parliament wanted to disregard international law that the courts have no choice but to apply legislation. They would not want to allow their own predilections to supersede legislative will.

It is submitted that, although this exception – and constitutional supremacy – ensures that international law should not have an absolute and unregulated operation in Namibian national law, its net effect is to limit the role of international law, both customary and conventional, in municipal law. It weakens the effectiveness of Namibia's newly adopted monist approach to the interrelation between international law and national law. Also, it demonstrates Namibia's cautious approach of according international law a firm place and function in its municipal law.

Concluding remarks

The extant Namibian legal order has fundamentally improved and enhanced the domestic status and role of international law. A constitutional strategy has been adopted to directly incorporate customary and treaty rules into the municipal law of Namibia. These rules do not only enjoy statute-like effect in Namibian municipal law, they have also been accorded a constitutional status. This device makes Namibian municipal law international-law-friendly. It enhances unity and interaction between the two legal regimes. It also makes international law more effective in municipal law. Individuals can invoke and rely directly on international norms before national institutions such as national courts and other bodies with similar trappings, under acceptable limitations. There is recognition of individuals both as objects and as subjects of international law, capable of claiming international norms independently of the State of Namibia.

Thus, Namibia has embraced a monist approach in its domestic treatment of both customary and treaty rules. As regards customary international law, Namibia has not altered its pre-Independence legal position, namely that customary international law is directly applicable in municipal law. The domestic position of treaties, on the other hand, has been fundamentally

[77] Erasmus (1989/1990:95).

[78] (ibid.).

changed. Unlike in the pre-existing law, where treaties were governed by traditional dualist theory, under the new 1990 constitutional and legal dispensation, they are regulated by monism. This theory implies that it is not necessary to legislatively incorporate treaties into the municipal law of Namibia: they are self-executing. The monist approach seeks to erode the power of Parliament to transform treaties. However, if Namibia's international law clause is reconciled with other constitutional provisions, particularly those on the powers of the President and Parliament in relation to treaties, it is clear that treaties – especially those that come into force upon signature – require parliamentary ratification in order to be part of Namibian law. Moreover, Namibia will continue to ratify and incorporate certain kinds of treaties, notwithstanding Article 144. Human rights treaties, for example, require legislation that is sufficiently clear in order to implement them in national law. Therefore, Article 144 does not completely displace the transformation theory requiring treaties or certain category of treaties to be internally legislated.

It also emerges from Article 144 that the automatic application of international law in Namibian law is not absolute. It can be excluded by the Constitution or by statute. These are the only recognised exceptions to, and limitations upon, the automatic incorporation of international law into Namibian law. These exclusions have displaced the act of State doctrine and stare decisis rule which, under the pre-existing law, were also recognised as capable of excluding the domestic operation of customary international law. The abandonment of these exceptions can potentially raise problems, however, especially for the judiciary and executive. Firstly, the stare decisis rule is a significant aspect of any legal system, particularly one with common law attributes such as Namibia's. Namibian lower courts would have to follow the precedent of higher courts, even where their decisions are in conflict with a rule of international law – especially customary international law. Secondly, there are certain matters with respect to which the executive arm of government should have a final say. A typical example is national security. However, given the proactiveness of Namibian national law in relation to international law, the courts would reasonably be expected to reconcile Namibia's international obligations with these two rules, and to ensure that they effectuated the former.

It is submitted that the Namibian constitutional strategy is an attractive and highly preferable mode of incorporating international law into domestic law. It ensures clarity, certainty and predictability. Most significantly, as the supreme law of the land, the Constitution commands universal national respect. Moreover, as a social compact, it would not be easily disregarded and whimsically tampered with in order to reduce the effectiveness of international law in municipal law.

That said, it is important to note that Namibian courts have yet to reinforce the significance of Article 144 in Namibian law. This clause in particular and international law – both customary and conventional – in general have been discussed in comparatively few and isolated cases. They have only been referred to incidentally in cases dealing with the interpretation of the human rights provisions of the Constitution and in some legislation. Thus, Namibian courts have yet to internalise the Namibian monist theory. It is submitted that municipal courts should adopt a positive and proactive attitude towards international law generally, so as to accord it a firm position in municipal law. Furthermore, this approach gives additional impetus and force to the newly adopted Namibia's monist theory.

The contribution of *Campbell v Zimbabwe* to the foreign investment law on expropriations[1]

Dunia P Zongwe*

Introduction

The Zimbabwean Parliament passed two amendments to the Constitution of Zimbabwe: one on 19 April 2000 (Amendment 16),[2] and one on 14 September 2005 (Amendment 17).[3] The two amendments authorised the seizure of white-owned farmlands without compensation. Since 2000, the Zimbabwean Government has expropriated a string of white-owned commercial lands without compensation.[4] In March 2008, in a consolidated case (*Mike*

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[2] Constitution of Zimbabwe Amendment No. 16, Act 5 of 2000 (hereinafter *Amendment 16*).

[3] Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005 (hereinafter *Amendment 17*).

[4] Constitution of Zimbabwe paragraph 16A(1) (hereinafter *Zimbabwean Constitution*): "In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance [–]

(a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land; and accordingly –

Campbell (Pvt) Ltd & Others v Zimbabwe),[5] 79 applicants filed an application with the Southern African Development Community (SADC) Tribunal to challenge the legality of the acquisition of certain agricultural lands by the Zimbabwean Government. On 28 November 2008, the Tribunal ruled that the expropriations of agricultural lands by the Zimbabwean Government were illegal because they were based on racial discrimination and did not compensate the applicants.

This article seeks to understand the contribution that the *Campbell* case brings to the law on foreign direct investment, especially the principle that expropriations must not be discriminatory. Investment law generally prohibits discriminatory expropriations or nationalisations on the basis of race, with the notable exception of post-colonial expropriations carried out to end the economic domination of the nationals of the former colonial power.[6] By declaring that the expropriations of white-owned agricultural lands in Zimbabwe were illegal because they amounted to racial discrimination,[7] the SADC Tribunal in *Campbell* appears to develop the investment law jurisprudence on expropriations by creating an exception to the exception. Accordingly, the question that this article addresses centres on the extent to which a country can expropriate property as part of a general Government programme to correct present economic inequalities brought about by a colonial past.

The article starts with a presentation of the legal position on expropriations from an investment law vantage point and, more specifically, on the requirements that expropriations must not be discriminatory and that they must be for a public purpose. The article continues with a brief of the *Campbell* case and an explanation of the contribution, if any, that the case makes to the jurisprudence on expropriations. The article ends by concluding, in light of the

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(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and

(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement".

[5] *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (hereinafter *Campbell*).

[6] Sornarajah, M. 2004. *The international law on foreign investment*. Cambridge: Cambridge University Press, p 398.

[7] *Campbell*, at 53.

foregoing discussion, whether the SADC Tribunal rightly decided the *Campbell* case and, if not, how the case could and should have been decided.

Expropriations in investment law

Application of foreign investment law to Campbell

To understand the change that *Campbell* may have brought about in foreign investment law, it is first necessary to verify that foreign investment law applies to the case. To start with, the SADC Tribunal is an international court tasked with the duty to develop SADC jurisprudence having regard to applicable treaties, public international law and any rules and principles of the law of the 15 SADC states.[8] In *Campbell*, the SADC Tribunal used an international human rights law approach and not an investment law approach, though nothing forbade nor obliged it to apply investment law.

Foreign investment law applies to *Campbell* because of the foreign nationality or British origins of the investors in some of the Zimbabwean corporations whose lands were expropriated.[9] In *Funnekotter v Zimbabwe*, a case involving Amendment 17 and the expropriations of white-owned agricultural lands in Zimbabwe, the claimants were variously of Dutch and Italian nationalities[10] and they claimed that the Zimbabwean Government had violated a bilateral investment treaty (BIT) between the Netherlands and Zimbabwe.[11] Finally, the settlement of the *Funnekotter* dispute by the International Center for the Settlement of Investment Disputes (ICSID) is evidence of the application of foreign investment law. It follows from the foregoing that the changes or contribution that the *Campbell* case may have wrought on the international law of expropriations applies to foreign investment law as well.

Basic distinctions

[8] Protocol on Tribunal in the Southern African Development Community, Article 21(b) (hereinafter *SADC Tribunal Protocol*).

[9] In *Campbell*, 28 private companies registered in Zimbabwe were among the applicants.

[10] *Bernardus Henricus Funnekotter & Others v Republic of Zimbabwe* (ICSID Case No. ARB/05/6) at 1 (hereinafter *Funnekotter*).

[11] Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Zimbabwe and the Kingdom of the Netherlands, 11 December 1996.

Sornarajah, a leading foreign investment scholar and a Professor at the National University of Singapore, distinguishes between three types of takings which are often used interchangeably, namely *confiscation*, *expropriation*, and *nationalisation*.[12] He states that *confiscation* is the capricious taking of property by the rulers of the State for personal gain. *Expropriation* (or *compulsory acquisition* as it is termed in the Zimbabwean Constitution) refers to the taking by States for an economic or public purpose, whereas *nationalisation* refers to the across-the-board takings designed to end or diminish foreign investment in the economy or in sectors of the economy.[13]

From Sornarajah's basic distinctions of takings, it is evident that the fundamental issue in *Campbell* is not whether compulsory takings of commercial farms in Zimbabwe constitute illegal expropriations, as the SADC Tribunal and the parties frame it. Rather, the real dilemma is whether the compulsory takings amount to confiscations or nationalisations.

Sornarajah's basic distinctions between the different meanings of *takings* by the State also reveal that, given the across-the-board scale of takings in the agricultural sector in Zimbabwe since 2000, it would be more accurate to characterise the Zimbabwean land redistribution measures as *nationalisation* rather than *expropriation*. The legal implications of both nationalisations and expropriations are the same in a relevant respect: they both trigger compensation mechanisms. Nevertheless, nationalisations and expropriations have different impacts: unlike expropriations, nationalisations can be crippling and devastating for a host country's economy, as is the case for Zimbabwe.[14] The nationalisation that started in 2000, after the rejection of President Robert Mugabe's constitutional referendum,[15] resulted in

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[12] Sornarajah (2004:345ff); see also Comeaux, Paul E & N Stephan Kinsella. 1997. *Protecting foreign investment law: Legal aspects of political risk*. New York: Oceana Publications, p 3.

[13] Sornarajah (2004:346).

[14] It is estimated that, in 2005, the unemployment rate in Zimbabwe was in excess of 80%, and in 2008 the gross domestic product (GDP) growth rate in Zimbabwe was –12.6%; Central Intelligence Agency. 2009. The World Factbook 2009: Zimbabwe; available at https://www.cia.gov/library/publications/the-world-factbook/geos/ZI.html; last accessed 18 November 2009. Moreover, the compulsory acquisition of agricultural lands caused a steep decline in agricultural exports and shortages in hard currency, which in turn caused hyperinflation and chronic shortages in imported fuel, food and consumer goods. See Human Rights Watch. 2002. "Fast track land reform in Zimbabwe", *Human Rights Watch*, March, 14(1)(A).

[15] "Mugabe accepts referendum defeat", *BBC Africa*, 15 February 2000; available at http://news.bbc.co.uk/2/hi/africa/644168.stm; last accessed 18 November 2009. The article reported that voters in Zimbabwe had rejected a constitution proposal to consolidate presidential powers and

Zimbabwe beating world economic records (highest inflation rate, smallest domestic market size, and lowest foreign direct investment).[16]

Expropriations

Expropriations are "the most severe form of interference with property",[17] even though they are prima facie lawful.[18] States enjoy the right to expropriate or the "the right of eminent domain", which is an entitlement that emanates from the States' territorial sovereignty.[19] Foreign investment law says that expropriations or nationalisations constitute a political, non-commercial risk that can be insured against by dint of insurance guarantees from national investment insurance agencies or the World Bank's Multilateral Investment Guarantee Agency (MIGA). In foreign investment law, a *political risk* is a risk faced by an investor that a host country will confiscate all or a portion of the investor's property rights located in the host country.[20]

Nonetheless, the sovereign power of States to expropriate property is not unfettered or boundless. States trade credibility for sovereignty, as foreign investment law not only restricts the regulatory conduct of States to an unusual extent, but also subjects it to control through compulsory international adjudication mechanisms,[21] such as the ICSID and the SADC Tribunal. In particular, the power of States to expropriate is circumscribed by the requirements that the expropriation serve a public purpose and that the State compensate individuals aggrieved by expropriation. Apart from scaring away foreign investment, a policy that would permit States to take property without restrictions would increase the costs of

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allow the Government to confiscate white-owned land for redistribution to black farmers without compensation.

[16] World Economic Forum, International Bank for Reconstruction and Development/World Bank & African Development Bank. 2009. *The Africa Competitiveness Report 2009*. Geneva: World Economic Forum, p 237.

[17] Dolzer, Rudolf & Christoph Schreuer. 2008. *Principles of international investment law*. Oxford: Oxford University Press, p 89.

[18] Sornarajah (2004:395).

[19] Dolzer & Schreuer (2008:89).

[20] Comeaux & Kinsella (1997:1).

[21] Van Aaken, Anne. 2009. "International investment law between commitment and flexibility". *Journal of International Economic Law*, 12:507, 509.

doing business in those States, like it did in Zimbabwe.[22] Such a policy would also reduce the incentive of States to be careful about what they take and would dilute drastically the very idea of property ownership.[23]

The fundamental rule of English law that property could be taken only for a public purpose and on payment of compensation settled in the written constitutions of most Commonwealth States[24] such as Botswana, Malawi, Zambia and Zimbabwe.[25] When compensation follows a taking by the State, expropriations or nationalisations amount to forced sales.[26] When, on the other hand, no compensation is paid for expropriations or nationalisations, the taking amounts to a *confiscation*, as the author submits later in this article.

Therefore, for an expropriation to be legal in international law, it has to comply with the following requirements:

- It must be for a public purpose
- It must not be discriminatory, and
- The State must pay compensation for expropriation.

These requirements form part of customary international law and must be met cumulatively,[27] which means that, if any of those requirements is violated, there is a violation of customary international law. Accordingly, the SADC Tribunal in *Campbell* sat to determine whether the Government of Zimbabwe had complied with these three conditions. However, for the purposes of this article, the next sections zero in on the public purpose and non-discrimination requirements.

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[22] The World Economic Forum et al. (2009:237) suggest that Zimbabwe is one of Africa's least competitive countries.

[23] See Harrison, Jeffrey L & Jules Theeuwes. 2008. *Law and economics*. New York: WW Norton & Co., pp 102–103. The World Economic Forum et al. (2009:237) also state that Zimbabwe has the weakest property rights protection system.

[24] Allen, Tom. 2000. *The right to property in Commonwealth constitutions*. Cambridge: Cambridge University Press, p 36.

[25] In 2002, the Commonwealth of Nations suspended Zimbabwe from membership following abuses committed during the land redistribution process and the elections in the early 2000s.

[26] Harrison & Theeuwes (2008:108).

[27] Dolzer & Schreuer (2008:91).

Requirements for lawful expropriations

Public purpose

The doctrine

The first requirement for a lawful expropriation is that it must be for a public purpose.[28] Thus, while the compensation requirement makes an expropriation that is non-discriminatory and for a public purpose conditionally legal, an expropriation that is discriminatory or not for a public purpose is illegal in itself, whether or not compensation is paid.[29] In *Certain German Interests in Polish Upper Silesia,* the Permanent Court of International Justice (PCIJ) defined *public purpose* as "reasons of public utility, judicial liquidation and similar measures".[30] The doctrine probably originates from the statement by Hugo Grotius of public purpose as a limitation on the powers of eminent domain.[31]

The uncertain status of the doctrine

It is still uncertain whether *public purpose* is a requirement for lawful expropriations. Even though *public purpose* is, on a preponderance of authorities, a requirement for lawful expropriation,[32] some still maintain that *public purpose* is not so much of a limitation today;[33] others go as far as declaring that it is not a requirement at all.[34] Earlier authors tend to favour

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[28] Permanent Sovereignty over Natural Resources, GA Res. 1803 (XVII), UN Doc. A/5217 (14 December 1962), p 4: "Nationalization, expropriation or requisition shall be based on grounds or reasons of public utility, security, or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign"; *Texaco v Libya* (1977) 53 ILR 389.

[29] Comeaux & Kinsella (1997:78).

[30] *Certain German Interests in Polish Upper Silesia*, 1926 PCIJ, Series A, No. 7, p 22.

[31] Sornarajah (2004:396).

[32] See *Sabbatino v Banco Nacional de Cuba* (1961) 193 F Supp. 375 at 384, which held that nationalisation in Cuba was invalid for want of a public purpose.

[33] Sornarajah (2004:395).

[34] See *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic* 63 ILR 140 (1977) at 194: "As to the contention that the said measures were politically motivated and not in pursuance of a legitimate public purpose, it is the general opinion in international theory that the public utility principle is not a necessary requisite for the legality of a nationalization"; *Shufeldt Claim* (1930) UNRIAA 1079 at 1095: "[I]t is perfectly competent for the Government of Guatemala to enact any decree they like and for any reasons they see fit, and such reasons are no concern of the

the public purpose doctrine,[35] whereas modern authors tend to disfavour it.[36] The author's position in this debate is that one cannot meaningfully conceive of *expropriation* without *public purpose* for the simple reason that the definition of *expropriation* subsumes *public purpose*. In other words, a taking would not even qualify as an expropriation if it is not for a public purpose. It therefore makes more logical sense to say that *public purpose* is one of the elements definitive of an expropriation rather than a requirement for lawful expropriations.

The doctrine in practice

Very few cases revolve on the question as to whether an expropriation is for a public purpose, and those that do indeed address the question usually play down the significance of the public purpose doctrine. In *James v United Kingdom*, the European Court of Human Rights declared as follows:[37]

> The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless the judgment be manifestly without reasonable foundation.

The small number of cases on the substance of *public purpose* may be imputable to the fact that an expropriating State can effortlessly couch any taking in terms of some 'public purpose'.[38] In *Campbell*, the Government of Zimbabwe had formulated the taking of white-

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Tribunal"; *Oscar Chinn Case* (1934) PCfJ Series A/B, No. 63 at 79, which held that the Belgian state was "the sole judge" of the situation.

[35] Wortley, BA. 1959. *Expropriations in public international law*. Cambridge: The University Press, pp 24–25; McNair, L. 1959. "The seizure of property and enterprises in Indonesia". Netherlands *International Law Review*, 6: 218, 243.

[36] Sornarajah (2004:395); White, Gillian. 1961. *Nationalisation of foreign property*. London: Stevens & Sons, Ltd, p 150; Friedman, Samy. 1981. *Expropriation in international law: Contributions in comparative colonial studies*. London: Greenwood Press, p 142; Amerasinghe, CF. 1967. *State responsibility for injuries to aliens*. Oxford: Oxford University Press, p 138.

[37] *James v United Kingdom* (1986) 8 EHRR 123.

[38] Sornarajah (2004:395ff); Dolzer & Schreuer (2008:91).

owned commercial farms in terms of "land resettlement purposes",[39] which is without a doubt a legitimate government purpose.[40]

Foreign investors seldom argue that a host State has not fulfilled the public purpose requirement for at least three possible reasons. First, the determination of what constitutes *public purpose* is a political one[41] and, as stated in the *Restatement of Foreign Relations Law of the United States,* it is not subject to "effective re-examination by other states".[42] An international forum like the SADC Tribunal would be none the more effective in the re-examination exercise. Second, though a few arbitral tribunals elaborated on the significance of the public purpose requirement,[43] the concept of *public purpose* is generally regarded as broad, vague and ambiguous. Third, State regulation of private property is such a daily feature of national life that it is harder and harder for courts and tribunals outside the State to sit in judgment of the motives behind the takings by the State.[44]

Despite the uncertainty as to its nature, the *public purpose* doctrine is frequently (re-)affirmed in virtually all BITs and in the practice of States. Even in Article 16 of the Lancaster House Constitution[45] that ended colonial rule in Rhodesia,[46] the circumstances under which the State could compulsorily acquire property in the public interest were clearly defined[47] – but the Parliament amended Article 16 twice.[48] Sornarajah believes that the

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[39] Amendment 17, paragraph 16B(2).

[40] See e.g. Amoo, SK. 2002. "The exercise of the rights of sovereignty and the laws of expropriation of Namibia, South Africa, Zambia and Zimbabwe". In Hinz, MO, SK Amoo & D van Wyk (Eds). *The Constitution at work: 10 years of Namibian nationhood*. Pretoria: VerLoren van Themaat Centre for Public Law, pp 256, 262: "In the context of the constitutional and political history of Namibia, land resettlement and agrarian reform will *legitimately* come within the definition of public interest" [emphasis added].

[41] (ibid.:265).

[42] Restatement (Third) of Foreign Relations Law, Article 712(1)(a), 1987.

[43] Dolzer & Schreuer (2008:91).

[44] Sornarajah (2004:396–397).

[45] The Lancaster House Constitution refers to the Zimbabwean Constitution as adopted at Independence in 1981. Since then, the Zimbabwean Government has amended the Constitution several times.

[46] *Rhodesia* was the name of the formerly British colony of *Southern Rhodesia*, today's *Zimbabwe*, that declared itself independent on 11 November 1965. The international community never recognised Rhodesia, whose governments were dominated by white minorities.

[47] Zimbabwean Constitution, paragraph 16(1)(a).

[48] Amendment 16 in 2000, and Amendment 17 in 2005.

recurrent reference to the *public purpose* doctrine may be due to the "compulsion to follow a time-tested formula rather than to any conviction that the requirement continues to have any force".[49]

This section has demonstrated that the requirement that expropriation be for a public purpose is not so much of a restriction on expropriations. The succeeding section immediately turns to the analysis of the non-discrimination requirement.

Discriminatory expropriations

Discrimination

From an extensive body of jurisprudence, it appears that discrimination may be defined by employing three equations. Discrimination has been equated with action –[50]

- motivated by prejudice or "discriminatory intent"
- motivated by factors other than prejudice, or
- which has the effect of disproportionately disadvantaging a particular group defined by sex or race, yet which cannot be justified by other countervailing considerations (the 'disparate impact' theory of discrimination).[51]

Though the *Campbell* case features all three conceptions of *discrimination*, the "disparate impact" meaning of discrimination (i.e. indirect discrimination) dominates and determines the case, as the article shows below.

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[49] Sornarajah (2004:396).

[50] McCrudden, Christopher. 1991. *Anti-discrimination law*. Massachusetts: Dartmouth Publishing Company Limited, pp xivff.

[51] In South Africa, when courts consider an equality claim, the primary issue is the impact of the discrimination and not whether it treats different groups identically; Liebenberg, Sandra & Michelle O'Sullivan. 2001. "South Africa's new equality legislation: A tool for advancing women's socio-economic equality". In Jagwanth, Saras & Evance Kalula (Eds). *Equality law: Reflections from South Africa and elsewhere*. Cape Town: Juta Law, pp 70, 78. See also Jayawickrama, Nihal. 2002. *The judicial application of human rights law: National, regional and international jurisprudence*. Cambridge: Cambridge University Press, p 177; Gutto, Shadrack BO. 2001. *Equality and nondiscrimination in South Africa: The political economy of law and law-making*. Cape Town: New Africa Books (Pty) Ltd, p 127.

Racial discrimination

Even a furtive look at any major dictionary reveals that *race* is a notion that does not easily lend itself to any simple or simplistic explanation,[52] not to mention the inescapable tautologies that such explanations would entail. Part of the conceptual difficulty is due to the fact that *race* is not essential, but socially constructed.[53]

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides an authoritative legal definition of *racial discrimination*. Article 1 of CERD is a useful attempt to stabilise the meaning of *racial discrimination*, which it defines as –

> … any distinction, exclusion, restriction or preference based on race, color, descent, or natural or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Since the SADC Treaty does not define the phrase, the SADC Tribunal and other SADC institutions must consider the definition of *racial discrimination* in the CERD.

Racial discrimination in foreign investment law

A racially discriminatory taking is a violation of international law. The principle against racial discrimination and the principle of non-discrimination in general are well-established norms of international law. Effectively, racial discrimination is castigated by the main international legal instruments, including the CERD,[54] the Charter of the United Nations,[55] the Universal

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[52] The *Oxford Dictionary of Current English* (Fourth Edition) (2006:742) defines *race* as follows:

1. each of the major divisions of humankind, based on particular physical characteristics
2. racial origin or the qualities associated with this
3. a group of people sharing the same culture or language, or
4. a group of people or things with a common feature.

[53] See United Nations Convention on the Elimination of All Forms of Racial Discrimination, Preamble, 7 March 1966, 660 UNTS 195 (hereinafter *CERD*): "… any doctrine of superiority based on racial differentiation is scientifically false ...".

[54] CERD, Article 1.

[55] United Nations, Charter of the United Nations, Article 1(3), 24 October 1945, 1 UNTS XVI (hereinafter *UN Charter*).

Declaration of Human Rights (UDHR),[56] the United Nations (UN) Covenant on Civil and Political Rights (CCPR),[57] and the UN Covenant on Economic, Social and Cultural Rights (CESCR).[58] Furthermore, like the European Convention on Human Rights (ECHR)[59] and the American Convention on Human Rights,[60] the African Charter on Human and Peoples' Rights (*African Charter*) proscribes racial discrimination.[61]

The status of the principle against racial discrimination as a peremptory norm of international law is unclear and debatable. Some legal scholars suggest that there is widespread support to elevate anti-discrimination (including anti-apartheid) to the status of a ius cogens norm, from which no derogation is permitted.[62] Other scholars claim that racial discrimination is already a ius cogens principle.[63]

SADC,[64] the regional economic community of southern Africa, has an equivalent anti-discrimination provision in its constitution, the SADC Treaty.[65] Article 6(2) of the SADC Treaty ordains that –[66]

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[56] United Nations, Universal Declaration of Human Rights, Article 2, GA Res. 217A, at 71, UN GAOR, 3rd Session, 1st Plenary Meeting, UN Doc. A/810 (12 December 1948) (hereinafter *UDHR*).

[57] United Nations Covenant on Civil and Political Rights, Article 2(1), 16 December 1966, at 999 UNTS 171 (hereinafter *CCPR*).

[58] United Nations Covenant on Economic, Social and Cultural Rights, Article 2(1), 16 December 1966, 993, UNTS 3 (hereinafter *CESCR*).

[59] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14, 213 UNTS 222.

[60] Organization of American States, American Convention on Human Rights, Article 1(1), 22 November 1969, OASTS No. 36, 1144 UNTS 123.

[61] Organisation of African Unity, African Charter on Human and Peoples' Rights, Article 2, 27 June 1981, 21 ILM 58 (1982) (hereinafter *African Charter*).

[62] Dugard, John. 2005. *International law: A South African perspective*. Lansdowne (Cape): Juta & Co. Ltd, p 43.

[63] Sornarajah (2004:398).

[64] SADC is a 15-member regional economic community. SADC Member States are Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. SADC welcomed back the Seychelles at the 28th SADC Heads of State and Government Summit in August 2008.

[65] SADC, Treaty of the Southern African Development Community, 17 August 1992, 32 ILM 116 (hereinafter *SADC Treaty*).

[66] (ibid.).

> SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, *race*, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit. [Emphasis added]

Article 6(2) of the SADC Treaty is the applicable and most relevant provision in the *Campbell* case. More precisely, the legal question in the case was whether the Government of Zimbabwe had violated Article 6(2) of the SADC Treaty by enacting and implementing Amendment 17.

