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ARTICLES

NOTES AND COMMENTS

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JUDGMENT NOTE

BOOK REVIEW

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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 first semester edition in 2013 edition need to reach the editors by 15 March 2012.

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- Only original, unpublished articles and notes are usually accepted by the Editorial Board.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.
- Articles should be between 4,000 and 10,000 words, including footnotes.
- "Judgment Notes" contain discussions of recent cases, not merely summaries of them. Submissions in this category should not exceed 10,000 words.
- Shorter notes, i.e. not longer than 4,000 words, can be submitted for publication in the "Other Notes and Comments" section.
- Summaries of recent cases (not longer than 4,000 words) are published in the relevant section.
- Reviews of 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.

INTRODUCTION

Nico Horn*

This eighth issue of the *Namibia Law Journal* will reach you at just about the time you prepare for the end-of-year holiday. I trust it will make good reading when there's wind in Swakop, or rain in the Cape.

The *Journal* has an African side to it this month. Not only do we have two articles on international law and the rule of law – one focusing on the African Union (AU) and the other on recent developments in the Southern African Development Community (SADC), but also that both articles are dedicated to two prominent African leaders.

Nasila Selasini Rembe – Professor in Law, and United Nations Educational, Scientific and Cultural Organisation (UNESCO) Chair holder (UNESCO Oliver Tambo Chair of Human Rights) at the University of Fort Hare in South Africa – visited Windhoek recently to deliver the Walter Kamba Inaugural Lecture organised by the Faculty of Law of the University of Namibia (UNAM) as part of the University's 20th anniversary celebrations. Prof. Kamba resigned as Vice-Chancellor of the University of Zimbabwe when he felt that political interference threatened academic freedom. He joined UNAM as the founding Dean of the Faculty of Law. We publish Prof. Rembe's article, "Shared vision, shared future: Nurturing democracy and human rights to advance SADC regional integration, stability and cooperation", in honour of the legacy of the late Walter Kamba. It is at the same time a clarion call for SADC not to be dragged back to autocratic rule and oppression. Or to use Archbishop Desmond Tutu's words as quoted by Prof. Rembe, "In 2012? In a democracy? In a new South Africa? Have we forgotten so soon?"

André Mbata Mangu – Research Professor and Director of the VerLoren van Themaat Centre for Public Law Studies, College of Law, University of South Africa – spread the net wider in an article he finalised during his 67 minutes' community service on Mandela Day, 18 July 2012, "… to pay tribute to one of the greatest democrats and human rights fighters in human history as the world celebrated his 94th birthday". In the article "The African Union and the promotion of constitutionalism and democracy in post-colonial Africa: Ten years on", he analyses the success and failures of the AU in stabilising constitutionalism in Africa.

In one of the Notes, Gerhard Erasmus – a tralac[1] Associate – looks at the latest SADC Summit and the future of the SADC Tribunal, or a possible new Tribunal.

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* Editor-in-Chief; Professor of Law, Faculty of Law, University of Namibia.

1 Trade Law Centre.

Ndjodi Ndeunyema, a fourth-year UNAM Law student, contributes an article on the possibility of introducing plea bargaining in Namibia. Ndeunyema was a member of the UNAM Moot Court team who won the English section of the African Human Rights Moot Court competition in Pretoria earlier this year.

Clever Mapaure and Raphael T Hamunyela analyse the prison and parole laws of Namibia. Hamunyela, a UNAM graduate, is in a good position to look at parole since he is an Assistant Commissioner and Head of the Legal Service in the Department of Namibian Correctional Service.

Manfred Hinz brings his regular Note to the table. This time he revisits the Namibian genocide more than 100 years after the battle of Ohamakari, and asks how the genocide committed by Imperial Germany should be dealt with.

We usually have a contribution by Tousy Namiseb on new legislation. This time around Sacky Shanghala, Chairperson of the Law Reform and Development Commission, teaches us some new things about an old law – the Namibian Constitution.

And finally, there is the review by Cord Luedemann on Oliver C Ruppel and Katharina Ruppel-Schlichting's book, *Environmental law and policy in Namibia*, while in the Judgment Notes you can read about my predictions on the outcome of the second Supreme Court appeal relating to the 2009 election case, and a short comment on the judgment.

As we come to the close of 2012, allow me to wish you all a pleasant festive and holiday season on behalf of the Editorial Board of the *Namibia Law Journal*.

ARTICLES

Shared vision, shared future: Nurturing democracy and human rights to advance SADC regional integration, stability and cooperation*

Nasila Selasini Rembe**

Introduction

It is a singular honour and privilege for me to deliver the inaugural Professor Walter Kamba Lecture. I interacted with Prof. Kamba as a fellow United Nations Educational, Scientific and Cultural Organisation (UNESCO) Chair holder at various meetings of the global University Twinning and Networking (UNITWIN)/UNESCO Chairs Programme.[1] Many of these meetings took place in Stadtschlaining, Austria. I was privileged to attend the launch of the Herbert Chitepo UNESCO Chair on Human Rights, Democracy, Peace and Governance at the University of Zimbabwe in 1998, where he was the first to serve in this Chair. I also interacted with him at various conferences in South Africa. Professor Kamba is perhaps the only person in the Programme's history to date to have held three successive UNESCO Chairs: the UNESCO Chair in African Studies in the Framework of the Utrecht/UNESCO Network for Southern Africa at the University of Utrecht in The Netherlands;[2] the UNESCO/Utrecht Chair on Democracy and Human Rights at the Human Rights and Documentation Centre, University of Namibia, established in 1994 – also within the framework of the Utrecht/UNESCO Network for Southern Africa;[3] and the Herbert Chitepo Chair referred to above.

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* This Professor Walter Kamba Inaugural Lecture was held at the Peter Katjavivi Lecture Hall 1, University of Namibia, 11 October 2012. This is a slightly edited version of the Inaugural Lecture with footnote references.

** Professor in Law, and United Nations Educational, Scientific and Cultural Organisation (UNESCO) Chair holder (UNESCO Oliver Tambo Chair of Human Rights), University of Fort Hare, Alice Campus, South Africa; member of the International Jury for the Award of the UNESCO/Bilbao Prize for the Promotion of a Culture of Human Rights; nsrembe@ufh.ac.za.

1 The UNITWIN/UNESCO Chairs Programme was established in 1992 following the relevant decision of UNESCO's General Conference taken at its 26th session; see http://www.unesco.org/en/unitwin/university-twinning-and-networking/; last accessed 10 November 2012.

2 Ref Chair ID 155. Note that the entries in different editions of the Directory of UNITWIN/UNESCO Chairs may differ.

3 (ibid.).

During the Second International Meeting of UNESCO Chairs on Human Rights, Democracy, Peace and Tolerance held in Stadtschlaining, Austria, which was dedicated to the International Year of mobilisation against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Professor Kamba served as Vice Chairperson, in recognition of his outstanding leadership within the global network of UNESCO Chairs. In a subsequent seminar entitled Current Developments with Respect to Human Rights in Africa, held in South Africa, Professor Kamba spoke passionately and almost in tears about the volatile political climate obtaining in his country, Zimbabwe, and the fertile ground that such an environment had created for widespread violations of human rights.

Professor Kamba was an academic giant as much as he also stood tall in stature. In addition to the enormous contribution he made to academic scholarship and university leadership, his contribution to the liberation struggle and the transition to democracy in Zimbabwe and in the southern African region is enormous.[4] He spoke eloquently, with authority and great dedication to human rights and democracy issues even when he was frail and had to walk with the aid of crutches. He was a professional and principled lawyer as well as an academic scholar who stood by what he believed in: when he perceived that there was political interference by the government in the academic freedom and autonomy of the University of Zimbabwe, where he served as its first black Vice Chancellor,[5] he tendered his resignation. His remarks at the Herbert Chitepo Memorial Lecture amply capture the essence of his inner spirit:[6]

> Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary.

I have titled this Inaugural Lecture "Shared vision, shared future: Nurturing democracy and human rights to advance SADC regional integration, stability and cooperation". The presentation will attempt to answer why the focus is on the Southern African Development Community (SADC); it will examine the SADC Treaty; it will provide contrasting features and similarities among its constituent member states; and it will suggest how SADC can re-image itself. This will be followed by an exposé of democratisation and human rights in the SADC region, including the implementation of regional and international obligations agreed to by member states. The last part will address SADC as an 'unfinished intellectual project', followed by concluding remarks.

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4 He served on the Lancaster House negotiating team for the independence of Zimbabwe, and subsequently served as a member of a number of Commissions and Trusts in Zimbabwe and South Africa.

5 Professor Kamba made enormous contributions to higher education. He also served as President of the International Association of Universities.

6 Kwenda, Stanley. 2007. "Obituary of Professor Walter Kamba". *Tatambura Times*, 26 May 2007; available at http://tatamburatimes.blogspot.com/2007/05/obituary-professor-walter-kamba.html; no longer accessible.

Why SADC?

The late Professor Walter Kamba had this region at heart: in his works and speeches, he spoke out against human rights violations not only in his home country, but also in the context of the entire subregion. Southern Africa is a region that has endured many decades of the most insidious form of European settler colonialism, racial discrimination and apartheid. The accompanying humility and indignity, as well as social exclusions, have left deep scars and a legacy that is vividly visible even today. The painful path towards liberation and freedom garnered solidarity from within and beyond, and sowed the seeds from which solidarity and cooperation grew amongst states in the region. This solidarity was built on a common historical and cultural identity that emerged over the years for a common shared destiny in a liberated southern Africa.

SADC represents a unique regional integration initiative that emerged in stages and from a series of efforts that can be traced back from the process of liberation of this part of the African continent.[7] It emerged from a loose but purposeful political grouping rather than through functional cooperation. This process, which was spearheaded by the Frontline States[8] – thanks to the resilience and wisdom of the leaders of that time – created an environment that was conducive to individual state's attainment of freedom and democracy and, subsequently, regional political cooperation and solidarity. The need to counter the policy of constellation, the hegemony, and the pressure generated by the apartheid South African Government against states that supported and assisted the liberation movements, especially the landlocked states in the region,[9] took the form of disengagement from dependence on South Africa's infrastructure and economy in key sectors such as transport, trade and energy. This resulted in the establishment of a non-treaty-based Southern African Development Coordination Conference (SADCC), the predecessor of SADC, in Lusaka, Zambia, in 1980, following the adoption of the Lusaka Manifesto.[10] It was not until 1992, here in Windhoek, that the Treaty establishing SADC as

7 An analysis of African regional integration is provided in Rembe, NS. 1990. "Regional African Cooperation Agreements". In Frigo, Manlio & Paolo Martinello (Eds). *La Cooperazione allo svillupo tra Italia e Paesi africani*. Rome: Edizioni Lavora. See also Oosthuizen, Gabriel. 2006. *SADC: The origin, its history and prospects*. Midrand, South Africa: Institute for Global Dialogue.

8 The Frontline States (FLS) consisted of five states: Angola, Botswana, Mozambique, Tanzania and Zambia. Initially, SADCC consisted of nine states, namely the FLS, Lesotho, Malawi, Swaziland and the newly independent Zimbabwe.

9 Six SADC states are landlocked, namely Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe.

10 Entitled "Southern Africa: Towards economic liberation". The Conference was preceded by a meeting of FLS Foreign Ministers in Gaborone in May 1979, and a Conference with donor agencies in Arusha in July that year. The latter underlined the need for regional economic cooperation.

a formal intergovernmental, regional organisation was adopted by the existing SADCC Heads of State and Government.

The SADC Treaty

The Treaty establishing SADC underscores the socio-economic cooperation spelt out by its predecessor, SADCC, and adds cooperation in the political and security arenas. Among the principles of SADC provided for in Article 4 of the Treaty are the sovereign equality of all member states; solidarity, peace and security; human rights, democracy and the rule of law; equity, balance and mutual respect; and the peaceful settlement of disputes. The objectives which SADC aims to achieve – which also constitute the SADC Common Agenda for guiding the integration process – are spelt out in Article 5(1) of the Treaty, key among them being to –

- achieve equitable economic growth and socio-economic development that would ensure poverty alleviation and its ultimate eradication
- evolve common political values, systems and institutions which are democratic, legitimate, and effective
- consolidate, defend and maintain democracy, peace, security, and stability
- promote self-sustaining development on the basis of collective self-reliance
- achieve sustainable utilisation of natural resources and effective protection of the environment
- address poverty eradication in all SADC activities and programmes
- strengthen and consolidate long-standing historical, social and cultural affinities and links among the people of the region
- combat HIV and AIDS and other deadly communicable diseases, and
- mainstream gender in the process of community-building.

The above also feature as priority objectives in a number of policies and programmes adopted at national, regional and international levels, such as those articulated subsequently in the United Nations Millennium Development Goals (MDGs).[11]

One novelty in the Treaty which also mirrors the historical context from which SADC emerged is the non-discriminatory clause contained in Article 6. Under the latter provision, member states undertake –

11 Following the Summit of World Leaders in New York, September 2000, the Millennium Declaration was adopted as a statement of commitment to tackle growing and complex global challenges facing the world in the 21st Century. The MDGs provided eight agreed targets and indicators to be achieved by the year 2015.

> … not to discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other grounds as may be determined by the Summit.

The historical setting and context from which SADC developed and in which it will function is evidenced in copious references made in the Preamble to founding declarations as well as documents pertaining to the wider continent, such as the Lagos Plan of Action[12] and the Constitutive Act of the African Union,[13] including reference to *globalisation*. Therefore, although SADC's focus is on its 15 constituent member states, its frame of reference is a wider continental and global context.

Sovereign states operate in environments which are less predictable in comparison with other agencies in the business and private sectors. Therefore, the legal instruments establishing regional economic communities (RECs), however elegantly drafted, may not be sufficient to contain political pressure and ideological differences among the partners, and this is already evidenced by the temporary suspension of the SADC Tribunal.[14] The SADC Treaty's emphasis tends more towards economic and technical cooperation at the expense of other equally vital, but often neglected aspects, such as cultural integration. The extent to which member states are prepared to put SADC interests above those of their own may hold the key to successful integration and the future of SADC.

Similarities and contrasting features

SADC is a receptacle of diverse historical, cultural, linguistic, political and ideological traditions. The SADC region consists of 15 independent sovereign states: six are landlocked; three are island states (Madagascar, Mauritius, and the Seychelles); two are former Portuguese colonies (Angola and Mozambique); three are former French colonies (Madagascar, Mauritius, and the Seychelles); one was under Belgian rule (the Democratic Republic of the Congo/DRC); and the rest fell under the British colonial administration.

The region covers a combined area of almost 10 million km^2 with a population of 277 million. They are largely rural, but a significant 40% of the inhabitants live in urban and peri-urban areas. The population, like the geographical size

12 The Lagos Plan of Action was adopted by the Organisation of African Unity (OAU) in 1980 (Doc. ECOM/ECO/9(XIV) Rev. 2). See also Rembe, NS. 1984. "Prospects for the realisation of the New International Economic Order: An African perspective". *Comparative and International Law Journal of Southern Africa*, 336.

13 Adopted by Heads of State and Government in Lomé, Togo, on 11 July 2000, and entered into force in 2001; OAU Doc. CAB/LEG/23.15.

14 allAfrica. 2011. "SADC Tribunal suspended for a further year"; available at allafrica.com; last accessed 23 November 2012.

of individual counties, varies significantly: over 70 million people live in the DRC, while Botswana, Lesotho, Mauritius, the Seychelles and Swaziland each have less than 3 million inhabitants. Of significance is the accelerated average population growth rate of 4.3% in 2010, compared with a steady growth rate of 2.5% over previous years. This may impact negatively on the overall economic performance measured in gross domestic product.[15]

SADC is endowed with rich agricultural land and forestry; vast deposits of both industrial and precious mineral resources; and oil, gas and coal. It claims the world's largest lakes and rivers; its highest mountain and second-deepest canyon; the greatest biodiversity; renowned world heritage sites; and the most scenic attractions of three oceans with beautiful, sunny islands and archipelagos. Despite the existence of this enormous wealth of natural resources and heritage, SADC remains underdeveloped with glaring disparities of income between and within member states. Ownership, management and access to resources, especially land – which was at the heart of the liberation struggle, remains farfetched to the masses and, therefore, a politically volatile issue.

About 45% of the SADC population lives below the poverty line and on less than 1 US Dollar a day. Life expectancy has declined over the last decade[16] from 60 to 40 years; infant mortality is high, with 50 deaths per 1,000. The decline in life expectancy can be attributed partly to the high prevalence of HIV and AIDS, with the region claiming 37% of the world's infected population. Unemployment levels are also high at or higher than 20%, which exacerbates the region's efforts to address poverty and income inequality. High levels of illiteracy, poverty, and income inequalities make it difficult for the region to achieve the MDGs by the target date of 2015.[17] Almost 50 years after independence for some states and almost 20 years into democracy after the demise of apartheid in South Africa, the lives of the ordinary people have not improved significantly; in some cases, they have even worsened. Archbishop Emeritus Desmond Tutu poured out his rage during the launch of Father Michael Lapsely's autobiography *Redeeming the past: My journey from freedom fighter to healer*[18] in District Six, Cape Town, on 3 September 2012, as follows:[19]

15 Statistical information available at www.sadc.fint/files; last accessed 21 November 2012.

16 Since 2003.

17 African Development Bank. 2011. "Southern Africa Regional Integration Strategy Paper 2011–2015"; available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2011-2015%20-%20Southern%20Africa%20-%20Regional%20Integration%20Strategy%20Paper.pdf; last accessed 23 November 2012.

18 Lapsely, M, with Karakashian, S. 2012. *Redeeming the past: My journey from freedom fighter to healer* New York: Orbis Books.

19 News24. 2012. "Tutu bursts into rage". *News24.com*, 4 September 2012; available

> "What on earth are you doing!" he cried. "I am 80-years-old. Can't you allow us elders to go to our graves with a smile, knowing that this is a good country? Because truly – it is a good country!" …
>
> "Is this the kind of freedom people were tortured and people were maimed for?" …
>
> "I ask myself, why were we in the struggle? The highest price was paid for freedom, but are we treating it as something precious?" …
>
> "How can we have children 18 years later [after the dawn of democracy] who go to school under trees and whose education is being crushed without textbooks[20] and no one is held accountable? Have we so quickly forgotten the price of freedom?" ...
>
> "People are going to sleep hungry in this freedom for which people were tortured and harmed." ...
>
> "It is difficult to believe people are getting such money and benefits, and are driving such flashy cars while the masses suffer in cramped shacks." ...
>
> "It's legal, but is it moral?" he asked. "Please, please, please, come to your senses."
>
> [Referring to the shootings at the Marikana mine,[21] Bishop Tutu said they reminded him of events under apartheid.]
>
> "In 2012? In a democracy? In a new South Africa? Have we forgotten so soon? Marikana felt like a nightmare, but that is what our democracy is in 2012."

Although Bishop Tutu was referring to the situation in South Africa, perhaps this is not dissimilar from what is happening in other SADC member states.

Re-imaging SADC

The above lamentation by Archbishop Tutu and various sordid episodes captured on a daily basis by the print and electronic media tell a depressing story of SADC: a tale of SADC in crises, of governments at war with themselves and with their own citizens. Recently in 2012, three inaugural lectures held in South Africa within a short space of time were delivered by three eminent people: Mary Robinson presented the Tenth Nelson Mandela Annual Lecture at Cape Town City Hall on 5 August 2012;[22] the Thirteenth Steve Biko Annual

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at www.news24.com/South Africa/Tutu-shock-audience-outburst-20120904; last accessed 21 November 2012.