Remedying racial discrimination

Litigation, enforcement by a regulatory agency, and contract compliance are the three main institutions for the redress of discrimination.[67] Two other remedies may be mentioned, namely providing a monetary substitute for a lost opportunity, and requiring a re-run of the occasion, minus the discrimination.

By far the most popular way of remedying instances of discrimination is by advancing members of a historically disadvantaged group, such as blacks and women. It is a method widely known as *affirmative action* in most countries in the world and as *positive action* in the United Kingdom (UK). Certainly, Amendment 17 is on its surface aimed at advancing black Zimbabweans. Since the white settlers themselves 'expropriated' the lands of black Zimbabweans before the country's independence from the UK on 18 April 1980, Amendment 17 sets out to even out the economic imbalances that colonialism created by expropriating lands acquired during the colonial days. Such provisions lay bare the homeopathic paradox of reversing *past* structural discrimination by *present* structural discrimination.

Exceptions to racial discrimination in investment law

Either as an end in itself or as a means to an end, anti-discrimination is not absolute. It is limited by its own purposes or by a metaprinciple such as substantive equality, often in the form of affirmation action. Thus, post-colonial expropriations carried out to end the economic domination of the nationals by the former colonial power are an exception to the general prohibition on racial discrimination in foreign investment law.[68]

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[67] McCrudden (1991:xxviff).

[68] Sornarajah (2004:398).

Non-discrimination or anti-discrimination can be seen in two basic ways: either as an end in itself or as a means to an end.[69] With the first alternative, anti-discrimination is a principle worth supporting in its own right and one which attempts to advance a goal different from other goals such as justice and equality.[70] However, this is a limited principle and it is limited in scope by the very goal which it is advancing. With the second alternative, on the other hand, anti-discrimination is a mediating principle, a partial translation of another principle such as substantive equality and justice.[71] Here, anti-discrimination is open-ended, ambiguous or standardless, and thus in need of interpretation in light of the other principle (the metaprinciple) on which it is based.[72]

With either alternative, post-colonial expropriations to reverse the adverse economic legacies of colonialism are in principle legitimate and lawful. Following the comparatively recent accession to political independence by the black majority in Zimbabwe (1980),[73] Namibia (1990), and South Africa (1994), the Constitutions of Zimbabwe,[74] Namibia[75] and South Africa[76] subject equality to affirmative action. Affirmative action animates and inspires their respective land redistribution programmes, which all aim to rectify the economic ills of

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[69] McCrudden (1991:xviii).

[70] (ibid.).

[71] (ibid.).

[72] (ibid.).

[73] The Constitution of Zimbabwe was published as a Schedule to the Zimbabwe Constitution Order 1979 (SI 1979/1600 of the United Kingdom).

[74] Constitution of Zimbabwe, paragraph 23(3)(g): "Nothing contained in any law shall be held to be a contravention of [the provision prohibiting discrimination] to the extent that the law in question relates to … the implementation of affirmation action programmes for the protection or advancement of persons or classes of persons who have been previously disadvantaged by unfair discrimination".

[75] Constitution of the Republic of Namibia, Article 23(2), Act No. 1 of 1990 (hereinafter *Namibian Constitution*): "Nothing contained in [the Article providing for the right to equality in the Namibian Constitution] shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices …".

[76] Constitution of the Republic of South Africa, section 9(2), Act No. 108 of 1996 (hereinafter *South African Constitution*): "… To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".

apartheid and colonialism. Similarly, the Constitutions of South Africa[77] and Zimbabwe[78] subordinate the right to private property to the Government power to expropriate property for land redistribution purposes. However, depending on whether one assumes the peremptory nature of the principle against racial discrimination, exceptions to the general prohibition on racial discrimination violate international law as ius cogens norms are by definition non-derogable. David Schneiderman even noticed that international investment law may be counter-majoritarian and side against public purpose, as investment rules can be viewed as a set of binding constraints designed to insulate economic policy from majoritarian politics.[79]

Campbell v Zimbabwe

The case

Core issues

The questions of law in *Campbell v Zimbabwe* are –[80]

- whether the SADC Tribunal had jurisdiction to entertain the application
- whether or not the applicants had been denied access to the courts in Zimbabwe (i.e. the Respondent)
- whether or not the applicants had been discriminated against on the basis of race, and
- whether or not compensation is payable for the lands compulsorily acquired from the applicants by Zimbabwe.

This article, however, only focuses on the issue of racial discrimination.

Facts

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[77] South African Constitution, section 26(4), (6), (7), (8) and (9); in particular, paragraph 26(8): "No provision of this section may impede the state from taking legislative and other measures to achieve *land*, water and related reform, in order to redress the results of *past racial discrimination* …" [emphasis added].

[78] Amendment 17, paragraph 16B(2).

[79] Schneiderman, David. 2008. *Constitutionalizing economic globalization: Investment rules and democracy's promise*. Cambridge: Cambridge University Press, p 3.

[80] *Campbell*, at 16–17.

On 14 September 2005, the Zimbabwean Parliament passed an amendment to the Constitution of Zimbabwe (Amendment 17). Section 16B(2) of Amendment 17 read in relevant part as follows:

> (a) all agricultural land … [reference to national gazettes where specific agricultural lands for resettlement purposes are identified] … is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and
>
> (b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

Following Amendment 17, the Zimbabwean State expropriated a number of white-owned agricultural lands. Mike Campbell (Pvt) Limited, a Zimbabwean-registered company, and William Michael Campbell commenced legal action in the Supreme Court of Zimbabwe, the country's highest court, challenging the acquisition of their land by the State.[81] Concurrently, on 11 October 2007, the two applicants filed an application with the SADC Tribunal challenging the taking by the State of their agricultural land as well as applying for interim measures in terms of Article 28 of the Tribunal Protocol.[82] On 13 December 2007, the SADC Tribunal granted the interim measure, which ordered Zimbabwe to refrain from taking any step or permitting any step, directly and indirectly, to interfere with the peaceful residence on, and beneficial use of, the land in question.[83] On 22 February 2008, however, the Supreme Court of Zimbabwe dismissed the two applicants' claims entirely.[84]

Later, 77 other persons applied to intervene in the proceedings and applied to the Tribunal for interim measures, which the Tribunal granted.[85] The *Mike Campbell (Pvt) Limited and*

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[81] *Mike Campbell (Pvt) Ltd & Others v The Minister of National Security Responsible for Land, Land Reform and Resettlement and the Attorney-General* (SC 49/07) (2007).

[82] Protocol on Tribunal and the Rules of Procedure Thereof (hereinafter *SADC Protocol*).

[83] *Mike Campbell (Pvt) Limited & Another v The Republic of Zimbabwe*, Case No. SADCT 2/07 at 8.

[84] *Mike Campbell (Pvt) Ltd & Others v The Minister of National Security Responsible for Land, Land Reform and Resettlement and the Attorney-General* (SC 49/07)(2007).

[85] *Gideon Stephanus Theron v The Republic of Zimbabwe & Others*, Case No. SADC (T) 2/08; *Douglas Stuart Taylor-Freeme & Others v The Republic of Zimbabwe & Others*, Case No. SADC (T) 03/08; *Andrew Paul Rosslyn Stidolph & Others v The Republic of Zimbabwe & Others*, Case No. SADC (T) 04/08; *Anglesea Farm (Pvt) Ltd & Others v The Republic of Zimbabwe & Another*, Case No. SADC (T) 06/08.

William Michael Campbell case and the cases of the 77 other applicants were then consolidated into one case. Though the main hearing was set for 28 May 2008, it was postponed until 16 July 2008.

However, between these two dates, Michael Campbell, 76, one of the two early applicants, and his family were brutally beaten up on their farm in Zimbabwe and allegedly forced to sign a paper declaring that they would withdraw the case from the SADC Tribunal.[86] On 20 June 2008, the applicants referred to the Tribunal the failure by Zimbabwe to comply with the Tribunal's decision regarding the interim reliefs. Yet, after 28 November 2008, when the SADC Tribunal decided for Campbell, his home of 50 years was burnt to the ground by farm invaders in September 2009.[87]

Parties' submissions

The applicants were represented by one Namibian lawyer[88] and three eminent and senior advocates from South African,[89] Zimbabwean[90] and English[91] bars. On the respondent's side, the Government of Zimbabwe was represented by its Deputy Attorney-General[92] and Chief Law Officer.[93]

The applicants deployed several arguments to buttress their main contention that Zimbabwe was in breach of Article 6(2) of the SADC Treaty, prohibiting racial discrimination, by enacting and implementing Amendment 17. First, they submitted that expropriations, carried out pursuant to Amendment 17, were based solely or primarily on consideration of race and ethnic origin, and that they were being directed at white farmers, whether or not white farmers had acquired the land during the colonial period or after Independence. The

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[86] Ruppel, Oliver C & Francois-X Bangamwabo. 2008. "The SADC Tribunal: A legal analysis of its mandate and role in regional integration". In Namibian Economic Policy Research Unit (Eds). *Monitoring regional integration in southern Africa: Yearbook 2008*. Windhoek: NEPRU, p 7.

[87] Chimhavi, Dominic. 2009. "Prize Zim farm attacked", *NEWS24*, 3 September 2009; available at http://www.news24.com/Content/Africa/Zimbabwe/966/850667d917044a828d997a2869379abc/03-09-2009-10-08/Prize_Zim_farm_attacked; last accessed on 18 November 2009.

[88] Elize M Angula.

[89] Jeremy J Gauntlett, SC.

[90] Adrian Phillip de Bourbon, SC.

[91] Jeffrey L Jowell, QC.

[92] P Machaya.

[93] Nelson Mutsonzwa.

applicants further argued that, even if Amendment 17 made no reference to the race and colour of the owners of the land expropriated, its legislative intent was clearly directed only at white farmers and apparently had no other rational categorisation. Finally, they contended that the Government of Zimbabwe had expropriated the targeted farms and distributed them to certain senior political, judicial or military officers politically connected to the Government.

In reply to the applicants' submissions that Amendment 17 violated Article 6(2) of the SADC Treaty, the Government of Zimbabwe denied that its land reform programme targeted white farmers only. It explained that the programme was for the benefit of the people who had been disadvantaged under colonialism and it is within this context that the applicants' farms had been identified for acquisition by the Zimbabwean Government. The farms expropriated were suitable for agricultural purposes and happened to be largely owned by the white Zimbabweans, who were inevitably the people most likely to be affected by the expropriations. According to the Zimbabwean Government, such expropriation of land under the programme could not be attributed to racism but circumstances brought about by colonial history. And, contrary to the submissions by the applicants, not only lands belonging to white Zimbabweans had been expropriated, but also those of the few black Zimbabweans who possessed large tracts of land.

Holdings

The main hearings took place in July 2008 before the SADC Tribunal at its official seat in Windhoek, the capital city of Namibia. It was a five-member bench,[94] consisting of Isaac Mtambo (Malawi), Luis Mondlane (Mozambique), Dr Rigoberto Kambovo (Angola), Dr Onkemetse Tshosa (Botswana) and, as President of the Tribunal, Ariranga Pillay (Mauritius). Justice Mondlane delivered the majority judgment, whereas Justice Tshosa handed down a brief dissenting opinion on the issue of racial discrimination.[95]

From the outset, the SADC Tribunal noted that discrimination of whatever nature was outlawed or prohibited in international law.[96] The Tribunal cited several provisions in

[94] The SADC Tribunal consists of ten members, including the President of the Tribunal appointed from SADC Member States. See "Legal instruments" on the official website at http://www.sadc-tribunal.org.

[95] *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (Tshosa, J, dissenting; hereinafter *Dissenting Opinion*).

[96] *Campbell*, at 45.

international legal instruments that prohibited discrimination based on race.[97] It then proceeded to define *racial discrimination*, noting that the SADC Treaty neither defined *racial discrimination* nor offered any guidelines to that effect.[98] The Tribunal reviewed the provisions of the CERD, the CCPR, and the CESCR.[99] In the process, it distinguished between formal and substantive equality,[100] on the one hand, and between direct and indirect discrimination,[101] on the other.

After it had addressed the definition of *racial discrimination*, the Tribunal moved on to determine whether Amendment 17 fitted that definition. It first observed that Amendment 17 affected all agricultural lands or farms occupied by the applicants and that the applicants were white farmers.[102] It held that, even though Amendment 17 did not explicitly refer to white farmers, its implementation affected white farmers only and, consequently, constituted indirect discrimination or substantive inequality.[103] It added that the differentiation of treatment meted out to the applicants also constituted discrimination as the criteria for such differentiation were not reasonable and objective but arbitrary and based primarily on considerations of race.[104] The Tribunal concluded that, implementing Amendment 17, the Government of Zimbabwe had discriminated against the applicants on the basis of race and thereby violated its obligation under Article 6(2) of the SADC Treaty.[105]

Analysis of the case

The SADC Tribunal seems to have handled most facets of the case well. It brushed a generally limpid picture of the events that had led up to the trial; it faithfully recited the procedural history of the case as well as the submissions of the applicants and the Government of Zimbabwe. Furthermore, it rightly and unanimously adjudicated on the issues of its own jurisdiction to hear and determine the case, the alleged denial of access to the

[97] *Campbell*, at 45ff.

[98] *Campbell*, at 48ff.

[99] (ibid.).

[100] *Campbell*, at 49–50.

[101] *Campbell*, at 50–51.

[102] *Campbell*, at 51.

[103] *Campbell*, at 52.

[104] *Campbell*, at 53.

[105] (ibid.).

courts by the Zimbabwean Government, and the payment of compensation. On all those issues, the SADC Tribunal found against the Zimbabwean Government.

It is the parts of the *Campbell* judgment on racial discrimination and public purpose that contain disputable assertions.

Racial discrimination

Campbell provided the Tribunal with an excellent opportunity to develop the meaning of *racial discrimination* in the SADC Treaty. At the same time, the issue of racial discrimination, the kernel of the case, defied the SADC Tribunal as a trier of fact and as a finder of law in *Campbell.* To be sure, racial discrimination was the only issue that was not unanimous, as Justice Onkemetse Tshosa dissented with good reason from the rest of his brethren. As a trier of fact, the SADC Tribunal wrongly assumed that all the persons affected by Amendment 17 were white Zimbabwean farmers,[106] an omission that Justice Tshosa corrected.

As a finder of law, the SADC Tribunal did not adequately disentangle the difficult matters of discrimination and the racial ground of the alleged discrimination. As Justice Tshosa himself admitted, –[107]

> I observe that during the deliberations on the case, it was not entirely clear to us how the issue of racial discrimination would be resolved. It was only towards the end of the deliberations, that is, a day before the judgment was to be delivered, that the majority were inclined to hold that Amendment 17 indirectly discriminated against the applicants.

Something of a circular argument lies in the Tribunal's finding that the Zimbabwean Government's land resettlement programme, as spelt out in Amendment 17, is racially discriminatory because it is based on considerations of race.[108] The circularity of the Tribunal's finding becomes obvious when one realises that the land resettlement policy in Zimbabwe, as in Namibia and South Africa, are redistributive and in the nature of affirmative action measures.[109] In most southern African countries that achieved independence through

[106] Dissenting Opinion, at 3–4.

[107] Dissenting Opinion, at 1–2.

[108] *Campbell*, at 53.

[109] Compare Zimbabwean Constitution, paragraph 23(3)(g); Namibian Constitution, Article 23(2); and South African Constitution, section 9(2).

liberation wars, colonial land policies and land tenure systems were the seeds of liberation struggles.[110] Admittedly, affirmative action measures intend to bring about substantive equality by differentiating on the ground of race in order to offset the present effects of the race-based injustices of the past. A Namibian scholar once outlined the purposes of affirmative action as implying the augmentation of representativeness in areas dominated by the white minority and the redistribution of wealth.[111] Therefore, to say that Amendment 17 is racially discriminatory is as redundantly repetitive as saying that affirmative action measures are founded on considerations of race.

Once it found that race-based classifications had occurred in *Campbell*, the SADC Tribunal should not have stopped its inquiry at that point. The next inquiry should have been whether or not the race-based discrimination was unfair.[112] South African and Namibian courts would have investigated the fairness or otherwise of alleged discrimination.[113] In foreign investment law, this inquiry would have turned on the question whether the alleged racial discrimination in *Campbell* fell under the exception to the general prohibition on racial discrimination. This further inquiry is necessary because not all race-conscious classifications are unfair. Indeed, some race-conscious classifications are imperatively mandated by the ideal of equality, and rejecting rather than accepting the imperative of race-conscious classifications would undermine people's confidence in that ideal.[114]

The SADC Tribunal did not actually embark on a full-fledged inquiry into the fairness of the allegedly discriminatory provisions of Amendment 17. Instead, after concluding that Amendment 17 was discriminating against the applicants indirectly on the basis of race, Justice Mondlane only uttered the following dictum:[115]

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[110] See Amoo (2002:265).

[111] Jauch, Herbert M. 1998. *Affirmative Action in Namibia: Redressing the imbalances of the past?*. Windhoek: New Namibia Books (Pty) Ltd, p 20.

[112] See *Union of Refugee Women v The Director: The Private Security Regulatory Authority* 2007 4 SA 395 (CC), which held that discrimination against refugees (as opposed to permanent residents and citizens) was not unfair. See also *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC); *City Council of Pretoria v Walker* 1998 2 SA 363 (CC); *Jordan & Others v The State (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 6 SA 642 (CC); *Volks NO v Robinson & Others* 2005 5 BCLR 446 (CC).

[113] See the Namibian and South African leading cases of *Müller v President of the Republic of Namibia* 1999 NR 190 (SC), and *Harksen v Lane* NO 1998 (1) SA 300 (CC) 23.

[114] See Sadursky, Wojcieh. 2008. *Equality and legitimacy*. Oxford: Oxford University Press, p 122.

[115] *Campbell*, at 53.

> We wish to observe here that if: (a) the criteria adopted by the respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands[;] and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalised individuals or groups, *rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination*. [Emphasis added]

Public purpose

The above dictum by Justice Mondlane reflects what went wrong with the SADC Tribunal's rulings on racial discrimination. First, although *public purpose* is a definitional element and requirement of lawful expropriation, it does not belong to international courts like the SADC Tribunal to pronounce themselves on the legitimacy of a sovereign State's legislative purposes. This is so despite the high probability that a challenge to an expropriation based on a claim that the expropriation was not for a 'public purpose' would possibly be effective in the case of a dictator, like Robert Mugabe, seizing property clearly for his or her personal use.[116] Second, the compensation of parties afflicted by expropriation is a separate requirement for lawful expropriations and not a benchmark for determining an expropriation's public purpose or its legitimacy.

Justice Mondlane's third observation is more pertinent to the implementation of Amendment 17. It is a fact that the Zimbabwean Government did not distribute most lands taken from white commercial farmers to poor, landless and other disadvantaged and marginalised Zimbabweans but to the adherents of the ruling party, the Zimbabwe African National Union – Patriotic Front (ZANU–PF). It is also a fact that rhetoric by Zimbabwe President Robert Mugabe and most tenors of the ruling clique has long been anti-British, if not downright racist.[117] However, while these facts justify the SADC Tribunal's finding of indirect discrimination, it does not explain why the Tribunal declared that Amendment 17 violated

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[116] Comeaux & Kinsella (1997:80).

[117] For instance, ahead of a high-level visit by a European Union (EU) delegation in Zimbabwe on 11 September 2009, Robert Mugabe told a meeting of his ZANU–PF youth party that "[w]e have not invited these bloody whites. They want to poke their nose into our own affairs". See Cornish, Jean Jacques. 2009. "Mugabe criticises sanctions as Zuma makes new deals", *Radio France International*, 11 September 2009; available at http://www.rfi.fr/actuen/articles/117/article_5101.asp; last accessed on 18 November 2009.

Zimbabwe's obligation under Article 6(2) of the SADC Treaty not to discriminate on the basis of race.[118] The Tribunal should have distinguished between the text of Amendment 17 and the way it was implemented by the Zimbabwean Government. After all, that is exactly what a finding of indirect discrimination entails.[119] As the Tribunal itself recognised, the text of Amendment 17 does not expressly or explicitly refer to race, ethnicity or people of a particular origin.[120]

Moreover, conflating the purpose of the Zimbabwean Parliament with that of the executive or the ruling party is a long stretch because, notwithstanding the fact that legislators often dissemble, land resettlement legislation evolved in Zimbabwe over a long period of time[121] through the countless inputs of countless individuals and different political parties with different sectional interests. In cases where racial considerations are the only motives, the taking is clearly illegal, like Hitler's takings of Jewish property in Germany[122] and Idi Amin's takings of Indian property in Uganda. But a major conundrum arises, as in *Campbell*, where both economic and racial considerations motivate a taking. In such cases, it is difficult to determine which motive prevails, "for when economic nationalism is the reason for the taking both motives are present in equal strength".[123] In *Campbell*, the Tribunal could have sorted out this intricate situation by ruling that the *enactment* of Amendment 17 was not illegal, while its *implementation* was not only illegal but also contrary to the statutory purpose of Amendment 17.

Finally, in his dissenting opinion, Justice Tshosa even disputed that the discrimination was indirectly racial and insisted that, for the purposes of Amendment 17, classifications only targeted certain lands and not certain people:[124]

> Amendment 17 targets agricultural land and [the applicants] are affected not because they are of white origin but because they are the ones who own the land in question. Thus, the target of Amendment 17 is agricultural land[,] not people of a particular racial origin. This

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[118] *Campbell*, at 58.

[119] The SADC Tribunal used the following definition of indirect discrimination: "Indirect discrimination occurs when a law, policy, or programme *does not appear to be discriminatory but has a discriminatory effect when implemented*"; *Campbell*, at 53; emphasis in original.

[120] *Campbell*, at 51.

[121] See Consolidated Land Acquisition Act, 2002 (No. 16 of 2002); Amendment 16.

[122] *Oppenheimer v Inland Revenue Commissioner* (1795) 1 All ER 538.

[123] Sornarajah (2004:399).

[124] Dissenting Opinion, at 3.

> means that in implementing the Amendment it was always going to affect those in possession of the land, be they white, black or [from any] other racial background.

In this section, the article explained in what respects the SADC Tribunal's holdings on racial discrimination and public purpose were deficient. It highlighted that the SADC Tribunal could have differentiated between the purpose of Amendment 17, which is legal, and the manner in which the Zimbabwean Government implemented it, which was illegal. The next part of the article recasts the issues and puts forth an alternative way of resolving them.

Compensation and unlawful nationalisations

If, as Justice Tshosa let out, the SADC Tribunal did not know how to go about deciding the issue of racial discrimination, one interrogation that arises is this: why did the Tribunal not decide the case by relying solely on the issue of compensation? The same holds true for the issue of public purpose. Public purpose was not raised by the parties as an issue for the Tribunal's determination, but it was an essential part of the Tribunal's analysis of the applicant's claim that the compulsory acquisition of farmlands was based on racial discrimination. The issue of public purpose was also an integral part of the Zimbabwean Government's counterclaim.

For an applicant to succeed on a claim of illegal expropriation, he or she needs to establish that a respondent did not satisfy *at least one* of the three requirements for lawful expropriations, and not all of them. In *Funnekotter*,[125] the ICSID eschewed in its arbitral award the thorny questions of public interest and racial discrimination. Rather, it decided the case solely on the basis of compensation, ignoring the public interest and racial discrimination allegations raised by the claimants.[126]

The SADC Tribunal could have settled the *Campbell* case by taking up the issue of compensation exclusively, especially because of the want of conclusive evidence for a finding of direct discrimination. The legal question would have been whether the compulsory acquisition of the applicants' agricultural lands without compensation constituted an unlawful

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[125] *Funnekotter*.

[126] *Funnekotter*, at 98: "The Tribunal will first examine whether or not the subparagraph (c) relating to the provisions of a just compensation has been breached. If it arrives [at] the conclusion that it has, it will not be necessary for it to consider whether, as alleged by the Claimants, the other conditions provided for in that Article or the provisions of Article 3 have also been breached".

nationalisation. In addition, given the fact that the Zimbabwean Government dished out the expropriated lands to the ruling party adherents, the real question would have been whether the compulsory acquisition of the lands without compensation resulted in confiscation.[127] It appears that the facts that are common cause in the *Campbell* case would tip the balance in favour of a finding of confiscation, but the chief factor speaking against such a finding is that in modern times the term *confiscation* is seldom used.[128]

The article does not definitively answer these alternative questions, the main point here being that the SADC Tribunal could have broached these controversial issues by focusing exclusively on the requirement of compensation.

Contribution of *Campbell* to expropriation law

The precedental value of *Campbell* is equivocal on the question as to the extent to which a country can expropriate property to correct the economic inequalities caused by colonisation. On the one hand, *Campbell* clearly creates an exception to the exception. It implies that, if they are based on race and do not compensate the plaintiffs, expropriations can be illegal even if they are part of policies aimed at redressing economic inequalities brought about by colonialism.

On the other hand, *Campbell* loses sight of the general exception that post-colonial expropriations to redress economic inequalities are lawful. As a matter of principle, the failure by the SADC Tribunal to contextualise the Zimbabwean expropriations as a form of affirmative action policies or an exception to the general prohibition on discriminatory expropriations contradicts foreign investment law and creates a constitutional crisis in the SADC region. Unlike most African countries that achieved political independence in the 1960s, Zimbabwe, Namibia and South Africa are unique on the continent in that the black majority reclaimed political power from the white minority fairly recently. Namibia and South Africa have provisions in their Constitutions which exempt affirmative action policies and other measures to redress past injustices from the general prohibition on racial discrimination. The *Campbell* case creates a crisis by suggesting that these policies and

[127] See *Siderman de Blake v Argentina* 965 F 2d 699 (1992), which held that the confiscation of property in that case had a "discriminatory motivation based on ethnicity" and was illegal.

[128] Sornarajah (2004:348): "In modern law … it is best to refer to takings by states as expropriation [as opposed to confiscation], as in most instances these takings are carried out for an economic or a public purpose".

measures potentially or actually violate their obligations under the SADC Treaty. The difference, however, between Zimbabwe and its Namibian and South African counterparts is the orderly, gradual and procedurally fair process that characterises land redistribution in Namibia and South Africa.

On the issue of compensation, the SADC Tribunal rightly ruled that the absence of compensation for the expropriations of white-owned farmlands rendered the expropriations unlawful.[129] In so doing, the SADC Tribunal conformed to the battered paths of international law on expropriations.

Conclusion

So how far can Zimbabwe or other countries take and redistribute property as part of a general Government programme to redress the economic legacies of colonialism? This article's main argument is that the *Campbell* case gives an ambiguous, equivocal answer to that question. The value of *Campbell* as a precedent for these questions in foreign investment law is watered down by the partly wrong reasoning in that case. Although the outcome of *Campbell* is what a proper interpretation of the applicable law would have dictated, the process by which the Tribunal reached this outcome is incorrect, as far as discriminatory expropriations are concerned. In that sense, this article is more like a concurring opinion than a dissent from the *Campbell* judgment.

Expropriations to redress past injustices are, as a matter of law, an exception to the non-discrimination principle and, thus, legal. Nevertheless, the Zimbabwean land invasions are, as a matter of fact, a violation not only of foreign investment law but also of the spirit and stated purpose of Amendment 17.

The *Campbell* case could have and would have enjoyed full precedental value if it had ruled that –

- race-based expropriations are not unlawful, as a matter of principle, if they aim at redressing the economic inequalities caused by a colonial past
- race-based expropriations to correct the effects of colonialism are an exception to the non-discrimination principle, but

[129] *Campbell*, at 57.

- expropriations as an exception to the non-discrimination principle are unlawful if the expropriating State does not pay compensation to the plaintiffs (i.e. if the expropriating State confiscates the plaintiff's property).

The constitutionality or otherwise of section 66(1) of the Magistrates' Courts Act, 1944 (No. 32 of 1944)

Francois-X Bangamwabo[*] and Clever Mapaure[**]

Introduction

Namibian law is generally a prisoner to its own history. Almost 20 years after the country's independence, there are still some old statutes that require revision but have either received too little or none at all. The ongoing domestication of these old laws in Namibia perpetuates past injustices. One such injustice is found in the procedure of property execution, as encapsulated in section 66(1) of the Magistrates' Courts Act.[1] Of late, judgment orders made under the authority and in terms of this section have been effected in a manner that brings into question the constitutionality of the whole process of execution as this impacts on the individual's right to dignity and the constitutional responsibility of the Namibian State to both provide accommodation to and protect the right of individuals to retain their rights of ownership and benefits thereof, and thereby maintain their security of tenure. The histories of the legislative scheme under apartheid and the grave injustices perpetrated in the context of land have been dealt with in many judgements and scholarly works.[2]

Some unfortunate members of the community have recently been evicted from their own homes pursuant to sales in execution of judgment orders against immovable property. In

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[1] No. 32 of 1944.

[2] See O'Regan, K. 1989. "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act". *South African Journal of Human Rights*, 5:361; Van der Walt, AJ. 2001. "Dancing with codes: Protecting, developing and deconstructing property rights in a constitutional State". *South African Law Journal*, 118:258; Van der Walt, AJ. 2002. "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land-reform legislation". *Tydskrif vir Suid-Afrikaanse Reg*, 18:254–372. See also *Port Elizabeth Municipality v Various Occupiers* CCT 2005 (1) SA 217 (CC) and 2004 (12) BCLR 1268 (CC), where Sachs J discusses the various pieces of apartheid legislation which have dealt with the occupation of land, at paragraphs 8–10.

most cases, the outstanding instalments involve paltry and trifling sums of money, which renders the whole process of the sale in execution unjustifiable and unconstitutional.

As a result, on 16 April 2009, the National Council adopted a motion which mandated the Standing Committee on Constitutional and Legal Affairs to investigate the constitutionality of the above impugned provision, and thereafter report back to the house. Heated debates erupted in the hearings – which prompted the writing of this article. The debates were also aired in the media, which reported that the injustices of the said section had led to some homeowners losing their property – in one case because a paltry N$168 was owed to a butchery.[3] Without concentrating on these media reports and other unreported out-of-court cases, we tackle section 66(1) of the Act head on by analysing the procedure it lays down. We argue that this provision is unconstitutional for it violates both constitutional and international law imperatives.

Legal analysis on the constitutionality or otherwise of section 66(1)(a)

Section 66(1)(a) of the Magistrates' Courts Act raises momentous legal and public interest issues which are centred on the attachment and sale of immovable property in execution. Section 66(1)(a) provides as follows:

> Whereas a court gives judgement for the payment of money or makes an order for the payment of money in instalments, such judgment in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and the manner ordered by the court, shall be enforceable by execution against the movable property and if there is not found sufficient movable property to satisfy the judgement or order or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgement has been given or such order has been made.

It would be convenient at this point to discuss briefly the procedure by which a debt is recovered in the magistrates' courts. If the defendant fails to enter an appearance to defend, the plaintiff is entitled to lodge with the clerk of the court a request for default judgment.[4]

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[3] See Maletsky, C. 2004. "House sold to recover N$168 debt", *The Namibian*, 14 July 2007; available at http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=7433&no_cache=1; last accessed 2 September 2009.

[4] See Rule 12(1)(a) of the Magistrates' Courts Rules, which reads as follows:

After this request has been lodged, and where the claim is for a liquidated debt, the clerk of the court, as opposed to a magistrate, enters judgment in favour of the plaintiff.[5] Rule 36 deals with the process in execution, which occurs when the judgment in the plaintiff's favour has not been satisfied.[6] The process of execution starts with a warrant prepared by the judgment creditor's attorney, which is issued and signed by the clerk of the court and addressed to the sheriff.[7] The process does not need to involve the courts at all in circumstances where the original judgment was entered by consent or default; however, if this is not the case, the process in execution may only be issued with leave of the court, which is sought at the same time as the granting of the judgment.[8] Therefore, if the judgment is entered by default because of, for example, the non-appearance of the defendant, and where the debt is for a liquidated amount, the entire process occurs without any oversight by the courts. If judgment is not entered by default and is granted after a hearing, court oversight occurs only at that initial hearing because Rule 36(7) provides for the application that initiates the process of execution to occur simultaneously with the granting of judgment and not at a later date.

Section 66(1)(a) of the Act prescribes the process from the time a court gives judgment in favour of a creditor until the ultimate sale in execution of the debtor's immovable property. The messenger of court calls at the home of the debtor and attaches movable property sufficient to settle the debt. If insufficient movables exist, the sheriff issues a nulla bona return, which reflects that there is insufficient movable property to settle the debt. On the strength of the fact that no movables were found, the clerk of the court is obliged to issue a warrant of execution against the immovable property if the debtor possesses any.[9] It is for the clerk of the court to decide whether, in the light of the sheriff's nulla bona return,

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"If a defendant has failed to enter appearance to defend within the time limited therefor by the summons or before the lodgement of the request hereinafter mentioned, and has not consented to judgment, the plaintiff may lodge with the clerk of the court a written request, in duplicate, together with the original summons and the return of service, for judgment against such defendant for –

(i) any sum not exceeding the sum claimed in the summons or for other relief so claimed;

(ii) the costs of the action; and

(iii) interest at the rate specified in the summons to the date of payment or, if no rate is specified, at the rate prescribed under section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975).".

[5] See Rule 12(1)(c). See Rule 12(4) for the position where the claim is not for a liquidated amount.

[6] See Rule 36(2)

[7] See Rule 36(1)

[8] See Rule 36(7).

[9] Rule 43 deals with execution against immovable property.

insufficient movables exist to satisfy the judgment.[10] Once the clerk of the court is satisfied of this fact, it follows that the debtor's immovable property will be sold in execution.

It should be noted from the above procedure that, in each of these circumstances, the relevant person being the owner at the time in question is a fact necessary for the right to proceed in rem under the Act to be legitimately invoked. Such a fact is called a *jurisdictional fact*, though care needs to be taken in using the phrase. Under the provisions of the Act and common law, the following are the condition precedent for the issuance of writ of attachment against immovable property:

- The movable property has to have been insufficient to satisfy the judgement debt
- Reasonable diligence has to have been exercised to trace the movable properties with no success
- There has to have been an application to court for writ of execution against immovable property, and
- The judgment creditor has to establish that the judgement debtor is the owner of the property.

These are the requirements that create the current procedure followed by the messenger of court. It is this procedure that appears to be in conflict with the Constitution – hence the necessity to analyse section 66(1). An analysis of the constitutionality or otherwise of the above provision will need to focus on whether –

- in the circumstances of the section, the manner of execution of debtors' immovable property is against the fundamental tenets of fair procedure, and
- in the light of the answer to the above issue, section 66(1) violates the fundamental rights enshrined in the Constitution and, if so, which specific rights are thus violated.

Is section 66(1) a violation of homeowners' procedural rights?

The language of section 66 is in itself not unconstitutional, but the procedure that is created by the section may be. There have been cases in Namibia where debtors' immovable property was attached and sold in execution. This is a normal, legal action, practiced universally. Unique in Namibia's jurisdiction, however, is that upon the issuance of nulla bona return on movables, the clerk of the court can, based on the report of the messenger of

[10] Erasmus, HJ & J van Loggerenberg. 1997. *The civil practice of the magistrates' courts in South Africa*, Volume 1 (Ninth Edition). Lansdowne: Juta, p 287; relying on *Lambton Service Station v Van Aswegen* 1993 (2) SA 637 (T) at 641G–I.

the court alone – i.e. without going through the court or any judiciary officer – issue a writ for the messenger of the court to attach the debtor's immovable property.

Striking in this procedure is that the debtor's immovable property is attached and sold without his/her knowledge. What has already happened in Namibia is that, without the debtor even knowing about it, his/her property is auctioned to an unknown third party. The first the debtor learns of the transaction is when the new owner of the property comes with an eviction notice. This procedure has raised much debate on section 66(1) in legal circles and in the media, both here and in South Africa.

Clearly, when the messenger of the court follows the procedure under section 66 of the Act, there is no miscarriage of justice as such, since the Act provides for such a procedure and section 66 does not provide that the respondent/debtor should be put on notice; in fact, it provides for the opposite. It should be mentioned at this juncture that section 66(1) was amended by section 16 of Act 40 of 1952,[11] and substituted by section 3(1) of Act 63 of 1976.[12] All this was done before Namibia's independence in 1990, i.e. before the Constitution came into force. Now that there is a Constitution with both substantive and procedural rights entrenched in it, can one say that section 66 creates a fair procedure, hence passes constitutional muster? This issue brings to the fore Article 18 of the Constitution and its jurisprudential foundation, which are constituted by the two basic tenets of the concept of fair hearing, to wit: audi alteram partem[13] and nemo judex in causa sua.[14] Article 18 provides as follows:

> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

This provision encapsulates the two basic rules of natural justice set out earlier. Arguably, therefore, where an order is made against a party who was not informed or given notice of the suit or proceeding, and was therefore not given an opportunity to be heard, the party has been denied fair hearing and the denial amounts to a violation of Article 18 of the Constitution. The audi rule enshrined in Article 18 is a universal principle and is part of the

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[11] Magistrates' Courts Amendment Act, 1952 (No. 40 of 1952).

[12] Magistrates' Courts Amendment Act, 1976 (No. 63 of 1976).

[13] "Hear both sides [in a dispute]".

[14] "No man shall be a judge in his own case".

rules of natural justice that are deeply entrenched in Namibia's statutory and common law. In essence, the audi rule calls for the hearing of the other party's side of the story before a decision can be taken which may prejudicially affect such party's rights or interests or property. Historically, the audi rule is part of Namibia's administrative law and, as a general rule, has no application to private contracts.[15] It applies to attachments in so far as the messenger of the court is an administrative official subject to the imperatives of Article 18.

In *Administrator, Transvaal & Others v Traub & Others*,[16] Corbett CJ cautioned against the danger of freely applying the doctrine in determining whether or not procedural fairness required a pre-decision hearing. The Chief Justice added the following:[17]

> There are many cases where one can visualise in this sphere – and for reasons which I shall later elaborate I think that the present is one of them – where an adherence to the formula of "liberty, property and existing rights" would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected … A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority …

Therefore, even if one may argue that that the principles in Article 18 do not apply to attachment and sale in execution processes, the common law dictates that they ought to.[18] In this light, a hearing can only be *fair* when all parties to the dispute are given a hearing or the opportunity of one. If one of the parties is refused a hearing or not given an opportunity to be heard, the hearing cannot qualify as *fair*.[19] Without a fair hearing, the principles of

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[15] See *Embling v The Head Master, St Andrew's College (Grahamstown) & Another* (1991) 12 ILJ 277 (E); *Damsell v Southern Life Association Ltd* (1992) 13 ILJ 848 (C) at 859E–H; *Sibanyoni & Others v University of Fort Hare* 1985 (1) SA 19 (CK); *Mkhize v Rector, University of Zululand & Another* 1986 (1) SA 901 (D) at 904F. However, there is one exception to the general rule that the audi rule does not apply to private contacts, namely where a private contract contains a provision which either expressly or by necessary implication incorporates the right to be heard; see *Lace v Diack & Others* (1992) 13 ILJ 860 (W); *Lamprecht & Another v McNellie* 1994 (3) SA 665 (A) at 668B–J*; Moyo & Others v Administrator of the Transvaal & Another* (1988) 9 ILJ 372 (W) at 384E–J.

[16] 1989 (4) SA 731.

[17] (ibid.:761E–G).

[18] See *Ndulue v Ibezim*; *OTAPO v Sunmonu* (1987) 2 NWLR (pt 58) 587.

[19] (ibid.).

natural justice are abandoned; and without the guiding principles of natural justice, the concept of the rule of law cannot be established and grow in the society. Hence, in this light, section 66 propagates the rule of man, uncertainty and whimsicality.

The attachment and sale of property on an ex-parte basis, i.e. without putting the other party on notice or giving that party the opportunity of being heard, is intrinsically unconstitutional, therefore. However, circumstances do arise in which courts can legitimately make ex-parte orders, namely when –[20]

- from the nature of the application, the interest of the adverse party will not be affected, and
- time is of the essence in the application.

The attachment and sale of immovable property does not seem to fall into any of these exceptions.

In the circumstances of the above analysis, therefore, the entire proceedings under section 66(1) add up to a breach of the audi alteram partem rule, which in turn constitutes a breach of Article 18. Under Article 18, the procedural aspects of civil rights – including the right to property – are protected; thus, the Article sends the message that no court ought to deprive any party of property without putting the party on notice. This has not been said by any court in Namibia to date.

Nigeria offers an example to follow in this regard. In the case of *Prince Fred Obinabo v Lady Olayinka Obayele & Others*,[21] Nigeria's Court of Appeal declared a sale in execution unconstitutional and in violation of the audi alteram partem rule because its attachment and sale had been done without the knowledge of the judgement debtor.

In more detail and for more clarity, the appellants in *Prince Fred Obinabo* case were judgment debtors against the second respondent. The second respondent had levied execution against the appellants and had, in the process, caused the property to be sold by public auction to the first respondent. With the sale, title to the property became vested in the first respondent, but possession remained with the second appellant. To recover possession, therefore, the first respondent approached the Lagos State High Court pursuant to S.51 of the Sheriff and Civil Process Act, and her application was granted. Thus, it was the

[20] See *Bayero v FMBN* (1998) 2 NWLR (pt 538) 509.

[21] Unreported Appeal case number CA/L/450/03.

procedure for the grant of this application that was being challenged. Similar facts are found in the case of *Leed O Presidential Motel v BON Ltd*.[22]

As stated earlier, ex-parte applications are intrinsically unconstitutional – let alone the clerk of the court's decision based solely on the messenger of the court's report or the nulla bona return. Indeed, the clerk of the court's decision, effected without putting the appellants on notice, violates the principles of fair hearing and is in breach of the audi alteram partem rule and Article 18 of the Constitution.

Section 66(1)(a) v substantive rights under the Namibian Constitution

It may be stupendous argument that the provisions of section 66(1) violate the right to housing under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the right to property in general, as blanketed under Article 16 of the Namibian Constitution. Namibia is a state party to the ICESCR; and although the right to adequate housing is not explicitly protected under the Constitution, the right to property is. Also, the Namibian Constitution was recently described as "an international law friendly constitution"[23] since, in terms of its Article 144, international law that meets the conditions in the Article is part of Namibian law – including the ICESCR. Article 11(1) of the ICESCR, which is binding on Namibia, states the following:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The fact that the Constitution is silent on the specifics of the right to housing should not detract us from this argument. Since Namibia's Supreme Law is "friendly" to international law, combined with the superior courts' already "extensive jurisdiction"[24] in common law, how the interpretation or formulation of the right to housing in Namibian law is determined should

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[22] (1998) 10 NWLR (pt.570) 353.

[23] See *S v Mwinga* 1995 NR 166 (SC).

[24] See the description of the jurisdiction of Namibian superior courts in the *Mwinga* case.

not be based on "definitional obsessions and technical formulations,"[25] but should, according to the *Mwinga* case, keep in step with the other common law Commonwealth countries such as Canada, England and South Africa. In terms of the right to housing, both the State and private parties have a duty not to interfere unjustifiably with any person's existing access to adequate housing. Therefore, it is legally supportable that section 66(1) of the Magistrates' Courts Act is unconstitutional to the extent of its overbreadth in that it allows a person's right to have access to adequate housing to be removed – even in circumstances where it is unjustifiable. This is particularly so in the circumstances of the analysis at hand.

In addition, and reinforcing the above argument, the practice under section 66 of the Act – a practice that involves State organs – is in gross violation of Article 95(b) and (e) of the Constitution, which imposes an obligation on the State to –

> … actively promote and maintain the welfare of the people of Namibia by adopting, *inter alia*, policies aimed at the following:
>
> (b) enactment of legislation to ensure that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced tby economic necessity to enter vocations unsuited to their age and strength; [and]
>
> (e) ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law; ...

True, Government efforts to implement and realise the State policies contained in Chapter 11 of the Constitution, as well as any other programmes put in place to do so, are rendered null and void, and hampered by the application of the impugned provision in the Magistrates' Courts Act. Notwithstanding that the right to housing is not justiciable in Namibian courts, it is worth noting that Namibia is expected to honour its obligations as contained in the ICESCR. One of the main obligations imposed by the ICESCR on member states is –[26]

> … to take steps … to the maximum of their available resources, with a view to achieving progressively the full realization of the rights by all appropriate means, including particularly the adoption of legislative measures.

The above provision, Article 2(1) of the ICESCR, has been interpreted as imposing an obligation on member states to move as expeditiously and effectively as possible towards realising the rights contained in it, one of which is the right to housing. Namibia's obligations

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[25] *Mwinga* case.

[26] Article 2(1) of the ICESCR.

under the ICESCR do not end with the duty to refrain from interference with the enjoyment of the right to housing. In addition, as a state party to the ICESCR, Namibia is expected to take positive steps directed towards fulfilling the right to housing. The positive component of this right requires two forms of actions from Namibia. Firstly, in accordance with Article 2(1) cited above, Namibia is obliged to adopt "legislative measures", that is, to create a legal framework that grants Namibian citizens and residents the legal status, rights and privileges that would enable them to pursue their right to housing. Secondly, Namibia is required to implement various other measures and programmes designed to assist individuals in realising the right in question.[27]

Violation of constitutional rights: decoding international laws

Violation of the right to housing or property in general

With the freedom to go in search of authority from outside Namibia, as recommended by the Supreme Court in the *Mwinga* case, it is notable that a comparative study of the constitutional law of other countries is always helpful. Indeed, in matters concerning the interpretation of fundamental rights and freedoms, this has more or less become the norm, bearing in mind the almost universal application of those rights with more or less the same content. Also notably, however, there are clear differences between the various constitutional instruments and backgrounds to the force of international instruments in various countries; and for such a comparative study as the one presented below to be of any real value, due cognisance will need be given to these differences when analysing the applicability of these principles to Namibia.

In South Africa, the Constitutional Court decided this matter from a constitutional and international law standpoint under section 26 of the South African Constitution, which is inspired by Article 11 of the ICESCR.[28] In consequence of the Constitutional Court judgment in *Maggie Jaftha v Stephanus Schoeman & Others, Christina van Rooyen v Jacobus Stoltz & Others*,[29] the court held that that the sale in execution had been invalid as the warrant of execution pursuant to which the sale had taken place had been issued by the clerk of the

[27] See United Nations Committee on Economic, Social and Cultural Rights. 1994. *General Comment 3. The nature of States Parties' obligations.* UN Doc. HRI/Gen 1/Rev 1 at 45 (1994), paragraph 4.

[28] The same inspiration is not found in the Namibian Constitution.

[29] 2005 (2) SA 140 (CC).

magistrate's court, without judicial supervision.[30] The issue which was considered in this case was whether section 66, being a piece of legislation which permitted the sale in execution of people's homes because they had not paid their debts, thereby removing their security of tenure, violated the right to have access to adequate housing, as protected in section 26 of the South African Constitution.

In its consideration of this issue, the Constitutional Court declared section 66(1)(a) of the Act[31] to be "unconstitutional and invalid" in that it failed to provide for judicial oversight over sales in execution of the immovable property of judgment debtors. In her judgment, Mokgoro J, writing for a unanimous court, held that the section constituted an unreasonable and unjustifiable limitation of the fundamental right of access to adequate housing protected by section 26(1) of the South African Constitution:[32]

> I have held that s 66(1)*(a)* of the Act is over-broad and constitutes a violation of s 26(1) of the Constitution to the extent that it allows execution against the homes[33] of indigent debtors, where they lose their security of tenure. I have held further that s 66(1)*(a)* is not justifiable and cannot be saved to the extent that it allows for such executions where no countervailing considerations in favour of the creditor justify the sales in execution.

In order to remedy this constitutional defect, the court ordered that section 66(1)(a) be amended by a 'reading in' of the words underlined below:[34]

> Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then *a court, after consideration of all relevant circumstances,*

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[30] As amended by a 'reading in' of certain words by the Constitutional Court.

[31] As it currently still reads in the Namibian Act.

[32] *Jaftha* case, paragraph 52; see also paragraphs 39–44.

[33] In this regard, see *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) paragraph 22; *Nedbank Ltd v Mashiya & Another* 2006 (4) SA 422 (T) paragraphs 10–11; *Standard Bank of South Africa Ltd v Saunderson & Others* 2006 (2) SA 264 (SCA) paragraphs 15–17.

[34] *Jaftha* case, paragraph 67.

> *may order execution* against the immovable property of the party against whom such judgment has been given or such order has been made. [Emphasis added]

Zondi AJ[35] held that the declaration of invalidity of s 66(1)*(a)* by the Constitutional Court applied retrospectively and that, accordingly, a warrant of execution obtained prior to *Jaftha* without judicial oversight and, thus, in violation of the law laid down in that case – without the court making any order limiting the retrospective effect of its declaration of invalidity[36] – was invalid. The learned Acting Judge held further that it was clear the warrant of execution pursuant to which the property was sold in execution had been issued by the clerk of the court without judicial supervision and was, therefore, invalid.

As regards the question of the implications of these findings for a bona fide purchaser of property pursuant to such an invalid sale in execution, the Cape High Court in *Schloss*[37] emphasised that any exercise of public power had to be carried out in terms of a valid rule of law. The court approved of McCall AJ's finding in the *Joosub* case[38] to the effect that, where there was no sale in execution or where the sale in execution which was purported to have taken place was a nullity, then it could not have served to pass any title to the property concerned to the purchaser or to any successor in title into whose name the property was subsequently transferred:[39]

> [T]he plaintiff [the judgment debtor], as owner of the property, would be entitled to recover the [property] by way of a *rei vindicatio*.

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[35] Following the judgment of Davis J in *Reshat Schloss v Gordon Taramathi & Others*, Case No. 2657/2005, unreported judgment of the Cape High Court dated 10 October 2005.

[36] *Ex Parte Women's Legal Centre: In Re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) paragraphs 11–13.

[37] *Reshat Schloss v Gordon Taramathi & Others*, Case No. 2657/2005, unreported judgment of the Cape High Court dated 10 October 2005.

[38] *Molelengoabe v Joosub* (Unreported case number CIV\T\252\92) Lesotho Court of Appeal, decided on 3 February 1995.

[39] *Joosub* has been followed in the High Court context in a number of cases; see e.g. *Sowden v Absa Bank Ltd & Others* 1996 (3) SA 814 (W) at 821H–I; *Kaleni v Transkei Development Corporation & Others* 1997 (4) SA 789 (TkS) at 792D–H; *Rasi v Madaza & Another* [2001] 1 All SA 498 (Tk) at 510G–J. See also *Van der Walt v Kolektor (Edms) Bpk & Andere* 1989 (4) SA 690 (T) at 696H–697D, and the criticism of this case by Davis J in *Standard Bank of South Africa Ltd v Prinsloo & Another (Prinsloo & Another Intervening)* 2000 (3) SA 576 (C) at 586F–H.

This means that all properties which have been sold in execution in Namibia under the section can be vindicated if challenged in court because no genuine title ever passed to those who 'bought' the properties.

Furthermore, in the case of *Menqa & Another v Markom & Others*,[40] the Supreme Court of Appeal in South Africa declared the warrant of execution issued under section 66 of the Act as it currently reads in Namibia as invalid, as it was issued without the judicial oversight required by the Constitutional Court in the *Jaftha* case, and the absence of this procedural safeguard imperilled the debtors' rights to housing. The sale in execution to the purchaser was declared invalid for the same reason. On appeal, the purchaser wanted to use the provisions of section 70 of the Act to justify why he should proceed with acquiring the house he had bought. The Supreme Court of Appeal agreed with the High Court that, if one were to hold that the provisions of section 70 of the Act rendered such a sale in execution unimpeachable, this would indeed "defeat the whole purpose of the Constitutional Court ruling in the *Jaftha* case".[41]

It was held in the *Menqa* case that the absence of judicial supervision in the execution of property under section 66(1) imperilled the respondent's constitutional rights under section 26(1) of the South African Constitution, and rendered the sale to Menqa, the first applicant, invalid. The court quoted from the case of *Sookdeyi & Others v Sahadeo & Others*,[42] where Van Heerden JA said that to hold that the provisions of section 70 of the Magistrates' Courts Act rendered such a sale unimpeachable would defeat the purpose of the constitutional ruling in *Jaftha*. In a minority judgment in the *Jaftha* case, Cloete JA, with whom Scott JA concurred, agreed with these findings of the majority, but considered it desirable to analyse the meaning of s 70 and provide a rational basis for its interpretation. Having referred to Roman–Dutch law authors, Cloete JA disagreed with the passage in the *Sookdeyi* case where Van Den Heever JA, in respect of section 70, stated that –

> … had the section not contained the words "in good faith and without notice of any defect", a sale in execution by the messenger would after delivery or transfer have been absolutely unassailable.

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[40] 2008 (2) SA 120 (SCA); [2008] 2 All SA 235 (SCA).

[41] *Jaftha* case.

[42] 1952 (4) SA 568 (A) at 572D–E.

This being so, it followed that the sale could not in these circumstances be 'saved' by an application of section 70 of the Magistrates' Courts Act.[43]

Against the above backdrop, it must be emphasised that the sale of property under a defective procedure in section 66(1) of the Act contravenes Article 8 of the Constitution. In this light, Article 8 needs to be seen as making that decisive break from ill-treatment in the past. As held in the *Jaftha* case, where section 66 was declared unconstitutional, the indignity suffered as a result of eviction from homes, forced removal and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the State strives to provide access to adequate housing for all and, where it exists, refrain from permitting people to be removed without justification.

Violation of the right to dignity

The Namibian Constitution provides for the right to dignity in Article 8, which addresses respect for human dignity. However, it is inconceivable to some how this right could be breached by section 66 of the Magistrates' Courts Act. South African judgements can guide us here in seeing the link or interface between first-generation rights, which include the right to dignity and second-generation rights, which include the right to housing. In fact, the interconnectedness and interdependence between socio-economic rights, on the one hand, and civil and political rights, on the other, were recognised by the drafters of the ICESCR.[44] In addition, some judicial pronouncements have taken cognisance of these close

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[43] The grounds on which the warrant and the subsequent sale in execution were invalid in this case render it unnecessary to consider the correctness of the analysis by Van den Heever JA in two earlier Constitutional Court decisions, namely on the Roman–Dutch authorities in respect of the qualified inviolability (in Namibia's common law) of sales in execution, and the relationship between the common law position and section 70 of the Magistrates' Courts Act; see *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683F–684H, and *Sookdeyi & Others v Sahadeo & Others* 1952 (4) SA 568 (A) at 571G–572G. See also *Gibson NO v Iscor Housing Utility Co. Ltd & Others* 1963 (3) SA 783 (T) at 786G–787A; *Van der Walt*, at 696B–F; *Joosub*, especially at 672C–F, 674G–677H and 679D–681H; *Jones & Others v Trust Bank of Africa Ltd & Others* 1993 (4) SA 415 (C) at 419G–420D.

[44] In this regard, the Preamble to the ICESCR reads as follows: "... the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights".

relationships between the two types of rights.[45] In *Government of the Republic of South Africa & Others v Grootboom & Others*,[46] the court put it as follows:

> The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen.