20 See http://www.digitaljournal.com/article/329815; last accessed 10 November 2012.

21 See http://www.digitaljournal.com/article/331100; last accessed 10 November 2012.

22 Transcript of Mary Robinson's Nelson Mandela Annual Lecture entitled "Freedom, democracy, citizenship and common purpose", 5 August 2012; available at http://

Memorial Lecture was delivered at the University of Cape Town by Professor Ben Okri on 12 September 2012;[23] while the Second Annual Desmond Tutu International Peace Lecture was delivered by Graça Machel at the University of the Western Cape on 2 October 2012.[24] The most common and recurring issues that underline the three presentations are deepening social inequalities side by side with extreme wealth enjoyed by a few; high levels of corruption in public office; lack of government accountability and transparency; high levels of violence, and especially violence perpetrated against women and children; and citizens orphaned by their governments.

News headlines broadcast all over the world do not portray a good image of SADC as a region proud of its recent legacy of liberation, a heritage bathed in the philosophies proclaimed by our forebears: African Renaissance, humanism, *Batho Pele*,[25] *ubuntu*,[26] *authenticité*,[27] and *ujamaa*.[28] In Tanzania, hundreds of albinos are hunted, ritually murdered, and their body parts cut off while they are alive because of a superstitious belief that they are witches or their body parts have magical powers.[29] In Botswana, the *Basarwa* are dispossessed and driven off their ancestral lands by a government that is lauded as a model of democracy and success;[30] in South Africa xenophobia led to the most brutal

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www.nelsonmandela.org/news/entry/transcript-of-mary-robinson-nelsonmandela; last accessed 5 August 2012.

23 Transcript of the Thirteenth Steve Biko Annual Memorial Lecture delivered by Prof. Ben Okri at the University of Cape Town (UCT), 12 September 2012; copy of transcript issued by Mologadi Makwela, UCT Communication and Marketing Department.

24 "Graça Machel addresses Second Annual Desmond Tutu International Lecture, 2 October 2012"; available at http:/www.oryxmedia.co.za/; last accessed 5 August 2012.

25 "Putting people first"; http://www.info.gov.za/aboutgovt/publicadmin/bathopele.htm; last accessed 10 November 2012.

26 "I am what I am because of what we all are"; http://en.wikipedia.org/wiki/Ubuntu_(philosophy); last accessed 10 November 2012.

27 "Authenticity"; http://en.wikipedia.org/wiki/Authenticit%C3%A9_(Zaire); last accessed 10 November 2012.

28 "Extended family", "familyhood", "a person becomes a person *through the people* or community" [emphasis in original]; http://en.wikipedia.org/wiki/Ujamaa; last accessed 10 November 2012.

29 www.theworld.org/2010/06/the-murder-of-albinos-in-tanzania; page no longer accessible.

30 The *Basarwa*, an indigenous community that is part of the larger San community, once occupied Botswana's Central Kalahari Game Reserve. The Botswana Government attempted to relocate them to settlements outside the Reserve on the pretext that their residence in the Reserve was incompatible with the conservation of wildlife, although the decision was actually prompted by the discovery of diamonds in the area. The government's attempts gave rise to a series of litigations; see e.g. *Sesana & Others v The AG*, 2006 (2) BLR 633 (HC).

killings of foreigners; over 40 protesting miners at Marikana were shot and killed by the police in a manner reminiscent of the dark days of apartheid;[31] in the DRC, rape and murder take place almost on a daily basis, forcing people to flee their homes;[32] elsewhere, people with different sexual orientations are persecuted and harassed;[33] people living with HIV and AIDS are discriminated against, raped, and even sterilised without their consent.[34]

These are not issues with quick-fix solutions but issues that must engage governments and civil society across SADC to awaken to the harsh realities and the difficult conditions experienced by the people of this region. Because people are denied participation and the platform to make their voices heard, they have to break eggs in order to be heard: the spate of violent protests by social movements, workers and students, among others, is a testimony to malfunctioning governments drifting away from their responsibility to protect and provide for their citizens.

Democratisation and human rights

Democracy and human rights, despite the contest and debates about these ideals, are essential for providing an environment that is conducive to enhancing the potential of every citizen and the quality of the human condition. Thus, the level of democratisation and the enjoyment of human rights is an indication of how responsive a government is to its people. Regular, free and periodic elections have featured in many SADC countries, the latest being Angola. Democracy does not, however, begin and end with elections, but is a process that must be carefully nurtured so that people can exercise their freedom of choice of government and be able to participate in the decision-making process. Therefore, how elections are conducted and managed influences the outcome. In many cases, dubiously run elections have cast a shadow on the legitimacy of the elected government.

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31 The stand-off between miners and the South African Police at the Lonmin Mine in Marikana, South Africa, over wage negotiations took a protracted and ugly confrontational turn which spilled over to workers in other mines and sectors.

32 It is estimated that over 1.5 million people have fled the DRC to neighbouring countries due to the brutal conflict currently waged by the M23 militia group, which is alleged to be supported by Rwanda and Uganda.

33 Ditshwanelo: Gays, lesbians, and bisexuals of Botswana; available at www.ditshwanelo.org.bw/gay.html; last accessed 10 November 2012. See also Keorapetse, Dithapelo. 2012. "Gay rights are human rights". *The Botswana Gazette*, 7 March 2012.

34 Gevisser, Mark. 2010. "Homosexuality and the battle for Africa's soul". *Mail & Guardian*, 4 June 2010. See also the case of *LM & MI & NH v The Government of Namibia*, where three women successfully sued the Namibian Government for being sterilised without their consent; Duval Smith, Alex. 2012. "Namibia court rules HIV-positive women sterilised without consent". *The Guardian*, 30 July 2012.

A lack of political maturity and tolerance in the period leading to and during elections as well as perceived election rigging and corruption have resulted in violence and contestation of election results. The DRC has experienced a protracted and costly internal conflict that has repercussions beyond SADC; Zimbabwe went through a volatile political period that resulted in the imposition of limited sanctions and a travel ban on its leaders; Madagascar has had its membership suspended from SADC;[35] while Swaziland remains a source of growing concern.

A number of indices can be used to measure the level of democratisation and development of a culture of human rights in a country. Such indices include the United Nations Development Programme's Human Development Index; the Human Rights Index, which measures the degree of lack of protection of human rights or non-compliance with international human rights instruments; the Universal Human Rights Index, which are country-specific indicators emanating from international human rights mechanisms; the Economic and Social Rights Fulfilment Index; the Freedom in the World Index, which focuses on civil and political rights; and the Ibrahim Index of African Governance. However, each has a different emphasis on the factors to be taken into account, and this has a bearing on the outcome. The Ibrahim Index, for example, analyses 88 indicators which are grouped under four broad categories: safety and the rule of law; participation and human rights; sustainable economic opportunities; and human development.

Table 1: 2011 Ibrahim Index of African Governance

No.	Southern African Development Community (SADC) states	Score	Rank
1	Angola	41	42
2	Botswana	76	3
3	Democratic Republic of the Congo	32	50
4	Lesotho	63	8
5	Madagascar	47	33
6	Malawi	57	17
7	Mauritius	82	1

35 The decision to suspend Madagascar from the African Union was taken by the AU in March 2009 and followed by SADC due to an unconstitutional change of government in that country. See Ploch, L. 2012. "Madagascar's political crisis"; available at http://www.fas.org/sgp/crs/row/R40448.pdf; last accessed 23 November 2012.

No.	Southern African Development Community (SADC) states	Score	Rank
8	Mozambique	55	21
9	Namibia	70	6
10	Seychelles	73	4
11	South Africa	71	5
12	Swaziland	51	26
13	Tanzania	58	13
14	Zambia	57	16
15	Zimbabwe	31	51

Source: *www.moibrahimfoundation.org; last accessed 23 November 2012.*

Neither the African Union nor SADC can dictate to states the type of political order that their governments should adopt. However, it is undeniable that states which are more democratic enjoy a measure of political stability and sustainable social and economic development. SADC should, therefore, adhere to its own Principles and Guidelines Governing Democratic Elections;[36] the AU's African Charter on Democracy, Elections and Governance;[37] and the United Nations Guidelines on Elections.[38] SADC should also apply the provisions of the Constitutive Act of the African Union,[39] which sanction governments that come into power through unconstitutional means; these provisions are echoed in the SADC Treaty.[40]

36 Adopted by the SADC Summit in Mauritius, August 2004. The Introduction states that the Guidelines were adopted in line with AU principles governing elections, and were informed by SADC legal and policy instruments, among other things. See also Matlosa, Khabele. 2004. "Managing democracy: A review of SADC Principles and Guidelines Governing Democratic Elections"; available at http://www.eisa.org.za; last accessed 23 November 2012.

37 Adopted by the AU in Addis Ababa on 30 January 2007.

38 UN/United Nations. 1994. *Human rights and elections: A handbook on the legal, technical, and human rights aspects of elections*. New York/Geneva: UN; IDEA/ International Institute for Democracy and Electoral Assistance. 2002. *International electoral guidelines for reviewing the legal framework of elections*. Stockholm: IDEA; EC/European Commission. 2007. *Compendium of International Standards for Elections* (Second Edition). Brussels: EC.

39 See Article 30, read together with the principles of the AU as stated in Article 4(m) and (p) therein.

40 See Article 33(1)(b), read together with Articles 4 and 5.

Implementation of SADC Protocols and other regional and international instruments

A cursory examination of SADC member states' record of ratifying basic regional and other international human rights instruments reveals a number of shortcomings. Out of 11 international (United Nations) human rights instruments analysed, Swaziland has not ratified eight of them; Angola and Botswana eight each; Zimbabwe seven; Madagascar, Malawi and Mozambique six each; Zambia five; Tanzania four; the DRC three; and Lesotho, and the Seychelles two. Only two SADC member states (Lesotho and the Seychelles) have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in 1990; and only two (the DRC and Mauritius) have ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The International Convention on the Suppression and Punishment of the Crime of Apartheid has not been ratified by six SADC states (which ironically includes South Africa) and the Convention on the Prevention and Punishment of the Crime of Genocide by seven states. Six states have ratified neither the Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) nor the Optional Protocol to the Convention on the Rights of Persons with Disabilities. On the other hand, the Convention against Corruption has been ratified by all SADC member states, with the exception of Swaziland. It is trite to point out that, in order for individuals to be beneficiaries of the human rights norms and standards adopted in the above instruments, states need to ratify those instruments and their accompanying optional protocols and make them operational in their national legal systems. However, it is apparent that SADC states have done so selectively, and chose not to ratify most of the optional protocols that allow individuals the right to petition directly against their states at the international level when their rights are violated.

Table 2: Non-ratification of basic international human rights instruments by SADC member states who are also UN members

No.	Southern African Development Community (SADC) member state	1	2	2a	3	4	5	6	6a	7	7a	8	9	9a	10	11
1	Angola				x	x	x	x	x				x	x	x	
2	Botswana	x		x		x	x		x				x	x	x	
3	Democratic Republic of the Congo										x			x	x	

No.	Southern African Development Community (SADC) member state	1	2	2a	3	4	5	6	6a	7	7a	8	9	9a	10	11
4	Lesotho								x					x		
5	Madagascar						x		x		x		x	x	x	
6	Malawi					x	x		x		x			x	x	
7	Mauritius					x	x							x	x	
8	Mozambique	x		x					x				x	x	x	
9	Namibia								x							
10	Seychelles								x					x	x	
11	South Africa	x				x			x						x	
12	Swaziland			x		x			x		x		x	x	x	x
13	Tanzania			x			x	x	x						x	
14	Zambia						x		x		x			x	x	
15	Zimbabwe			x				x	x		x		x	x	x	

Notes

1 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
2 International Covenant on Civil and Political Rights (ICCPR), 1966
2a Optional Protocol to the ICCPR, 1966
3 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965
4 International Convention on the Suppression and Punishment of the Crime of Apartheid, 1972
5 Convention on the Prevention and Punishment of the Crime of Genocide, 1948
6 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984*
6a Optional Protocol to CAT, 2002
7 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979
7a Optional Protocol to CEDAW, 1999
8 Convention on the Rights of the Child (CRC), 1989
9 Convention on the Rights of Persons with Disabilities (CRPD), 2006
9a Optional Protocol to the CRPD, 2006
10 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
11 Convention against Corruption, 2003

Source: *UNESCO. 2011. "Human Rights. Major International Instruments. Status as at 30 June 2011"; available at http://www.unesco.org/new/en/social-and-human-sciences/themes/human-rights-based-approach/sv3/news/human_rights_major_international_instruments_status_as_at_30_june_2011/; last accessed 11 November 2012.*

With respect to the regional instruments, the Protocol establishing the new African Court of Justice and Human Rights[41] has not been ratified by any SADC state, while only one state (Mauritius) has ratified the African Charter on Values and Principles of Public Service and Administration, which was adopted in 2011. The AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) adopted in 2009 has only received two ratifications; but, more crucially, the African Charter on Democracy, Elections and Governance adopted in 2007 has only three ratifications (Lesotho, South Africa and Zambia); and the AU 2003 Convention on Corruption only five. The irony is that all SADC states ratified the UN Convention on Corruption. Heading the list of non-ratification of regional instruments is Swaziland (8); followed by Botswana, the DRC and Madagascar (7); Angola, Mauritius, Namibia and the Seychelles (6); Zimbabwe (5); Malawi, Mozambique and Tanzania (4); South Africa and Zambia (3); and Lesotho (2).

Table 3: Non-ratification of regional human rights instruments by SADC member states who are also AU members

No.	Southern African Development Community (SADC) member state	1	2	3	4	5	6	7	8	9	10
1	Angola				x		x	x	x	x	x
2	Botswana				x	x	x	x	x	x	x
2	Democratic Republic of the Congo			x	x		x	x	x	x	x
4	Lesotho								x		x
5	Madagascar	x			x	x		x	x	x	x
6	Malawi							x	x	x	x
7	Mauritius	x			x	x	x	x	x	x	
8	Mozambique							x	x	x	x

41 This Protocol – which replaces the African Court on Human and Peoples' Rights (1998) and the Court of Justice of the African Union (2003) – was adopted at Sharm El-Sheik in July 2008. While the latter Protocol has not yet entered into force, the former two courts were already operative.

No.	Southern African Development Community (SADC) member state	1	2	3	4	5	6	7	8	9	10
9	Namibia	x			x			x	x	x	x
10	Seychelles				x			x	x	x	x
11	South Africa								x	x	x
12	Swaziland			x	x	x	x	x	x	x	x
13	Tanzania										
14	Zambia				x				x		x
15	Zimbabwe				x			x	x	x	x
	Total SADC (African Union)	45 (53)	53 (53)	46 (53)	26 (53)	33 (53)	33 (53)	17 (53)	5 (53)	14 (53)	2 (53)

Notes

1. *AU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969*
2. *African Charter on Human and Peoples' Rights, 1981*
3. *African Charter on the Rights and Welfare of the Child, 1990*
4. *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998*
5. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003*
6. *AU Convention on Preventing and Combating Corruption, 2003*
7. *African Charter on Democracy, Elections and Governance, 2007*
8. *Protocol on the Statute of the African Court of Justice and Human Rights, 2008*
9. *AU Convention on the Protection and Assistance of Internally Displaced Persons in Africa, 2009*
10. *African Charter on Values and Principles of Public Service and Administration, 2011*

Source: *http://www.africa-union.org/root/au/documents/treaties/treaties.htm; last accessed 11 November 2012.*

The SADC Treaty is complemented by a series of declarations and protocols. Among the most important of the latter are the Charter on Fundamental Social Rights in SADC adopted in 2003, and ratified by all member states with the exception of Madagascar; a Protocol on Extradition, adopted in 2002; a Protocol on the Facilitation of the Movement of Persons in SADC, adopted in 2005; a Protocol on Corruption, adopted in 2001; and the SADC Protocol on Gender and Development, adopted in 2008.

The Gender and Development Protocol, which follows a sequence of other regional and international instruments that speak to women's rights,[42] adopted a unique and innovative approach which provides 23 targets that have to be met by 2015 in order to address gender imbalances and inequities in SADC. In a region where patriarchy is deeply embedded in culture, gender-based discrimination, violence and abuse against women is a continuing concern. The rate at which women and young girls are raped – including so-called correctional rape, i.e. the rape of women who are alleged to be lesbians – or brutally murdered for the belief that they are witches or for their body parts is most alarming. Women are also by far the most ravaged population group when it comes to HIV and AIDS. Therefore, women's health, safety, education and empowerment must receive priority in SADC programmes. Although significant strides have been made in respect of the representation of women in national parliaments and their appointment to ministerial positions, including one woman serving as head of state,[43] very few states have reached the 50% target set for 2015. Representation of women at local government level and in the private business sector is equally low, and remains a matter of concern to human rights observers.

Another vice that that has reared its ugly head is corruption. It has mutated itself and spread in all levels of society. The irony is that virtually all SADC states have signed the UN, AU, and SADC instruments aimed at combating corruption and other related offences, but the pervasive culture of corruption, coupled with ineffective anti-corruption institutions and legal frameworks, thwarts all attempts to curb the phenomenon. Corruption diverts resources for fighting poverty and for developing the social infrastructure, unjustly enriching a few individuals and exacerbating the plight of intended beneficiaries such as orphans and other vulnerable children, the aged, and people with disabilities.

The Corruption Perceptions Index,[44] which is used to indicate the level of corruption in a country on a score from 1 to 10, with 1 being the most corrupt and 10 the least, has only three SADC member states that score close to 5.0 or more. They are Botswana, Mauritius and the Seychelles. Angola and the DRC score the lowest (2.0), while Namibia and South Africa have scores of 4.4 and 4.1, respectively. In comparison, Denmark, New Zealand and Sweden score above 9.0.

42 For example, the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003.

43 Ms Joyce Banda became President of Malawi following the death of Bingu wa Mutharika.

44 See http://cpi.transparency.org/cpi2011/results/; last accessed 11 November 2012.

Table 4: Corruption Perception Index, SADC member states, 2011

No.	Southern African Development Community (SADC) member state	Score	Rank		No.	SADC member state	Score	Rank
1	Angola	2.0	168		9	Namibia	4.4	57
2	Botswana	6.1	32		10	Seychelles	4.8	50
3	Democratic Republic of the Congo	2.0	168		11	South Africa	4.1	57
4	Lesotho	3.5	77		12	Swaziland	3.1	95
5	Madagascar	3.0	100		13	Tanzania	3.0	100
6	Malawi	3.0	100		14	Zambia	3.2	91
7	Mauritius	5.2	46		15	Zimbabwe	2.2	154

Source: *http://cpi.transparency.org/cpi2011/results/; last accessed 11 November 2012.*

"Think SADC" as an intellectual project

If the hopes and aspirations created by liberation and the attainment of freedom after the people of the SADC region were oppressed and humiliated for so many years are to be realised, urgent and fundamental changes are required. The pace of democratisation and transformation has been painstakingly slow and without concomitant social justice or reconciliation. Revolutionary change has also been hamstrung by a protective shield built around the status quo: that change has to be peaceful and gradual, and be carried out within the constitution and the rule of law.[45] However, given the legacy of the past and

45 See Rembe, NS. 1984. "Law and transformation of societies: The use of law in Tanzania's socialist development". In Royal Academy for Overseas Sciences (Eds). *Symposium on the Knowledge of Law in Africa*. Brussels: Royal Academy for Overseas Sciences, p 267. The relationship between the rule of law, democracy, and human rights is well articulated in Barry, James. 2006. "Media and good governance" New York: United Nations Educational, Scientific and Cultural Organisation.

the injustices that span over many decades, which contributed to the morally and legally indefensible status quo that exists today, unwavering observance of the stringent requirements of the doctrine of the rule of law and legality may not always serve as effective instruments for dislodging systemic injustice or acquired and vested interests over land and mineral resources.

Is it fanciful, therefore, to suggest that the strict application of this doctrine be relaxed, albeit only temporarily, in order to bring about the desired social transformation? If not, what are the alternatives? Are we content to be passive recipients of these ideals, or should we interrogate and define them for our context? This is where there is a felt need for innovative ways to bring about rapid social and economic change without the inhibitions imposed by the traditional models of rule of law, democracy and development. Here is where space for citizen participation and dialogue as provided for in the SADC Treaty[46] needs to be created as well as robust intellectual reflection and debate.

In her Inaugural Address, Mary Robinson[47] referred to citizen participation as –

> … action, in which the people engage with the process of governance in all its forms, starting with the very local.

She asks the following:

> What are religious leaders saying and doing … What are the professionals saying? What are the unions saying? ... Are they truly working to hold the government accountable for the inequities, the imbalances, the injustices they witnessed close to home? Or are they more concerned with their own survival, their own advancement, to the detriment of that wider common purpose of achieving a constitutional democracy …?

In a poem titled *Apolitical intellectuals,* the greatest Latin American liberator, Otto René Castillo, castigated intellectuals who remain passive while the masses suffer and endure bitter struggles to liberate themselves. He states that –[48]

> … when the apolitical intellectuals will be interrogated by the masses on what they did when their country was slowly dying out, they will have nothing to say, their own misery will gnaw at their souls, and they will be mute in their shame.

46 See Article 23, particularly 23(1).

47 Robinson, M. 2012. "Freedom, democracy, citizenship and common purpose"; available at http://www.nelsonmandela.org/news/entry/transcript-of-mary-robinson-nelsonmandela; last accessed 5 August 2012.

48 The quotation is paraphrased from the poem, which is available at ottorenecastillo.org/tomorrow/Intellectual.html; last accessed 21 November 2012.

In the same vein and in a similarly poetic fashion, Thabo Mbeki titled the Second National Institute for Economic Policy (NIEP) Oliver Tambo Lecture, which he delivered in Johannesburg on 11 August 2000 as "Ou sont'ils, en ce moment?" – "Where are they now?"

Mbeki was also referring to the apathy shown by intellectuals after liberation had been achieved, aligning themselves with the interests of their erstwhile colonial oppressors and abandoning the struggle and the suffering of the masses:[49]

> Where is the black intelligentsia now, given that the victory over white minority domination, scored during their joint action with the native masses, has created the conditions for them to pursue their class interests, without let or hindrance?
>
> This intelligentsia must engage with vigour the critical issues of the transformation of ours into a non-racial and non-sexist society, understanding that the realization of these goals will be a defining feature of fundamental social transformation of our country to which many of us claim to be committed.

If SADC is to succeed, its intellectuals and the wider civil society must "Think SADC" and be engaged in shaping its future through ideas, dialogue and research, and in building solidarity and understanding across the region.

Concluding remarks

If the vision for a common shared future is to be achieved, more work and reflection is needed in order to strengthen the state of governance and socio-economic development of each member state within the framework of the SADC Common Agenda. Attention should be paid to the attainment of participatory democracy that ensures legitimacy and effectiveness in the institutions of governance, with significant representation of women and young people, and in which civil society plays a vibrant role. A prosperous future SADC must inject massive investment in education and in the training of teachers and educators, in order to lay the foundation for the leadership of tomorrow, and also provide the skills that are necessary for employment. Equally, susceptibility of the region to diseases such as the ebola virus and pandemics such as HIV and AIDS requires a significant improvement in the provision of health services as well as the coordination of intervention programmes.

The spate of violence and conflicts that has been witnessed across SADC, between and within states, is a testimony of growing impatience with the pace of service delivery as much as with the ineffectiveness and malfunctioning

49 Available at http://www.thepresidency.gov.za/pebble.asp?relid=2650; last accessed 21 November 2012.

of the institutions of government. While resources must be marshalled to people-centred and pro-poor programmes, the bureaucracy must respond to the plight of the people with commitment, in a humane manner and without discrimination. This is why it is imperative for SADC states to ratify the AU Charter on Values and Principles of Public Service and Administration in order to make its values operational within member states. SADC states have a high degree of diversity in respect of racial, ethnic, tribal, linguistic, religious, minorities and indigenous peoples. The manner in which diversity is managed so that each identity has a sense of belonging and equal treatment can greatly minimise the conflicts that are so prevalent today.

With few exceptions, the economies within SADC rely on fluctuating agricultural and mineral exports, with high dependence on imported manufactured goods, oil, and foreign aid. The demands of growing populations coupled with rural–urban migration and the influx of migrants from conflict-ridden areas or economically less-developed countries to more affluent and politically stable ones has generated problems that require a regional approach in line with the provisions in the SADC Treaty relating to the free movement of persons and non-discrimination.

SADC must reflect and build on the strength of its past, while focusing on the future at the same time. The regional bloc has been the last bastion of settler colonial domination, racial discrimination and apartheid. While the resilience to overcome adversity unleashed unwavering resolve and commitment to the liberation process and solidarity against apartheid, it should also serve as an inspiration for achieving SADC's vision. The will and the commitment which was shown towards the speedy establishment of transfrontier parks for animals and nature conservation[50] in the SADC region can similarly be extended to enhance the living conditions of the people that live there. SADC can also draw strength and inspiration from the *ubuntu* and *ujamaa* philosophies in building a more compassionate, caring and sharing community.

The late Professor Kamba had a vision of a free, democratic and prosperous southern Africa and devoted a greater part of his life to achieve this dream. The challenge for us all – and young people in particular – is how to take this unfinished project further. The vision of SADC for a common shared future will be achieved when there is a common SADC citizenship, improved human living conditions, gender equality, and a culture of respect for the human rights of every individual in the region. When sprinters such as Frank Fredericks, Johanna Benson or the Chipolopolo soccer team win, we should all feel proud

50 The Kavango Zambezi Transfrontier Conservation Area involves Angola, Botswana, Namibia, Zambia and Zimbabwe. See "SADC to establish world's largest transfrontier park". *Southern Africa News Feature*, 23 September 2011; available at www.sardc.net/editorial/newsfeature/11230911.htm; last accessed 21 November 2012.

and rejoice in the victory because it is ours, because SADC won. This is the idea, the sense of pride and belonging to SADC that we should strive to achieve. In this regard, I must pay tribute to the Faculty of Law at the University of Namibia, the organisers of this event, for conceiving of the idea to honour Professor Kamba in this special way, and I hope that the memory of him will always be kept alive.

Thank you.

The African Union and the promotion of constitutionalism and democracy in post-colonial Africa: Ten years on*

André Mbata Mangu**

Abstract

The promotion of democratic principles and institutions, human rights, the rule of law and good governance features prominently among the objectives and principles of the African Union (AU).

The Constitutive Act of the African Union was adopted in Lomé, Togo, on 11 July 2000 and entered into force on 26 May 2001. The AU held its inaugural meeting in Durban, South Africa, in July 2002. By July 2012, when the AU Assembly held its Nineteenth Ordinary Summit in Addis Ababa, Ethiopia, and elected South African Home Affairs Minister Dr Nkosazana Dlamini-Zuma as the new Chairperson of its Commission in replacement of Dr Jean Ping of Gabon, the AU had already entered its second decade of existence.

Ten years on, as Dr Zuma starts her mandate as the first woman ever to preside over the Commission, this article revisits the concepts – and reflects on the AU's contribution to the promotion – of constitutionalism and democracy on the continent. Based on the important number of regional instruments adopted and on different actions undertaken, the paper argues that the AU has come a long way in promoting constitutionalism and democracy in Africa. However, a great deal still needs to be done because of the huge gap that exists between AU instruments and the practice in several AU member states.

The end of the first decade of the AU and the beginning of its second decade with the election of a new chairperson of the Commission constitutes an opportunity for African leaders, peoples, intellectuals, and different AU

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* This article is based on an unpublished paper read at an international conference organised by the United Nations Economic Commission for Africa (UNECA), the Council for the Development of Economic and Social Science Research in Africa (CODESRIA) and the Johns Hopkins University in Washington, DC, entitled "Two decades of democracy and governance in Africa: Lessons learned, challenges and prospects", held in Dakar, Senegal, on 20–22 June 2011. The article was finalised during my 67 minutes' community service on Mandela Day, 18 July 2012, to pay tribute to one of the greatest democrats and human rights fighters in human history as the world celebrated his 94th birthday.

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organs, to take stock, reflect on what the AU has achieved as well as on the challenges and prospects for constitutionalism and democracy that need to be consolidated as a prerequisite for an African renaissance.

Keywords: African Union, constitutionalism, democracy, Africa, good political governance, human rights

Introduction

The 1960s were the 'independence decade', as many African countries acceded to independence after years of colonisation by Europe. The Organisation of African Unity (OAU) played a crucial role in ending colonialism and apartheid on the African continent.

The OAU Charter was signed in Addis Ababa, Ethiopia, on 25 May 1963 and entered into force in September that year. By the end of the 20th Century, all African peoples had become independent. For most of them, independence was synonymous with freedom and development, which could be better achieved through constitutionalism and democracy. Unfortunately, African leaders who inherited power from the former colonial masters went on to establish authoritarian regimes that deprived their peoples of many human rights. This resulted in a new struggle: one for the 'second independence', as the first appeared to be lost to leaders and confiscated by them.[1]

Towards the end of the 1970s, the lack of ability among African governments to deliver on their developmental objectives became evident. Africans had to take note of the failure of the "dictatorships of development",[2] which were established with the support of the West and its financial institutions such as the International Monetary Fund (IMF) and the World Bank, which had engineered the Structural Adjustment Programs (SAPs). The dictatorships of development dramatically failed to achieve this objective, and the pro-SAPs

1 See Ake, CI. 1996. *Democracy and development in Africa*. Washington, DC: Brookings Institution Press, p 39; Nzongola-Ntalaja, G. 1994. *The democratic movement in Zaire 1956–1994*. Harare: African Association of Political Science (AAPS) Books, pp 13–14; Nzongola-Ntalaja, G. 1988. "Le mouvement pour la seconde indépendance au Congo/Kinshasa (Zaïre) 1963–1968". In Nyong'o, Anyang' (Ed.). *Afrique: La longue marche vers la démocratie. Etat autoritaire et résistances populaires*. Paris: Publisud, pp 208–251.

2 See Nicol, D. 1986. "African pluralism and democracy". In Ronen, D (Ed.). *Democracy and pluralism in Africa*. Boulder: Lynne Rienner, p 165; Sklar, RL. 1996. "Developmental democracy". In Nyang'oro, JE (Ed.). *Discourses on democracy: Africa in comparative perspective*. Dar-es-Salaam: Dar-es-Salaam University Press, pp 1–30.

ran out of breath. The time then came for the discourse on 'governance': this did not mean constitutionalism and democracy – at least at the beginning – as it was reduced to the practical exercise of power and authority to conduct public affairs.[3] The 1980s witnessed the "insurrection" or the "reawakening" of mass politics.[4] African peoples fought for constitutionalism, democracy and good governance even more vigorously than they had done for the 'first independences'.[5] Thus, Africa then embarked on the process of democratisation or political liberalisation.

Social scientists disagreed on the causes of the democratisation or political liberalisation[6] in the late 1980s. Others believed it was the 'Wind of the East' blown by Mikhail Gorbachev-initiated perestroika that led to the collapse of communism in the former Union of Soviet Socialist Republics (USSR).[7]

However, for some other social scientists, mainly Western and West-minded intellectuals, the political changes in progress were due to changes in the policies of international financial institutions such as the World Bank and the IMF, which made 'good governance' a precondition for African and other underdeveloped countries to access loans.

The late French President, François Mitterrand, also played an important role when he told African leaders attending the France–Africa summit in the French city of La Baulle in June 1990 that French aid would be subject to progress in the process of democratisation or political liberalisation.[8] This corroborated the contention that it was the 'Wind of the West' and not the 'Wind of the East' that had brought about political change in Africa.

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3 See Hyden, G. 1999. "Governance and the reconstruction of political order". In Joseph, R (Ed.). *State, conflict and democracy in Africa*. Boulder/London: Lynne Rienner, p 184.

4 Shivji, IG. 1992. *Fight, my beloved continent: New democracy in Africa*. Harare: Southern African Political Economy Series (SAPES) Books, pp 36-46.

5 (ibid.:42–43).

6 For an account of the debate on democratisation and political liberalisation, see Rijnierse, E. 1993. "Democratization in sub-Saharan Africa? Literature overview". *Third World Quarterly*, 14(3)652–653; Mbata Mangu, A. 2002. "The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo". Unpublished doctoral thesis, University of South Africa, Pretoria, pp 294–297; Sindjoun, L. 1994. "La Cour Suprême, la compétitivité électorale, et la continuité politique au Cameroun: La construction de la démocratisation passive". *Afrique et Développement*, 19(2):22–23.

7 Mbata Mangu (2002:297–305).

8 Ngarhodjim, N. 2007. *African Charter on Democracy, Election and Governance: A critical analysis*. London: Open Society Institute, African Monitoring and Advocacy Project, p 1.

Fontaine even argued that, were Marx still alive today, he would not agree that the 'Wind of the East' had prevailed over that of the West.[9] According to Banock, it was an "illusion" to attribute political change in Africa to the "Wind of the East".[10]

On the other hand, some African and non-African social scientists rejected the claims made by both the proponents of the 'Wind of the West' and those of the 'Wind of the East'. They held that both the West and the East had contributed to the establishment and consolidation of authoritarian rule in Africa during the Cold War in order to serve their respective interests.[11] According to Ake, it was rather "the Wind of the South, of Africa itself" that had caused political change on the continent.[12] Unfortunately, the international community decided to ignore this southerly wind because it challenged the status quo that favoured both the West and the East.[13] Arguably, it was the 'Wind of History' – a combination of influences from all sides – that had made political change possible in Africa. These winds of change did not spare the Organisation of African Unity (OAU).

The Constitutive Act of the African Union (AU) was adopted in Lomé, Togo, on 11 July 2000 and entered into force on 26 May 2001. The AU, which replaced the OAU, held its inaugural meeting in Durban, South Africa, in July 2002. The promotion of democratic principles and institutions, human rights, the rule of law and good governance features prominently among the AU's objectives and principles.

In July 2012, when the AU Assembly met in Addis Ababa, Ethiopia, and elected South African Home Affairs Minister Dr Dlamini Nkosazana Zuma the new Chairperson of the Commission to replace Mr Jean Ping of Gabon, the AU had already entered its second decade of existence.

Thus, ten years on, as Dr Zuma starts her mandate as the first woman to preside over the AU Commission, this article revisits the concepts and reflects on the contribution of the AU to the promotion of constitutionalism and democracy on the continent. Based on the important number of regional instruments adopted and also on different actions undertaken, it argues that, unlike its predecessor the OAU, the AU has gone a long way towards promoting constitutionalism

9 Fontaine, A. 1971. "Vent de l'Ouest". *Le Monde*, 14472:1.

10 Banock, M. 1993. *Le processus de démocratisation en Afrique. Le cas camerounais*. Paris: L'Harmattan, p 5.

11 See Ake (1996:131); Gonidec, PF. 1993. "Démocratie et développement en Afrique: Perspectives internationales ou nationales". *Afrique 2000*, 14:50–51; Odhiambo-Mbai, C. 1994. *The future prospects of multi-party democracy in Africa*. Johannesburg: University of the Witwatersrand, p 3; Wiseman, JA. 1996. *The new struggle for democracy in Africa*. Aldershot: Avebury, p 5.

12 Ake, CI. 1991. "L'Afrique vers la démocratie". *Africa Forum*, 1(2):13.

13 (ibid.).

and democracy in Africa, but a great deal still needs to be done because of the huge gap that exists between those instruments and the practice in several AU member states. The end of the first and beginning of the second decade of the AU, with the election of a new chairperson of its Commission, constitutes an opportunity for African leaders, peoples, intellectuals, and different AU organs to take stock and reflect on what the AU has achieved as well as on the challenges and prospects for constitutionalism and democracy that need to be consolidated as a prerequisite for an African renaissance.

Revisiting constitutionalism and democracy

Constitutionalism and *democracy* fit in well with Gallie's definition of "essentially contested concepts".[14] These are complex and quite polemic, controversial, contradictory, competing and confusing concepts.[15] As Mamdani correctly points out, –[16]

> [t]he discourse on human rights and constitutionalism in contemporary Africa remains a contested terrain and should not be seen as a settled issue.

Prior to examining the AU contribution to the promotion of constitutionalism and democracy in Africa, it is important to be as precise as possible about the key concepts used in this article, namely *constitutionalism*[17] *and democracy*.[18]

Constitutionalism

Two main approaches to constitutionalism may be distinguished in the literature, namely the 'traditional' and the 'modern'.

14 Gallie (1956), cited in Schochet, GJ. 1979. "Introduction: Constitutionalism, liberalism, and the study of politics". In Pennock, JR & JW Chapman (Eds). *Constitutionalism*. New York: New York University Press, p 6.

15 See Andrews, WG. 1968. *Constitutions and constitutionalism*. Princeton: Van Nostrand, p 13; Sunstein, CR. 1988. "Constitutions and democracies: An epilogue". In Elster, J & R Slagstad (Eds). *Constitutionalism and democracy*. New York/New Rochelle/Melbourne/Sydney: Cambridge University Press, p 352; Ihonvbere, J. 2000. *Towards a new constitutionalism in Africa*. London: Centre for Democracy & Development, p 13; Henkin, L. 1994. "A new birth of constitutionalism: Genetic influences and genetic defects". In Rosenfeld, M (Ed.). *Constitutionalism, identity, difference, and legitimacy: Theoretical perspectives*. Durham/London: Duke University Press, pp 3, 39–40.

16 Mamdani, M. 1991. "Social movements and constitutionalism in the African context". In Shivji, IG (Ed.). *State and constitutionalism: An African debate on democracy*. Harare: Southern African Political Economy Series (SAPES) Books, p 239.

17 Henkin (1994:40–42).

18 Touraine, A. 1990. *Qu'est-ce la démocratie?*. Paris: Fayard.

Traditional conceptions of constitutionalism

In its traditional conception, *constitutionalism* is defined as a legal principle, a set of rules aimed principally at limiting the power of government and protecting individual rights.[19] This traditional concept of *constitutionalism* is liberal, procedural, formal, and negative. It rests on two main pillars, namely limited government and individual rights.

As McIlwain once put it, –[20]

> [t]he most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.

In Andrews' view, –[21]

> [i]f one were to attempt a description of this complex concept in two words, we might call it 'limited government'.

Mojekwu also regards constitutionalism as "a man-made device to limit the arbitrariness of governments".[22] Zoethout and Boon take it for an expression of the conviction that no government should ever have unlimited power to do whatever it wants, since every political system is likely to relapse into arbitrary rule unless precautions are taken.[23]

As Rosenbaum also stresses –[24]

> [c]onstitutionalism has evolved to mean the legal limitations placed upon the rightful power of government in its relationship to citizens.