Therefore, it should be noted that an analysis of the issues, including second-generation rights, brings one to the controversy of intersecting rights – socio-economic rights and the founding values of human dignity, equality and freedom – which reinforce one another at the point of intersection.[47] The South African Constitutional Court has made it clear that any claim based on socio-economic rights must necessarily engage the right to dignity. Many in Namibia suffer a lack of adequate food, housing and health care, which is a blight on their dignity. Therefore, the right to dignity can easily be read into Article 8(2)(b) of the Constitution, which states the following:

> No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

There is no doubt that homeowners whose houses are sold in execution by virtue of section 66(1)(a) of the Magistrates' Courts Act in order to settle debts owed by them to municipalities or town councils are exposed to unbearable and inhuman living conditions as homeless

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[45] See e.g. *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) paragraph 23: "All the rights [both civil and political as well as socio- economic and cultural] as encapsulated in our Bill of Rights are inter-related and mutually supporting …".

[46] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paragraph 83.

[47] Mapaure, C. 2009. "Child labour: A universal problem from a Namibian perspective". In Ruppel, OC (Ed.). 2009. *Children's rights in Namibia*. Windhoek: Macmillan Education Namibia.

persons. Each time an applicant approaches the courts claiming that his/her socio-economic rights have been infringed, the right to dignity is invariably implicated.[48] Therefore, guidance may be sought from international instruments that have considered the meaning of adequate housing.

In its General Comment 4, the Committee, giving content to Article 11(1) of the ICESCR, emphasised the need not to give the right to housing a restrictive interpretation, but rather to see it as "the right to live somewhere in security, peace and dignity".[49] The Committee's position reflects the view adopted by the Constitutional Court in *Grootboom*, namely that the right to dignity is inherently linked with socio-economic rights.[50] The court put it as follows:[51]

> The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.

For the purposes of this case, it is important to point to the Committee's recognition that the concept of adequacy was particularly significant in relation to the right to housing.[52] While acknowledging that adequacy "is determined in part by social, economic, cultural, climatic, ecological and other factors", the Committee identified "certain aspects of the right that must be taken into account for this purpose in any particular context".[53] Of relevance is the focus on security of tenure. The Committee points out that security of tenure takes many forms and does not only involve ownership, but that –[54]

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[48] (ibid.).

[49] The Right to Adequate Housing (Article 11(1)), UNCESCR General Comment 4 (1991) 13 December 1991 E/1992/23 at paragraph 7.

[50] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paragraph 83.

[51] (ibid.:paragraph 24).

[52] The Right to Adequate Housing (Article 11(1)), UNCESCR General Comment 4 (1991) 13 December 1991 E/1992/23 at paragraphs 7–8.

[53] (ibid.).

[54] (ibid.).

> … all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.

This is a broad interpretation of Article 11(1) of the ICESCR, which definitely includes the right not to be deprived of housing through the arbitrary and unconstitutional procedure provided for under section 66(1) of the Magistrates' Courts Act.

In the *Jaftha* case,[55] it was said that the situation under apartheid demonstrated the extent to which access to adequate housing was linked to dignity and self-worth – and Namibia was not excepted. Not only did section 66 of the Act permit the summary eviction of people from their land and homes which, in many cases, they had occupied for an extremely long time, but it also branded as criminal anyone who was deemed to be occupying land in contravention of that section.[56] In this sense, as the Constitutional Court reasoned in the *Jaftha* case, a person is made to suffer a double indignity: the loss of one's home, and the stigma that attaches to criminal sanction. In this light, section 66(1), as it continues to exist in the Namibian statute books, still carries this stigma and has to be jettisoned. In the *Jaftha* case, the appellants appealed against the judgment of the Cape High Court for the sale in execution of houses to settle outstanding debts. The issue was whether a law which permitted the sale in execution of people's homes because they had not paid their debts, thereby removing their security of tenure, violated the access to adequate housing protected by and provided for in section 26 of the South African Constitution.

The Constitutional Court of South Africa, in a unanimous decision, stated the following:[57]

> Any claim based on socio-economic rights must necessarily engage the right to dignity. The lack of adequate food, housing and health care is the unfortunate lot of too many people in this country and is a blight on their dignity …

The Court further held that –[58]

> … [s]ection 66(1)(a) is so broad that it permits sales in execution to occur without judicial intervention and even where they are unjustifiable. The fact that a permissive measure which must be invoked by the debtor exists does not change the potentially unjustified executions

[55] 2005 (2) SA 140 (CC).

[56] See O'Regan *supra.*

[57] Paragraph 21.

[58] Paragraph 48.

> that may occur when the process envisaged by section 66(1)(a) is initiated by creditors. So long as the possibility exists within the legislative scheme for sales in execution to occur in circumstances where the debtors' rights have been unjustifiably violated, the scheme is overbroad.

Consequently, the Honourable Court held that section 66(1)(a) was unconstitutional to the extent that it allowed for sales in execution in unjustifiable circumstances and without judicial intervention, and that the most appropriate way to remedy this overbreadth was to provide for judicial oversight at the point of sale in execution against immovable property.

The Court held that the appropriate way to remedy the lack of judicial oversight over the process was to amend the impugned section by the addition of the phrase "a court, after consideration of all relevant circumstances, may order execution", so that it applied to sales in execution over immovable property where insufficient movables had been found to satisfy the judgment or order. Subsequent judicial decisions in South Africa have upheld the ruling in the *Jaftha* case.

Clearly, the judgments of the Constitutional Court of South Africa are not binding in Namibia, but they have persuasive authority in our jurisdiction. It is also important to note that the objectives of the Bill of Rights in the Constitution of the Republic of Namibia and that of the Republic of South Africa are principally aimed at protecting the fundamental human rights of indigenous peoples who suffered humiliation and oppression under the apartheid system.

The way forward: An amendment to section 66(1)?

The constitutional position in clear: section 66(1)(a) was enacted by the South African apartheid regime, but, in terms of Article 140(1) of the Namibian Constitution, the offending section remains in force until repealed or declared unconstitutional. To date, the section has not been repealed, nor has it been declared unconstitutional – hence this enquiry. After the establishment of the new constitutional order in Namibia, the higher courts, which are no longer hamstrung by the distorted version of parliamentary sovereignty that colonial and apartheid regimes pursued till the demise of those systems, introduced a system of constitutional supremacy, where all laws – whether made before or after the Constitution itself – are inferior to it if found to be inconsistent with it. Thus, Article 25 of the Constitution permits the courts to strike down any law as unconstitutional, or Parliament can amend such law.

Therefore, it is recommended that section 66(1) be repealed by an amendment to the Magistrates' Courts Act. The amendment should include the due process provisions which respect the fundamental principles of fairness in the attachment and sale of property, as well as the right to property and adequate housing.

The above holds in so far as we consider that the classic formulation of the audi encompasses not only existing rights, but also the property of an individual when it is prejudicially affected by a public official's decision. The word *property* would ordinarily tend to connote something which is the subject of ownership. It can also be said, however, that the concept of *property* to which the audi rule relates is wide enough to comprehend economic loss consequent upon the attachment and sale of property in execution. The immediate financial consequences of the loss of property owing to debts are very distressing; hence, there is a need to reform the law.

Thus, it is recommended, as was done in the *Jaftha* case, that the Magistrates' Courts Act be amended to include a provision which allows for judiciary oversight on sales in execution of property. Judicial oversight in this regard, if provided for in the Act, will permit a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order an execution. The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on sections 62 and 73 of the Act is that the former takes place invariably without being prompted by the debtor. Even if the process of execution results from a default judgment, the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sales in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act.

The Constitutional Court in the *Jaftha* case commented that it would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, the court provided some guidelines to follow in similar cases, and stated that if the procedure prescribed by the rules was not complied with, a sale in execution could not be authorised.

When it comes to what can be recommended, the *Jaftha* case is very informative to Namibian legislators, courts and law reformers. In this case it was stated that if there are other reasonable ways in which the debt can be paid, an order permitting a sale in execution will ordinarily be undesirable.[59] This is an acceptable position, since some homeowners have

[59] See *Jaftha* case, paragraph 56.

lost their property due to debts amounting to a paltry N$168. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is a trifling amount and insignificant to the judgment creditor – in our cases, municipalities and/or town councils.[60]

Therefore, if the requirements of the rules have been complied with and if there is no other reasonable way by which a debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of such sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family homeless. As was held in the *Jaftha* case, this is why the size of the debt is relevant for the court to consider; but, at the same time, it may be difficult to conclude that a debt is insignificant. In this regard, it is also important to bear in mind that there is a widely recognised legal and social value that needs to be acknowledged as regards debtors meeting the debts that they incur. As per the South African Constitutional Court precedent, this procedure would be fair, and would allow the realisation of the right to housing and property in general, for which the Namibian populace have yearned for so long.

[60] See Maletsky (2004); in some cases the houses were sold to rich individuals for meagre amounts.

N v UK: No duty to rescue the nearby needy?

Virginia Mantouvalou*

What duties do we owe a fellow citizen who faces severe suffering and death due to a life-threatening illness? Do we have any similar obligation towards a foreigner living in a remote country who suffers from such a condition? And would the answer to this latter question differ if the distant needy happened to be within our borders? This complex moral question was explored in a judgment of the Grand Chamber of the European Court of Human Rights (ECtHR), namely in *N v UK*,[1] which involved the issue of whether the removal from the United Kingdom (UK) of a Ugandan HIV-positive[2] asylum seeker would violate the European Convention on Human Rights (ECHR or *Convention*). The case split the 17-judge Grand Chamber, with the majority rejecting the applicant's claim to stay in the UK, with dissenting Judges Bonello, Spielmann and Tulkens arguing that her deportation would breach the ECHR.

The present article presents the judgment and identifies its key principles. It scrutinises the reasoning of the majority of the ECtHR, which held that returning the seriously ill applicant to her home country – which would have put her at a high risk of severe suffering and death – would not constitute inhuman and degrading treatment. The Court put emphasis, first, on the fact that Ms N's plight would stem from natural causes and not from human action, and second, on the idea that the Convention was not primarily concerned with wrongs resulting from socio-economic deprivation. This article suggests that both statements are misleading, for in exploring whether the applicant's situation was so extreme as to warrant her protection under the ECHR, the court misplaced its focus. I then propose an alternative principle that was at issue here – the duty to rescue the nearby needy – and set out the criteria grounding State responsibility under the ECHR. What emerges, in my view and in the opinion of the dissenting judges, is that the real reason that led the majority to conclude that there was no violation of the ECHR was based on consequentialist considerations, usually labelled as a 'floodgates argument', which I explore. Yet this argument was neither explicitly articulated,

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[1] *N v UK*, App. No. 26565/05, Grand Chamber judgment of 27 May 2008, hereinafter cited as *N*.

[2] Human immunodeficiency virus.

nor closely scrutinised in the reasoning. The final part of the article discusses the implications of the judgment in *N v UK* for medical asylum applications.

Background

Ms N was a Ugandan national born in 1974. She arrived in the UK in 1998, and was diagnosed as HIV-positive upon arrival. She submitted an application for asylum, alleging that, should she be returned to her home country, the National Resistance Movement would imperil her life and bodily integrity. She also argued that returning her to Uganda would breach Article 3 of the Convention, because the country did not have the necessary infrastructure for her disease to be treated. Article 3 provides as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

While her asylum application was pending, she developed further HIV-related illnesses, but her condition was stabilised with medical treatment. A physician prepared a report on her medical condition in 2001, stating that –[3]

> … without continuing regular antiretroviral treatment to improve and maintain her CD4 count, and monitoring to ensure that the correct combination of drugs was used, the applicant's life expectancy would be less than one year, due to the disseminated Kaposi's sarcoma and the risk of infections.

As regards the question of whether the treatment would be available in Uganda, the report suggested that it existed, "but only at considerable expense, and in limited supply in the applicant's home town of Masaka",[4] and added that "there was no provision for publicly funded blood monitoring, basic nursing care, social security, food or housing".[5]

The asylum claim failed in domestic proceedings. The Court of Appeal held by majority that Ms N would not face extreme circumstances violating the Convention if she were made to return to her home country, and the House of Lords unanimously rejected the complaint.[6] This situation would only be covered by the ECHR if it satisfied the test of "exceptional

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[3] *N* at 12.

[4] (ibid.).

[5] (ibid.).

[6] *N (FC)* (Appellant) *v Secretary of State for the Home Department* (Respondent) (2005) UKHL 31, on appeal from (2003) EWCA, Civ. 1369, hereinafter cited as *N* (House of Lords).

circumstances" that the ECtHR had developed in relevant case law – a condition that was not met. No "compelling humanitarian grounds" were said to demand that she be allowed to stay in the UK – a condition that would only have been held to apply had her illness reached a terminal stage. Before the ECtHR, Ms N claimed that removing her from the UK to Uganda would lead to her intense suffering and early death, because of the lack of adequate medical treatment for her illness, which lack in turn was due to the socio-economic conditions prevailing in Uganda. She alleged that her situation would amount to inhuman and degrading treatment, in contravention of Article 3 of the ECHR. The majority of the ECtHR rejected her claim, ruling that returning her to Uganda would not violate the Convention. The court held that, although States had the right to control entry and removal of non-nationals, there might be certain limitations to this power if the applicant faced a high risk of being subjected to inhuman treatment by the authorities of the receiving State or non-State bodies while the receiving authorities were unable to act so as to protect her from these non-State bodies.

The court accepted that medical asylum applications could also, in principle, give rise to a breach of the Convention. However, the circumstances in such claims have to be exceptional for the ECHR to be violated. The principle that the conditions have to be extreme and that the applicant has to be close to death so as to enjoy the protection of the Convention was said to be supported by two considerations:

- In medical asylum cases, the applicant's suffering in the receiving country would stem from a naturally occurring illness and not from human action, and
- The Convention was primarily adopted to safeguard civil and political rights, and does not impose a duty to alleviate poverty in developing countries.

In the present case, Ms N was not held to face circumstances that would violate Article 3. She was fit to travel; she might have access to medical treatment in Uganda – albeit at a considerable cost and not in her home town; and she had some family that could look after her while her suffering lasted. For these reasons, the majority concluded that her deportation would be compatible with the ECHR.

Human rights and immigration policy

Human rights scholars and activists received the N judgment with disappointment.[7] Was this reaction justified or was the reasoning of the Court correct? That States have the power to control who enters their territory, that they can plan and implement their own immigration policy, is a principle generally accepted in international law, in academic literature[8] and in the case law of the ECtHR.[9] Yet human rights law has, over the years, set substantive limitations on this discretion, which are supplementary to the protection recognised by refugee law. Deportation, extradition or expulsion is contrary to State obligations under the Convention if the applicant faces a serious threat of ill-treatment upon return to his/her home country[10] – a principle that was emphatically and unanimously reiterated by the Grand Chamber of the ECtHR in the important *Saadi v Italy*,[11] which involved the return of a Tunisian national to his home country, where he would be at risk of torture. The court stated that –[12]

> … expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3.

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[7] See, for instance, Julien-Laferriere, F. 2009. "L'eloignement des etrangers malades: Faut-il preferer les realités budgetaires aux preoccupations humanitaires?". *Revue Trimestrielle des Droits de l'Homme*, 77:261. For activists' reactions, see, for instance, "Deportation from UK of refused HIV-positive asylum seeker to Uganda does not breach human rights, European Court rules"; available at http://www.aidsmap.com/en/news/F3531FE4-A8F1-401F-8299-B427A9D88DB2.asp; last accessed 7 January 2010.

[8] For an interesting collection of essays, see Schwartz, WF (Ed.). 1995. *Justice in immigration.* Cambridge: Cambridge University Press.

[9] *N* at 30.

[10] See *Soering v UK*, App. No. 14038/88, judgment of 7 July 1989 (hereafter referred to as *Soering*), and *Chahal v UK*, App. No. 22414/93, judgment of 15 November 1996. For an overview of the case law, see Blake, N. 2004. "Developments in the case law of the European Court of Human Rights". In Bogusz, B, R Cholewinski, A Cygan & E Szyszczak (Eds). *Irregular migration and human rights: Theoretical, European and international perspectives*. Leiden/Boston: Martinus Nijhoff, p 431.

[11] *Saadi v Italy*, App. No. 37201/06, judgment of 28 February 2008; referred to as *Saadi* later herein.

[12] (ibid.:125).

Generally, in Article 3 claims, in order to decide whether the alleged treatment violates the ECHR, the court considers the facts in order to establish if the suffering to which the individual has been or will be subjected reaches a certain threshold of ill-treatment, called a *minimum threshold of severity*.[13] If this is not attained, the impugned act falls outside the scope of the provision. As Article 3 contains one of the most fundamental principles in human rights law – an absolute and non-derogable right – it allows no balancing test, unlike other Convention rights.[14]

Prior to *N*, the sole example of a medical asylum application where the court found that the threshold of severity was attained was *D v UK*,[15] a decision extensively discussed in *N*.[16] The applicant there was a national of St Kitts, who had served a prison sentence for a drug-related offence in the UK. While in prison, he contracted HIV, which at the time that he completed his sentence and was due to be deported, was at a very advanced stage. Before the ECtHR he claimed that deportation to his home country would constitute inhuman and degrading treatment. The court stated that, when an individual claimed asylum for medical reasons, there was scope for Article 3 protection, but that in such a case "the Court must subject all circumstances surrounding the case to a rigorous scrutiny".[17] In *D*, the court was convinced that the conditions were "very exceptional":[18] The applicant's immune system was irreparably damaged and his life was drawing to a close; in St Kitts he had no family to look after him or any other moral or social support; and the medical treatment was inadequate. The minimum level of severity in these extreme circumstances had, therefore, been reached.

The claim in *N* was approached by the ECtHR in a manner similar to *D*, implying that both cases involved the same principles, but that perhaps a line could be drawn to separate them based on the level of the applicants' misfortune. The court suggested that, unlike Mr D, Ms N did not face an extreme degree of suffering at the time that her case was being heard: she was not close to death; she was fit and able to travel, thanks to the medical treatment that she had received; notwithstanding that it was not clear whether she would have access to

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[13] See *Ireland v UK*, App. No. 5310/71, judgment of 18 January 1978 at 162.

[14] On this see, in particular, (ibid.:130ff), cited also in the dissenting opinion at (ibid.:7).

[15] *D v UK*, App. No. 30240/96, judgment of 2 May 1997, hereinafter cited as *D*. See also *BB v France*, App. No. 30930/96, judgment of 7 September 1998, where the European Commission of Human Rights found a breach of the ECHR, but a friendly settlement was subsequently reached.

[16] *D* at 32–34.

[17] (ibid.:49).

[18] (ibid.:54).

the drugs that she needed in Uganda, she would at least have some family by her side during the time that she would be dealing with the devastating consequences of her condition. For these reasons, her plight was not very exceptional and did not reach the threshold of severity required to trigger the protection of Article 3.

While the cases *N* and *D* bear similarities, I suggest that the difference of degree in the applicants' condition leads to qualitatively distinct duties under the Convention. In *D*, the question was whether Article 3 imposed a humanitarian obligation to let someone stay in a country where the conditions might be less distressing, as the applicant's life was drawing to a close and the circumstances back home were extremely poor. Indeed, in this extreme situation, to let Mr D stay in the UK was found to be a duty imposed by the ECHR. In *N*, on the other hand, the real issue was whether the applicant's removal from the country – and the resulting high likelihood of a dramatic change from living a decent life for years to come, to a high risk of severe suffering and a much earlier death in Uganda – would constitute extremely harsh treatment, and so reach the minimum threshold of severity violating Article 3. The question, to use the words of Lord Nicholls, was whether returning Ms N to her country, which would probably have dramatic consequences equivalent "to having a life-support machine turned off",[19] would breach the Convention. The *N* case, then, did not concern the question of whether the UK had a duty to let the applicant stay to die, like in *D*, but whether it had a duty to let her stay and live a decent life. For this reason, the two cases might be distinguished and regarded as triggering different obligations – a point that will be further explored later on.

The crucial act

Before analysing further State duties under the ECHR in medical asylum cases such as *N*, we need to observe more closely the key considerations that the majority used to support their ruling. In articulating the main principles that were decisive in the judgment, emphasis was placed on a certain line that is to be drawn between medical asylum cases, such as *N* and *D*, and other extradition or expulsion cases, such as *Saadi*. The difference between the two lines of cases, in terms of this view, rests on the fact that, in the former, –[20]

[19] Lord Nicholls, *N* (House of Lords) at 4.

[20] *N* at 43.

> … the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

Is it correct to place our attention on the source of suffering following the return of the applicant to her home country? Is this the crucial situation that gives rise to a breach of Article 3? This might be pertinent if we were looking at States' obligations towards the distant needy.[21] However, if we are looking at the obligations of the authorities that seek to return an individual who is already within their borders, the crucial act does not concern the source of the suffering after that individual's return, namely some State action or omission, or some other disaster in a foreign country: the alleged violation of the Convention does not occur extraterritorially. The crucial act is that of the extradition, deportation or expulsion that has certain particular consequences – a point that was emphasised in *Saadi*:[22]

> In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment.

In *Soering*, to use another example, it was not the death row phenomenon that violated the Convention on the part of the UK – a situation in which the UK authorities were, in any case, not involved – but the decision to extradite the applicant to a country where he was at risk of facing that penalty. The active and intentional nature of the decision – and action upon that decision – to deport, extradite or expel, which has a high likelihood of severe suffering and death of the applicant as its foreseeable effect, engages State responsibility under the Convention. And it is precisely that act that should have been scrutinised in the *N* judgment.

The ECHR and socio-economic conditions: An 'integrated approach' to interpretation

In presenting the second principle deriving from past case law, the court stated that –[23]

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[21] For a discussion of the matter, see Pogge, T. 2007. "Severe poverty as a human rights violation". In Pogge, T (Ed.). *Freedom from poverty as a human right*. Oxford: Oxford University Press, pp 11, 16.

[22] *Saadi* at 126. For further support from the case law, see the dissenting opinion in *N* at 5.

[23] *N* at 44.

> [a]lthough many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights.

This statement marks a retrograde step in the protection of socio-economic aspects of the rights protected under the ECHR, a point that was emphasised in the dissenting opinion of Judges Bonello, Spielmann and Tulkens.[24]

The artificial dichotomy created between civil and political rights, on the one hand, and socio-economic rights, on the other, has been challenged over the last few years in academic literature and in law in several jurisdictions. Most importantly for the present purposes, the ECtHR itself has questioned this separation. From as early as 1979 and the landmark *Airey* judgment,[25] which involved the right to be granted legal aid for the purposes of judicial separation from the applicant's husband, to decisions such as *Sidabras & Dziautas*,[26] which examined the applicants' dismissal and ban from access to public and private sector employment because of their former KGB[27] membership, the court adopted a stance that was described in the literature as an "integrated approach" to interpretation.[28] Following this interpretive method, the court argued that "there is no water-tight division"[29] separating socio-economic rights from the entitlements covered in the Convention. Civil and political rights cannot be made effective unless their socio-economic aspects are also guaranteed, while the breach of a right that would have traditionally been classified as *social* may, in certain circumstances, give rise to State responsibility under the ECHR. Adopting this interpretive method, the court has endorsed the view that civil and social rights are two sides of the same coin: social rights have moral weight similar to that of civil and political

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[24] *N*, dissenting opinion at 6.

[25] *Airey v Ireland*, App. No. 6289/73, judgment of 9 October 1979; hereafter referred to as *Airey*.

[26] *Sidabras & Dziautas v Lithuania*, App. No.'s 55480/00, 59330/00; judgment of 27 July 2004.

[27] Abbreviation of the Russian title of the Committee for State Security, the national security agency of the former Soviet Union.

[28] See Mantouvalou, V. 2005. "Work and private life: *Sidabras and Dziautas v Lithuania*". *European Law Review,* 30:573, cited in *N* by dissenting Judges Bonello, Spielmann and Tulkens at 6. For a discussion of this interpretive method in workplace rights under the Human Rights Act, 1998, see Collins, H. 2006. "The protection of civil liberties in the workplace". *Modern Law Review*, 69:619. For an overview of Strasbourg case law, see Brems, E. 2007. "Indirect protection of social rights by the European Court of Human Rights". In Barak-Erez, D & E Gross (Eds). *Exploring social rights*. Oxford: Hart, p 135.

[29] *Airey* at 26.

rights, and they may sometimes be essential conditions for the realisation of the material scope of the Convention.

Article 3 constitutes a provision that has given rise to socio-economic claims both before Strasbourg decision-making bodies and in the UK. An early example to illustrate this is *Francine van Volsem v Belgium*,[30] which involved whether cutting off or the threat of cutting off the electricity from the applicant's council flat while she was a depressive, suffering from chronic respiratory problems that made it difficult for her to find a job, and was caring for her ill grandchild constituted degrading and humiliating treatment. The Committee examining the admissibility of the case suggested that, although in principle facts such as these might have given rise to a breach of Article 3, the minimum level of severity had not been attained. The complaint was, therefore, declared inadmissible in a decision that was criticised by Antonio Cassese for not providing a sufficiently rigorous analysis to enlighten us on the exact standard of socio-economic deprivation required for Article 3 to apply.[31] In *Moldovan v Romania*,[32] the applicants' appalling living conditions, which were due to the destruction of their houses by individuals incited by the police, coupled with the authorities' racist behaviour towards them, were held to breach Article 3.

Socio-economic conditions have also given rise to complaints under the Human Rights Act, 1998, at a domestic level in the UK.[33] An interesting illustration is to be found in the *Limbuela, Tesema & Adam* judgment of the House of Lords.[34] They ruled that the decision of the Secretary of State to withdraw social support from asylum seekers – at a time when they were banned from employment and while their application for asylum was pending, for the reason that they did not apply for asylum as soon as reasonably practicable after their arrival

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[30] *Francine van Volsem v Belgium*, App. No. 14641/89, Admissibility Decision of 9 May 1990. *Droit Social*, 1999(1):88. Discussed by Pettiti, L. 1999. "Pauvreté et Convention Européenne des Droits de l'Homme". *Droit Social*, 1999(1):84.

[31] Cassese, A. 1991. "Can the notion of inhuman or degrading treatment be applied to socio-economic conditions?". *European Journal of International Law*, 2:141.

[32] *Moldovan & Others v Romania* (No. 2), App. No.'s. 41138/98, 64320/01; judgment of 12 July 2005.

[33] For a thorough analysis of the matter, see O'Cinneide, C. 2008. "A modest proposal: Destitution, State responsibility and the European Convention on Human Rights". *European Human Rights Law Review*, 583. See also Palmer, E. 2007. *Judicial review, socio-economic rights and the Human Rights Act*. Oxford: Hart.

[34] *R (on the application of Limbuela, Tesema & Adam) v Secretary of State for the Home Department* (2005) UKHL at 66.

in the country, with the effect of letting the applicants live in destitution – amounted to a violation of Article 3.

The view that there is a dividing line that separates civil and political rights from socio-economic rights has been questioned in several cases. The two sets of entitlements have been presented in jurisprudence as not only essential for individual well-being, but also as necessary conditions for the protection of the rights incorporated in the ECHR itself. Why, then, did the majority of the ECtHR decide to put forward a statement that undermines the *Airey* principle?

A duty to rescue the nearby needy

I have this far argued that the court erroneously placed its attention on the cause of suffering following Ms N's return, and suggested that the crucial act on which it should have focused was the active and intentional decision of State authorities to deport her. I also claimed that there is no sharp line separating civil and political from socio-economic rights – a position that finds support even in several ECtHR cases. In addition, I suggested that the facts in *N* might be distinguished from *D*, because the latter raises the question of recognising a right to stay when a person's life is drawing to a close, while the former involves a choice between the possibility to live a decent life, on the one hand, and deportation that has as its effect a high probability of a dramatic deterioration of life quality and expectancy, on the other. What the section that follows suggests is that *N* concerned the question whether the Convention might in certain circumstances impose on Member States a duty to rescue the nearby needy. What is the content of this duty, and could it be seen as falling within the material scope of Article 3?

When *N* was being considered by the House of Lords, Lord Nicholls stated that –[35]

> … [i]t would be strange if the humane treatment of a would-be immigrant while his immigration application is being considered were to place him in a better position for the purposes of Article 3 than a person who never reached this country at all.

I suggest, contrary to this argument, that the distinction between the needy who are distant and those who are close by is morally justifiable and legally significant.

[35] Lord Nicholls, in *N* (House of Lords) at 17.

Regarding the moral justification of the difference of treatment, it can be argued fairly that we might owe different – stronger – obligations to those who are close by, those who are members of our community, irrespective of their nationality, than to the needy who are distant. In his paper entitled "Moral closeness and the world community",[36] Richard Miller states that –[37]

> … [o]rdinary moral thinking about aid to needy strangers discriminates in favor of the political closeness of compatriots and the literal closeness of people in peril who are close at hand.

The idea of *closeness* is based on the fact that we have special relationships with several people, such as certain members of our family or friends, compatriots or others that belong to our community, which justify the intuition that we owe special duties to them. These special obligations make their partial treatment morally defensible: they explain the position that we have stronger duties to aid those who are close to us when they are in need – without foreclosing our duty to assist the distant needy too.[38] Miller described the moral principle of 'nearby rescue' as follows:[39]

> One has a duty to rescue someone encountered close by who is currently in danger of severe harm and whom one can help to rescue with means at hand, if the sacrifice of rescue does not itself involve a grave risk of harm of similar seriousness or of serious physical harm, and does not involve wrongdoing.

Although the force of the argument – that we have an obligation to save someone who is in peril and is found close to us when we can do so at minimal risk – seems compelling, it is not uncontroversial. This is because it raises issues surrounding the moral weight of the complex distinction between *action* and *omission*. To be sure, an analysis of this matter is beyond the scope of the present article, although it should be said that human rights law imposes on State authorities not only correlative duties to refrain from action, but also stringent duties to act.[40] In any case, this discussion would perhaps be pertinent if we had a different set of facts, e.g. if UK authorities witness a situation whereby a boat with illegal

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[36] Miller, R. 2004. "Moral closeness and the world community". In Chatterjee, DK (Ed.). *The ethics of assistance – Morality and the distant needy*. Cambridge: Cambridge University Press, p 101.

[37] (ibid.).

[38] On this debate, see (ibid.).

[39] (ibid.:115).

[40] See Fredman, S. 2008. *Human rights transformed – Positive rights and positive duties*. Oxford: Oxford University Press.

immigrants on board is caught in a storm and is in danger of sinking, and do not attempt to prevent the loss of human life. In cases such as *N*, though, the crucial act that raises issues under the Convention is that of deportation – positive State action, rather than inaction – so the distinction between *act* and *omission* is not pertinent.

While the duty to rescue the nearby needy appears to be a weighty moral consideration, its legal relevance might be questioned. In law, the duty to rescue perhaps first brings to mind questions regarding the commission of a crime by omission, a matter that common law and civil law countries approach differently. In continental Europe and Latin America, criminal codes or legislation frequently contain provisions dictating that one can be held liable for a crime committed by omission when one fails to rescue a person in danger, provided that assistance can be given without setting oneself or others in peril.[41] However, criminalisation of omission is controversial, and rare in common law traditions.[42]

In human rights law, the legal aspect of the duty to rescue begs two sets of observations. Firstly, the principle that there is a legal duty under the ECHR to protect life at risk from natural causes might be exemplified in cases such as *Budayeva v Russia*.[43] The ECtHR examined whether State authorities breached Article 2 (the right to life), among other provisions, by not taking the necessary steps to ensure the safety of the population from the danger of mudslides that devastated the area where they lived. The ECtHR ruled that Russia had violated the right to life. That there is a positive obligation to protect human life under the Convention in these circumstances is, therefore, not novel. It might of course be more readily accepted that not providing a foreign national with emergency medical treatment, if caught in an accident within our borders, would violate our duty to rescue the life of someone in peril. Yet – and this brings us to the second relevant consideration – the non-refoulement cases demonstrate that we may sometimes have a stringent duty to protect someone within our territory from a danger that might occur extraterritorially; this is not an obligation that we owe to remote foreigners subjected to similar suffering. The above observations suggest that the ECHR might be interpreted as incorporating a duty to rescue someone in the position of Ms N, and that different treatment of those close at hand and those that are in remote countries might be justified.

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[41] See, for instance, Article 223(2) of the French Criminal Code.

[42] For an analysis, see Murphy, L. 2001. "Beneficence, law and liberty: The case of required rescue". *Georgetown Law Journal*, 89:605.

[43] *Budayeva & Others v Russia*, App. No.'s 15339/02, 211266/02, 11673/02, 15343/02; judgment of 20 March 2008. See also *Oneryildiz v Turkey*, App. No. 48939/99, judgment of 30 November 2004.

If it is accepted that medical asylum cases can, in principle, fall within the scope of the Convention, what criteria could be used to establish that a State is responsible under Article 3? Drawing to an extent on the considerations of the court in *D*,[44] I propose that the minimum level of severity is reached if the following conditions are met:

- An individual is physically present within the territory – and, therefore, within the jurisdiction for the purposes of Article 1 of the ECHR – of a Council of Europe Member State
- S/he is in the advanced stages of a terminal and incurable illness or other medical condition of similar gravity
- There is medical treatment and support available for her illness in the Member State of the Council of Europe that can guarantee a decent way of living, albeit for a relatively short period of time, and
- His/her removal and consequent withdrawal of treatment is likely to lead to a dramatic deterioration of the individual's circumstances (in terms of significantly increased suffering and bringing on a much earlier death), either because of a lack of medical treatment for the illness in the individual's country of origin, or because the applicant would most likely lack access to such treatment due to, for example, its unaffordable cost.

The examination of the conditions in the applicant's home country should be based on various sources,[45] i.e. materials of international organisations such as the World Health Organisation; specialist bodies such as the United Nations Committee of Economic, Social and Cultural Rights; or specialist non-governmental organisations (NGOs). These have to be closely examined so as to establish whether a minimum standard of decency prevails in the receiving State.

Additional weighty considerations in the overall assessment of the case might include the length of the applicant's stay in the country; whether the State has assumed responsibility for his/her treatment during this period;[46] and the relationships that s/he has formed in the meantime – a matter that could also raise issues under the right to a private life.[47] Looking

[44] See *D* at 48–52.

[45] See, for instance, *N* at 18–19.

[46] *D* at 53.

[47] Article 8 issues were raised but rejected without analysis in *N*, a point that was criticised by Judges Bonello, Spielmann and Tulkens, at 26.

back at *N*, it should be noted that, during the years that the applicant spent in the UK, her condition had been stabilised thanks to the medical treatment she had received; she had achieved a decent standard of living and had established close ties to individuals and organisations that had supported her in dealing with her condition.[48] Her removal from the UK, on the other hand, would probably have meant a dramatic change of circumstances; antiretroviral therapy is available in Uganda only to half of those that need it,[49] so her life prospects would be "bleak"[50] and her condition "appalling";[51] and she would "suffer ill-health, discomfort, pain and death within a year or two".[52] The act of deportation, whose effect would be a high risk of a tragic deterioration of her health – her suffering and death – was the act that perhaps violated the duty of rescuing an individual in serious peril. This situation could have been found, in my view, to reach the minimum level of severity of Article 3.

Floodgates

What really led to the rejection of *N*, i.e. the real reason why the treatment was said not to reach the minimum level of severity, was not explicitly articulated in the reasoning of the majority, but was implied in the judgment when the court suggested that the Convention did not impose on Member States a duty to alleviate poverty through the provision of medical treatment to foreigners, as this would be extremely burdensome for them.[53] This point was emphasised with regret by Judges Bonello, Spielmann and Tulkens:[54]

> [T]he real concern that [the majority of the court] had in mind [was that] if the applicant were allowed to remain in the United Kingdom to benefit from the care that her survival requires, then the resources of the State would be overstretched.

A similar argument had been put forward by Lord Hope, who observed that finding a violation of Article 3 in *N* "would result in a very great and no doubt unquantifiable

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[48] *N* at 27.

[49] *N*, citing reports of the World Health Organisation, at 19.

[50] Lord Hope, *N* (House of Lords) at 20.

[51] (ibid.:3).

[52] (ibid.).

[53] *N* at 44. The same argument has been used in the past. See, for instance, *Vilvarajah & Others v UK*, App. No.'s. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87; judgment of 30 October 1991 at 105.

[54] *N*, dissenting opinion at 8.

commitment of resources".[55] Is this consideration legitimate, and if so, is it justified? The 'floodgates argument', according to which the negative consequences of an act may be so extensive as to relieve the State from a prima facie obligation that it has, ought to be regarded with great scepticism. It implies that imposing a certain Convention duty on a State would place an extensive burden – one that was perhaps impossible to bear – on its resources. The implications of accepting this argument in the present case would be that, even if Ms N had had a right to remain in the UK, and even if the UK had a duty not to deport her, it might have been relieved from this correlative duty had there been concrete evidence that the decision would lead to waves of medical asylum seekers wishing to benefit from treatment available in the country. It could be said that the principle of nearby rescue, articulated above, leaves space for such considerations, when it refers to the potential disproportionate cost of the imposition of the duty. It is important to appreciate, though, that when the question is whether we have an obligation to save someone from extreme suffering and death, for the cost on us to be found disproportionate it ought to reach a similar degree of magnitude and urgency, and should involve goods as precious as health and bodily integrity.

So if the floodgates argument was indeed the reason that took priority and determined the decision of the court, it should have been clearly articulated and supported with appropriate evidence – something that we find nowhere in the decision of the majority. Interestingly, the ECtHR has in the past rejected the argument that limited resources may relieve a State from its obligations under Article 3. In a number of cases that looked at whether extremely poor prison conditions in Ukraine violated the Convention, for instance, it stated that –[56]

> … lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention.

In addition, the argument that there will be floodgates of refugees if the appropriate protection is afforded has been regarded with great scepticism in other jurisdictions. One such illustration comes from the Supreme Court of Canada, where Mahoney JA stated that –[57]

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[55] Lord Hope, *N* (House of Lords) at 53.

[56] See, among others, *Aliev v Ukraine*, App. No. 41220/97, judgment of 29 April 2003 at 151.

[57] See *Chan v Canada (Minister of Employment and Immigration)*, (1995) 3 SCR 593 at 57.

> … the possibility of a flood of refugees may be a legitimate political concern, but it is not an appropriate legal consideration. To incorporate such concerns implicitly within the Convention refugee determination process, however well meaning, unduly distorts the judicial-political relationship.

While the majority of the court did not analyse the floodgates argument, the dissenting judges who argued that it played a determinative role in the decision of the majority questioned this consequentialist consideration with compelling evidence, found in the so-called Rule 39 statistics of the court, concerning requests for interim measures in cases of asylum.[58]

And finally, scepticism towards the suggestion that a more expansive protection of refugee rights would necessarily lead to a great increase in the numbers of those seeking to make use of this protection has been expressed in academic literature, where it has been supported that there is no evidence that refugees easily flee their countries in order to enjoy some privilege in an affluent but remote State.[59]

Implications

The implications of the *N* judgment are already apparent in medical asylum applications. In Strasbourg, following *N*, approximately 30–50 similar cases were dismissed as inadmissible by a committee of three judges. Examples from the UK include *RS (Zimbabwe) v Secretary of State for the Home Department*,[60] involving a Zimbabwean national who was HIV-positive, but whose condition had been stabilised due to medical treatment. The Court of Appeal had held the case back until the ECtHR had decided *N*. Yet, following the judgment of the Grand Chamber, which it discussed in detail, it attempted to distinguish between the two situations as Ms RS, if she returned, would face hardship not only because of her illness, but also due to the oppressive policies of the Zimbabwean government. The confusion created by the distinction drawn in *N* between harm emanating from natural causes and harm provoked by human actions or omissions is evident in the opinion delivered by Lady Justice Arden, which stated that there may sometimes be a complication when both the *Saadi* and the *N* principle

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[58] *N*, dissenting opinion at 8.

[59] See Foster, M. 2007. *International refugee law and socio-economic rights*. Cambridge: Cambridge University Press, pp 344–348.

[60] *RS (Zimbabwe) v Secretary of State for the Home Department*, Court of Appeal (Civil Division), 18 July 2008, (2008) EWCA Civ 839.

are involved. As the *RS* application invoked both medical and political considerations, the Court of Appeal allowed the appeal and returned the case for consideration to the immigration tribunal.

At the same time, the increased latitude that courts now have in rejecting medical asylum cases reaches beyond applications by people suffering from HIV, and also covers other medical asylum claims. An example is the *RA (Sri Lanka) v Secretary of State for the Home Department*[61] of the Court of Appeal, where the applicant – who was mentally ill and suicidal – argued that his deportation would breach Article 3. The argument advanced by the applicant that mental illness cases should be approached differently, as the very act of deportation may have a further damaging effect on the person's health, was rejected. In doing so, the court relied on a passage from *N*, which did not distinguish between the treatment of mental and physical illnesses for the purposes of Article 3.

Conclusion

The Convention does not impose an obligation to rescue the nearby needy, held the majority of the ECtHR in *N*, even if this can be fulfilled at a minimal cost. The return of the desperate foreigner to her home country was found to be compatible with the prohibition of inhuman and degrading treatment, notwithstanding the high likelihood of the irreversible tragic effect of acute physical and psychological suffering and early death that would most probably follow. The present article suggested that the judicial reasoning in the case suffers from several shortcomings.

The most serious concern, to conclude, is that the sad effects of this judgment will not only become evident in subsequent case law, where there is a chance that authorities and courts will need to provide far less of an explanation as to their decision to leave other desperate needy unprotected. The consequences will be wider still, for the judgment of the majority of the Grand Chamber set a precedent that undermines the belief that human rights law has a role to play for those that are most in need of it. *N* constitutes a statement that the dignity of the poor and needy foreigner amongst us does not carry equal worth to ours, since we are privileged enough to live in affluent communities and are not prepared to make an effort to rescue them – even at a relatively low cost.

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[61] *RA (Sri Lanka) v Secretary of State for the Home Department*, Court of Appeal (Civil Division), 6 November 2008, (2008) EWCA Civ. 1210.

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Editor-in-Chief's postscript: *N v UK* – A lesson for southern Africa?

Mantouvalou's article does not affect Namibian or southern African law in any direct manner. For example, the ECtHR decisions do not fall within the ambit of Article 144[62] of the Namibian Constitution, and neither do those of the British Court of Appeal. But in this instance, both judgments may have persuasive value in the ongoing 'foreigner crisis' in southern Africa, which can easily spill over into Namibia.

If the guidelines of the ECtHR and the British Court of Appeal were to be followed, one would need to decide between at least three scenarios, as follows:

1. Where the so-called nearby needy will suffer ill-treatment in the home country upon return (*Saadi v Italy*,[63] *Soering v UK*[64])
2. Where the nearby needy will suffer as a result of a condition in (or any other intervention by) the home state. This scenario can be subdivided as follows:
    2.1 Where an individual requests asylum and the envisaged inhumane and degrading treatment and conditions in his/her home country are "very exceptional", or[65]
    2.2 Where returning an individual will result in "a dramatic deterioration of life quality and expectancy",[66] but the conditions are not considered to be "very exceptional"[67], and
3. Where the expected suffering upon an individual's return to his/her home country will at least partly be the result of a politically oppressive situation.[68]

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[62] "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia".

[63] App. No. 37301/06, judgment on 28 February 2008.

[64] App No. 14038/88, judgment on 7 July 1989.

[65] *D v UK*, App. No. 30240/96, judgment on 2 May 1997.

[66] See Mantouvalou, above.

[67] *N v UK*, App. No. 26565/05, judgment on 27 May 2008.

[68] *RS (Zimbabwe) v Secretary of State for the Home Department Court of Appeal*, 18.07.2008, EWCA Civil 839.

The last-mentioned scenario is closely related to southern Africa. When it comes to refugees, the vast majority of the nearby needy are now Zimbabweans, who are knocking at the doors of their closest neighbours – Botswana, Malawi, Namibia, South Africa, and Zambia. Botswana's strong stand against the Mugabe Government does not make it a safe destination for the most vulnerable: the workers and lower-middle-class migrants from Zimbabwe.[69] While Botswana is the second most popular destination for Zimbabweans, and despite the Government there having implemented the 1951 United Nations Convention Relating to the Status of Refugees legalistically, they are deporting huge numbers who seek refuge there and they refuse medical care to any who are HIV-positive.[70]

Commenting on a recent report by the Forced Migration Studies Programme (FMSP) at the University of the Witwatersrand in South Africa, the Kenyan *Daily Nation* eloquently described the present situation of the flow of Zimbabweans in the southern African region:[71]

> The "humanitarian nature" of the mass movement of Zimbabweans to neighbouring Southern African countries has blurred the distinction between what is a "refugee" and an "economic migrant", because such people fit neither category perfectly and fall between the cracks …

The Zimbabweans that have been crossing the borders since the beginning of the political and economic crisis in their country do not fit the traditional *refugee* or *asylum seeker* definitions; indeed, most of them do not apply for refugee status or asylum, irrespective of the reason for having left their home country. There are many reasons for this, one being that Zimbabweans see their problems as temporary. Since 2007, when negotiations began between the ruling Zimbabwe African National Union – Patriotic Front (ZANU–PF) and the two branches of the opposition party, the Movement for Democratic Change (MDC), Zimbabweans have been preparing to return home. Those who are crossing their neighbours' borders to go back home do so because they do not want to be seen as victims in their host countries. Rather, having undergone possibly the best schooling in Africa, they want to contribute to their host countries. In Botswana and Namibia, Zimbabweans are

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[69] Kiwanuka, M & T Monson. 2009. *The Zimbabwean migration into southern Africa: New trends and responses.* Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand.

[70] (ibid.:48).

[71] "Zimbabwean refugees would rather operate as illegals", *Daily Nation,* Nairobi, 16 December 2009; available at www.nation.co.ke/News/africa/-/1066/823976/-/125mt4az/-/; last accessed 1 January 2010.

increasingly occupying positions in the public service; in Namibia, many are in the judiciary.[72] However, very few – if any – of these public servants see their stay in Namibia and Botswana as anything more than a temporary necessity to survive.

Since refugees in Botswana, Malawi, Namibia and Zambia are placed in refugee camps – even after refugee status has been granted – and their rights to work and move around are restricted, only desperate political refugees opt for this route. In their report on Zimbabwean migration, Kiwanuka and Monson comment that the migrants often have only one tool to survive: their ability to trade Zimbabwean-made products and, with the proceeds, buying commodities in the host country to take back to their families in Zimbabwe.[73]

Even when these migrants opt to apply for refugee status, it is extremely difficult to obtain. Mozambique, for example, is reluctant to award refugee status to opposition party members from Zimbabwe – possibly because of the close relationship it has with the ruling ZANU–PF party. Mozambique also does not recognise the category of *economic refugee*.[74]

While South Africa has granted asylum to some Zimbabweans, it is clearly a politically controversial process. The struggle of the prominent white farmer and opposition politician, Roy Bennett, to obtain asylum in South Africa is well documented. Bennett's application for asylum was initially rejected by the Refugee Status Determination Office in Pretoria, together with those of eight other applicants. The reason given for their rejection was that the Office discarded as "manifestly unfounded" the applicants' claims of human rights abuses in Zimbabwe.[75] Bennett later received asylum on appeal. Unlike other southern Africa countries, people with refugee status in South Africa are not kept in isolated camps, but are allowed to move freely and even to work.

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[72] See Kiwanuka & Monson (2009:8). In Namibia, the Director of International Relations in the Ministry of Justice and the Government Attorney are Zimbabweans, and several Zimbabweans serve as magistrates. Some respected Zimbabwean judges have also lent their value to the High Court Bench since the early 1990s.

[73] Kiwanuka & Monson (2009:38).

[74] (ibid.:14, 23, 35).

[75] "Manifestly unfounded: South Africa dismisses allegations of human rights abuses in Zimbabwe", *Business Day*; available at http://www.sokwanele.com/thisiszimbabwe/archives/405; last accessed 4 January 2009.

The Zimbabwean migration report concentrated on Botswana, Malawi, Mozambique and Zambia. Of these countries, Botswana has reportedly been the most critical of the Zimbabwean Government. While Botswana is more willing than the other reported countries to grant asylum to political refugees from Zimbabwe, the report criticises Botswana's actions in sending unsuccessful asylum applicants back to Zimbabwe – without taking the possibility of refoulement into consideration.[76]

How should the SADC region deal with these nearby needy? Given the solidarity among leaders in the SADC region, it is highly unlikely that political asylum cases will increase dramatically in the foreseeable future. With the possible exception of Botswana, while SADC leaders encourage Mugabe to reach a settlement with the opposition, they remain reluctant to criticise the Zimbabwean Government or see the crisis as the result of oppressive political actions by ZANU–PF. However, while most of Zimbabwe's neighbours have ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) as well as the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, social and economic rights are not generally treated as independent human rights.

Mantouvalou makes a legitimate and – for SADC's present dilemma – important point when she questions the validity of discerning between different sources of suffering under Article 3 of the European Convention:[77]

> Is it correct to place our attention on the source of suffering *following* the return of the applicant to her home country? Is this the crucial situation that gives rise to a breach of Article 3? This might be pertinent if we were looking at States' obligations towards the *distant* needy. However, if we are looking at the obligations of the authorities that seek to return an individual who is already within their borders, the crucial act does not concern the source of the suffering after that individual's return, namely some State action or omission, or some other disaster in a foreign country. [Emphases added]

Mantouvalou also points out the following:[78]

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[76] See Kiwanuka & Monson (2009:45, 69).

[77] See earlier in her contribution to the current volume.

[78] (ibid.).

> The artificial dichotomy created between civil and political rights, on the one hand, and socio-economic rights, on the other, has been challenged over the last few years in academic literature and in law in several jurisdictions.

The source of the Zimbabwean suffering is a bone of contention.

There is no doubt that the situation in Zimbabwe can be described as "very exceptional". How else can one understand an economic dispensation where inflation was so out of hand at one point in 2008 that hundred trillion Zimbabwe Dollar notes were being printed; where the frontrunner of the presidential elections had to withdraw from the final stage because he feared his followers would lose their lives; and where an estimated six million nationals left the country in the space of ten years? Despite the recent formation of a Government of National Unity there is still no light at the end of the tunnel. While there are goods in the major stores, the ordinary people do not have the foreign currency needed to buy them – and the Zimbabwean currency is basically worthless.

No one can doubt that, for many Zimbabweans, leaving the country is not an option. Even if SADC countries deny the political dimension of the Zimbabweans' suffering, they cannot deny the humanitarian crisis in that country.

If we attempt to place Zimbabwe in one of the categories identified by the English Court of Appeal and the ECtHR, Zimbabweans can be classified as the nearby needy in a country with exceptional circumstances. President Mugabe's sympathisers will blame the economic decay on the Western powers and their 'misplaced' opposition to Zimbabwe's land reform programme. However, the Zimbabwean opposition itself places the blame on the Government's political oppression.

As pointed out by Mantouvalou, the British courts accepted the political situation in Zimbabwe as circumstances where a "very exceptional" situation had been created or worsened by political oppression.[79]

The judgment of a British court will not impress the friends of ZANU–PF, however. For them it would simply be another manifestation of British imperialism. Nonetheless, the SADC Tribunal ruled against Zimbabwe in a groundbreaking case on Mugabe's land reform programme. While Zimbabwe's Supreme Court acknowledged the Tribunal's jurisdiction over

[79] *RS (Zimbabwe) v Secretary of State for the Home Department, Court of Appeal*.

Zimbabwe, overturning an earlier High Court judgment, the Zimbabwean Government per se denies such jurisdiction. But the fact that the Government refuses to comply with the judgment does not change its validity in terms of international law.

The economic deterioration of Zimbabwe can be ascribed to more than one issue, namely the withholding of economic aid by the European Union and the United States, and the Government's reckless land reform programme, to mention two major factors. In addition, no objective observer can deny that the opposition have been severely brutalised and oppressed, which is confirmed by the amnesty given to Roy Bennett and other opposition members by the South African Government and, to a lesser extent, by Malawi and Zambia.

Mantouvalou bemoans the emphasis on the source of suffering and the dichotomy between civil and political rights on the one hand, and social and economic rights on the other. The report on Zimbabwean migrants points at another traditional distinction that no longer helps vulnerable migrants in Africa, namely "the binary distinction between refugees and voluntary migrants":[80]

> Refugees benefit from guarantees of entry and protection under international law, while voluntary migrants – seen as synonymous with those who do not apply for asylum – are for the most part left to fend for themselves. The conditions of refugee status tend to favour applicants who have suffered clear forms of persecution in their home country, in line with the 1951 UN Convention, even though the OAU Protocol … allows scope to recognise the effects of "events seriously disturbing public order in either part or the whole of [their] country of origin or nationality".

The OAU Protocol, which has somehow been forgotten by the international world and by African leaders, goes beyond a mere classification of *migrants* as refugees and economic migrants. It invites the successor of the OAU, the African Union, to take cognisance of events seriously disturbing the public order. African leaders, if they are concerned about the movement of literally millions of fellow Africans, will have to interpret the Protocol in the broadest purposive manner possible.

The 1951 UN Convention Relating to the Status of Refugees already protects the politically persecuted refugee, while the ICESCR can protect economic refugees, as Mantouvalou

[80] Kiwanuka & Monson (2009:62ff). See also Turton (2003:12), in Kiwanuka & Monson (2009:62).

points out.[81] What is needed to take care of the vulnerable migrating Zimbabwean population is an interpretation of the OAU Protocol that will recognise the need to protect those migrating Zimbabweans (and migrating communities elsewhere) that do not fit the strict definition of a *refugee*.

Two important steps can help SADC members and other countries deal with the Zimbabwe crisis:

- Acceptance that the Zimbabweans' suffering is both a denial of their right to a dignified life in terms of the African Charter on Human and Peoples' Rights, as well as the ICESCR. Enough has been said by Mantouvalou on the issue of social rights as human rights; suffice it to say here that the lives of millions of Zimbabweans have been compromised by the country's economic failure.
- Creation of a dispensation were the nearby needy (the moving Zimbabwean population) can be cared for outside the traditional structures and understanding of *refugee* and *asylum seeker*, within the framework of the OAU Protocol.

South Africa seems to be the only country that has attempted to address the economic crisis as a human rights issue, possibly because of the recognition of social rights in its Constitution. In the rest of the SADC region, official dealings with the crisis of Zimbabwean migration are based on making a strict distinction between *political refugees* and *economic refugees*.

South Africa has also set an example by allowing Zimbabweans with refugee status to work and travel freely in the country. There is a perception that South Africa follows an unofficial policy of allowing Zimbabweans to enter the country without visas and to work without work permits. It is also possible that the flood of Zimbabweans crossing the South African border – legally and illegally – is just too huge to manage. A recent xenophobic outburst of violence against Zimbabweans in the farming community of De Doorns in the Western Cape Province is a clear indication of the problems that can be caused by the uncontrolled settlement of new workers in an established community.