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19 See Ihonvbere (2000:13); Shivji, IG. 1991a. "State and constitutionalism: A new democratic perspective". In Shivji, IG (Ed.). *State and constitutionalism: An African debate on democracy*. Harare: Southern African Political Economy Series (SAPES) Books, p 28.

20 McIlwain, CH. 1947. *Constitutionalism: Ancient and modern*. New York: Cornell University Press, p 22.

21 See Andrews (1968:13); Vile, MJC. 1967. *Constitutionalism and the separation of powers*. Oxford: Clarendon Press, p 11.

22 Mojekwu, CC. 1979. "Nigerian constitutionalism". In Pennock, JR & JW Chapman (Eds). *Constitutionalism*. New York: New York University Press, p 184.

23 Zoethout, CM & PJ Boon PJ. 1996. "Defining constitutionalism and democracy: An introduction". In Zoethout, CM, ME Pieterman-Kros & PWC Akkermans (Eds). *Constitutionalism in Africa. A quest for autochthonous principles*. Deventer: Gouda Quint, pp 1, 11.

24 Rosenbaum, AS. 1988. "Introduction". In Rosenbaum, AS (Ed.). *Constitutionalism: The philosophical dimension*. New York/Westport/Connecticut/London: Greenwood Press, p 4.

This is in line with the classic definition by Carl Friedrich, who considered *constitutionalism* as "an institutionalized system of effective regularized restraints on governmental action".[25]

In all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; and its opposite is despotic government, the government of will instead of law.[26]

According to Nwabueze, –[27]

> [t]here is something logically incoherent about the modern doctrine of constitutionalism, for it places a limit on supreme political authority without denying its existence.

The problem has always been how to limit the arbitrariness of political power which humankind can manipulate in a government. It is this limitation of the arbitrariness of political power that is expressed in the concept of *constitutionalism*.[28] This is the logic of negative constitutionalism, or what Ivison called "Hobbesian Constitutionalism".[29]

In Ivison's words, –[30]

> [n]egative constitutionalism … focuses on the limiting functions of the constitution. It coordinates to a definition of what the state cannot or should not do. So constitutionalism is a means of opposing … state power where constitutions are primarily inhibiting and preventing mechanisms meant to protect individuals and society against arbitrary exercises of power.

Insofar as it restricts the state in what it can do, traditional constitutionalism tends to create a 'minimal state', that is, a state which leaves greater space to individual freedom and activities. However, negative constitutionalism seems –[31]

> … an incomplete formulation of what constitutionalism means. Constitutions are about preventing abuses of powers, but are also about more positive things too.

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25 Sigmund, P. 1979. "Carl Friedrich's contribution to the theory of constitutionalism – Comparative government". In Pennock, JR & JW Chapman (Eds). *Constitutionalism*. New York: New York University Press, p 34.

26 See McIlwain (1947:21–22); Schochet (1979:5).

27 Nwabueze, BO. 1073. *Constitutionalism in the emergent states*. London: C Hurt, p 1.

28 See Zoethout & Boon (1996:1); Mojekwu (1979:164).

29 Ivison, D. 1999. "Pluralism and the Hobbesian logic of negative constitutionalism". *Political Studies*, 57:83–89.

30 (ibid.:85).

31 (ibid.:83).

Zoethout and Boon hold that, because of its mainly procedural nature, traditional constitutionalism is unable to respond adequately to contemporary problems of the welfare society, since it is primarily aimed at protecting (negative) individual rights and freedoms; therefore, they believe, it should be redefined or reconceptualised.[32]

Constitutionalism ought to transcend this negativism: it should not only provide for individual rights and freedoms, but also include (some) social, economic and collective rights – in other words, the second- and third-generation rights.[33] Thus, there is a tendency to move away from the traditional approaches to constitutionalism; away from legal, procedural, formal and negative constitutionalism to modern approaches that favour substantive and positive constitutionalism.

Modern conceptions of constitutionalism

Unlike the traditional concept of *constitutionalism*, with its overemphasis on procedural and formal rules, restraint, and individual human rights, modern thinking is said to be more concerned with values. It is value-laden, teleological or purposive, substantive and positive constitutionalism that emphasises all generations of rights, including individual and collective rights. It goes far beyond the limitation of government and the idea of a 'minimal state' that gives government more powers in order to promote and protect human rights. A powerful version of this kind of constitutionalism is what Ivison called "rights-based constitutionalism".[34]

The concept *modern constitutionalism* fits in well with the definition offered by Rosenfeld, who considered *constitutionalism* "a three-faceted concept" based on three general features, namely limitation of governmental powers, adherence to the rule of law, and protection of human rights.[35]

Thus, constitutionalism entails the existence of a constitution, respect for human rights, separation or limitation of powers, and adherence to the rule of law with an independent judiciary established as the guardian of the constitutional and legal order and the custodian of the values entrenched therein. It is based on both rules and values. It encompasses both negative and positive constitutionalism, both 'traditional' and 'modern'. It requires a state that is both 'minimal' and proactive. It exists to protect and promote

32 Zoethout & Boon (1996:1, 15).
33 (ibid.:2).
34 Ivison (1999:85).
35 Rosenfeld, M. 1994. "Modern constitutionalism as interplay between identity and diversity". In Rosenfeld, M (Ed.). *Constitutionalism, identity, difference, and legitimacy: Theoretical perspectives*. Durham/London: Duke University Press, pp 3–5, 28.

individual, civil and political rights, but also collective, cultural, socio-economic and community or peoples' rights. This is the broad or holistic conception of *constitutionalism* that is generally adopted in the African context, and this is how *constitutionalism* is understood in this article.

A conceptual and political closeness exists between constitutionalism per se and the having of a constitution: a closeness that is behind the easy and frequent slippage from one to the other, and the confusion between these two related but different concepts.[36] This has resulted in a great deal of 'confusion' between constitutionalism and constitutions.[37] Yet, one needs to distinguish between the *constitution* – which is the main instrument of constitutionalism,[38] and constitutionalism itself,[39] that is, between the mere fact of having a constitution and compliance with constitutionalism. Constitutions are expected to go with constitutionalism and vice versa. However, in some instances, especially in Africa, constitutions have gone without constitutionalism.[40]

Three major tests need to be passed to find out whether a particular constitution or legal system complies with constitutionalism. According to Nwabueze, –[41]

> [t]he crucial test is whether the Constitution, if any, imposes limitation upon the powers of the government.

Although we may not find written constitutions in traditional African governments or in states with customary or unwritten constitutions like the United Kingdom, the test remains the same: how does a system in a society limit the arbitrary powers of those who govern society?[42]

The second test is that of legitimacy: not only external legitimacy, but also – and mostly – internal legitimacy. The constitution has to be legitimate, and it should emanate from the people. It must first serve the interests of the people

36 Schochet (1979:11).

37 See Andrews (1968:22); Grey, TC. 1979. "Constitutionalism: An analysis framework". In Pennock, JR & JW Chapman (Eds). *Constitutionalism*. New York: New York University Press, p 189; Olukoshi, A. 1999. "State, conflict, and democracy in Africa: The complex process of renewal". In Joseph, R (Ed.). *State, conflict and democracy in Africa*. Boulder/London: Lynne Rienner, p 453.

38 See Olukoshi (1999:456); Rosenfeld (1994:14); Andrews (1968:22).

39 See Harbeson, JW. 1999. "Rethinking democratic transitions: Lessons from eastern and southern Africa". In Joseph, R (Ed.). *State, conflict and democracy in Africa*. Boulder/London: Lynne Rienner, pp 7–15; Olukoshi (1999:456).

40 Okoth-Ogendo, HWO. 1991. "Constitutions without constitutionalism: Reflections on an African political phenomenon". In Shivji, IG (Ed.). *State and constitutionalism: An African debate on democracy*. Harare: Southern African Political Economy Series (SAPES) Books, pp 3–25.

41 Nwabueze (1973:2).

42 (ibid.).

and not those of the leaders who long to remain in power. It needs to express the will of the people and not of the government. This requires that the people should also be involved in the process of its drafting and adoption, and should not be caught by surprise by a document foreign to them, which they are only requested to adopt by a "Yes" vote during a referendum. In Nwabueze's view, –[43]

> [a] constitution need not necessarily have been enacted by the people to have legitimacy … what is important is that the people should be involved in the process of its making.

Thus, even when the people were not involved in its adoption, a constitution needs to be put through a process of popularisation, with a view to generating public interest in it and an attitude that everybody has a stake in it – that it is the common property of all citizens. This is required for a constitution to command the loyalty, respect and confidence of the people.[44]

According to Nwabueze, –[45]

> [t]he people must be made to identify themselves with the Constitution. Without this sense of identification, of attachment and involvement, a constitution would always remain a remote, artificial object, with no more real existence than the paper on which it is written.

The third important test of whether or not a constitution complies with constitutionalism is the protection, promotion and enforcement of human and peoples' rights. If a constitution or legal system fails to pass these three tests, it will exist without constitutionalism.

Shivji laments that, although –[46]

> … we have had great use, if not reverence, for the documents called constitutions, there has been little regard for constitutional principles or constitutionalism.

In Andrews' words, –[47]

> [t]yrants, whether individual or collective, find that Constitutions are convenient screens behind which they can dissimulate their despotism … Provisions that seem to be restraints can be employed to rationalize the arbitrary use of power.

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43 (ibid.:27).
44 (ibid.:24–25).
45 (ibid.:25).
46 Shivji, IG. 1991b. "Contradictory class perspectives in the debate on democracy". In Shivji, IG (Ed.). *State and constitutionalism: An African debate on democracy*. Harare: Southern African Political Economy Series (SAPES) Books, p 254.
47 Andrews (1968:23).

> Apart from these slim limitations, Constitutions can perform other pseudo-constitutional functions in despotic States … They may contribute to the stability of these regimes and guide political action through the channels desired by the despots by explicit description of the machinery of government.

Therefore, instead of limiting the government's powers, constitutions may merely describe them and instead rather limit the rights of the people or channel their obeisance to authoritarian leaders.

Not all constitutions conform to the demands of constitutionalism.[48] Some constitutions manifest constitutionalism in appearance alone, and nearly all perform functions not integrally related to constitutionalism.[49] A written constitution may proclaim lofty ideals as its objectives, but then ultimately establish a dictatorship.[50] In some cases, as Shivji points out, –[51]

> [t]he only rationale for the Constitutions is international legitimacy or respectability, to constitute the sovereignty of the state in the international arena.

Under these conditions, despite the existence of a constitution, there would be neither constitutionalism nor democracy – as the two concepts are closely related.

Democracy

Democracy is undoubtedly the most discussed and contested notion of political theory.[52] Nonetheless, there is a widespread agreement that democracy is a good thing.

The epithet *democratic* almost inevitably connotes praise, while *undemocratic* implies censure.[53] Nwabueze points out that "No word is more susceptible of a variety of tendentious interpretations than democracy".[54]

According to Sono, –[55]

48 Rosenfeld (1994:3).
49 Andrews (1968:26).
50 Mojekwu (1979:164).
51 Shivji (1991b:254).
52 Hoffman, J. 1988. *State, power, and democracy: Contentious concepts in practical political theory*. Sussex: Wheatsheaf, p 31.
53 Wiseman, JA. 1990. *Democracy in Black Africa: Survival and revival*. New York: Paragon House Publishers, p 4.
54 Nwabueze (1973:1).
55 Sono, T. 1992. Comments on democracy and its relevancy in Africa". *African Perspectives: Selected Works*, 3:29.

> [t]hroughout history the ideal of democracy has been the mother of all mischief. No concept has spawned such a multitude of devotees as democracy, however contradictorily conceived; nor has one, in the annals of political theory and conduct, been as disfigured, debased, and distorted as this one.

As Wiseman holds, –[56]

> [m]any governments of quite different types wish to describe themselves as democratic. In some cases the term has even been incorporated into the official name of the state … although it is a noticeable paradox that in most cases where this happened (e.g. the German Democratic Republic, the People's Democratic Republic of Yemen, or in Africa, the Democratic Republic of Congo), the States concerned appear significantly undemocratic.

Democracy has been suffering as much from its loyal partisans as from its opponents. Even its fierce enemies – dictators and authoritarian leaders – claim to be democrats and proclaim their faith in 'democracy'.[57]

Democracy has walked throughout centuries and ages surrounded by these paradoxes.[58] However, defining *democracy* is a challenge.[59]

Depending on the scope of democracy, two major conceptions of it may be identified, namely the minimalist and maximalist.[60] These two conceptions are reminiscent of the 'traditional' and 'modern' conceptions of constitutionalism that were examined earlier.

Minimalist conceptions of democracy

Minimalist conceptions are basically procedural, formal, and institutional. *Democracy* is defined as a specific political machinery of institutions, processes and roles.[61] In minimalist views, democracy is synonymous with competitive, multiparty democracy and elections. It is representative democracy, also

56 Wiseman (1990:4).

57 Mbata Mangu, A. 1996. "Démocratie, régime pluraliste et tribalisme au Zaïre". Unpublished monograph, CODESRIA Summer Institute, Council for the Development of Social Science Research in Africa/CODESRIA, Dakar, p 11.

58 Mbata Mangu (1996:12).

59 Ronen, D. 1986a. "The challenge of democracy in Africa: Some introductory observations". In Ronen, D (Ed.). *Democracy and pluralism in Africa*. Boulder: Lynne Rienner, p 1.

60 See Nyang'oro, JE. 1996. "Discourses on democracy in Africa: Introduction". In Nyang'oro, JE (Ed.). *Discourses on democracy: Africa in comparative perspective*. Dar-es-Salaam: Dar-es-Salaam University Press, p X; Wiseman (1996:7–14); Sklar (1996:166); Shivji (1991a:27–69).

61 Ronen, D. 1986b. "The state and democracy in Africa". In Ronen, D (Ed.). *Democracy and pluralism in Africa*. Boulder: Lynne Rienner, p 200.

labelled *Western* or *liberal* democracy. The latter was defined by Sandbrook to mean –[62]

> … a political system characterized by regular and free elections in which politicians organized into political parties compete to form the government, by the right of virtually all adult citizens to vote, and by guarantees of a range of familiar political and civil rights.

The notion of procedural, formal, or institutional democracy is of the sort found in Robert Dahl's concept of *polyarchy*.[63] According to Dahl, polyarchy in a political order is characterised by seven institutions, all of which must be present. These are elected officials, free and fair elections, and inclusive suffrage, as well as the right to run for office, freedom of expression, alternative information, and associational autonomy.[64]

According to Sorensen, Dahl's notion of *polyarchy* has three elements: competition for government power; political participation in the selection of leaders and policies; and civil and political rights.[65]

Marxist and socialist scholars were among the first to level criticism at minimalist conceptions of *democracy*. Such criticism primarily targets capitalism and liberalism, which liberal scholars such as Francis Fukujama associate with democracy as "the end of history".[66] Samir Amin argues that liberal or Western democracy is only a mask for what he terms *bourgeois democracy*.[67] In his view, such a democracy has no social dimension: it is confined to the political domain and ignores the masses to serve a minority. Thus, it privileges individual and political rights over collective and socio-economic rights and the rights of the minority (bourgeois) over those of the people.[68] According to Amin, –[69]

62 Sandbrook, R. 1996. "Liberal democracy in Africa: A socialist-revisionist perspective". In Nyang'oro, JE (Ed.). *Discourses on democracy:* Africa *in comparative perspective*. Dar-es-Salaam: Dar-es-Salaam University Press, pp 137–138.

63 See Dahl, RA. 1971. *Polyarchy: Participation and opposition*. New Haven: Yale University Press; Dahl, RA. 1989. Democracy and its critics. New Haven/London/New Delhi: Yale University Press/Orient Longman, pp 220–224; Sorensen, G. 1996. "Democracy and the developmental state". In Nyang'oro, JE (Ed.). *Discourses on democracy: Africa in comparative perspective*. Dar-es-Salaam: Dar-es-Salaam University Press, p 42; Wiseman (1996:8).

64 See Dahl (1989:220–224); Wiseman (1996:8).

65 Sorensen (1996:42).

66 Fukujama, F. 1992. *The end of history and the last man*. New York: Free Press.

67 Amin, S. 1996. "The issue of democracy in the contemporary Third World". In Nyang'oro, JE (Ed.). *Discourses on democracy: Africa in comparative perspective*. Dar-es-Salaam: Dar-es-Salaam University Press, p 61.

68 (ibid.:64–70).

69 (ibid.:70).

> [f]or our democracy to take root, it must, from the start, take a position that goes beyond capitalism.

In a recent book, he goes as far as suggesting that we should be more concerned with the end of capitalism rather than only ending the crisis of capitalism.[70] Capitalism is associated with formal democracy – and Amin was not the only scholar to blame, indict, prosecute and even sentence it to death for alienating and failing the people of the world, especially the African people.

Glaser also laments Western "formal democracy" as being "irretrievably associated with individualism, formalism and reformism".[71] Shivji prefers a "substantive" or, more specifically, a "popular democracy"[72] to this liberal democracy, which Ake regards as an "impoverished democracy",[73] and which even prominent Western intellectuals such as Maurice Duverger label "*démocratie sans le peuple*" ("democracy without the people"), "particracy" (government by political parties) and "plutocracy" (government by the wealthy).[74]

Maximalist conceptions of democracy

Maximalist conceptions are instead built on criticisms against liberal, bourgeois and Western democracy. Whilst minimalist scholars define *democracy* as a process and a set of institutions, and focus on a political democracy that emphasises individual and political rights, maximalist conceptions concentrate on the substance and values of democracy, the most prominent among them being social equality, and on collective and socio-economic rights.[75]

In the maximalists' view, democracy is essentially socio-economic, participative, popular or social democracy. The maximalist's definition of *democracy* is broad enough to include some or all of the desirable political, social, and economic characteristics of a 'good society'.[76] To liberal and bourgeois or "elite-driven democracy", they oppose social and economic or popular democracy, or "people-driven democracy".[77]

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70 Amin, S. 2010. *Ending the crisis of capitalism or ending capitalism?*. Dakar: Council for the Development of Social Science Research in Africa/CODESRIA.

71 Glaser, D. 1996. "Discourses of democracy in the South African Left: A critical commentary". In Nyang'oro, JE (Ed.). *Discourses on democracy: Africa in comparative perspective*. Dar-es-Salaam: Dar-es-Salaam University Press, p 270.

72 See Shivji (1992:2); Shivji (1991b:254–255).

73 Ake (1996:132).

74 Duverger, M. 1976. *La démocratie sans le peuple*. Paris: Armand Colin.

75 Glaser (1996:251).

76 Wiseman (1996:9).

77 See Amin (1996:70–71); Ake (1996:132–134, 137, 139); Glaser (1996:250–251); Nyang'oro (1996:X); Wiseman (1996:9).

Maximalist definitions of *democracy* are in many ways very attractive and contain a far clearer and broader notion of *good government* than the minimalist ones.[78] However, they also are not immune to criticism. Wiseman identified at least three sets of problems associated with maximalist conceptions.[79] Firstly, values such as economic equality, high participation levels, and gender equality should be seen as the possible results of democracy rather than as part of its definition. Secondly, these conceptions are inherently imprecise as regards the extent to which such characteristics have to be realised. There is also no agreement on how equality should be measured.

Thirdly, and probably most importantly, whilst maximalist definitions of *democracy* may be useful in outlining future goals, they are less useful when analysing the political systems of the real world, which inevitably fall far short of the ideal.[80]

Glaser also considers the maximalist conceptions in respect of their emphasis on social equality, substantive democracy and collective rights to the detriment of formal legal equality, formal democracy and individual rights.[81] He blames the maximalists for the low status accorded to political pluralism and civil liberties, which are indispensable to any political order claiming to be democratic and should not, therefore, be judged or jettisoned on the basis of instrumental criteria.[82]

Accordingly, our conception of democracy as a system of government includes institutions; principles; individual, civil and political rights championed by minimalist scholars; and the values and collective and socio-economic rights defended by maximalists.