While xenophobia can never be justified, the link between the unexpected action against foreigners – predominantly Zimbabweans – in 2008 and again in De Doorns in November 2009 is clear. Zimbabweans educated in the best schools in Africa and mobile enough to

[81] See contribution by Mantouvalou in the current volume.

travel to South Africa or other SADC countries compete in the labour market with semi-skilled workers.[82]

While Namibia has never officially relaxed the requirements for Zimbabweans to enter and work here, the presence of Zimbabweans in the food industry in Windhoek is an indication that Namibia's strict immigration laws are somewhat relaxed in their application to Zimbabweans.

If host countries cannot protect unofficial refugees from Zimbabwe against intimidation and xenophobic attacks, the nearby needy will receive little by way of long-term assistance or fair treatment. The report on Zimbabwean migration suggested the institution of a SADC Protocol creating protection for what could be seen as a different kind of refugee.[83] Zimbabwe has a lot to give to the SADC region with its skilled and well-educated workforce. The Protocol could ensure that those who are eligible for refugee status get a fair hearing in both political and economic cases. Those Zimbabweans who are also in need of financial relief for their own survival and that of their families back home, but who do not want to be kept in distant refugee camps, should be allowed to work or trade in the host SADC country.

The Protocol could also allow for some protection of vulnerable workers in the host country; the workers on the winelands of the Western Cape Province of South Africa may be such a group. And, while this issue should be dealt with in a politically sensitive manner, SADC countries cannot escape their legal responsibility because of difficult political situations, as Mantouvalou points out.[84]

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[82] Misago, JP. 2009. "Violence, labour and the displacement of Zimbabweans in De Doorns, Western Cape". *Migration Policy Brief*, 2. Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand.

[83] Kiwanuka & Monson (2009:12, 77).

[84] See contribution by Mantouvalou in the current volume.

Sixty years of a social market economy in Germany – Legal sociological observations[1]

Manfred O Hinz*

Introduction

For an observer in Africa, particularly one of German origin, it is interesting to note how a social market economy was a point of reference in the campaigns for the federal elections in Germany, which were held on 27 September 2009. Measures to cope with the current global

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[1] The following essay is a slightly amended version of a presentation made by the author to the Stakeholders' Conference on Economic Rights as Human Rights, organised by the Konrad Adenauer Foundation's Rule of Law Programme, and held in Cape Town from 23 to 26 September 2009. The author's observations attracted particular interest in view of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (A/HRC/8L.2/Rev.1/Corr.1) adopted by the United Nations Human Rights Council and now open for ratification and accession (see www.un.org/News/Press/docs/2009/Lt4418.doc.htm; last accessed 11 October 2009). The new Optional Protocol opens the door for the development of a new field of international jurisprudence – jurisprudence on economic, social and cultural rights – as provided for by the International Covenant on Economic, Social and Cultural Rights of 1966 (GA Res. 2200 A XXI) and in force since 1976. Accessing to the Optional Protocol will mean that "communications on behalf of individuals or groups of individuals who claim to be victims of a violation of the economic, social and cultural rights" set forth in the said Covenant (cf. Article 2 of the Optional Protocol) will have the opportunity to submit communication to the Committee, which will have the mandate to examine the communication and assess the complaint forwarded therein (Articles 7–12). In assessments of complaints in terms of the Optional Protocol, questions will arise which have occupied the constitutional jurisprudence since the enactment of social rights in national constitutions; questions on the nature of economic and social rights; their dependence on the economic power of the State providing such rights; and their enforceability. International answers will unavoidably lead to national challenges. A comparative approach, which takes note of what national constitutions have done with economic and social rights, why they have done what they have done, and what reality corresponds to the constitutional vision, will certainly help in drafting international answers and responses to the international challenge. The following observations can only provide some preliminary suggestions.

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economic crisis, measures to limit the consequences of the crisis for the average German citizen, were on the agenda of basically all pre-election debates: in the newspapers, in public speeches, on the radio, and on TV.

The proponents of the two major political parties, the previous and now re-elected Chancellor of Germany, Angela Merkel, who is also the leader of the Christian Democratic Union (CDU), and Frank-Walter Steinmeier, the Vice Chancellor-cum-Minister of Foreign Affairs in the German coalition government for the past four years,[2] and the eventually unsuccessful candidate of the Social Democratic Party (SPD) for the Chancellorship appeared on TV on 13 September 2009 to make their cases to the nation and convince voters, particularly the undecided, that they were worthy of office. The social market economy as a concept and the platform for State interventions featured high on the agenda of the encounter, which was broadcast across the nation, was referred to in TV-speak as a *duel*. Some commentators, having watched the 90-minute interrogation of the two top politicians, called it a *duet* instead: they had hoped to see some political blood drawn, but the encounter was extremely civil.

The debate certainly revealed differences, but it also revealed a broad common basis, a common point of departure – the social market economy. The shared orientation towards this type of economy had assisted the CDU–CSU–SPD coalition over the past few years, particularly since the members of the international community had begun to suffer the consequences of the economic crisis, with jointly accepted tools to embark on national measures to combat it. In the TV duel/duet, one of the two top politicians called on the social market economy to renew itself, while the other was satisfied with the concept and mechanism as it stood, as well as with its capacity for political action.

An academic spectator would certainly have been surprised if the proponents of the historically differently rooted political parties had shown full agreement on the catalogue of appropriate measures to employ in combating the economic crisis. Notwithstanding this, the emphasis and focus on the social market economy as the underlying politico-philosophical principle appeared to be firmly entrenched in both of the political approaches.[3]

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[2] In which the Christian Social Union (CSU), the CDU's Bavarian sister party, also participated.

[3] It is not the task of this essay to interpret the results of the elections in view of this statement. The German electorate voted against the continuation of the coalition of the last years by giving substantial support to the Liberal Party (FDP). The new government will therefore be a government of the CDU/CSU on the one side and the FDP on the other. According to many political analysts, the

The current degree of consensus of the parties as regards the concept of the social market economy is the result of a very specific socio-political development. The broad acceptance of the social market economy as the guiding principle of Germany's economic order is the result of a political process that goes back to the beginning of post-Nazi Germany, to 1949, when the *Grundgesetz*[4] was adopted as the country's Constitution.

Therefore, it is the intention of the first part of this essay to take the reader back to the legal debate at the time when the *Grundgesetz* was being enacted and implemented. The second part will shed some light on the realities behind what German history termed *die Sozialfrage*,[5] and on the current challenge to the concept of *social market economy*. The conclusion will link the said the discussion to the state of affairs in southern Africa, and offer some comparative remarks.

The social market economy from a constitutional perspective

Social State *and* social market economy

One of the questions that occupied lawyers and legal-minded members of the public at large after the adoption of the *Grundgesetz* was what type of economy it envisaged. It was obvious from the political environment that had led to the drafting of the *Grundgesetz* that it would not tolerate a socialist economy in the strict, i.e. communist, sense. The rest was not so obvious. For example, how *social* or *liberal* was the economy allowed to be?

In developing a constitutional framework, where do we find assistance that would allow us to place emphasis either on liberality or on sociality? There is not much assistance offered by the *Grundgesetz*. However, there are the fundamental rights and freedoms that basically follow the international standards in place at the time the *Grundgesetz* was drafted. Thus, apart from the guarantee of the right to property, there is the guarantee to be allowed to do

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scope for liberalizing the State of the social market economy is very limited. Some political commentators added to this by terming the old and new German Chancellor Merkel to be the *social democrat* that will remain in government after the voting out of the SPD.

[4] "Basic Law".

[5] "The social question".

whatever you would like to – provided you do not infringe on the rights of others and do not offend the constitutional order or the moral code.[6]

Does this general guarantee of liberty encompass the right to engage in economic activities, in entrepreneurial activities? Whatever some may have said against the integration of activities of this nature into the scheme of constitutional protection, there will eventually be no argument to exclude one of the most important dimensions of human beings, namely to be *homines oeconomici* from the protection of liberty. What remained as a constitutional ground to argue?

The chapter in the *Grundgesetz* that follows the one on human rights and freedoms deals with the relationship between the federal State and the respective individual States. Although one would have expected the *Grundgesetz* to deal with the social dimension of Germany's new legal order at a different place, there are in fact two Articles of relevance to the social question. Article 20, Sub-article 1, states the following:[7]

> The Federal Republic is a democratic and *social* federal state. [Emphasis added]

Article 28 sets certain legal conditions for the constitutions of the States and says the following in its Sub-Article 1(1):

> The constitutional order of the States must conform to the principles of republican, democratic and *social government based on the rule of law*, within the meaning of the Basic Law. [Emphasis added]

The phrase "social government based on the rule of law" is an attempt to translate what the *Grundgesetz* terms a *sozialer Rechtsstaat*. *Rechtsstaat*, the rule of law, is by now understood internationally, while the adjective *sozial* denotes its social dimension.

What is the legal meaning of this constitutional provision? Is there any meaning in it at all? The post-1949 debate shows two legal schools of thought on this issue. The first followed a

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[6] Article 2(1). Article 7 read with Articles 21 and 22 of the Constitution of the Republic of Namibia of 1990 can be referred to as the rights equivalent to the quoted rights in the *Grundgesetz*.

[7] It is noteworthy that a draft version of Article 2(2) contained an amendment which aimed at guaranteeing minimum standards with respect to clothing, food and housing. This amendment was later deleted and did not become law.

conservative interpretation, according to which the reference to *social* did not lead to any substantial change in the provision of rights:[8] such provision remained the principal objective of liberal constitutionalism. In this sense, the reference to *social* was interpreted as the expression of a mere programme and, thus, was relegated to administrative activities to be embarked upon by the State as the need arose. The second school of thought referred to the achievements of social movements since the era of industrialisation and their right to the right to sociality.[9] *Social*, in terms of the *Grundgesetz*, was interpreted as meaning the recognition of social rights against the State and, by recognising social rights, the recognition of the obligation to limit liberal rights.[10]

A number of cases brought before the *Bundesverfassungsgericht*[11] provided an opportunity for the court to pronounce itself on the debate. A very early decision by the court laid the foundation for subsequent decisions. In the so-called *Hinterbliebenenversorgung* case,[12] the court was confronted with the following problem: the widow of an attorney who had lost his life as a soldier in World War II (WWII), who was the mother of their three children between the ages of 6 and 16, complained about the amount of money she had received in accordance with the relevant law providing for the dependants of, in this case, war victims. The widow received a monthly amount of 183 German Marks per month. The widow submitted that this amount was not sufficient to provide for her children's essentials. In particular, the widow noted that she was disabled, meaning that she was unable to earn additional money through work.

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[8] Cf. here Forsthoff, E. 1964. *Rechtsstaat im Wandel: Verfassungsrechtliche Abhandlungen 1956–1964*. Stuttgart: Kohlhammer Verlag, pp 27ff.

[9] Cf. Abendroth, W. 1995. "Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland". In Sultan, H & W Abendroth (Eds). *Bürokratischer Verwaltungsstaat und soziale Demokratie: Beiträge zu Staatslehre und Staatsrecht der Bundesrepublik*. Hannover & Frankfurt/M: O Goedel, pp 81ff.

[10] The author of this essay discussed the arguments submitted by the two schools of thought in his study on the legal foundation of the statutory power of the parties to industrial agreements (trade unions and employer associations) in setting labour standards; see Hinz, MO. 1971. *Tarifhoheit und Verfassungsrecht: Eine Untersuchung über die tarifvertragliche Vereinbarungsgewalt*. Berlin: Duncker & Humblot. For a more recent approach to the debate, see Badura, P. 2009. "Wirtschafts- und Sozialpolitik im sozialen Rechtsstaat". In Herdegen, M, HH Klein, H-J Papier & R Scholz (Eds). *Staatsrecht und Politik. Festschrift für Roman Herzog zum 75. Geburtstag.* München: CH Beck, pp 7ff.

[11] "Federal Constitutional Court".

[12] "Provision for survivors". Cf. BVerfGE 1, 97 (Decision of the Federal Constitutional Court, Vol. 1).

In arguing the case before it, the court recognised the changed nature of constitutional rights. While the original dimension of the fundamental rights was to protect the individual against the State, this dimension, according to the court, had changed with time, namely to the effect that the dimension of State assistance to the individual had been added to the original understanding of *fundamental rights*. This new call on the State to provide assistance to its subjects, the court submitted, was, at least politically, increasingly being accepted as essential, particularly after WWII and the destruction it had caused. Despite the political acceptance of this new dimension, the court found itself bound by the law, including the *Grundgesetz*, which accommodated the new dimension in a limited manner only. In analysing Article 1 on dignity and the cited Article 2(1) of the *Grundgesetz*, the court concluded that both Articles would not provide for the right to claim specific benefits from the State. Nevertheless, the constitutional clauses that contain the above-quoted references to the social State accord a right in principle to social benefits.

But is this so-called right really a right, and what is its content? For the court in the *Hinterbliebenenversorgung* case, the content was that the State was obliged to provide for the necessary legislative instruments to fulfil these obligations to its subjects. Only if the State deliberately neglected its legislative duty, i.e. if the State refrained from acting without good reason, did an individual have the right to take the State to court.

Noting this court's decision and other subsequent decisions,[13] one could summarise the position of the constitutional views established thus far with regard to the 'social State' clause as follows:[14]

- The clause is not simply an expression of a programme, but a proper legal provision with legally traceable consequences.
- As part of the binding body of law, the clause creates the legal obligations of the State.
- However, the clause is not the basis for immediately enforceable rights.
- Therefore, the clause is primarily directed towards the State, i.e. the legislator, to concretise its application and, thus, provide for legal instruments the citizens can use in pursuing their social rights.
- The clause has to be taken into account when laws are being interpreted, i.e. the clause assists in the interpretation of the law in the sense that, in a situation where

[13] Cf. BVerfGE 9, 124; or 27, 253.

[14] As to this, see Richter, I & GF Schuppert. 1996. *Casebook Verfassungsrecht* (Third Edition). München: CH Beck, p 412f.

different interpretations are possible, the interpretation that gives the sociality preference is to prevail, and

- Wherever there is discretion for the administration in deciding on benefits, such discretion has to be exercised to give the clause prominence.

With respect to the more prominent question of whether the *Grundgesetz* did not, at least, inherently decide in favour of a specific economic order, it became increasingly apparent that it was in fact order-neutral, meaning that whatever was not in conflict with the *Grundgesetz* was permitted.[15] In other words, the basically accepted interpretation of the *Grundgesetz* opened up the potential for a variety of political programmes addressed to social problems that were caused by otherwise liberal-minded economic developments.

The challenge of social realities

Addressing the social question has a long history in Germany.[16] It goes back to the beginning of industrialisation, the demands of the labour movement, and Government responses such as the famous social laws promoted by Chancellor Otto von Bismarck.[17] Bismarck's social laws were a ground-breaking attempt to react to developments prompted

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[15] Within the framework of that permission, political alternatives were debated. See here e.g. Gromoll, B. 1976. "Klassische und soziale Grundrechte". In Mayer, U & G Stuby (Eds). *Die Entstehung des Grundgesetzes: Beiträge und Dokumente*. Köln: Pahl-Rugenstein, pp 112ff, 138ff.

[16] The history of responses to the social question has far-reaching theoretical implications, which this essay will not pursue. The answers of the Marxist philosophy, social-democratic answers, but also answers of the social theory of the Catholic Church, would need to be looked at here. The reorientation of these answers to meet the demands of Germany's post-WWII formative years and those that followed would also be of interest in determining the conceptual framing of the social market economy. The collection of articles in Hasse, H, H Schneider & K Weigelt (Eds). 2005. *Social market economy: History, principles and implementation* (Second Edition). Johannesburg: Konrad-Adenauer-Stiftung, provides helpful short summaries not only on key issues, but also on key persons, such as Ludwig Ehrhard (Germany's Federal Minister of Economic Affairs from 1949 to 1963 and CDU Chancellor from 1963 to 1966), one of the chief promoters of the social market economy after WWII, and Oswald von Nell-Breuning (a member of the Order of Societas Jesu and Professor of Moral Theology and Social Sciences; he also served as advisor to the German Federal Ministry of Economics for 17 years).

[17] To the latter, see Borchardt, K. 1985. "Die industrielle Revolution in Deutschland 1750–1914". In Cipolla, CM & K Borchardt (Eds). *Europäische Wirtschaftsgeschichte, Vol. 4: Die Entwicklung der industriellen Gesellschaften*. Stuttgart/New York: Gustav Fischer Verlag, pp 196ff.

by growing industrialisation. The well-known German scholar and politician Lorenz von Stein developed his concept of *social kingship* to show that the king had to do more than rule: he also had to promote some kind of social balance between the haves and the have-nots.[18]

What the *Grundgesetz* was meant to sustain was the very understanding of the social question as it emerged in response to the problems of industrialisation and what was further shaped in the Weimar constitutional period.[19] However, the post-WWII constitution-making could not ignore the fact that the socio-political context had changed since the Weimar Republic. Social demands had increasingly evolved into the domain of rights and law,[20] resulting in the debate mentioned in the first section of this article.

There is no doubt that the 'social market' interpretation of the 'social State' clause in Germany's post-1949 development was politically of enormous importance.[21] It made it possible to establish a legal framework that responded adequately to social demands in terms of support to families, heath care, cases of sickness during employment, unemployment, pension funds, etc. This led to a very efficient and effective social welfare system being established over the years.

Looking at the more recent of the 60 years of a social market economy, however, we see challenges not experienced before. The first challenge to the system occurred with the changing age structure, according to which increasingly older citizens relied on welfare provisions. Serious restructuring was therefore undertaken, basically leading to increased own contributions of the recipients of welfare towards the welfare coffers.

The second challenge came as a bit of a surprise, being due to the current economic crisis. Major production units in Germany were affected by the crisis and faced with the threat of

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[18] Cf Fortshoff, supra:32 and E R Huber, Nationalstaat und Verfassungsstaat. Studien zur Geschichte der modernen Staatsidee. Stuttgart 1965:127ff.

[19] Hermann Heller's contribution to the concept of the *social State* during Weimar Germany's post-imperial constitution deserves special mention here. Cf. Schluchter, W. 1968. *Entscheidung für den sozialen Rechtsstaat. Hermann Heller und die staatstheoretische Diskussion in der Weimarer Republik*. Köln/Berlin: Kiepenheuer & Witsch.

[20] See here Forsthoff, E. 1961. *Lehrbuch des Verwaltungsrechts, Vol. 1: Allgemeiner Teil* (Eighth Edition). München/Berlin: CH Beck'sche Verlagsbuchhandlung, pp 56ff.

[21] Cf. Schlecht, CO. 2005. "Social market economy: Political implementation". In Hasse et al. (ibid.:401ff).

closure, leaving hundreds of thousands unemployed. The collapse of several banking institutions threatened the economy with severe consequences. How would the social State react? Would it allow for so far unheard of State interventions?

It did. What nobody could have imagined a few years ago became reality, namely that the expropriation of certain enterprises was debated in order to prevent an economic freefall. It was debated without references which one would have encountered some year ago, according to which the proposal to expropriate was a clear indication that its proponent could only be a 'communist'.

Huge financial savings programmes were devised to help the economy survive the crisis. The case of the car producer, Opel, owned by the United States-based General Motor Company, is a significant example of how one could interpret the 'social State' clause in a social market economy and make meaningful political contributions to stabilising the economy from a social perspective.[22] The Opel project and other interventions have turned out to be widely accepted as viable for the social market economy. Whether the Opel project will stand the European test[23] remains to be seen, however.

Conclusion

Can an African country such as Namibia or South Africa learn from the German experience?

Namibia and South Africa have taken different paths when it comes to social and economic rights in their respective Constitutions. According to Article 98 of the Constitution of the Republic of Namibia, for example, the country's economic order is based on the "principles of a mixed economy". Social rights and so-called third-generation rights feature in a limited sense only. Apart from the right to education,[24] second- and third-generation rights appear under "Principles of State Policy" in Chapter 11 of the Constitution. Article 101 of the Constitution determines the legal status of such principles, as follows:

> The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and

[22] "Opel-Krise", *Der Spiegel*, 11 September 2009; available at www.spiegel.de/politik/deutschland/0,1518,648294,00.html; last accessed 23 September 2009.

[23] It could be argued that the €1.5 billion bridging loan violates the European competition law.

[24] See Article 20, Namibian Constitution.

applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.

The South African Constitution[25] has taken a more radical approach: it provides for economic *rights*. Section 24 of the South African Constitution provides for the right to a healthy environment; section 26 for the right to housing; section 27 for the right to health care, food, water and social security; and section 29 for the right to education. All these rights are enforceable in terms of section 38.

What is the meaning of these differences between Namibia and South Africa in reality? What do/can economic rights achieve? If one considers what the Constitutional Court of South Africa said in the *Grootboom* case when it defined the right to housing to be the right to reasonable "planning of housing", where are the citizen's economic rights?[26] Where are economic rights in view of the limited resources available to the State? What can the law actually and meaningfully offer when economic rights are at stake?

Looking at the three quoted jurisdictions – those of Germany, Namibia and South Africa – one sees a very specific development in the attempts tp respond to social problems. In Germany, the response to the social question was basically left to the German Federal Constitutional Court, assisted by scholarly work. What the German court achieved is more or less what the drafters of Namibia's Constitution wrote into its Article 101 – although one may debate whether an individual would have the opportunity to make a case against the Government based on what Article 101 determines as the latter's obligation.

South Africa went an important step further than Germany and Namibia by granting social rights the status of constitutional rights. However, what we see in the approach of the South African Constitutional Court, for example, as documented in the *Grootboom* case,

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[25] The Constitution of the Republic of South Africa, 1996.

[26] *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC). In its final order, the Constitutional Court of South Africa declared as follows:

"(a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.

(b) The programme must include reasonable measures such as, but not necessarily limited to[,] those contemplated in the Accelerated Managed Land Settlement Programme to provide relief for people who have not access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

constitutional rights were transformed into the right to adequate procedure. The right to housing is reduced to a right to developing policies for the implementation of the right, which are governed by the obligation to be reasonable – albeit subject to the availability of funds.

In terms of comparative constitutional law, the developments in the three jurisdictions falls within the generally noted picture that the more recent constitutions tend to reach out to and into areas of regulation, which earlier constitutions avoided doing. This most probably owes itself to a phenomenon being observed worldwide, according to which the social philosophies underlying given legal orders have, in their increasing focus on communication as a means of achieving justice, become concomitantly less complex.[27] The reduction of philosophical complexity is compensated by an increasing degree of complexity in legal texts. Having said this, one could, on the one hand, be tempted to conclude that the South African way of dealing with the social question is the way forward; on the other, one also has to accept that the procedural reduction of the social rights to the right to reasonable planning, as determined by that country's Constitutional Court, overrides the notion of a right being an asset of the individual right-holder who would like to see that s/he receives in substance what the right promises.

A concluding word on these two ways of interpreting this very progressive constitutional implementation of social rights in a democratic constitution is hardly possible. Further developments in securing social rights will certainly add to the debate about the legal status of social rights and, with this, eventually support one of the two approaches.

In view of this open conclusion, I would like to return back to the debate I referred to in the introductory remarks to this essay.

Whatever lawyers maintain when they compare the different approaches to the social question, social rights, and their place in a given legal order, one important lesson can be learnt from the political debate between the parties that campaigned in the recent German elections. Up to the very end of the campaign, most of the debates and contributions by the former governing parties (CDU/CSU and the SPD) and the opposition (the FDP, the Greens[28] and the Left Party) showed a high degree of commitment to a debate of standard in arguing economic details, e.g. when arguing about the proposal to reduce certain taxes,

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[27] Cf. Häberle, P. 1992. *Rechstvergleichung im Kraftfeld des Verfassungsstaates: Methoden und Inhalte, Kleinstaaten und Entwicklungsländer*. Berlin: Duncker & Humblot, p 257f.

[28] *Bündnis 90/Die Grünen.*

as strongly advised by one of the then opposition parties. The German public has obviously accepted this high standard of the economic discourse. The majority were even able to follow the debates on tax reform, as promoted in particular by the Liberal Party (the FDP), whose popularity increased at the polls as a result.

What does this mean? Sixty years of a social market economy have created a widely accepted political foundation: a foundation, which, on the one hand, appreciates the dynamics of the market, but, on the other, is firm in its stance that markets need social regulation. What kind of regulation has to be put in place is a societal issue that will eventually be determined by societal forces – at least in countries such as Germany, where civil society works! Only a functioning civil society will be able to make political use of the *Grootboom* case formula, which made the availability of funds a criterion to limit the authority to plan. Whether or not funds are available will not depend on whether the budget in fact provides for them, but on whether or not the State's generation of income follows the principles of justice (tax justice), and whether the budget distributes the generally available income in a justifiable manner.

NOTES AND COMMENTS

The protection of natural resources and biodiversity: Work in progress in three Master's theses in the Faculty of Law of the University of Namibia

Manfred O Hinz, Clever Mapaure, E Ndateelela Namwoonde and P Nangoma Anyolo

Introduction

For the past six seven years, the Faculty of Law of the University of Namibia has been part of the international research consortium entitled *Biodiversity Monitoring Transect Analysis in Africa* (BIOTA), a project being funded by the German Government until 2010 and implemented in three regions of Africa. As is clear from its title, the objective of the BIOTA Project, which will come to an end in 2010, is to monitor biodiversity. The results of the monitoring exercise are then evaluated with the aim of recommending interventions by governmental and non-governmental stakeholders for the sustainability and, where necessary, enhancement of biodiversity.

Several LLB dissertations were promoted and completed under the BIOTA Project.[1] The following progress report focuses on three Master's theses, which are expected to be submitted for approval by early 2010. The BIOTA-related LLB and LLM dissertations have one important element in common: they investigate the role and function of customary law in the interest of protecting natural resources and biodiversity.[2] In this sense, they take seriously what the Convention on Biological Diversity refers to where it emphasises the importance of traditional knowledge.[3] The Convention on Biological Diversity is part of the

[1] Cf. Hinz, MO & OC Ruppel (Eds). 2008. *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society. This collection of contributions contains 11 studies conducted by students of the University of Namibia's Faculty of Law.

[2] To this and to the following, see Hinz, MO. 2008. "Findings and the way forward". In Hinz & Ruppel (ibid.:211ff).

[3] Cf Articles 8(j); 17(2) and 18(4) of the Convention.

law of Namibia, and customary law enjoys confirmation in Article 66 of the Namibian Constitution.

The legal – or, rather, legal anthropological – research done as regards implementing the objectives of the BIOTA Project has, on the one hand, shown problems in the relationship between the general law of Namibia, i.e. the enacted statutory law, and customary law. On the other, the research could also assess the limits of customary law. Both findings contribute to our knowledge on the workings of law at the interface between statutory and customary law.

The jurisprudential interpretation of the law in a statutorily defined legal order as a legally pluralistic order is still a strongly debated matter. Jurisprudential conclusions, including their normative consequences, to be drawn from legal pluralism are equally open to debate. Progress in these fields will help in conceptualising the said interface and, thus, assist in the more efficient application of the law.

The following preview gives an insight into work in progress. The preview's intention is to draw attention to three research projects that investigate three specific problems of general legal and political interest.