Unfortunately, as for constitutionalism and constitutions, in the conventional intellectual and political discourse, democracy is very often and abusively reduced to two components, namely elections and a multiparty system – and this is highly regrettable.[83]

Elections and democracy have become virtually synonymous in Western political thought and analysis.[84] More recently, in the hurry to globalise

78 Wiseman (1996:9).
79 (ibid.).
80 (ibid.).
81 Glaser (1996:251).
82 Glaser (1996:248–251).
83 Ronen (1986b:192).
84 See Joseph, R. 1999. "State, conflict and democracy in Africa". In Joseph, R (Ed.). *State, conflict and democracy in Africa*. Boulder/London: Lynne Rienner, pp 9–11; Bratton, M & N van de Walle. 1996. "Popular protest and political reform in Africa". In Nyang'oro, JE (Ed.). *Discourses on democracy: Africa in comparative perspective*.

democracy in the aftermath of the Cold War, democracy was reduced to the crude simplicity of multiparty elections – to the benefit of some of the world's most notorious autocrats, who were able to parade democratic credentials without reforming their repressive regimes.[85]

Equating democracy with elections would be a fallacy.[86] According to Olukoshi, the embrace of dubious electoral and political arrangements on the grounds that, at this stage of Africa's development, it is the only outcome that can be realistically expected, is very problematic.[87]

According to Bratton and Posner –[88]

> [f]ormal procedures for elections do not create a democracy because, as in Africa and Latin America for instance, experience has shown elections can coexist with systematic abuses of human rights and disenfranchisement of large segments of the population.

This resulted in an "electoral democracy", a "cosmetic democracy", a "choiceless democracy", where people are "voting without choosing", to use Ake and Mkandawire's words,[89] or what Barack Obama dismissed as "electocracy".[90]

Elections are organised every year on the African continent, mostly to satisfy some foreign donors. The year 2011 was a great one for elections, as African peoples went to the polls in around 20 countries.

However, these elections were hardly free and fair or democratic. In all the countries that went to presidential elections, the losers were always from the opposition. Most of them refused to concede defeat, as the elections were rigged in favour of the incumbent leaders clinging to power and working to establish a de facto presidency for life.

Dar-es-Salaam: Dar-es-Salaam University Press, p 378; Harbeson (1999:39).

85 Ake (1996:130).

86 Bratton, M & DN Posner. 1999. "A first look at second elections in Africa with illustrations from Zambia". In Joseph, R (Ed.). *State, conflict and democracy in Africa*. Boulder/London: Lynne Rienner, p 378.

87 Olukoshi (1999:456).

88 Bratton & Posner (1999:378–379).

89 See Ake (1996:137); Mkandawire, T. 1999. "Crisis management and the making of 'choiceless democracies'". In Joseph, R (Ed.). *State, conflict and democracy in Africa*. Boulder/London: Lynne Rienner, pp 119–135.

90 See Obama, B. 2008. *The audacity of hope. Thoughts on reclaiming the American Dream*. New York: Vintage Books, p 375; Mbata Mangu, A. 2011. *Obama's election: Lessons for the world, Africa, and US foreign policy*. Saarbrucken: Lambert Academic Publishing, p 180.

On the other hand, democracy cannot be equated with a multiparty system. Nor is multipartyism a guarantee of democracy. Experience in many African countries has shown that authoritarianism may well and very often tie the knot with elections and integral multipartyism.[91] During the last years of President Mobutu Sese Seko's rule, for example, more than 400 parties existed in the Democratic Republic of the Congo/Zaire (DRC). This has not changed under President Joseph Kabila. Instead of advancing democracy, this wild multipartyism instead contributed to the survival of the authoritarian regime established under President Sese Seko and is currently contributing to the consolidation of President Kabila's rule. Regrettably, 'multimobutism' (multipartyism with several hundred parties created by Sese Seko and his partisans) has been replaced with 'multikabilism' (multipartyism with many parties created by Kabila and his followers) to achieve the same objective as that espoused by Sese Seko, namely to perpetuate his reign in the DRC.

Ben Yahmed warned that those African peoples who would content themselves with multipartyism and elections would not take long to be disappointed.[92] This entails that, if elections and multipartyism are not synonymous with or a guarantee of democracy, they nevertheless feature among its ingredients. One cannot consider that they do not matter and that modern democracy can go without them.[93] Thus, while we should acknowledge the "electoralist fallacy" and the "fallacy of electoralism" that equates elections with democracy, or the "multiparty fallacy" that makes it synonymous with multipartyism, we should also be critical of the 'anti-electoralist fallacy', or what we may refer to as the *anti-multiparty fallacy*, which would consider that elections and multipartyism do not matter for democracy.[94]

Against this background, like constitutionalism, democracy should go beyond elections, multipartyism, rules, principles, and individual, civil and political rights to embrace values, substance, and collective, socio-economic, cultural and peoples' rights. Democracy should emphasise the rights and sovereignty of the people and not those of their leaders.

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91 Conac, G. 1993a. "Etat de droit et démocratie". In Conac, G (Ed.). *L'Afrique en transition vers le pluralisme politique*. Paris: Economica, p 492.

92 Gonidec (1993:57–58).

93 See Bauer, G. 1999. "Challenges to democratic consolidation in Namibia". In Joseph, R (Ed.). *State, conflict and democracy in Africa*. Boulder/London: Lynne Rienner, pp 439–441; Bratton & Posner (1999:379); Conac, G. 1993b. "Introduction". In Conac, G (Ed.). *L'Afrique en transition vers le pluralisme politique*. Paris: Economica, pp 5, 492); Glaser (1996:249–250); Nzongola-Ntalaja, G. 1997. "The state and democracy in Africa". In Nzongola-Ntalaja, G & M Lee (Eds). *The state and democracy in Africa*. Harare: African Association of Political Science (AAPS) Books, p 15.

94 Bratton & Posner (1999) at 379.

Most African social scientists adopt a broad, modern concept of *constitutionalism*, while their understanding of democracy is rather holistic, and generally goes beyond minimalism. This is also what derives from the AU Constitutive Act and several other instruments that the AU adopted during its first decade in order to promote constitutionalism and democracy on the continent.

The AU and its promotion of constitutionalism and democracy in Africa

The AU's contribution to the promotion of constitutionalism and democracy can be assessed through the various instruments that it has adopted in this regard and the extent of their implementation. Thus, the AU's Constitutive Act is arguably the first AU instrument that should be considered.

The AU Constitutive Act

With the exception of Morocco, which earlier withdrew from the OAU in reaction to the disputed admission of Western Sahara, all other African states are members of the AU. The AU's Constitutive Act contains its objectives and principles. It also defines its different organs.

Article 3 of the Constitutive Act provides for a number of objectives. Some of them are closely related to the promotion of constitutionalism and democracy. These include the promotion of peace, security, and stability on the continent; the promotion of democratic principles and institutions, popular participation and good governance; and the promotion and protection of human and peoples' rights.[95]

Article 4 deals with the principles of the AU. Related to the promotion of constitutionalism and democracy are –[96]

> .. .the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; promotion of gender equality; respect for democratic principles, human rights, the rule of law and good governance; respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities … [as well as the] condemnation and rejection of unconstitutional changes of governments.

To achieve its mandate, the AU established several organs. The most important are the Assembly of the Union, the Executive Council, the Pan-

95 AU Constitutive Act, 2000, Article 3(f)–(h).
96 (ibid.:Article 4(h), (j), (l), (m), (o), (p)).

African Parliament, the Court of Justice and Human Rights, the Peace and Security Council, and the Commission.[97]

Ten years after the Constitutive Act came into operation, African countries such as Burundi, the Central African Republic, the DRC, Mali, Rwanda, Somalia, Sudan and Uganda are still confronted with rebellions and even aggression by neighbouring states, as in the case of the DRC. Recent United Nations (UN) reports on the current situation in the eastern DRC have revealed that the country is the victim of foreign aggression by Rwanda, which is backing the Congolese M23 rebels. Democratic principles and institutions are not firmly established on the continent. African countries are lagging behind in terms of several governance indexes, including the rule of law, freedom of expression and the media, independence of the judiciary, separation of powers, free and fair elections, and respect for human and peoples' rights.

Constitutions are regularly violated or amended by incumbent governments. War crimes, genocide and crimes against humanity are reportedly committed in conflicts zones in the DRC, Mali, Somalia and Sudan, without the AU resorting to its right of intervention entrenched in Article 4 (h) of its Constitutive Act. This corroborates the argument that, a decade after its establishment – despite the fact that all African states are party to its Constitutive Act and, therefore, bound by its provisions – the AU still struggles to achieve its objectives and principles.

Other AU instruments

As broadly defined in this article and understood in the African context, constitutionalism and democracy are intertwined and require respect for the principle of the separation of powers, the independence of the judiciary, human rights, the rule of law, and free and fair elections.

Some of the instruments that the AU has adopted in order to promote constitutionalism and democracy on the continent are treaties and conventions. Unlike declarations, treaties, conventions and international agreements are binding on states parties upon signature and ratification, and become enforceable at national level on their domestication.

AU Conventions and Declarations

In its ten-year existence, the AU adopted four conventions and three declarations to those that had been adopted and come into force under the OAU. The new instruments aimed at promoting constitutionalism and democracy or some of their requirements, such as respect for human and

97 (ibid.:Articles 5–22).

peoples' rights, a separation of powers, the independence of the judiciary, free and fair elections, good governance, and the rule of law.

The four Conventions adopted are the following:

- Protocol to the African Charter on Human and Peoples' Rights (ACHPR) on the establishment of an African Court on Human and Peoples' Rights, adopted on 9 June 1998 at Ouagadougou, Burkina Faso; entry into force 25 January 2004
- Protocol on the African Court of Justice, adopted by the Assembly of the Union on 11 July 2003 in Maputo, Mozambique; entry into force 11 February 2009
- African Charter on Democracy, Elections and Governance (ACDEG), adopted in Addis Ababa, Ethiopia, on 30 January 2007; entry into force 15 February 2012, and
- Protocol on the Statute of the African Court of Justice and Human Rights, adopted in Sharm El-Sheikh, Egypt, on 1 July 2008; not yet in force.

The three Declarations at issue here are the following:

- Declaration on Unconstitutional Changes of Government (Algiers, Algeria, 1999)
- Declaration for an OAU Response to Unconstitutional Change of Government (Lomé, Togo, 2000), and
- Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG), adopted under the New Partnership for Africa's Development (NEPAD) and endorsed by the AU Assembly during its Inaugural Summit held in Durban, South Africa, in July 2002. This Declaration is the main instrument on which the African Peer Review Mechanism (APRM) is based. However, the APRM is a voluntary mechanism.

Unlike Declarations, Conventions and Treaties are directly binding on states parties upon their signing and ratification, and become enforceable at the national level on their domestication. Accordingly, they require implementation. Governments would lose their credibility under international law if they were to ignore the Conventions they sign – even the Declarations they make, despite the latter not being directly binding or enforceable.

AU Conventions

The implementation of AU Conventions relating to the establishment of an African Court will be considered here, but more attention will be paid to the ACDEG due to its critical contribution to the promotion of constitutionalism and democracy under the AU.

(a) AU Conventions relating to the establishment of an African Court

The AU has adopted three Conventions related to the establishment of an African Court.

The Protocol to the ACHPR establishing an African Court on Human and Peoples' Rights was a critical instrument for the promotion of constitutionalism and democracy in general and human and peoples' rights in particular. The Court complemented the African Commission on Human and Peoples' Rights as the enforcement mechanism of the ACHPR. Unlike the Commission that was subject to the OAU Assembly of Heads of State and Government and only made non-binding recommendations, the Court is independent and its decisions are binding. Unfortunately, the Protocol to the ACHPR on the establishment of an African Court on Human and Peoples' Rights that had the potential of improving the African human rights landscape took almost six years to get the 15 ratification instruments required by its Article 34(3) for it to come in operation. This was evidence that, despite the OAU's change into the AU and a number of AU Declarations, African leaders were not more committed to the promotion of human and peoples' rights in Africa than they had been under the OAU. In addition, the Protocol also leaves much to be desired: it does not provide for the prosecution and punishment of individuals responsible for the violation of rights under the ACHPR; only states parties can be held responsible.

Criminal sanctions for individuals may not be the most effective way to protect human rights, but they do contribute to promoting constitutionalism and democracy. The fact that the Protocol does not provide for such sanctions does not render it useless, but it certainly constitutes one of its shortcomings. On the other hand, Article 34(6) of the Protocol disappointingly provides that the Court is not permitted to receive petitions lodged by non-governmental organisations (NGOs) with observer status before the Commission, or by individuals against those states parties that have not declared their acceptance of the competence of the Court to receive such petitions. Out of 26 AU states parties to the Protocol, the declaration required by Article 34(6) of the Protocol has been made by five countries only, namely Burkina Faso, Ghana, Malawi, Mali and Tanzania. To date, the African Court on Human and Peoples' Rights has received 20 applications and delivered 12 judgments.[98]

98 The African Court delivered its first ruling on 19 December 2009 in *Michelot Yogogombaye v The Republic of Senegal*. The applicant requested the Court to order Senegal to suspend the proceedings against Hissene Habré, the former President of Chad. The application was dismissed on the ground that Senegal had not made the declaration required under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights establishing an African Court of Human and Peoples' Rights. The latest judgment – in *Femi Falana v The African Union* – was delivered on 26 June 2012. The Court ruled that despite being a legal person as an

As for the Protocol on the African Court of Justice adopted on 11 July 2003, it also took almost six years to come into operation. However, it was more concerned with the settlement of legal disputes between AU member states than with the promotion of constitutionalism or democracy per se. Moreover, even before the Protocol on the African Court coming into force, AU leaders agreed to merge the African Court of Justice provided for in the AU Constitutive Act (Articles 5(d) and 18) with the African Court on Human and Peoples' Rights that already existed. Unfortunately, although the Protocol on the Statute of the African Court of Justice and Human Rights adopted in Sharm El-Sheikh, Egypt, on 1 July 2008, merged the two Courts (via Article 1), the merged Court has not been established because the Protocol has not yet come into force. Almost four years after the adoption of the Protocol, it has been ratified by only three states (Burkina Faso, Libya and Mali), which have deposited their instruments of ratification. Considering the time taken by different AU Conventions to come into operation (between five and six years),[99] the Protocol on the Statute of the African Court of Justice and Human Rights may take another two years or more to get the 15 ratifications required for its entry in force. Meanwhile, it cannot be implemented.

(b) The African Charter on Democracy, Elections and Governance

Arguably, the ACDEG is the most important AU instrument with regard to the promotion of constitutionalism, democracy, and good governance in Africa. It came into force on 15 February 2012. This happened 30 days after the deposit of the fifteenth ratification instrument required by the ACDEG to this end.[100] Cameroon was the fifteenth AU member state to deposit its instrument of ratification of the ACDEG, and did so on 16 January 2012. The 14 other

international organisation, the AU could not be sued on behalf of or for the violations attributable to its member states because it was party neither to the ACHPR nor the Protocol establishing an African Court for Human and Peoples' Rights. One of the most interesting cases still pending before the Court is *The Tanganika Law Society and the Legal and Human Rights Centre & Reverend Christopher Mtikila v The United Republic of Tanzania*. The hearings were closed on 15 June 2012 and the judgment was to be delivered within 90 days. The applicants alleged that Tanzania had violated the rights in the ACHPR by preventing independent candidates from contesting presidential, parliamentary and local government elections. Therefore, they requested the Court to order Tanzania to effect constitutional, legislative and other measures to guarantee basic political rights and allow independent candidates to contest these elections.

99 The Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights was adopted on 9 June 1998 and entered into force on 25 January 2004. The Protocol of the African Court of Justice, adopted by the Assembly of the Union on 11 July 2003, entered into force on 11 February 2009; while the African Charter on Democracy, Elections and Governance (ACDEG), adopted on 30 January 2007, entered into force on 15 February 2012.

100 Article 48, ACDEG.

AU member states that have ratified this instrument are Burkina Faso, Chad, Ethiopia, Gabon, Ghana, Guinea, Guinea Bissau, Lesotho, Mauritania, Niger, Nigeria, Sierra Leone, South Africa, and Zambia.

The ACDEG reaffirmed the commitment of African leaders to the 1990 Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World; the 1995 Cairo Agenda for the Re-launch of Africa's Economic and Social Development; the 1999 Algiers Declaration on Unconstitutional Changes of Government; the 2000 Lomé Declaration for an OAU Response to Unconstitutional Change of Government; and the 2002 OAU/AU Declaration on Principles Governing Democratic Elections in Africa.[101] However, unlike these instruments, the ACDEG is a treaty. As such, it is binding on states parties, which should, therefore, comply with its provisions.

What is innovative about the ACDEG, especially in terms of concepts, it that this Convention embodies a broad definition of *democracy* that requires the holding of regular, competitive, free and fair elections, and is also related to good governance. Accordingly, democracy cannot exist without good governance and the organisation of regular, competitive or multiparty, free and fair elections by an independent body under the supervision of an independent judiciary.

The ACDEG complements the ACHPR with another peoples' rights, namely the right to democracy, free and fair elections, and good governance. However, compared with the earlier normative framework, especially the ACHPR, the ACDEG does not provide for any enforcement mechanism that may decide sanctions against any AU member state or state party that fails to comply with its provisions.

While the coming into operation of the ACDEG constitutes an important step in the struggle for constitutionalism and democracy in Africa, the fact that it took almost five years to get the required 15 instruments of ratification, and that it has been so far ratified by less than the required two thirds of AU member states (15 by July 2012) speaks volumes about the commitment of African leaders to promoting constitutionalism and democracy in Africa in general and in their respective countries in particular. Many African leaders who claim to be committed to democracy, free and fair elections and good governance have so far failed to ratify the ACDEG; moreover, the AU – under which this critical instrument was adopted – has done little to have it signed and ratified by its member states. This is yet another African paradox. The lack of eagerness to ratify, implement and promote the ACDEG testifies to the lack of a strong political will to promote democracy, free and fair elections and good

101 See Preamble, ACDEG.

governance among many African political leaders who still seem comfortable with vote rigging, authoritarianism and corrupt governance.

A few months after the coming into operation of the ACDEG, a military coup d'état in Mali ousted the democratically elected President, Amadou Toumani Touré. At that stage, Mali had not yet ratified the ACDEG. Weeks later, another coup occurred – this time in Guinea-Bissau, one of the first 15 AU member states to have ratified the ACDEG.

However, not everything is dark in Africa, despite what Conrad once suggested.[102] In terms of democracy, respect for the rule of law, human rights, good governance and free and fair elections, African countries such as Benin, Botswana, Ghana, Lesotho, Mauritius, Mozambique, Namibia, Senegal, South Africa and Zambia have made good progress. Unfortunately, these positive trends are generally hidden in the news of despair. Yet, despite the staunch resistance of some authoritarian leaders and the rise of some coup-minded military officers, democracy is spreading in Africa.

The economies of authoritarianism and dictatorship, which paradoxically used to be funded by some Western democracies, have fallen into a recession. Arguably, the AU has not been instrumental in these developments.

The ratification and implementation of the ACDEG by an overwhelming majority of AU member states will test whether or not African leaders are now more committed to constitutionalism, democracy, good governance, free and fair elections, respect for human rights and the rule of law than their predecessors or some still in power used to be under the OAU.

Regrettably, in the past ten years following the establishment of the AU and with its leaders having committed to promoting democratic principles and institutions, popular participation, good governance, and respect for human rights, this test was not passed. Collectively and individually, African leaders have in this time shown little commitment and most of them have only paid lip service to constitutionalism, democracy, good governance in Africa, and free and fair elections.

The AU's contribution to promoting constitutionalism and democracy in individual AU member states: A balance sheet

During the first decade of its existence, the AU's response to different crises of constitutionalism, democracy and human rights in Africa was a mixed one. In some cases, the AU was caught between the contradictions of its member states and failed to respond. When it resolved to respond in other cases, its

102 Conrad, J. 1999. *Au cœur des ténèbres*. Paris: Edition Mille et Une Nuit.

response was belated and disappointing. Some examples from the five African subregions help illustrate this poor track record in respect of the promotion of constitutionalism, democracy, the rule of law, free and fair elections, good governance, and respect for human rights.

In Central Africa and the Great Lakes Region, the AU has never criticised "constitutions without constitutionalism",[103] human rights violations, and the mockeries of elections in Burundi, Cameroon, the Central African Republic, Chad, Congo (Brazzaville), the DRC, Equatorial Guinea, Gabon, and Rwanda, where Presidents Pierre Nkurunziza, Paul Biya, François Bozizé, Idriss Déby, Denis Sassou Ngouesso, Joseph Kabila, Teodoro Obiang Ngouema Mbasogo, Ali Bongo Ondimba, and Paul Kagame, respectively, have been busy consolidating their power and there is no indication that they may retire soon.

Presidents Biya, Déby and Mbasogo, for instance, have been in power for more than two decades in Cameroon, Chad and Equatorial Guinea, respectively, and there is no constitutional limitation on the number of terms for which a president may be re-elected in these countries. On the other hand, countries such as Congo (Brazzaville) have constitutions which provide that the President can only be re-elected once.

As in President Abdelaziz Bouteflika's Algeria, Blaise Compaoré's Burkina Faso, and Yoweri Musevini's Uganda, the constitutions of Cameroon and Gabon were amended to enable the incumbent president to stand for election and be re-elected ad infinitum, which may result in a de facto presidency-for-life being established in these African states. It is not clear whether François Bozizé, Joseph Kabila, Paul Kagame, Denis Sassou Ngouesso and Pierre Nkurunziza – all of whom are now serving their second and final terms – will not give into temptation to amend the constitutions of their countries in order to get a third term. As for the AU's position on this, in all cases where constitutions were irregularly amended, human rights violated and elections rigged by incumbent presidents, the organisation remained silent or instead supported their actions.

Recently, the AU gave a *satisfecit*[104] to the DRC Government and the allegedly independent Electoral Commission for their successful organisation of the much-rigged 2011 presidential and parliamentary elections. Indeed, they even applauded President Joseph Kabila who had succeeded in retaining power amid massive fraud that had been denounced by all international as well as Congolese observers.

103 Okoth-Ogendo (1991:3–25).
104 Good report.

Moreover, President Teodoro Obiang Ngouema Mbasogo, who had exercised undemocratic or authoritarian power for more than three decades in Equatorial Guinea, was elected Chairman of the Assembly of the Union on 31 January 2011. This election took place in the middle of the Arab Spring – indicating clearly that African leaders were not fully committed to change.

However, Central Africa and the Great Lakes Region were not the only subregion where the AU and African leaders respond poorly or not at all to popular demands for constitutionalism and democracy. In southern Africa – just close to democratic Botswana, Lesotho, Namibia, Mozambique, South Africa and Zambia – the Kingdom of Swaziland remains one of the few absolute monarchies in the world. So far, the AU and the Southern African Development Community (SADC) have failed to promote constitutionalism and democracy there. Quiet diplomacy has been the AU, SADC and South Africa's response to the pleas of the Swazi people demanding democracy. AU's quiet diplomacy is equally enforced with regard to Angola and Zimbabwe. In Zimbabwe, President Robert Mugabe, another de facto president for life, has been opposing democratic change, rigging elections, and abusing the rights of his people in order to remain in power. SADC nevertheless got involved in the Zimbabwean crisis by mediating the conflict between President Mugabe and Prime Minister Morgan Tsvangirai. In Angola, President José Eduardo dos Santos has been in power for more than three decades, and seems determined to rule forever in a country where free and fair elections have never taken place. The AU and SADC always declare the Angolan elections free and fair. Nevertheless, they embarked on the settlement of the political crisis in Madagascar where Mr Andry Rajoelina, the Mayor of Antananarivo, with the support of the military, overthrew the incumbent President Marc Ravalomanana. The ousted President found refuge in South Africa in 2009 and has since been declared a persona non grata in his home country, sentenced in absentia, and prevented from returning home. The AU and SADC have not given up on Madagascar, but have so far been unsuccessful in resolving the political crisis there.

In East Africa, Somalia became an illuminating and paradigmatic case of the "failed", "collapsed", "disintegrated" African state or of "statelessness" in Africa.[105] Since the collapse of the Government of General Mohamed Siad Barre in 1991, there has not been a central unified government controlling the entirety of Somalia, despite several attempts to establish one. The country has been split into several self-governing entities. Yet, constitutionalism and

105 See Villalon L & P Huxtable (Eds). 1997. *Critical juncture: The African state between disintegration and reconfiguration*. Boulder: Lynne Rienner Publishers; Zartman, IW (Ed.). 1995. *Collapsed states: The disintegration and restoration of legitimate authority*. Boulder: Lynne Rienner Publishers; Zartman, IW. 1999. *Collapsed states*. Boulder: Lynne Rienner Publishers; Widner, JA. 1995. "States and statelessness in late twentieth-century Africa". *Daedalus*, 124(3):129–154.

democracy can only prosper in a functional state. The first step, therefore, was to help bring the state "back in"[106] – and this required ending the Somali war. The AU Peace and Security Council responded by setting up an AU Mission for Somalia (AMISON) in 2007, which replaced the force established by International Governmental Authority on Development (IGAD), namely IGASOM, on 19 January 2007. AMISOM's mission was to help the Transitional Federal Government (TFG) re-establish the state of Somalia, implement a national security plan, create a secure environment for the delivery of humanitarian aid, train the Somali security forces, and support them in their battles against Al-Shabaab militants. AMISOM was approved by the UN Security Council. AMISOM's six-month mandate has regularly been extended since its establishment and is set for review again on 16 January 2013. Indeed, the TFG has survived – thanks to AMISOM.

However, the AU has been conspicuous by its silence on the consolidation of authoritarianism in Uganda under Mr Yoweri Museveni, another African de facto president-for-life. The AU also remained quiet vis-à-vis the situation of constitutionalism and democracy in Eritrea and Ethiopia, where elections and multipartyism have not produced a genuine democracy.

African leaders also sent a wrong message by supporting their authoritarian colleague President Omar al-Bashir of Sudan who was indicted by the International Criminal Court (ICC) for genocide, war crimes and crimes against humanity, in violation of the Rome Statute that some of them have ratified. The AU changed the venue of its July 2012 Assembly Ordinary Summit from Lilongwe, Malawi, to its headquarters in Addis Ababa, Ethiopia, following the insistence of the Malawian Government under the leadership of interim President Joyce Banda that it would comply with the Rome Statute and arrest President Al-Bashir if he were to attend the Summit. The AU's position on President Al-Bashir's indictment contradicted the commitment to human rights enshrined in its Constitutive Act and several other regional instruments. It also violated the Rome Statute, which many AU member states had ratified and were obliged to comply with under international law.

In West Africa, if the AU could claim some credit for settling the crises in countries such as Guinea, Liberia, Niger and Sierra Leone, this credit should mainly be given to the Economic Community of Western African States (ECOWAS), which has done more than any other sub-regional African organisation in this regard. Some kind of constitutionalism and democracy was restored in these four countries: relatively free and fair elections were held, and military rulers who had perpetrated coups d'état were prevented from running.

106 See Evans, P, D Tueschemeyer & T Skocpol. 1985. *Bringing the state back in*. New York: Cambridge University Press.

In Mauritania, the AU responded to the 2005 coup d'état by suspending this member state. The military leader of the coup, General Mohamed Ould Abdel Aziz, was nevertheless allowed to organise and win the presidential election before his AU colleagues welcomed him back into the fold. His moment of glory was probably when he was appointed as a member of the AU Ad Hoc Committee in 2011 to help resolve the political crisis in Côte d'Ivoire. ECOWAS also responded to the crisis of constitutionalism and democracy in Côte d'Ivoire, where Mr Laurent Gbagbo refused to relinquish power after losing the election. Instead, Gbagbo shamefully had himself sworn in as President by the Constitutional Council before the same Court could declare Mr Alassane Ouattara the winner of the 2010 presidential election. President Gbagbo continued to be backed by some colleagues within the AU and could have illegitimately extended his term of office without the controversial intervention of the UN Mission in Côte d'Ivoire (ONUCI), the Force Licorne sent by France, and the contribution of ECOWAS and the UN Security Council.

ECOWAS is also currently involved in the crisis in Mali, where the incumbent President Amadou Amani Touré was overthrown by a military junta while the north of the country fell under the Tuareg rebellion that was recently hijacked by Islamists who have turned northern Mali into an Islamic state. ECOWAS managed to restore some order by compelling the junta to transfer power to civilian political leaders, who have since constituted an interim government of national unity. While threatening sanctions against the former members of the junta that ousted Mali's civilian and democratically elected President, ECOWAS has already pledged that it will assist the interim government in combating the rebellion and restoring Mali's territorial integrity.

ECOWAS was created in 1975 and is the oldest African subregional organisation. It is the most integrated economic community, and is based on the right to freedom of movement recognised to the citizens of its member states. A common passport was established for all ECOWAS citizens, who subsequently do not need visas to circulate or reside in any ECOWAS country. Freedom of movement of goods and services is also recognised. ECOWAS has made tremendous progress on the road to economic integration. With the exception of The Gambia, Ghana, Liberia, Nigeria and Sierra Leone, all ECOWAS countries are former French colonies. They share a common currency, a common official language, and a common political history. France remains the most influential foreign power in many ECOWAS countries and in the East African region. It continues to play an important role in both their national and foreign policies, and is always ready to intervene when called upon to do so. ECOWAS is also an African subregional organisation where democracy has been consolidated in several countries, which includes Benin, Cape Verde, Ghana, Nigeria, and Senegal, thanks to their leaders' commitment and the development of a political culture of democracy among the population. Nigeria, as the regional superpower which itself suffered decades of military rule, seems committed to fighting any kind of authoritarianism emerging in

West Africa and has demonstrated leadership in this regard. On the other hand, ECOWAS has never acted alone. Its interventions generally enjoy support from the key powers in the UN Security Council, notably France and Britain as the former colonial powers, as well as the United States. All these factors may help explain why ECOWAS has been more successful and has performed better than any other African subregional organisation – even surpassing the AU as a regional body in promoting constitutionalism and democracy.

Despite the progress that has been made, however, the history of constitutionalism and democracy in West Africa has been characterised by some resistance in countries such as Burkina Faso, Cape Verde and The Gambia, or by reversals in others such as Guinea-Bissau, where a coup d'etat was perpetrated just months after this country had ratified the ACDEG, or Mali, where a military junta seized power after two decades of constitutional and democratic rule under Presidents Alpha Oumar Konaré (1992–2002) and Amadou Toumani Touré (2002–2012). The AU belatedly intervened, but ECOWAS once more took the lead – as it had done during the crisis in Guinea – by threatening sanctions against those in charge of the coup and forcing them to restore the constitutional and civilian order.

The AU response to popular uprisings in North Africa, particularly in Egypt, Libya and Tunisia, was not surprising. The authoritarian leaders of these three countries continued to enjoy support from the AU. There is little doubt that without the determination of the masses of the people, Presidents Hosni Mubarak of Egypt, Muammar Gaddafi of Libya, and Zine El Abidine Ben Ali of Tunisia might still be in power.

The above account should not lead to the conclusion that the AU has done nothing to foster constitutionalism and democracy in Africa. In many AU member states, people enjoy more freedom than under the OAU. Several constitutions have been passed to promote constitutionalism and democracy. Elections are held more regularly on the continent, and the prospects for peaceful and constitutional change of regime are better than at any time under the OAU. Some African leaders who are more committed to constitutionalism and democracy have come to power even though they are still in small numbers. The political culture of the masses has improved, with the people asserting more democratic rights and demanding good governance. The media enjoy more freedom and the political arena is more liberalised than under the OAU – despite the fact that this cannot be attributed to any specific AU efforts. It would be naïve to expect that the many authoritarian leaders and other coup masters who deny human rights to their peoples and those who have mastered vote-rigging and constitutional violations would contribute to promoting constitutionalism and democracy at the continental level. The paradox is that the few leaders who are committed to constitutionalism and democracy and who were democratically elected in their countries have not been able to speak out during AU summits to convince their authoritarian

colleagues to embark on the road to constitutionalism and democracy. Africa's future is up to the African people more than to its leaders. The same goes for the future of constitutionalism and democracy. The AU has certainly made some contribution to promoting constitutionalism and democracy in Africa, but the balance sheet has been disappointing. The time might have come for the people to claim ownership of the AU, and to contribute towards transforming it from an African leaders' union into an African peoples' union that would better serve the cause of constitutionalism and democracy on the African continent.

Conclusion

Unlike the OAU, the AU gives pride of place to constitutionalism and democracy, which feature prominently among its objectives and principles. One of the major challenges to Africa's development and renaissance relates to the establishment and consolidation of constitutionalism, democracy and good governance in Africa.

Some progress has been made in this respect, especially since the establishment of the AU. However, much more needs to be done. The AU and African leaders have demonstrated little eagerness to sign and ratify the Conventions they adopt or to live up to their commitments in various Declarations they solemnly make in relation to the promotion of constitutionalism and democracy on the continent. And where they have indeed signed and ratified such undertakings, they generally fail to comply with them or live up to their commitments. Accordingly, these Conventions remain dead letters in many countries. The AU itself has done little to promote its instruments among its member states, especially those that have signed and ratified them, betraying African leaders' lack of strong political will at regional and the domestic level. One of the challenges facing the AU relates to non-compliance by its member states with AU Conventions and failure to deliver on their various commitments, particularly in the area of constitutionalism and democracy, as broadly defined in this article and in various AU instruments. The primary responsibility in this regard lies with African leaders acting collectively within the AU structures, individually in their countries, and with the AU, its different organs, and with the governments of other AU member states. This is the state of affairs that Dr Ping left in the AU and its Commission's hands when he handed over the reins to Dr Zuma as the new Commission Chairperson.

Dr Zuma's election was a victory for the diplomacy of SADC under the leadership of Angola's President Dos Santos and also of the South African Government, which fully supported her after she failed to win in January 2012. During the almost 50 years of tis existence, the OAU had never once elected a woman to lead its General Secretariat. On the other hand, the AU's record in respect of electing a woman to chair its Commission was no different until ten years after its existence.

Dr Zuma's election was a historic event not only because she became the first woman, the first South African, and the first southern African to chair the Commission, but also because it coincides with the beginning of the second decade of the AU.

The end of the first and the beginning of the second AU decade has provided an opportunity for African leaders, peoples, intellectuals, governments, and different AU organs, including the Commission now under a new leadership, to take stock, to reflect on what the AU has achieved, and to define the challenges and prospects for constitutionalism and democracy that need to be developed and consolidated as a prerequisite for an African renaissance in this new century and millennium. This article is intended as a modest contribution to this critical reflection.

Annexure A: African instruments

1. African Charter on Democracy, Elections and Governance (ACDEG), adopted in Addis Ababa, Ethiopia, on 30 January 2007, and entered into force on 15 February 2012
2. African Union (AU) Constitutive Act, adopted in Lomé, Togo, on 11 July 2000, and entered into force on 26 May 2001
3. Declaration on Unconstitutional Changes of Government (Algiers, Algeria, 1999)
4. Declaration for an OAU Response to Unconstitutional Change of Government (Lomé, Togo, 2000)
5. Declaration on Democracy, Political, Economic and Corporate Governance (Durban, South Africa, 2002)
6. Protocol to the African Charter on Human and Peoples' Rights (ACHPR) on the establishment of an African Court on Human and Peoples' Rights, adopted on 9 June 1998 in Ouagadougou, Burkina Faso, and entered into force on 25 January 2004
7. Protocol of the African Court of Justice, adopted by the Assembly of the Union on 11 July 2003 in Maputo, Mozambique, and entered into force on 11 February 2009
8. Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 1 July 2008 in Sharm El-Sheikh, Egypt, but not yet in force

Igniting the plea bargaining discourse in Namibia: What is it and do we need it?

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Abstract

Outside of Namibia, the influence of plea bargaining on defendants has been fiercely debated. Where it has been introduced, many scholars call for it to be banned, arguing that the practice coerces innocent defendants to plead guilty. Proponents of plea bargaining, however, often respond that even an innocent accused is better off when s/he chooses to plea bargain in order to be assured of a lenient result, if s/he concludes that the risk of wrongful trial conviction is too high. The proponents further claim that, since plea bargaining is only an option, it cannot harm the accused – whether s/he is guilty or innocent. The plea bargaining discourse in Namibian criminal justice may be categorised as 'the debate we should have had but never did'. Recently though, plea bargaining has obtained the endorsement of a new influential protagonist: High Court Judge President Damaseb has proposed it be introduced into the Namibian legal system. Damaseb JP cites it as an innovative remedy to what is proving to be a leitmotif predicament of saturated court rolls which are fast reaching unsustainable proportions.[1] This article strives to understand the fundamentals of plea bargaining by endeavouring to define its exact meaning and tracing its historical origins, while venturing into the respective pros and cons that may arise by its introduction. This paper finds that cited jurisdictions such as India, South Africa and the United States of America have, with reasonable success, used this concept to positively influence the inadequacies of their criminal justice systems. Finally, it is concluded that a meticulous research-orientated expedition, with an associated 'cost–benefit' anatomy, ought to be conducted on the potential introduction of plea bargaining into the Namibian criminal justice system, with emphasis placed on the constitutional implications that may arise as a result.

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1 Damaseb, PT. 2010. *Report – Familiarization Tour of Judge President, 2–16 May 2010. Promoting access to justice in the High Court of Namibia: First Report. The case for judicial case management*, p 20; available at http://www.superiorcourts.org.na; last accessed 29 January 2012.

Introduction

One of the latest legal transplantations in the field of criminal justice is the notion of plea bargaining. It is a generic banality that plea bargaining, as a legal concept in comparative jurisprudence, is nothing novel given its comprehensive discussion, adoption and application in numerous legal systems the world over. Countries that employ plea bargaining have debated the concept, attracting both proponents and opponents in deciphering whether or not it is to be implanted in their respective jurisdictions. Nonetheless, in Namibia, its appropriateness has rarely been addressed seriously in academic and professional circles, which places it in a nascent stage in the local context. Namibia's Criminal Procedure Act[2] does not currently provide for formal plea bargaining. However, it is widely accepted that the practice often occurs between the *dominus litus* state, through prosecuting counsel and accused persons (or their representatives), albeit on an informal basis.[3] This can be attributed to the wide discretionary powers that are vested in a prosecutor on behalf of the state.