Water wars: Legal pluralism and hydro-politics in Namibian water law[4]

Conflicts and multifarious questions about water in Namibia, a country with scarce water resources, are manifold. Central to the enquiry on water law is the question as to who owns water in Namibia. Since this is a jurisprudentially controversial question, concise and/or coordinated answers are as scarce as the water itself. Whereas the Namibian Constitution creates a public trusteeship principle in the ownership of all natural resources in the country, the communities on the ground do not seem to agree to the provisions of the Constitution. Communities subscribe to their customary laws; hence, the plurality or at least duality of legal systems in the country is a situation to be reckoned with in so far as the management of all natural resources is concerned.

[4] This part of the progress review is by Clever Mapaure.

If one says that Namibia is the driest country among the members of the Southern African Development Community (SADC), is it justifiable to say that Namibian rural communities and their livestock are thirsty? The answer seems to be “No”: geohydrological surveys show that Namibia has enough water to sustain its small population. Why is it then that rural communities go without water for days, if not weeks? This question can only be answered if one critically considers the country’s hydro-political institutional set-up.

The study currently under way shows that rural communities in Namibia suffer from second-order water scarcity, which ranges at a scalar level from macroeconomic and institutional underdevelopment to micropolitics. The scarcity seems to arise out of the hydro-political interactions between various actors in the rural water supply industry, evidencing not only the aforesaid legal pluralism, but also the associated conflictual water management and ownership regimes.

Why is this all so, and what remedy could be recommended? In attempting to answer these questions one has to look at the policies and programmes put in place by the water administration bodies, which have had some unintended implications for rural water supply. The official promise to local communities is to secure water supply through a decentralisation programme. This programme gave rise what is known as *community-based management*, whereby rural communities control water points in their areas through Water Point User Associations and Water Point Committees. Inasmuch as this programme was accepted by Cabinet as well as some sections of the population and eventually found legislative force, the current situation shows that the process of decentralisation has created some unhealthy hydro-politics. For example, employees in the Ministry of Agriculture, Water and Rural Development’s Directorate of Rural Water Supply are supposed to work under the Regional Councils in all of Namibia’s 13 Regions, but the situation on the ground shows this not the case. Officials at the Directorate feel that the Regional Councils are not ready to handle regional water supply affairs so it is not willing to delegate these services to them. The Regional Councils, however, feel they are able to cope with rendering rural water supply services. This presents an irony: the Directorate’s employees willingly report to the Regional Councils and, to this end, signed secondment letters to allow the intended delegation process to proceed. Despite these signed letters, however, the delegation process has been halted. This situation has not only created resentment in the Regions, the end user of the water is also being affected – without knowing why. This is indeed a sad situation.

It is also surprising that people own private boreholes on communal land. A few residents in the Otjozondjupa Region, especially around the communal area of Okondjatu, have private

boreholes. These have even been fenced off, contrary to the Communal Land Reform Act.[5] These individuals, who mainly specialise in cattle ranching, also have what they call 'plots'. These 'plots' are also fenced off, again contrary to the latter Act. Although these residents say that they share the water with other community members as per the Chief or Headman's directive, it appears that such directives are ignored. For this reason a new system of water ownership is budding in the Otjozondjupa Region.

The questions, however, are these:

- Can water be privately owned?
- Can there be private ownership on communal land?

Whereas the issues of communal water rights and rural water supply have received special attention in both the Water Resources Management Act[6] and the Draft Water and Sanitation Policy of 2009, the details on water ownership, water governance, water utilisation by rural populations, and communal property rights still need to be clarified in Namibian's water legislation.

Notably, the Water Resources Management Act created a public trustee in water ownership; thus, there is only public ownership of water in Namibia. The question that arises now is whether Namibia's shift to this public rights system is in line with the Constitution, which recognises both private and public ownership of natural resources.

Water appears to be the new oil, i.e. internationally the most-wanted scarce resource, and discussions on the scarcity of water have led to conclusions that the next World War will be about water. Admittedly, there is considerable talk of water wars, but in fact there is little evidence of any international violent conflict over water. What is evident is that conflicts arise as a result of socio-political constructs of water scarcity, called *second-order* scarcity. These microlevel complaints seem to emerge out of the hydro-political interactions among various actors in rural water supply and the centrifugal dynamics of the institutional control of water in Namibia.

[5] No. 5 of 2002.

[6] No. 24 of 2004.

Biofuel production on communal land[7]

The current debate on climate change and rising oil prices has greatly increased interest in renewable energies such as biofuel. Consequently, many industrialised countries and more advanced developing countries are seeking to promote biofuel as a way of reducing fossil fuel consumption and mitigating the adverse effects of climate change.

In Namibia, the past few years have witnessed the emergence of an energy industry which is primarily based on oil plants. It has been held that an established and thriving energy industry will contribute meaningfully to the economy and support Namibia's Vision 2030 development goals. Due to the African continent's many arid climatic zones and the large extent of supposedly marginal land, *Jatropha*, a perennial oil-nut-bearing tree, has been given much attention as a potential energy source.

The study reported here constitutes an investigation into whether the allocation of land for *Jatropha* farming is legal in terms of procedure as well as the powers of institutions in charge of land allocation under the Communal Land Reform Act,[8] on the one hand, and in terms of the customary law concept of land tenure, on the other. Relevant land tenure research has shown that the land allocation procedures on communal land found in the Caprivi and Kavango Regions, for example, are twofold: there are those provided for by the Communal Land Reform Act, and those provided for under customary law. Although there was an attempt to incorporate customary land law concepts into the said Act, it became obvious that traditional authorities preferred to manage communal land under customary land law.

Moreover, the relationship between Traditional Authorities and State institutions (e.g. the Land Boards) lacks harmony. Traditional Authorities perceive Land Boards in communal land administration as an attempt to frustrate their customary mandate. In light of the above, it is clear that, as far as land allocation for *Jatropha* is concerned, there is a constant clash between the land allocation procedures in the Act and under customary law. However, research has also revealed that, despite most Traditional Authorities regarding other institutions as wearisome, they nevertheless seek assistance from the latter when faced with conflicts involving external parties such as *Jatropha*-cultivating companies.

[7] The following is contributed by Emily Ndateelela Namwoonde.

[8] No. 5 of 2002.

The research being conducted for this study is also exploring the socio-economic benefits that farmers stand to gain from *Jatropha*. Researchers from Namibia and elsewhere question the reputed benefits of *Jatropha*, and believe that the current rush to produce this type of biofuel on a large scale is ill-conceived and under-researched, and could contribute to an unsustainable trade that will not solve the problems of climate change, energy security or poverty.

The *food v biofuel* debate is given special attention in the study, as it is feared that *Jatropha* could replace the production of crops aimed at securing food for communal farmers. Although *Jatropha* is not farmed on a scale large enough to determine this aspect fully in the Namibian context, research in other countries has shown that *Jatropha* is planted in direct replacement of food crops by subsistence farmers. Notably, communal farmers in Namibia are in essence subsistence farmers, i.e. they produce basically what they consume; hence, major concerns arise when one considers the plan to encourage subsistence farmers to plant large amounts of *Jatropha*, particularly since such farmers have very weak links to markets in general, and they lack storage capacity.

The research for this study demonstrates that some investors have opted for farming contracts as a means of acquiring land. However, the obligations in farming contracts are mostly aimed at protecting the interests of the companies investing in the produce concerned – usually at the farmers' expense. It also became very clear during the research that many farmers did not understand the concepts stated in the agreements they had signed, and their decisions to do so had been clouded by the promise of huge profits and other developmental agendas.

The *Jatropha* experience proves that, although the procedures under the Act as well as under customary law are used to allocate land for *Jatropha* farming, the two sets of rules are not properly geared to protecting sometimes ignorant communal farmers from potential exploitation by investors. The lack of a remedial mechanism can be attributed to the lack of an appropriate legal accommodation of the interface between customary and statutory law. It is recommended, therefore, that the Act be revisited by the legislature and that it incorporate customary land law practices and principles. There is also a need to ensure that the ever-widening gap between customary law and statutory law is bridged. The current major recommendation of the study is the introduction of a National Policy for Biofuels.

Conservancies: What is the way forward in terms of protecting natural resources through community ownership?[9]

This research will present information on the Namibia Conservancy Programme (NCP). It will highlight the development impact that Namibia's incentive-based conservation laws have produced in communal areas, and how the NCP has alleviated poverty among the country's rural communities. A case study on the Uukwaluudhi Conservancy is used to provide information on the contributions that wildlife and tourism make to the livelihoods of the local people.

Traditionally, residents of communal land in Namibia have depended heavily on subsistence crop production and livestock management to support their daily livelihood needs. However, there is a growing concern about the suitability of land for arable crop or sustainable livestock production. In 1996, the Namibian Government, through its Ministry of Environment and Tourism, took a concrete step towards addressing this concern by enacting the Nature Conservation Amendment Act,[10] which amended and superseded the Nature Conservation Ordinance of 1975. The passage of the new conservancy legislation initiated a national conservancy movement that seeks to promote and integrate, where appropriate, wildlife production and tourism development efforts for the benefit of communal land residents. This has resulted in the registration of more than 50 communal conservancies to date, encompassing more than 118,704,000 km^2. Indeed, since 2000, communal conservancies under the Government's Community-based Natural Resource Management (CBNRM) Programme have become an important vehicle for meeting its goal to address both environmental and sustainable developmental issues in rural areas.

The central hypothesis of the study reported here is that multi-species animal production systems such as live game sales, game meat production, hide production and tourism provide a greater financial return on investment than do single-species domestic livestock systems. The background of the study tends to stress maximising foreign exchange earnings. The shift from single-species to multi-species production has been underpinned and encouraged by the Government as the latter was found to be more ecologically resilient and stable.

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[9] This section is by Prisca Nangoma Anyolo.

[10] No. 5 of 1996.

Empirical research was undertaken in the Uukwaluudhi Conservancy in the Omusati Region to recount not only what has been done there in terms of wildlife management, but also whether the conservancy has enhanced the livelihood of the rural communities.

Like many other communal conservancies in rural Namibia, the Uukwaluudhi Conservancy caused parts of communal land to be converted to land that was to be administered in terms of conservancy law. It was only after the establishment of the conservancy that it was realised that the co-area[11] demarcated for wildlife was too small to cater for the imported and indigenous species. Wildlife needed to meet the core intention of the conservancy, which was to increase wildlife for trophy hunting, the sale of game, etc. Therefore, the conservancy was extended to include sections formerly used as grazing areas by community members for stock farming as well as cultivation area for crop production. As a result, people had to give up their rights to communal farmland to the conservancy, which led to serious economic losses for those who had to be relocated.

In assessing the conservancy's degree of success, its financial report for the period ended 31 December 2008 is a telling account of events. The report shows that the total income from wildlife resources increased from about N$50,000 in 2005 to over N$600,000 by 2008. The wildlife populations were said to have shown remarkable growth and recovery during the same period. Despite this positive account, recent research shows that the three employees who work for the conservancy as security guards and caretakers of the co-area have never received any payment for their services. Although one of the principal motivations behind the CBNRM Project – as indeed manifested in the conservancy's Constitution – is to empower local people who cannot find jobs in the formal sector, otherwise jobless people work for the conservancy as volunteers. Where has the conservancy's income gone? For example, the audited financial reports for 2007 and 2008 reveal that over N$200,000 income has not been accounted for.

Although the above-mentioned official report of 2008 shows impressive figures in terms of total capital value and an increase in wildlife populations, no local investments have been made with the actual income generated, and no conservancy benefits have been paid out to the local community. These facts beg for an explanation. Despite the laudable intentions behind the Government's conservancy policy and the new Act, which empowered rural communities to be in charge of the wildlife in communal areas, the governance and ownership of wildlife in conservancies has remained a critical issue to many residents.

[11] The part of the conservancy area with game-proof fencing.

Most communal conservancies, including the Uukwaluudhi Conservancy, show great potential for generating an income that will benefit their members and others. Although it is acknowledged that the latter conservancy decided to donate the meat by-products of trophy hunting to nearby schools, and to assist hostels in the area for more than two months when NamWater cut off their water supply, the way in which Conservancy Committees distribute the income and benefits derived from communal conservancies' resources in general remains an issue.

In assessing customary rights over wildlife, the study examines the consequences for the local people losing their land to the conservancy without being recompensed. The study submits that there is no legal protection available to those affected by this change in the land tenure system, because the new Act does not provide for any remedy.

In conclusion, the study recommends ways to avoid conflict between the economic survival of agricultural communities and the foraging needs of wildlife. The study suggests certain law reforms that could bridge the gap between the statutory conservancy law and the right of residents of communal land recognised and protected under customary law.

RECENT CASES

Africa Personnel Services (Pty) Ltd v The Government of the Republic of Namibia & Others[1]

Explanatory notes

These notes are for the convenience of the media and any other institution or person interested to read this résumé. These notes are not an aid to interpret the judgment. The notes have no legal status and in the event that there is any difference between the notes and the judgment, the judgment shall be the only authentic source.

A. THE [GENESIS] OF SECTION 128

1. This case concerns the constitutionality of sec. 128 of the Labour Act, Act 11 of 2007 ("the Act"), which provides in s.s.(1): "No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party." S.s. (3) provides that any person contravening the section would be guilty of an offence.
2. The appellant, describing itself as a specialist in providing employees for its clients' needs, falls squarely within the ambit of the prohibition set out in s. 128(1) of the Act. It stated that 90% of its business activities concern the providing of services to third parties, sometimes loosely referred to as "Labour Hire." It therefore brought an application in the High Court for the striking down of s. 128 as unconstitutional.

3. This application was based on Art. 21(1)(j) of the Constitution, which is part of the fundamental freedoms set out in Chapter 3 of the Constitution and which provides that :

"21(1) All persons shall have the right to:
(a) ...
(j) practice any profession, or carry on any occupation, trade or business."

[1] This text has been placed verbatim from the source. For this reason it has not been subjected to the in-house journal style in terms of spelling preferences or formatting. Where editorial amendments have been made, these are indicated within square brackets.

4. Three Judges of the High Court dismissed the application and stated that agency work had "no legal basis at all in Namibian law and therefore (that it was) not lawful."

5. In its judgment the Supreme Court, first of all, dealt with the history of labour law and labour relations during the previous century. It dealt with the contract labour system which was part of the practices, and inspired by, the policies of racial discrimination. The contract labour system was also characterized as "labour hire." The Court referred to various legislative Acts, which had at their roots, statutory classification of people based on ethnic origin and race, such as influx control, the carrying of passes, curfew in urban areas and the forceful repatriation of some members of those groups. A lack of commercial infrastructure, poverty and large scale unemployment in the then northern reserves compelled Namibians from those areas to find employment elsewhere in the then South West Africa. However they could not do so, unless through the contract labour system, because of the harsh and stringent enforcement of the influx control legislation.

6. The only viable option open was to go through the various recruitment and placement agencies, which in 1943, amalgamated and established SWANLA.[2] The Court dealt with the inimical way in which persons recruited were treated. The system, which offended their dignity, was deeply resented by the majority of Namibians, who felt that it infringed their liberty and denied them equality and opportunities to develop their capacity and abilities as human beings and brought with it profound suffering. Bearing in mind this historical background, the Court appreciated that the mere possibility of reintroducing the contract system, albeit in a different form, would cause resistance. Against this historical background, the Court found that Parliament was justified in questioning and scrutinizing the regulation of "labour hire" as proposed in the then Labour Bill. During the debate in the committee stage "labour hire" was equated to the inimical SWANLA labour contract system which caused emotive reaction from most members. Other principled objections were also raised with the result that the Minister of Labour and Social Welfare withdrew the original clause and later tabled an amended s. 128 whereby "labour hire" was prohibited.

7. The Court pointed out that the phrase "labour hire" was not definitive and included a wide range of employment relationships. Classically it referred to the Roman law of

[2] South West African Native Labour Association.

letting and hiring of which today only two types remained. namely letting and hiring of services and letting and hiring of work, with many other possibilities in between. Driven by post-industrial economic forces and technological advances, the nature and structure of work had changed both nationally and globally, more particularly in regard to employment in services. But even in the industry, certain connotations of the words “labour hire” still remained. The Court referred to various examples thereof.

8. With all employment relationships based on the law of letting and hiring and their contents so different, “labour hire” does not convey the scope and meaning of the prohibition in s. 128 with legal clarity. The examples previously given by the Court illustrate that even today it may refer to any of four branches of the employment services industry. For historical reasons the words are in Namibia more closely related with the recruitment and placement industry than with the agency services industry.

9. Emerging from a century of discriminatory practices and seeking to address the socio-economic imbalances left thereby, the Legislature, through the Labour Act, sought “to give effect to its constitutional commitment to promote and maintain the welfare of the people and to further a policy of labour relations conducive to economic growth, stability and productivity.” The “constitutional commitment” is embodied in Art. 95 of the Constitution where the Principles of State Policy are set out. All these principles bear to a greater or lesser extent on the enactment of s. 128.

10. The prohibition in s.s. (1) and the exception in s.s. (2) of s. 128 draw in part on two of the types of “labour market services” set out in art. 1 of the *Private Employment Agencies Convention, 1997 (No 181)* of the International Labour Organisation (ILO). S.s (1) of s. 128 corresponds in part to the definition in art. 1(b) of the Convention, which latter article provides for “services consisting of employing workers with a view to making them available to a third party……. *who assigns their tasks and supervises the execution of these tasks.*” [Emphasis added] As already stated, Sec. 128(1) prohibits any person to “*for reward*, to employ any person with a view to making that person available to a third party *to perform work for the third party.”* The highlighted parts illustrate the differences between the Convention and the Act. In terms of the Act, to fall within the prohibition contained in s. 128(1), the third party need not be the person who assigns or supervises the tasks. All that is required to bring the prohibition into play, was to perform work for the third party.

B. THE NATURE OF APPELLANT'S BUSINESS.

11. For clarification the Court stated that it would provisionally refer to all employment structures prohibited by s. 128 as "agency work." To the "employer" in the relationship as the "agency service provider", to the "employee" as the "agency worker" and to the "third party" as the "agency client."

12. The appellant is an agency service provider. This activity forms the core of its business activities. To that extent the appellant concludes agreements to provide agency services to agency clients and it has employment contracts with its employees to do agency work for the clients. The appellant also had other business activities which do not fall within the prohibition but that form less that 10% of its revenue and workforce. The appellant had a workforce of about 6085 employees of which some 50% are skilled or semi-skilled. The balance of the workforce is unskilled. All the employees are engaged under either fixed or indefinite term contracts. The fixed term contracts are usually for the performance of specific tasks and terminate on completion thereof. Such workers are then re-engaged if their services are again in demand.

13. Indefinite contracts provide for remuneration on rates payable in the industry and commensurate with the skill of a particular worker. If there is no demand for their skills, their contracts are terminated within the ambit of the statutory requirements for retrenchment. Because there was an ongoing demand for labour this did not happen frequently.

14. The types of services provided are innumerable. Upon receiving a request for services the appellant would submit a quotation. This would include the terms and conditions of remuneration for the agency worker, the appellant's duty to register the worker with the Social Security Commission and the contributions to be made thereto as well as contributions to be made in terms of the Employee Compensation Act. It would also include arrangements for the transport of the agency worker as well as any other obligations which the appellant must comply with in terms of labour legislation. Once the quotation is accepted, the appellant then concludes a written agency service agreement in order to provide for the services. This agreement includes the reciprocal obligations of the agency client such as remuneration, hours of work etc. What is paid to the service provider is more than the remuneration received by the worker in terms of his or her agreement with the service provider.

C. THE JUDGMENT OF THE HIGH COURT

15. In dealing with the judgment of the High Court this Court stated that, excepting one instance, the High Court based its judgment on issues which were not raised by the respondents nor argued by their counsel and which were also not relied on by counsel in argument before this Court. The Court noted that the finding by the High Court that agency services were not known in the classical setting of letting and hiring of work and services in Roman times did not mean that such contracts were therefore unlawful. Such finding also negates the development which has since taken place driven by socio-economic changes as a result of globalization, industrial innovations, information technology developments and instant global telecommunication. Because of these developments contracts of letting and hiring have not remained static.

16. The Court then discussed the issue of letting and hiring in Roman times and pointed out that because most services were rendered either by slaves or other persons who, as a result of their status, were required to render services to others, contracts of letting and hiring were not of importance in the workplace. Centuries later, contracts of service were still not supplied over the entire spectrum of skilled, unskilled and professional work.

17. Had contracts of service remained rooted in Roman law or the common law of pre-modern times, it would not have been able to address the demands of employment relationships in the modern era.

18. The rapid rise of new structures in employment services industry during the last decades necessitated that new, non-standard employment relationships, were forged to cope with the development. The Court referred to the various theories concerning agency work which were developed in order to find a legal niche into which to fit agency work.

19. The Court concluded that unless provided for by regulating legislation, the legal character of agency services must ultimately depend on the terms and conditions underlying each agreement. The fact that such agreements may not fit a typical mould of a bilateral contract in Roman law or common law does not mean that they

are “not lawful” as was held by the Court *a quo*. Freedom of contract is demanded by public policy.

20. The demand for freedom of contract is also a fundamental principle of our law and is not only based on public policy. This was in any event not the basis of the respondents’ challenge. They relied on considerations of “decency and morality” which are limited to their second alternative defence based on the wording of Art. 21(2) of the Constitution which was used to justify the interference with the fundamental freedom set out in Art 21(1)(j).

21. The notion of “law, morality and public policy” by which contracts are assessed allows the regulation of contractual freedom by laws which are lawfully enacted. Such law may prescribe formalities for greater certainty or set minimum standards to prevent exploitation of people, as was done in the Labour Act. Barring these examples, freedom of contract is indispensable in the relationship of rights, duties and obligations which connect people.

22. It was not contended by respondents, either in their affidavits, or in argument by their counsel, that under common law agency work had no “legal basis at all in Namibian law and therefore (that it was) not lawful.” All the other findings by the Court *a quo*, except one, were based on the position in the common law which was neither pleaded or argued by respondents, and was also not relied upon on appeal.

D. THE ISSUE OF STANDING

23. The Court considered the submissions made by counsel. Counsel for the respondents first submitted that the appellant, being a private company and therefore being a juristic and not a natural person, did not enjoy any protection under Art. 21(1)(j) as that Article only protects the rights of natural persons. Counsel for the appellants contended that that approach was too narrow, bearing in mind the beneficial interpretation by our Courts concerning the rights set out in Chapter 3 of the Constitution. Moreover the freedom to carry on a business, trade or occupation was frequently exercised in Namibia through corporations. Counsel for the respondents submitted that Art. 21(1)(j) did not apply to juristic persons because a person’s profession or trade was tied up with his dignity and that could only include natural persons. The Court stated that although dignity underlies all the freedoms set out in Art. 21, and is even fundamental to those rights, it is not the only value which

inspires those rights but that those rights must also be seen against a history where job reservation for a minority was practised and the exclusion of a large number of disadvantaged people from access to practise certain professions and perform certain work was based on laws closely associated with discriminatory practices. The Court found that there were no grounds to limit the wide meaning of the introductory words of the Article, namely “All persons……” , in this instance, to natural persons only and that it was intended, in Art. 21(1)(j) to also include juristic persons. This interpretation is in accordance with the constitutional principle that the fundamental rights and freedoms, set out in Chapter 3 of the Constitution, should be interpreted in such a way as to give to subjects the full measure of the rights set out therein. Appellant was therefore an “aggrieved person” entitled to approach the Court to seek enforcement of its fundamental freedom as contemplated in Art. 25(2) of the Constitution.

E. THE SCOPE OF PROTECTION UNDER THE FREEDOM

24. The second ground raised by the respondents was that because s. 128 of the Act rendered the business of agency work unlawful it followed that agency work was not protected under Art. 21(1)(j). This argument was based on two decisions of the High Court. The Court analysed these decisions and concluded that they did not support the contentions of the respondents. The Court pointed out that to test the constitutionality of a law under Art. 21 involved two phases. Firstly, to determine whether the statutory prohibition is a limitation of a fundamental freedom. If that is found then the Court must establish whether the prohibition is permissible in terms of the provisions of Art 21(2). If the prohibition which limits the freedom is permissible the prohibition is constitutional. If the prohibition does not pass the test set for it by Art. 21(2) it is unconstitutional. The argument by the respondents only considers the first phase and suggests that once an economic activity is rendered unlawful that is the end of the matter and whether the prohibition is permissible, or not, in terms of the s.s. (2) does not arise. If this is correct it would mean that the Legislature, where it by statute places restrictions on the freedoms set out in Art. 21, could do so without being subject to constitutional review.

25. The Court considered the evidence and was satisfied that the principal economic activity for which the appellant sought protection was that of an agency service provider and that this business fell within the general protection granted by Art 21(1)(j) of the Constitution. It was also satisfied that if sec. 128 was implemented, the

appellant would have to cease this business. Applying the first phase of the investigation, set out herein before, the Court was satisfied that s. 128 would limit the appellant's fundamental freedom to carry on a trade or business. This, so it seems, was also Parliament's intention by justifying its prohibition on the authority of Art. 21(2).

F. THE ISSUE OF JUSTIFICATION

26. The Court then discussed the second phase of the enquiry and pointed out that Art. 21(2) limited the restrictions of fundamental freedoms to the grounds mentioned in the Article, which were threefold namely, that the fundamental freedoms should be exercised subject to the law of Namibia in so far as such law imposed reasonable restrictions on such exercise, which were necessary in a democratic society and were required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. The Court also pointed out that the party relying on a restricted law carried the burden to show that the restriction fell within the scope of Art. 21(2). The three criteria necessary for the constitutionality of a limitation on a fundamental freedom were further bound together by the requirements of "proportionality" and "rationality".

27. The Court referred to case law in other jurisdictions and compared our Art. 21(2) to that of various other Constitutions and concluded that Namibia was unique in expressly requiring a third category for limitations to freedoms to be constitutional namely that they be "required in the interests of [the] sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence." A restrictive measure, to be constitutional, must therefore also be "required" in the interest of one or more of the above defined objects.

28. The Court discussed the objectives of the Act as set out in its preamble and found that they fell within the scope of State policies as set out in Art. 95 of the Constitution and that the objectives also fell within the scope of what is constitutionally permissible in terms of "decency and morality" as set out in Art. 21(2). These were also the objectives which Parliament identified and relied on for authority for the prohibition. (See s. 128(4).) In supporting their justification for the prohibition of agency work the respondents argued that agency work ran counter to the objectives of the Act. By

prohibiting agency work Parliament sought to preclude deleterious aspects thereof such as “com[m]odification” and “casualisation.”

29. Having found that the prohibition on agency work is rationally connected to the permissible objective of “decency or morality” it remained for the Court to decide whether, in terms of Art 21 (2), the prohibition is a reasonable restriction which is necessary to achieve the permissible objectives of “decency and morality” and which is necessary “in a democratic society.” The requirements of reasonableness and necessity in Art 21(2) meant that the restrictive measure should not go further than what is reasonably necessary for it to achieve that objective.

30. Both the appellant and the respondents recognized that agency work was open for abuse. They however differed in their approach to the problem. The respondents addressed the problem by total prohibition of agency work whereas the appellant maintained that the deleterious aspects of agency work could be curbed by regulatory measures which would force service providers, who might be guilty of abusive practices, to comply with acceptable employment standards. The appellant contends that to totally prohibit agency work is disproportionate, unreasonable and unconstitutional as these objectives can be achieved by regulatory measures without prohibiting agency work altogether.