Stirring up the plea bargaining debate

The debate over the introduction of plea bargaining has been ignited by recent calls, most notably within legal circles, for the need to statutorily introduce and regulate it in the Namibian criminal justice system. Such a call was made by the Anti-corruption Commission of Namibia;[4] by legal stakeholders at the Law Reform and Development Commission of Namibia's Waterberg Conference;[5] and by an authoritative source in the High Court of Namibia, namely Damaseb JP, at the official opening of its 2012 Legal Year, where he stated the following:[6]

2 No. 51 of 1977, as amended. Notably, although section 112 of the Act provides for an accused to plead guilty, this cannot be regarded as a manifestation of plea bargaining.

3 This may occur in terms of section 204 of the Act, whereby a witness answers incriminating questions in return for a discharge from prosecution.

4 See "ACC wants plea bargaining introduced", *New Era*; available at http://www.newera.com.naarticle.php?articleid=38012&title=ACC%20wants%20plea%20bargain%20introduced; last accessed 26 January 2012.

5 "The Criminal Procedure Act, 2004 (Act No. 25 of 2004) and Statutory Time Limit for the Rendering of Judgments Workshop", held from 6 to 8 July 2012 at the Waterberg National Park, Otjozondjupa Region; workshop resolutions are available from the Law Reform and Development Commission of Namibia.

6 "Speech by Petrus T Damaseb JP on the occasion of the Official Opening of the High Court of Namibia Legal Year 2012", delivered on 16 January 2012; speech on record with the author of this article.

> [I]n December 2011, the High Court undertook a familiarization trip to the US State Arizona, to investigate techniques used in that State at State and federal levels to address the problem of congested criminal court rolls. Significantly, the delegation included the Prosecutor General's Office and that of the Inspector-General of Nampol. The visit came against the backdrop of the outcry about delay in the finalisation of criminal cases. We need to find more innovative ways to deal with the criminal cases brought before the Lower Courts and the High Court. To expect every case in respect of which a decision to prosecute had been taken by the Prosecutor General to go to *full trial, is to set ourselves an unrealistic objective as a nation.* We have learned from other jurisdictions, especially Arizona, that of the criminal cases where a decision is taken to prosecute, less than 10% actually go to trial. In the district of Arizona, up to 98% of criminal cases are finalised through plea-bargaining which, erroneously, is assumed to mean that the accused must always be allowed to plead to a lesser offence and must get a lesser sentence even when the case against him or her is strong. We have learned on our familiarisation visit to Arizona that plea-bargaining can be an important tool in de-congesting the court roll; and in crime detection and prevention. It is up to the Executive and the Prosecutor General to now take the lead in legislative reform in that respect. As judges we will give full cooperation to the steps being taken in that direction.[7] [Emphasis added]

From the onset, it must be pointed out that Damaseb JP's call for plea bargaining is manifestly primarily motivated by administrative considerations: the exponential growth in complaints from litigants, defendants and legal practitioners, most notably through the incumbent President of the Law Society, Adv. D Smalls, who have expressed their discontent with the undue delay in the delivery of reserved judgments by Judges of the High Court. On the strength of the above epigraph citing the Judge President, it would appear that his endorsement of the idea of statutory plea bargaining is a rather subtle attempt to circumvent the source of the delayed judgments predicament, by ensuring that, in effect, judges are not in the time-consuming yet obligatory position to deliver judgments as cases are settled through negotiating a guilty plea on the part of the accused.

The primary purpose of this paper is, thus, to enquire into the endorsement of plea bargaining made by Damaseb JP[8] in an attempt to obtain greater clarity on this often misunderstood facet of law. Pertinent questions that seek an answer include the following:

- What is plea bargaining, and where did it originate?
- Is the perception of leniency towards the accused accurate or erroneous?

7 There is, however, no report to scrutinise in respect of the nature of plea bargaining in Arizona. Reference will nonetheless be made to the US Federal Procedure with respect to plea bargaining.

8 See also Damaseb (2010:20).

- Will its introduction in Namibia yield tangible benefits that will outweigh its potential drawbacks?
- How will plea bargaining, if introduced, implicate constitutional imperatives during the criminal prosecution process?

Elucidating plea bargaining – A conceptual exposé

The law on pleading guilty in conventional criminal procedure is an area of much clarity and certainty. However, the law of plea bargaining is quite sticky to explain, understand and execute, which provokes a lot of confusion and considerable divergence over what exactly it is, whether to the lay person, seasoned academic, or legal practitioner. Research reveals that there is no simple, universal or perfected definition of the concept *plea bargaining*. In fact, there are a variety of 'special' definitions of this phenomenon and 'special' uses of this phrase, not only between, but within, jurisdictions.[9] *Black's Law Dictionary*, for example, defines it as follows:[10]

> [t]he process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge.

Similar to *Black's Law Dictionary*, *Latin for Lawyers* defines *plea bargaining* as follows:[11]

> An agreement between the prosecutor and the defense in advance of a plea, in which the accused agrees to accept guilt to a lesser offense, in exchange for a lighter sentence than might have been imposed on the original charge after a verdict of guilty.

In contrast, Alschuler defines *plea bargaining* as follows:[12]

> Plea-bargaining consists of the exchange of official concessions for a defendant's act of self-conviction. Those concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offence charged, or a variety of other circumstances.

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9 Bekker PM. 1996. "Plea bargaining in the USA and South Africa". *Comparative and International Law of Southern Africa Journal*, 29:172.

10 Garner, Bryan A (Ed.). 1999. *Black's Law Dictionary* (Seventh Edition). St. Paul, MN: West Publishing Company Ltd.

11 Emanuel L. 1999. *Latin for lawyers*. New York: Emanuel Publishing Corporation, p 286.

12 SALC/South African Law Commission. 2000. "Discussion". *Discussion Paper 94: Project 73. Simplification of criminal procedure (Sentence Agreements)*. Pretoria: SALC, p 4.

Moreover, in 1975, the Canadian Law Commission[13] initially defined *plea bargaining* as –

> [a]ny agreement by the accused to plead guilty in return for the promise of some benefit.

In a working paper of 1989, however,[14] the Commission used the more neutral expressions *plea negotiations* or *plea discussions*, since it was considered that the purpose of the process was to reach a satisfactory agreement and not to enable the accused to obtain a 'bargain'. They substituted the expression *plea agreement* for *plea bargain*, and the following definition was then given to the process:[15]

> … [A]ny agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action.

The above definitions, which are by no means exhaustive, illustrate the uncertainty that plea bargaining provokes, even amongst great legal minds. Although none of the above definitions can be proposed as paramount here, it is submitted that the one offered in *Black's Law Dictionary* has the upper hand in respect of covering a wider spectrum, whereas the Canadian Law Commission definition reflects the concept with greater accuracy. These definitions are useful as a starting point in order to wade through the misconceptions, misunderstandings and misapprehensions regarding plea bargaining.

A definitional exposé – *To plead* and *To bargain*

Once a charge is levelled against an accused, the accused will be expected to plead to such a charge. *Plea*, in legal parlance, means an accused person's formal response to a charge against him/her of *guilty*, *not guilty* or nolo contendere.[16] Bekker, writing in the US context, correctly points out that a source of confusion and irritation on the part of both the public and criminal justice officials is the term *bargain* in the phrase *plea bargain*; he also argues that the term is truly an unhappy choice, and describes it as misleading,

13 LRCC/Law Reform Commission of Canada (1975:45), cited in SALC (ibid.:5).

14 LRCC/Law Reform Commission of Canada. 1989. "Criminal law: Plea discussions and agreements". *Working Paper 60*, p 3. Ottawa: LRCC.

15 SALC (2000:6).

16 The Latin phrase literally translates as "no contest", and refers to a plea wherein a defendant neither pleads guilty to nor contests a charge. A plea of *nolo contendere* is treated as a guilty plea for the purposes of the case; however, such plea cannot be used against a defendant in any subsequent case where the same charge is required to be proved again.

inflammatory and pejorative.[17] Instead, *bargain* is supposed to convey the idea of compromise or the settlement of a case. Theoretically, both the state and the defendant give up something in exchange for getting something; but the word is rich in connotations and inaccurately suggests the idea of "bargain basement justice" and "white sales day at the courthouse", he feels:[18]

> Some individuals believe that defendants may dictate to criminal justice officials what sentences they will accept. The thought of compromising with criminals, especially on their terms, is repugnant to the citizenry. It inflames the public and shakes its confidence in the court system. Prosecutors state that plea-bargaining is the single most misunderstood and most difficult part of their work to explain to the public. Several of them state that they deliberately avoid reference to the word "bargaining" in public discussions. In one district the attorney flatly refuses to admit that "plea-bargaining" occurs in his jurisdiction. However, he does admit to a great deal of "settling" of criminal cases.

From the above extract, the connotation of *bargaining* may inflame, deceive and mislead some to believe that an accused is being 'given a break', or 'are not punished as much as they deserve', or that a 'deal' is brokered with them. Even the defendant might believe they are getting a 'bargain' and they may be encouraged in that belief by their lawyers, who may or may not know better although it would be expect that they should. In reality, however, a defendant is not permitted to get anything in return for a guilty plea: they are also not allowed to ask for anything – they simply have to plead guilty. Factually, therefore, there is no 'bargain'.[19]

Considering the above exposition, appropriate terminology that engenders less confusion and dissatisfaction such as *plea settlement*, *plea agreement, plea resolution* or *plea negotiations* should be employed by any possible prospective statutory reforms, as has been adopted by the Canadian Law Reform Commission. Nonetheless, despite the problems associated with the phrase *plea bargaining*, it will be used in this article in deference to current common usage.

Tracing the history and capturing the origins of plea bargaining[20]

Plea bargaining is said to have originated from the United States of America.

17 Bekker (1996:172).
18 (ibid.:172–173).
19 (ibid.).
20 Gazal-Ayal, O & L Riza. 2009. "Plea-bargaining and prosecution". *European Association of Law and Economics Working Paper No. 013–2009*. Haifa: University of Haifa, p 6; available at http://eale.haifa.ac.il/WorkingPapers/Binder%20WP%20013.pdf; last accessed 20 January 2012.

For an extended period, it was said to –[21]

> … operate in the backrooms of the halls of justice without any legal recognition of the fact that such a practice was actually going on.

It is now a norm that is an old and established procedure in criminal justice administration there.[22] Langbein[23] documents that plea bargaining was unknown during most of the history of common law, and only in the 19th Century does he find significant evidence of the practice in either England or the US. These findings beckon to the legal historian for explanation. Plea bargaining only evolved in the 19th Century given that, until then, trials were rapid and inexpensive, making plea bargaining unnecessary. With the appearance of lawyers – and their concomitant cost – in courts, the criminal procedure became much more complex, and courts and prosecutors started looking for ways to encourage guilty pleas. As the adversary system and evidence law continued to develop, jury trials became too convoluted; hence the need increased to turn to non-trial alternatives such as plea bargaining. Gazal-Ayal and Riza[24] further identify similarities between the development of the medieval European law of torture and plea bargaining. Both, they claim, were initiated to overcome the excessive safeguards against false accusations placed at trial. In the Middle Ages, a conviction required either two witnesses or a voluntary confession. Since these rules hampered the system's ability to convict many clearly guilty people, the law allowed a bypass. When the indications against defendants were sufficiently convincing, torture replaced the voluntary confessions.[25]

The current plea bargaining process could be seen as a somewhat refined version of the torture system since it coerces and induces defendants to plead guilty in order to overcome the highly regulated, complex and expensive criminal trial. Moreover, plea bargaining, like torture, being highly coercive, is risky for innocent defendants.[26] Gazal-Ayal and Riza finally conclude that a simplified trial process is required to assure society's ability to supply a trial for every defendant. A simplified bench trial as an alternative to the reliance on plea bargaining and shows that such a system has been proved workable.

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21 Church, TW. 1979. "In defence of bargain justice". *Law and Society Review*, 13(2):509.

22 Onwudiwe, M. 2009. "Plea bargaining: A catalyst for the Nigeria criminal justice system"; available at http://onwudiwemartins.hubpages.com/hub/plea-bargain-in-the-Nigeria-Criminal-Justice-System; last accessed 21 January 2012.

23 Langbein, JH. 1979. "Understanding the short history of plea bargaining". *Faculty Scholarship Series: Paper 544*, p 1; available at http://digitalcommons.law.yale.edu/fss_papers/544; last accessed 20 January 2012.

24 (2009:6).

25 (ibid.).

26 (ibid.).

Yet others argue that reducing the cost of trial needs to result in less accurate trials, and thus raise the rate of wrongful convictions, to the detriment of innocent defendants. When trials are less accurate, prosecutors' incentives to assure that only guilty defendants are prosecuted will also be weakened. Thus, a costly and accurate trial with the option to settle in its shadow protects innocent defendants better than a cheaper and less accurate trial.[27]

Understanding plea-bargaining-related concepts

Numerous concepts are encompassed under the umbrella concept of *plea bargaining*. Five basic concepts will be highlighted, namely –[28]

- charge bargaining
- sentence bargaining
- fact bargaining
- express bargaining, and
- implicit bargaining.

Charge bargaining

This entails bargaining for a reduction in either the number or severity of criminal charges. Charge bargaining in the USA, according to Bekker,[29] takes three forms. The first is where a defendant pleads guilty to a charge or charges in return for a prosecutor's dismissal of other charges filed. In the second, a defendant may plead guilty to a charge or charges in return for a prosecutor's promise not to file other charges. The third variant is where a defendant pleads guilty to a lesser included offence in return for a prosecutor's promise not to file the more serious charge.

Sentence bargaining

This entails bargaining for a favourable sentence, on recommendation by the prosecutor, or bargaining directly with a trial judge for a favourable sentence.[30] In such cases, trial judges ordinarily opt to impose sentences that are not more severe than those recommended by prosecutors, or else they afford the

27 Gazal-Ayal & Riza (2009:7).

28 Pradeep, KP. 2003. "Plea bargaining – New horizon in criminal jurisprudence", p 2; available at http://www.kja.nic.in/articleplea20%bargaining.pdf; last accessed 17 November 2012.

29 Bekker (1996:176).

30 (ibid.:174). This is exemplified in situations where a defendant trades his/her promise to plead guilty (and waives his/her right to trial) for the prosecutors promise to recommend a specific sentence.

accused an opportunity to withdraw his/her guilty plea.[31] The normal course would be where the defendants' contribution to the plea bargain is his or her guilty plea. However, the defendant may offer the prosecutor benefits aside from a guilty plea, which may, for example, include returning stolen property, making restitution to the victim, providing the police with information, or testifying against others.[32]

There are two types of sentencing agreements. The first is where the prosecution, in exchange for a plea of guilty, undertakes to submit to the court a proposed sentence or agrees not to oppose the proposal of the defence. The agreement has no effect on the court and does not require any particular action from the court. The court can ignore the agreement or implement it. If it ignores the agreement, the plea of guilty stands, and so does the sentence.[33] The second type of sentencing agreement is where the accused agrees with the state to plead guilty provided an agreed sentence is imposed.[34] Sentence bargaining is practised in South Africa, as will be discussed below.

Fact bargaining

In fact bargaining, a prosecutor agrees not to contest an accused's version of the facts or agrees not to reveal aggravating factual circumstances to the court. This form of bargaining is likely to occur when proof of an aggravating circumstance would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines. A prosecutor may also –[35]

- agree to provide leniency to an accused's accomplices
- withhold damaging information from the court
- influence the date of the accused's sentencing
- arrange for the accused to be sent to a particular correctional institution
- request that an accused receive credit on the sentence for time served in jail awaiting trial
- agree to support the accused's application for parole
- attempt to have charges in other jurisdictions dismissed
- arrange for sentencing in a particular court by a particular judge
- provide immunity for crimes not yet charged, or
- simply remain silent when a recommendation otherwise might be unfavourable to the accused.

31 Pradeep (2003:2).
32 Bekker (1996:176).
33 SALC. 2000. *South African Law Commission Annual Report 2000*, p 145; available at http://salawreform.justice.gov.za; last accessed 17 November 2012.
34 (ibid.:146).
35 Pradeep (2003:2).

Express bargaining

This entails an accused or his lawyer negotiating directly with a prosecutor or a trial judge, as the case may be, concerning the benefits that may follow the entry of a plea of guilty.[36]

Implicit bargaining

Contrary to express bargaining, implicit bargaining occurs without face-to-face negotiation. In implicit bargaining, the trial judges especially establish a pattern of treating those accused who plead guilty more leniently than those who exercise the right to trial. The accused, therefore, come to expect that the entry of a guilty plea will be rewarded.[37]

The advantages of plea bargaining

Proponents cite numerous reasons for justifying plea bargaining. In this article, only those reasons that would find resonance within Namibia's jurisdiction – should plea bargaining be introduced – will be examined.

The reduction of congested court rolls

A major rationale for plea bargaining, cited in many jurisdictions, is the administrative necessity. Protracted cases in Namibian courts have been identified as the leitmotif in the narrative of obstacles to the delivery of justice.[38] The finalisation of criminal trials in the courts takes considerable time, and in many cases trials do not commence before three to five years have passed since an accused was remitted to judicial custody.[39] Utopianly, procedural imperatives such as pre-trial appearances, thorough criminal investigations, the decision whether or not to prosecute, and adequate time to prepare a defence, inter alia, need to be employed to advance the journey of justice, yet it seemingly thwarts its aspirations here in Namibia. It is commonplace that justice should be dispensed as early as is pragmatically possible; if not, one falls prey to the common axiomatic evil of justice delayed being tantamount to having justice denied.[40] In *S v Heidenreich*,[41] a case concerning the right to be tried within reasonable time as provided for under Article 12(1)(b) of the Namibian Constitution, Hannah J stated the following in *ratio decidendi*:

36 (ibid.:3).
37 (ibid.).
38 See Damaseb (2010:11).
39 See Nakuta, J. 2011. *The justice sector and the rule of law in Namibia – The criminal justice system*. Windhoek: Human Rights and Documentation Centre, University of Namibia/Namibia Institute for Democracy, p 19.
40 Equally so, inaccessible justice is tantamount to justice denied.
41 1998 NR 229 (HC) at 235.

> The right [to be afforded a fair hearing within a reasonable time], therefore, recognizes that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma, and pressures detrimental to the mental and physical health of the individual. It is a truism that the time awaiting trial must be agonizing for accused persons and their immediate family. I believe that there can be no greater frustration for an innocent charged with an offence than to be denied the opportunity of demonstrating his lack of guilt for an unconscionable time as a result of delay in bringing him to trial. The right recognizes, also, that an unreasonable delay may well impair the ability of the individual to present a full and fair defence to the charge. Trials held within a reasonable time have an intrinsic value. If innocent, the accused should be acquitted with a minimum of disruption to his social and family relationships. If guilty, he should be convicted and an appropriate sentence imposed without unreasonable delay. His interest is best served by having the charge disposed of within a reasonable time so that he may get on with his life. A trial at some distant date in the future, when his circumstances may have drastically altered, may work an additional hardship upon him and adversely affect his prospects of rehabilitation.

The above epigraph enumerates some of the far-reaching civil rights consequences that fall upon the accused in the common occurrence of delays, which must be cured. Hence, plea bargaining can potentially assist not only the courts in reducing the number of cases on their rolls, but also the state, in the management of case loads. This is especially advantageous in a jurisdiction such as Namibia's where the speedy disposal of cases on court rolls has become a perplexing problem. Plea bargaining can reduce the prosecutors' workload, enabling them to prepare for cases of more gravity by leaving the effortless and petty offences to be settled through plea bargaining as an alternative to pursuing the route of a full-blown trial.[42] Becker states that US courts have accepted plea bargaining as a necessary and desirable practice designed to make the criminal justice system more efficient, resulting in the timely administration of justice.[43] However, this so-called case pressure theory has not been beyond criticism, as empirical data has shown that there is no significant correlation between caseloads and plea bargaining in the US.