31. It seems that in part the stance of the respondents is based on the historical background which finds its setting in the inimical contract labour system as further personified by SWANLA. The appellant denied that agency work was similar to that system and it was pointed out that the contract labour system functioned essentially as a means of influx control, which was further backed up by various legislative enactments, which, in combination, resulted in the degrading and inhuman treatment of workers under that system. These discriminatory measures were abolished long ago and the present legal framework in which agency work is carried out bears no resemblance to the contract labour system. It was pointed out that, unlike agency services, under the contract labour system workers did not work for SWANLA, were not paid by SWANLA, and SWANLA did not become a party to the resultant work contract between the worker and his employer.

32. For the reasons set out the Court found that agency work could not be equated to the contract labour system. One important distinguishing feature is that the contract labour system was rooted in discriminatory laws and implemented as part of a

system of institutionalized apartheid. Employment under that system was subject to an array of offensive regulatory provisions which, amongst others, criminalized the non-performance of a number of contractual obligations. In contrast thereto the legal framework against which agency work is carried out has changed. Racial discrimination and the propagation and practice of apartheid have been banished. People are equal before the law and all forms of discrimination are prohibited by the Constitution. People are able to move freely and can withhold labour without being exposed to criminal penalties. In addition service providers employ their employees and assume the statutory obligations as employers, and when they hire out the services of their employees they remain part of the employment relationship.

33. Counsel for the respondents conceded the differences between the contract labour system and agency work but submitted that agency work, as presently practised in Namibia, still contained many of the deleterious features of the old contract labour system. This, of course, refers to a situation where there is not any regulatory measures in place to curb these features.

34. Under our current constitutional dispensation there is very little in common between the contract labour system of years ago and agency work. The Court found that the justification which the respondents sought for the prohibition of agency work in the abusive labour contract system was misplaced and the Court found that there was no rational relationship between the immoral SWANLA-like contract labour system and the prohibition of agency work based on decency and morality. The Court further pointed out that there was a much greater similarity between employment placement services, preserved and protected in sec 128(2), and the contract labour system, as between that system and agency work. This, it was stated, appeared to be selective reasoning.

35. For the other reasons mentioned by the respondents, the Court was nevertheless satisfied that a rational causal relationship was established between sec. 128(1) and the objectives of decency and morality relied on by the respondents. What remained to be decided was whether the prohibition of agency work was reasonable, was necessary to achieve the permissible objectives of decency and morality and was necessary in a democratic society. These standards of assessment are objective and articulate that a restriction of a fundamental freedom must be reasonable, must be necessary in a democratic society and must be required in the interest of a legitimate constitutional objective, i.e., in this instance, to achieve decency and morality.

36. The appellant submitted that the prohibition was “hopelessly overbroad” and it was pointed out by its counsel that much more, than the type of agency work in which appellant engaged, was hit by the prohibition and would also become unlawful. Examples given were cleaning services to shopping mall operators, the provision of security guards and even the rendering of professional auditing and legal services to clients.

37. Although the issue of “overbreadth” was raised in the application, to limit the Court’s findings to the type of agency services provided by appellant alone might result in further challenges to the constitutionality, were Parliament to redraft the section, which would in any event, still prohibit appellant’s core activity. Therefore it was proper for the appellant to raise the issue of constitutionality on a wider basis.

38. The sweep of the prohibition is clearly wider than the type of employment services appellant is engaged in. As long as the labour constitutes “work for the third party” even if assigned or supervised by the employer (the service provider) and not the service client, it will still be prohibited by sec. 128(1). That is so even if the work is assigned, supervised or completed elsewhere than at the workplace of the employer, e.g. at home.

39. Examples of the type of work which is prohibited include lawyers, where a professional assistant is made available to do legal work for a client. Payment in such an instance is to the firm, i.e. the law firm which employs the professional assistant, and the fees charged are not related to what salary is paid to the assistant. This also includes similar instances where auditors, architects and doctors provide services through employees to clients or patients.

40. The use of the word “work” in the prohibition has wide implications and is not limited to personal services but would also include the performance of work under contracts of work. This would include sub-contract work.

41. Seen in this context the prohibition imposes restrictions on commercial activities protected by Art. 21(1)(j) which are grossly unreasonable and overly broad in their sweep. Such restriction, in so far as it extends beyond the type of agency services provided by appellant, does not serve any legitimate object, is not required in the

interests of decency and morality or necessary in a democratic society. Respondents, in any event, made no attempt to justify such wide prohibition.

42. Unable to defend its broad sweep, respondents contended that the prohibition be read down and/or, regard being had to the definition of “employee”, it be narrowly construed so as to avoid its wide application. The Court, dealing with these submissions, referred to the presumption of constitutionality which prescribes that, as far as possible, legislation should be interpreted to conform with the Constitution rather than to be struck down as unconstitutional, but concluded that the prohibition was so overly broad that it could not be read down as it would require a different and more exact reformulation to achieve that purpose.

43. The respondent’s reliance on the definition of “employee” in s. 1, as a means to cut back the overbreadth of the prohibition, is based on the words “independent contractors” which, in terms of the definition, exclude such contractors from being employees. It is correct that where an independent contractor is employed such person would not be regarded as an employee, in terms of the definition in the Act, but that would not take away the fact that work performed is for services. As presently worded sec. 128(1) applies equally to work performed by an individual, whether as employee, or as an independent contractor.

44. For the reasons given, the Court concluded that the prohibition of the economic activity defined in sec. 128(1) is so overbroad that it is not reasonable and should be struck down as unconstitutional.

45. Having dealt with the issue of overbreadth, which in one sweep prohibited a wide range of agency work, the Court returned to the specific challenge of the appellant to the blanket prohibition of the type of agency work provided by it.

46. In this regard it was also submitted by respondents that the constitutionality of sec. 128 should be determined on the basis that it regulates an economic activity which is best left to Parliament, as the chosen representative of the people, to deal with. All that is required in such an instance was to see that there was a rational connection between the prohibition and what was necessary to obtain the objective which Parliament had in mind. Reasonableness, as required by Art. 21(2),did not play any part in determining the constitutionality of the prohibition. The Court rejected this argument and stated that in determining the constitutionality of the provision, the

Court should not limit its enquiry to rationality only of the legislative option chosen by Parliament and not also examine the proportionality thereof in the context of the criteria set by Art. 21(2). That does not mean that the margin of legislative appreciation allowed as part of the proportionality test would always be the same. In particular circumstances, the margin of Legislative option may be sufficiently wide to bridge the gap between the scope of the enacted restriction and that which, in the assessment of the Court, is necessary in a democratic society, is required and, which in the Court's assessment, would have been proportionate to achieve the objective. The Court pointed out that Art. 21(2) differed from the South African constitutional provisions applicable in that jurisdiction. Where Art. 21(2) demands that a restriction of a fundamental freedom must be reasonable, necessary in a democratic society and required in the interest of legitimate objectives, set out in the article, there is no justification for applying to some freedoms all three criteria when testing the constitutionality of a restriction thereto and to apply in regard to other freedoms only one or some of those criteria.

47. Moreover, the Court found that the prohibition of a particular trade or business does not amount to the regulation of that trade or business in how it should be carried on but precludes that trade or business from being carried on at all. In the present instance, the prohibition seeks to remove and not to regulate the business of an agency service provider from what would otherwise be permissible under the freedom. Thus the Court should, instead of taking a deferential approach, examine the constitutionality of the prohibition more closely.

48. Respondents further submitted that agency work was against the ILO principle that labour "is not a commodity." The Court again reiterated that, unlike a commodity, labour may not be bought and sold on the market without regard to its connection to the rights and human character of the individual who produces that work. Reference was made to the necessity for labour legislation to redress bargaining imbalances, to protect employees etc.

49. Appellant denied that agency work is [inimical] to that principle and referred to the ILO Convention and to the fact that the ILO itself recognized agency work in art. 1(b) as a "labour market service" but proposed regulation thereof. It was also pointed out that Namibia was a signatory to the Convention although it had not ratified it.

50. The Court referred to the provisions of the Convention on *Private Employee Agencies of 1997* and article 2.3 thereof which stated that "(O)ne purpose of (the) Convention is to allow the operation of private employment agencies as well as the protection of workers using their services, within the framework of its provisions."

51. The Court again referred to its previous discussion of labour as a commodity, and stated that the numerous regulative requirements proposed in the 1997-Convention were intended to ensure that agency work was not treated as a commodity. A reading of the Convention showed that it created a framework in which private employment agencies might operate and it ensured protection of workers using the services. If those measures were properly regulated by a member State and supervised and enforced, it would not allow workers to be treated as a commodity. If that were not so intended, the ILO would have been in conflict with one of its most basic principles. A principle on which the ILO was founded.

52. The 1997-Convention was accompanied by the adoption of a Recommendation, No 188 of 1997 which supplemented the provisions of the Convention. It contained a number of recommendations to member States for protection of agency workers. The Court set out the relevant recommendations and concluded that both instruments urge the regulation of agency work, not the prohibition thereof.

53. The second ground relied upon by respondents was that agency work was inimical to Art 95(c) of the Constitution because it was prejudicial to union organisation. It was submitted that agency workers were not working at the workplace of the agency service provider and were scattered all over a number of workplaces. Furthermore the standard contracts between appellant and the agency client might not allow unions access to their workplaces to communicate to agency workers.

54. The nature of agency work clearly presented unions with new and difficult challenges. Both the nature of work and the workplace are changing creating employment opportunities which did not exist before. Advances in communication technology, the social and economic effects of globalisation by huge multi-national and international enterprises and the ever improving communication and transportation infrastructures, to mention only a few examples, are reshaping markets, competition and business on a national and international levels. Employment patterns are also changing with the emphasis on flexibility. The shift away from standard employment relationships is an undeniable reality. These changes and developments in the workplace and in the

employment market cannot be arrested just to preserve the most favoured model for union organisation. Unions will need to move on from their traditional organizing model and reach out to recruit workers in an era characterised by changed employment patterns.

55. The substance of the respondents' complaint was that agency work made it more difficult for unions to access and organise agency workers. These difficulties are present throughout the employment spectrum and is not only related to agency work. Other examples are where employees are thinly scattered over vast and often remote areas such as farm and domestic workers. The difficulty with which labour unions have to access and organise these workers does not diminish the freedom of these workers from joining trade unions protected by Art. 21(1)(e) of the Constitution. These examples show that it can therefore not be said that the organisational difficulties caused by employment in those difficult sectors is "inimical" to the State's duty under Art. 95(c) to actively encourage formation of independent trade unions, and one can hardly argue the banning of domestic or farm labour for that reason. On the same grounds it cannot be said that agency work, because of the difficulties involved for trade unions to get access and to organise such workers, should be banned and consequently respondent's submission in this regard cannot be sustained.

56. The respondents also relied on what is known as "casualisation" of work which is allegedly facilitated by agency work. It was submitted that agency work arrangement allowed the agency client to deny responsibility for the agency workers placed with it. Respondents pointed out the various deleterious effects of agency work where the agency client, *inter alia,* can remove an agency worker without complying with the provisions of the Act regarding fair dismissals. Similarly the agency service provider can avoid his obligation to agency workers through reliance on the contractual application of "no work, no pay" principle.

57. The Court pointed out that "casualisation" cannot only be looked at in the context of agency work. On the one hand there is the necessity for businesses to curb costs in order to stay competitive. By outsourcing work only if and when demand requires it, the employer reduces or limits his legal and industrial relation risks and limits his costs. It further creates flexibility and so becomes more cost effective and competitive. From an employee's perspective, without adequate regulation the casualisation of their employment increases vulnerability to exploitation and reduces

their bargaining power, training opportunities and employment security. These issues caused an ever ongoing debate of where to strike the balance.

58. The issue before the Court is however not to resolve this conflict but, given the requirement of proportionality in Art. 21(2), to determine whether the respondents have shown that the prohibition of agency work, and not the regulation thereof, is necessary in a democratic society and required in the interest of the legitimate objectives pursued by the Act.

59. The Court referred to a judgment of the European Court of Human Rights where the word "necessary" in the phrase "necessary in a democratic society" was discussed. It was stated that the phrase "means that to be compatible with the Convention, the interference must, *inter alia,* correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued.'" The Court, with reference to case law, further pointed out that the requirement of reasonableness in terms of Art 21(2), requires that a limitation should not only be reasonable but also necessary, and would call for a high degree of justification. These remarks applied equally to the first two criteria under our Constitution and even more so given the fact that our Constitution required a third criterion. In order to pass constitutional muster it is not enough for a restriction to be rationally connected to the permissible objectives in Art. 21(2), it must also be "required" in the interest of those objectives.

60. There was no evidence, either by experts or on the affidavits, that the phrase "necessary in a democratic society" was interpreted in other democratic societies to allow for the total prohibition of agency work. Where agency work was previously prohibited it was because it was considered to be an infringement "on the public monopoly in job placement." A judgment by the Oberslandesgericht of M[ü]nchen opened the way for private employment services in Europe which again led to recognition thereof by the ILO in the 1997-Convention. The 1997-Convention was not ratified by Namibia and is therefore not legally binding on it. However, to determine what is "required in a democratic society" it would be permissible to consider that the Convention was adopted by member States and ratified by those States of which many are constitutional democracies. The fact that the Convention was never denounced by any country is a significant consideration in order to determine what is required in a democratic society. The Court pointed out that the reference to the Convention is for the sake of comparison and to show that there is an alternative to

total prohibition of agency work. The reference is not to suggest to Parliament what regulatory measures it should adopt.

61. In relying on the issue of casualisation for justification of the prohibition of agency work, the respondents submitted that agency work, *inter alia,* caused the replacement of permanent workers with agency workers. The Court was aware that in an under[-]regulated situation these practices may impact adversely on matters such as the bargaining strength of workers, their skills' development and training. However in "high regulation" countries in Europe many of these concerns were addressed by regulation. In addition thereto laws were enacted specifying the length of agency work, restricting the purposes for which agency workers may be engaged, guaranteeing parity with other comparable workers in terms of pay and conditions of employment and ensuring the right of agency workers to join unions.

62. The Court further stated that in regulating agency work it would be permissible to distinguish between categories of workers. By excluding certain categories of workers, the Legislature may take into consideration that agency workers belonging to registered professions, who earn a substantial income and who are doing agency work by choice, are less vulnerable to exploitation. The converse may be true for unskilled workers who are much more vulnerable and therefore in need of much more protection.

63. Likewise, the exclusion of certain branches of economic activity may recognize that certain specialized activities are by nature temporary and cannot be accommodated by agency clients on a permanent in house basis. The Court mentioned various examples like [modelling] agencies, advertising agencies[,] etc. The Court further stated that economic activities such as providing agency services during pandemics, disasters, national emergencies etc. may also be excluded. This also goes for certain fixed term tasks such as building operations. Regulatory measures may also prohibit agency work in sectors where it would lead to the replacement of permanent workers by agency workers etc., unless required temporarily to replace employees on maternity leave, sick leave or other leave.

64. The Court concluded that if agency work is properly regulated within the ambit of the Constitution and the 1997-Convention it would be temporary in nature, pose no real threat to standard employment relationships or unionization and will greatly contribute to flexibility in the labour market. By enlisting as an agency worker with more than

one agency service provider, workers can assure employment in the interim until they can secure permanent employment. There are also those who choose the more flexible arrangements offered by agency work. All these options will not be available if agency work is prohibited.

65. Given the scope of regulation contemplated in the 1997-Convention to prevent potential abuses, the wide range of regulatory measures in other democratic societies and the fact that agency work in Namibia can also be effectively regulated without compromising the objects of the Act or the legitimate objectives of "decency and morality" in Art. 21(2) of the Constitution, the absolute prohibition of agency work by sec. 128(1) goes much wider than what would be a permissible restriction in terms of the Article. To state it differently, the prohibition goes much wider than would be required for the achievement of the same objectives and is disproportionately severe in relation to what is necessary in a democratic society to achieve those objectives. That is so even if a generous margin of appreciation is allowed for Parliament, as the Court was urged to do, because the unreasonable extent of the prohibition's sweep will still fall well outside what is permissible.

66. The Court, for the reasons set out in the judgment made the following order:

"1. The Appeal succeeds with costs, such costs to include the costs of one instructing and two instructed counsel.
2. The order of the court *a quo* is set aside and the following order is substituted:
   '1. Section 128 of the Labour Act, 2007 is struck down as unconstitutional.
   2. The 1st and 4th respondents are ordered to pay the applicant's costs, such costs to include the costs of two instructed counsel'."

JUDGMENT NOTES

Adda K Angula & Others v The Board for Legal Education & Others, Case No. A 348/2009

Fritz Nghiishililwa*

Twenty-four Candidate Legal Practitioners went to the High Court on a matter of urgency on Monday, 12 October 2009. The issue was a notice they had received the day before the students were due to write the Final Legal Practitioners' Qualifying Examinations, barring them from writing examination in those subjects in which they had not duly performed, that is, attended at least 80% of the lectures offered.

On 21 September 2009, the students had been requested to give reasons why they had not duly performed in the specified courses as required by the Regulation 14(4) of the Legal Practitioners Act.[1] The wording of the written request was important:[2]

> It has come to the Board for Legal Education's attention that you have failed to comply with Regulation 14(4) of the Candidate's Legal Practioner's [sic] Regulation and thereby obtaining less than 80% class attendance for each of the following subjects: …
> In the light of the above and in terms of Subregulation (b) the Board hereby invites you to make written submissions indicating your reasons for non-compliance.

The court concluded that the Board had made their decision based on the fact that specified students had not attended classes if they had not signed the attendance register.

This conclusion was supported by the Board's Responding Affidavit when they explained the register's role:[3]

> The Board accepted that the registers were properly kept and that it [sic] correctly reflected class attendance.

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[1] No. 15 of 1995.

[2] (ibid.:6).

[3] (ibid.:30).

The court also found that the attendance register had been given a value that it would not have had if it had been legally mandated – which was not the case.

In other words, the results of facts in the attendance registers could not be challenged.

Moving to the submissions by the students, the court divided the applicants into three groups:

- Those who had acknowledged that they had not attended, but without declaring any factual dispute
- Those who had used phrases such as –
  - "I submit I was not there"
  - "I cannot remember not having attended", or
  - "I have no record of not having attended",

  indicating that they may have attended the lectures in question, but had not declared a factual dispute, and
- Those who had declared a factual dispute, e.g. by stating "I was there", and then giving reasons why they had disputed the said register.

Relying on De Ville[4] and *Bel Porto School Governing Body v Premier Western Cape*,[5] the court pointed out that, if administrative action were inherently unreasonable and unfair, the court was entitled to grant relief, even if some applicants had not suffered prejudice. In this specific case, the Board's actions were so intrinsically unfair and unreasonable that they could not be condoned, even if their actions were not brought about by design but by circumstances.

The students were only informed of the Board's decision on Saturday, 10 October 2009, and they were not given a list of the subjects from which they had been barred from writing; nor were reasons given for the Board's decision. To make matters worse, the information given to the students was incorrect. They were informed that they could not write any of their subjects if they were in attendance default in one or more. On 11 October 2009, the Sunday, the students were again contacted and informed that the information of the previous day had been incorrect, and that they could in fact write all the subjects for which they had qualified.

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[4] De Ville, J. 2003. *Judicial review of administrative action in South Africa*. Durban: LexisNexis Butterworths, p 445.

[5] SALR, 2002, p 265 ff CC.

However, as before, the students were not given a list of subjects from which they had been barred and, again, no reasons were given for the decision taken.

The court also took cognisance of the fact that the classes in question had ended in June 2009. Consequently, there had been no reason whatsoever for the long delay until mid-September, which was when the students had been requested to give reasons for their non-compliance with the Regulation.

Consequently, the court granted the students' application. The court did not make a ruling on the costs apart from three students initially having been informed that they could not write some subjects, but later being informed that they qualified to write all the subjects, and whose costs therefore had to be paid by the Board.

The judgment of Acting Judge Heathcote was, as he himself acknowledged, somewhat contradictory. To say, on the one hand, that those students who had acknowledged their non-compliance had not suffered any prejudice and, on the other, to grant them relief seemed to take the expectations of Article 18[6] of the Namibian Constitution too far.

In the light of Article 18, can one really argue that, when an administrative body acts extremely unfairly or unreasonably, it creates rights for litigants who did not suffer prejudice? Or is this relief only broad because it was an urgent application? Alternatively, is the court applying a general constitutional principle here? In the minority judgment of the *Frank* case,[7] then Chief Justice Strydom followed a similar line of thinking. Without going into the merits of the appeal, Justice Strydom looked at the defects in the Immigration Board's appeal process, and concluded that the appeal was to be set aside. The court also made the following comment:[8]

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[6] Article 18 reads as follows:
Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

[7] *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another*, Case No SA 8/99, minority judgment of Judge Strydom, p 23.

[8] (ibid.).

> Furthermore, it seems to me that it is implicit in the provisions of Article 18 of the Constitution that an administrative organ exercising a discretion is obliged to give reasons for its decision. There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The Article requires administrative bodies and officials to act fairly and reasonably. Whether these requirements were complied with can, more often than not, only be determined once reasons have been provided. This also bears relation to the specific right accorded by Article 18 to persons to seek redress before a competent Court or Tribunal where they are aggrieved by the exercise of such acts or decisions. Article 18 is part of the Constitution's Chapter on fundamental rights and freedoms and should be interpreted "… broadly, liberally and purposively…" to give to the [Article] a construction which is "… most beneficial to the widest possible amplitude". (*Government of the Republic of Namibia v Cultura 2000*, 1993 NR 328 at 340 B–D.) There is therefore no basis to interpret the Article in such a way that those who want to redress administrative unfairness and unreasonableness should start off on an unfair basis because the administrative organ refuses to divulge reasons for its decision. Where there is a legitimate reason for refusing, such as State security, that option would still be open.

But Justice Strydom's judgment was not acceptable to the Supreme Court. In the majority judgment, Judge O'Linn took a different approach:[9]

> It should be noted however, that such reasons, if not given prior to an application to a Court for a review of the administrative decision, must at least be given in the course of a review application.

For the present, the legal fraternity will have to wait for the review judgment to clear the issue.

An even more disturbing issue, while only marginally considered in the judgment, is the prolonged process to obtain justice in Namibia. The court addressed the issue of balance of convenience raised by counsel for the Board. The latter counsel also mentioned that the students, in obtaining judgment against the Board, might be worse off than if they had lost. While all the students were granted permission to write their examinations in all subjects, they might end up spending another year in litigation. A trial date might only be available in the middle of 2010.

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[9] See the reported version of *Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another* 2001 NR 107 NS, on p 109.

BOOK REVIEWS

Kruger, A. 2008. *Hiemstra's* Criminal Procedure. Durban: Lexis Nexis; loose-leaf and online. ISBN 978 0 409 03272 7

Nico Horn*

Legal practitioners who practised or prosecuted in Afrikaans in the then South West Africa or South Africa in the 1970s will remember Hiemstra's commentary on the 1955 Criminal Procedure Act.[1] I was a law student at the time and my lecturer, Callie Snyman, introduced me to Hiemstra. When I started prosecuting in 1975, every prosecutor had a copy of Hiemstra's *Criminal procedure*.[2]

The late Etienne du Toit's commentary on the Criminal Procedure Act[3] published in 1987 later became the standard work, especially in Namibia. It had some important advantages over Hiemstra. The first was that Du Toit's work was in English – the sole official language in Namibia after 1990. The second was that the loose-leaf format could be updated annually. And finally, Du Toit, the General Editor and main contributor, was a regular visitor to Namibia. Consequently, his commentary contained more references to Namibian cases than Hiemstra's.

When Hiemstra was no longer able to update his voluminous book, the task was taken over by Albert Kruger and Johan Kriegler. Their first edition appeared in 1993. Judge Hiemstra passed away in 2006.

The sixth edition of Hiemstra's tome by Kruger and Kriegler appeared in 2002. By then, it was clear that an Afrikaans edition of a book on criminal procedure was no longer a good idea in South Africa, whose Constitutional Court and Supreme Court of Appeal dealt with

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[1] No. 56 of 1955.

[2] Hiemstra, VG. 1967. *Suid-Afrikaanse Strafprosesreg*. Durban: Butterworth; an earlier edition was published in 1957 under the title *Strafprosesreg van Suid-Afrika*.

[3] Du Toit, E, FJ de Jager, A Paizes, A STQ Skeen & S van der Merwe. 2003. *Commentary on the Criminal Procedure Act.* Cape Town: Juta; looseleaf, updated annually. Van der Merwe became General Editor after Du Toit's death.

criminal procedure almost on a daily basis, and also conducted its proceedings largely in English.

Now Hiemstra is back – and he is speaking English (and Afrikaans, if you wish to do your own translations). A Kruger, a judge in South Africa, translated the sixth edition from Afrikaans and updated it. It is now available both in loose-leaf format and online. The online edition is a useful contribution to the growing list of online legal publications by Lexis Nexis.

Namibia's Criminal Procedure Act[4] has been amended several times by Parliament since its departure from the South African version in 1990. It no longer looks like the South African version, and there is a new Criminal Procedure Act[5] in the offing, although it will possibly be repealed and never enacted. Since the Namibian Law Reports no longer have a place in their South African counterparts, and few South African jurists read the Namibia Law Reports, the South African commentaries on domestic laws and jurisprudence are not as useful to the Namibian legal framework as they used to be. However, Hiemstra and Du Toit remain important sources of information for those involved in criminal procedure and criminal justice. Even if Namibia eventually publishes its own commentaries, the standard commentaries will remain an important reference to the law in South Africa – to which Namibia still needs to refer on occasion because many laws inherited from that country still apply here – and the persuasive value of South African judgments, especially those of the Constitutional Court.

Kruger's commentary follows the standard approach of past editions in terms of the sections and themes of the 1977 Criminal Procedure Act. At present, the 1977 Act that Namibia follows uses the same numbering and heading system as that employed in its counterpart in South Africa,[6] which makes the commentary an exceptionally handy tool for prosecutors, magistrates, judges and defence legal practitioners in this regard.

However, when it comes to other legislation, it can be confusing to rely on the commentary. Chapter 1, for example, deals extensively with the prosecutorial authority in South Africa.

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[4] No. 51 of 1977.

[5] No. 25 of 2004.

[6] Namibia followed South Africa in 1977. They have the same basic Act (No. 51 of 1977), but with different amendment histories. When Hiemstra's first edition appeared, South Africa worked with the 1955 Act; the then South West Africa had a Criminal Procedure Ordinance similar to the 1955 Act.

Not only does it discuss the South African National Prosecuting Authority Act,[7] which operates with a prosecutorial philosophy very different from that in Namibia, as set out in *Ex Parte Attorney General: The relationship between the Attorney-General and the Prosecutor-General*;[8] the Namibian understanding of sections 2 to 4 of the 1977 Act is also substantially different from the South African perspective of those sections since the judgment in the latter case changed these sections substantially in Namibia.

Numerous other South African laws are discussed in various sections throughout the commentary. The section on extradition, for example, needs to be read by Namibians in the light of this country's own Extradition Act,[9] with its diametrically different approach.

Kruger has nevertheless maintained the straightforward direct approach characterised by Hiemstra's style. Where constitutional developments are discussed, Kruger remains focused on the interpretation of the Act and other legislation, applying straightforward rules to the process. One could perhaps criticise the commentary for not devoting enough attention to the dramatic changes in criminal procedure in South Africa after 1994 and the different ways in which these changes have impacted criminal procedure there.

For older legal practitioners, the lack of constitutional debate will not necessarily impact negatively on using and enjoying Kruger's direct method. Thus, Kruger's treatment of Hiemstra's *Criminal procedure* will undoubtedly find its way to the bookshelves of both older acquaintances and younger converts.

[7] No. 32 of 1998.

[8] 1995 (8) BCLR 1070.

[9] No. 11 of 1996.