Reforming the unreformed

Offenders often find it hard to acknowledge guilt to their lawyers – and even to themselves, because feelings of guilt and shame are painful and depressing.[44] Placing the guilty plea option before an accused person can be a positive factor in reforming the offender: s/he accepts responsibility for his/her actions and, by submitting such pleas voluntarily before the law, obviates the expense

42 Pradeep (2003). Note, however, that Pradeep writes on plea bargaining in relation to Indian criminal procedure.

43 Bekker (1996:170).

44 Bibas, S. 2004. "Plea bargaining outside the shadow of trial". *Harvard Law Review*, 117(8):2502.

and time consumption that characterise criminal trial prosecutions. Clearly, this advantage would cut both ways as the defence and the state will not dedicate financial and human resources to the prosecution and defence of accused persons.

Plea bargaining as a screening mechanism

Grossman and Katz note how plea bargains can be beneficial to both prosecutors and defendants, simply because the parties might be risk-averse.[45] More importantly, the authors demonstrate how asymmetric information leads innocent defendants to opt for trials. Prosecutors try to adjust the offered sentence to two factors: the probability of conviction and the post-trial sentence. Similarly, defendants – wishing to minimise the expected sentence – adjust their willingness to settle to those two factors. However, the defendants themselves know whether or not they are actually guilty. Since trials are designed to reveal the truth, an innocent defendant would correctly estimate that his/her chances at trial would be better than the prosecutor's offer suggests. As a result, innocent defendants tend to reject offers while guilty defendants tend to accept them. Thus, plea bargaining is a mechanism which screens the innocent from the guilty.[46]

Theories for accepting 'bargaining with justice'

Proponents of plea bargaining have argued that plea agreements should be viewed as a contract, similar to civil out-of-court settlements.[47] In the US, plea bargaining has been justified based on the premise that plea bargaining is a 'contract' between two equal bargaining entities that has to be upheld. If the prosecutor reneges on the offer, the defendant can withdraw his/her plea or plead for specific enforcement of the terms.[48] If the defendant breaches the

45 Grossman, GM & ML Katz. 1983. "Plea bargaining and social welfare". *American Economic Review*, 73(4):749–757.

46 (ibid.).

47 Organisation for Economic Co-operation and Development. 2008. "Plea bargaining/ settlement of cartel cases", p 30; available at http://www.oecd.org/competition; last accessed 20 October 2012. The paper cites one of the classic texts supporting plea bargaining as Easterbrook, FH. 1983. "Criminal procedure as market system". *Journal of Legal Studies*, 12:289. See also Scott, Robert E & William J Stuntz. 1992. "Plea bargaining as contract". *Yale Law Journal*, 101(1909):1912– 1917, who support the view that plea bargaining should be seen as a contract in which both sides can exchange their entitlements, and argue that restricting the right to exchange entitlements would undermine their value.

48 See e.g. *Santobello v New York*, 404 US 257, 261 (1971), where it was held that the US government may be in breach of contract if it breaks its promise not to oppose the defendant's request for a certain punishment by attempting to prove aggravating circumstances, or, for instance, by submitting a victim impact statement; see also

agreed terms, s/he may be prosecuted on the dismissed charges, held to the guilty plea, and be sentenced more harshly. Easterbrook invokes models of contract law, and characterises plea bargaining as a "voluntary transaction which maximizes the welfare of both parties".[49] The defendant is spared anxiety as well as the costs of litigation, while the prosecutor is able to free up resources to pursue other criminals. Easterbrook argues against judicial oversight, as follows:[50]

> [I]f a third party must approve the settlement, settlements and their savings become less frequent. It is seen to be an outgrowth of the adversarial system of justice where the search for truth is not an explicit goal of the proceedings and trial judges have no prior knowledge of the facts of the case to guide any search for truth due to the absence of an investigative file.

Less protracted trial delays

Delay in the courts is unqualifiedly bad. It is bad because it deprives citizens of a basic public service; it is bad because the lapse of time frequently causes deterioration of evidence and makes it less likely that justice can be done when the case is finally tried; it is bad because delay may cause severe hardship to some parties and may, in general, affect litigants differently and it is bad because it brings to the entire court system a loss of public confidence, respect and pride. In brief, it invites the wisecrack of "Okay, blind, but why so slow?"[51]

Congestion and delay in courts throughout Namibia threatens to strangle its system of justice: as delays increase, the innocent who cannot afford bail suffer longer in jail; the guilty who are released pose greater threats to society; and the deterrent value of speedy justice is lost. The resultant pressures to dispose of cases more and more quickly lead to yet more wrongs: less and less attention is given to each case, greater reliance is placed on the disposition of cases through plea bargaining, and the likelihood of injustice increases.

In favour of the accused as well as the demands of society, plea bargaining reduces the possibility of detention during extensive pre-trial and trial

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United States v Johnson, 187 F.3d 1129 (9th Cir. 1999), US, p 5. For a position in support of the contract theory, see Easterbrook, FH. 1992. "Plea bargaining as compromise". *Yale Law Journal*, 101(1969):1975.

49 Easterbrook (1992:1975).

50 Thaman, SC. 2007. "Plea bargaining, negotiating confessions and consensual resolution of criminal cases". *Electronic Journal of Comparative Law*, 11(3):22–23; available at http://www.ejcl.org/113/article113-34.pdf; last accessed 20 January 2012.

51 Monek, FH. 1982. "Court delay: Some causes and remedies"; available at http://www.lati.net/files/public/82_court_i4a.pdf; last accessed 11 November 2012.

processes. The accused can have his/her case completed more quickly and know what punishment has been meted out, instead of facing the uncertainty of a judge's sentencing decision. Protracted periods of pre-trial incarceration where accused persons are often subjected to horrendous conditions[52] are a common occurrence in Namibia. Such occurrences are frowned upon, given that they negate a citizen's right to a trial within a reasonable time, as guaranteed by Article 12(1)(b) of the Namibian Constitution.

Finally, the protection of the victim against publicity and against having to be subjected to cross-examination has also become a sensitive issue. Plea agreements may limit such exposure.

Miscellaneous advantages

Some of the other factors supporting plea bargaining fall into three main categories. In the first, some jurists maintain it is appropriate, as a matter of sentencing policy, to reward defendants who acknowledge their guilt. They advance several arguments in support of this position, notably that a bargained guilty plea may manifest an acceptance of responsibility or a willingness to enter the correctional system in a frame of mind that may afford hope for rehabilitation over a shorter period of time than would otherwise be necessary. A second view treats plea bargaining not primarily as a sentencing device, but as a form of dispute resolution. Some plea bargaining advocates maintain it is desirable to afford the accused and the state the option of compromising factual and legal disputes. They observe that, if a plea agreement did not improve the positions of both the accused and the state, one of the two parties would insist upon a trial. Finally, in the third category are those observers who endorse plea bargaining on the grounds of economy or necessity. Viewing plea negotiation less as a sentencing device or form of dispute resolution and more as an administrative practice, they argue that society cannot afford to provide trials to all the accused who would demand them if guilty pleas were unrewarded. At the very least, the resources that effective plea bargaining would save could be put to more appropriate use.[53]

Criticisms of plea bargaining

Clearly, plea bargaining has not been above the threshold of criticism as many remain sceptical about its modus operandi and legality in their criminal justice

52 See Nakuta (2011:43–45).

53 Oguche, S. 2011. "Development of plea bargaining in the administration of criminal justice in Nigeria: A revolution, vaccination against punishment or mere expediency?". *Nigeria Institute of Advanced Legal Studies Journal of Law and Development,* 1:71.

policies. One Indian academic is quoted to have gone as far as saying the following:[54]

> No doubt plea-bargaining is nothing but a cover-up [of] the inadequacies of government in dealing with each and every case that comes before it [and] indirectly shows the incompetence of traditional procedural laws.

Bekker concludes most legal scholars are opposed to plea bargaining because it not only lacks efficacy, it is also unjust. However, opposition to plea bargaining is not isolated to legal scholarship: public opinion also veers towards disapproval of the practice. Nonetheless, there is a major difference between popular and academic dislikes of the practice: while the public may criticise plea bargaining based on the perception that it treats defendants too leniently, academics often opine that it treats defendants unfairly.[55]

Threat of coerced plea

The oft-cited disadvantage of plea bargaining is the prosecution's power to present the accused with unconscionable pressure. Though an accused would plead guilty in procedural fiction to a charge against him/her, there is every chance of being unduly coerced. The prosecution has the incentive to maximise the benefit of pleading guilty in the weakest cases. As a theoretical principle, securing a conviction ought to be less important among the prosecutor's responsibilities than the administration of justice. Furthermore, as a legal officer of the court, the prosecutor's duty obliges him/her to protect the legal rights of the accused – whether innocent or guilty.[56] These priorities are sometimes reserved under the pressures and incentives of waging an effective battle against crime, in maintaining a respectable conviction 'batting average', in the face of public criticism, and in consideration of personal career advancement. More than that of any other role player in the criminal justice, the role of the prosecutor spans the entire criminal justice system and extends even to the protection of ordinary members of the community.

The ideal of adversarial system employed in Namibia presumes that prosecutors will decide who to prosecute based on the evidence, the equities, and the justifications for punishment. In other words, prosecutors should decide to prosecute based on the likelihood of conviction and the need to deter,

54 Ghosh, S. 2008. "Plea bargaining – An analysis of the concept"; available at http://www.legalserviceindia.com/articles/plea_bar.htm; last accessed 23 January 2012.

55 Bekker (1996:210).

56 In *S v Jija*, 1991 (2) SA 52 (E), it was stated that to regard the function of the state counsel as that of an advocate of the client is a misconception. A prosecutor stands in a special relationship to the court and his/her paramount duty is not that of procuring a conviction, but of helping the court to ascertain the truth and, thus, allow justice to prevail. See also *S v Steyn*, 1945 (1) SA 324.

incapacitate, rehabilitate, reform, and inflict retribution. Of course, prosecutors are supposed to pursue justice, not just convictions. In some cases, doing so means pursuing less severe sentences if the equities warrant them, or it may mean not prosecuting at all. While justice should temper the pursuit of punishment, self-interest should not.[57] Although the theory of objectivity by the prosecutor exists, one cannot merely turn a blind eye to the living reality that prosecutors have in the past and will probably in future continue to abuse their position of authority to the detriment of the accused and his/her interest. Therefore, there is a risk of cantankerous abuse in the state's plea bargaining process.

It should be pointed out that the Indian plea bargaining procedure has put safeguards in place to nullify this shortcoming. There, after the court's receipt of a plea bargaining application, it is obliged to conduct an examination of the accused in camera, avoiding the presence of other parties. This requirement is aimed at ensuring the genuineness and authority of the plea bargaining application.[58]

Perceived leniency towards the accused

It is often argued that plea bargains result in excessive leniency for defendants. This argument is predominantly advanced by the lay person. After all, the criminal law sets the standards that society has chosen for punishing an offender, and the trial is designed to implement these standards in each case, and to assure that offenders receive the optimal sanction. They feel that, since prosecutors have to offer defendants something in return for a guilty plea, "plea bargaining results in leniency that reduces the deterrent impact of the law".[59] However, the leniency, if it does factually exist, is often justified in inducing the accused not to go to trial. The guilty plea or no contest plea would, therefore, be the quid pro quo for such a concession.

Leniency giving rise to the so-called innocence problem[60]

While the public's objections to plea bargaining concentrate on the perceived lenient outcome, most legal scholars are more concerned with the innocence problem, that is, the risk that innocent defendants accept plea bargain offers. Alschuler shows how a rational, innocent defendant might plead guilty.[61] He refers to a certain rape defendant who accepted a charge bargain for a simple battery to avoid the risk of trial, even though the chances of conviction at trial

57 Bibas (2008:2470).
58 Pradeep (2003:10).
59 Gazal-Ayal & Riza (2009:7).
60 (ibid.:11).
61 Alschuler (1968:50–112), cited in Gazal-Ayal & Riza (2009:12).

were very low. This defendant preferred a certain conviction, which was likely to result in a probation sentence, to even a small risk of rape conviction that could be followed by years of imprisonment.[62] This could surely be a rational choice – even for an innocent defendant. Still, it means that plea bargaining could lead an innocent defendant pleading guilty.[63]

Potential lowering of the standard of proof

When an accused is arrested, prosecutors have the authority to level any charge if they possess enough facts to support a reasonable belief that the accused committed the offence. This standard of probable cause is lower than the ability to prove a charge beyond reasonable doubt – the standard with which the prosecution is obliged to conform at trial. Thus, for leverage, a prosecutor may tack on similar, more serious charges without believing that the charges can be proved beyond reasonable doubt at trial. This in effect would nullify the presumption of innocence with which the accused is bestowed as a right under Article 12(1)(d) of the Namibian Constitution. Bekker points out that US prosecutors are almost always elected public officials.[64] Conviction rates are important for their political future. Consequently, they do not press charges unless the chances of convicting the accused are good.

Miscellaneous criticisms

Miscellaneous criticisms include the unfairness and inaccuracy in the determination of an accused person's fate in terms of factual guilt or innocence may potentially result in false convictions, without full investigation, testimony, evidence and an impartial fact-finding, which will be to the detriment of the unsophisticated, impecunious and indigent. Detractors further tend to characterise the plea negotiation process as unnecessary and degrading to the criminal justice system. In particular, the process has been criticised as being, or appearing to be, an irrational, unfair and secretive practice that facilitates the manipulation of the system and the compromise of fundamental

62 (Ibid.)

63 Gazal-Ayal, O. 2006. "Partial ban on plea bargains". *Cardozo Law Review*, 27:104. Gazal-Ayal states that supporters of the plea bargaining system claim that the above argument ignores the crux of the practice. Plea agreements are not forced on defendants, supporters note: they are only an option. Innocent defendants are likely to reject this option because they expect an acquittal at trial. Of course, sometimes even an innocent defendant faces a risk of conviction. The prosecutor might gather evidence that could lead to his/her wrongful conviction in a jury trial. In such a case, the innocent defendant might prefer the more lenient outcome that results from a guilty plea. Even in this case, however, plea bargaining is the least aggravating alternative.

64 See Bekker (1996:185–186).

principles.[65] Furthermore, plea bargaining comes under fire because it is perceived to be hidden from judicial scrutiny and can potentially breed disrespect and even contempt of the law.[66]

Plea bargaining: A United States experience[67]

As stated above, plea bargaining was first used in the administration of justice in the US, where its anatomy has been given much attention by academics and practitioners alike. Hence, the practice of plea bargaining in the US will be discussed briefly below.

Combs opines that the non-hierarchical structure and laissez-faire ideology of the US criminal justice system provides a perfect setting for plea bargaining to flourish, whereas the more hierarchical structure and managerial tendencies of most continental criminal justice systems inhibit the development and use of this option.[68] By efficiently circumventing elaborate and lengthy trial practices, satisfying the human need to cooperate, and advancing the goal of conflict resolution and the value of individual autonomy, plea bargaining has become a pervasive and entrenched feature of the US criminal justice system.[69]

Given that every state within the US has its own procedure, the federal courts procedure will be discussed here. Rule 11(e) of the US Federal Rules of Criminal Procedure[70] gives statutory effect to the practice of plea negotiation and plea agreements in federal courts on condition that such agreements are disclosed in open court, and may be accepted or rejected by the trial judge.[71] Although there are no exact statistics, by the beginning of the 20th Century, 50% of all cases had been settled by guilty pleas in the US; the percentage rising to 80% in the 1960s, and has recently reached 93–95%.[72]

While guilty pleas were accepted in the 19th Century as a trial-ending procedural figure, it was only in the mid-20th Century that acknowledgement was given to the frequency of guilty pleas being preceded by fully fledged bargaining by the prosecutor, the defendant and, sometimes, the judge over the type of charge the defendant would admit to and the parameters of the resultant punishment.

65 LRCC (1989:6).

66 Onwudiwe (2009), who writes on the Nigerian experience, where corruption and cozenage are rife, records that "[in Nigeria,] criminals look at the judicial process as a game or a sham, much like other deals made in life".

67 See SALC (2000) for a comprehensive comparative discussion.

68 Combs, NA. 2002. "Copping a plea to genocide: The plea bargaining of international crimes". *University of Pennsylvania Law Review*, 151(1):50.

69 Combs (2002:60).

70 Rule 11(e), Federal Rules of Criminal Procedure, cited in SALC (2000).

71 See Bekker (1996:185).

72 Thaman (2007:19).

The US Supreme Court finally recognised the fact of such bargaining, and even put its stamp of approval on it, claiming it did not violate any of the important principles of criminal procedure as long as the defendant made a knowing and voluntary plea and properly waived his/her right to remain silent, to confront and cross-examine the witnesses, and his/her right to a trial by jury.[73] The 'knowledge' requirement was held to mean that s/he is obliged to know the character of the charges as well as the consequences of the plea, i.e. the range of possible punishment, and sometimes even collateral measures that might be applied upon the finding of guilt.[74]

In *Brady v United States*, which was the first to decide on the constitutionality of plea bargaining, the court made the following statement:[75]

> [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

The effect of the above judgment was that plea bargaining was found to be constitutional. From this premise, plea bargaining is regarded as an essential element of the US criminal justice system and is encouraged. The administration of the criminal system is also dependent on it. Although the practice ensures the speedy conclusion of cases, the basis for its recognition is an effective and just administration of the system of criminal law. Legitimacy is given to the practice because the plea bargaining agreement is disclosed in open court and its propriety is reviewed by the trial judge.[76]

Plea bargaining in India: A customised pragmatic approach

Useful lessons can be taken from India's pragmatic application of plea bargaining. To reduce the delay in disposing of criminal cases, the 145th Report of the Law Commission first recommended the introduction of plea bargaining as an alternative means of dealing with huge arrears in criminal cases. The introduction of plea bargaining in India was preceded by wide-ranging debate. Critics stated that it was not recognised and against public policy under the criminal justice system. The Indian Supreme Court has also time and again

73 In the cases of *Boykin v Alabama*, 395 US 238, 242–244 (l969); *United States v Brady*, 397 US 742, 751–752 (1970) and *Santobello v New York*, 404 US 257, 261 (1971) respectively.

74 Thaman (2007:20).

75 (ibid.:742).

76 Rule 11(e)–(h), Federal Rules of Criminal Procedure, pp 39–40.

blasted the concept of *plea bargaining*, saying that negotiation in criminal cases is not permissible.[77] In *The State of Uttar Pradesh v Chandrika*, the Indian Apex Court held that –[78]

> … it is settled law that on the basis of plea bargaining court cannot dispose of the criminal cases. The court has to decide it on merits. If the accused confesses its guilt, appropriate sentence is required to be implemented.

In the same case, the court held further that –[79]

> [m]ere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty the sentence be reduced.

Despite the hue and cry, the Indian Government found plea bargaining acceptable, thereby adding Chapter XXIV to its Code of Criminal Procedure so as to provide for plea bargaining in certain types of criminal cases. While commenting on this aspect, the division bench of the Gujarat High Court observed as follows in *State of Gujarat v Natwar Harchanji Thakor*:[80]

> The very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of criminal cases and considering … pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static.

Thus, Indian plea bargaining is categorically a measure of redress, and aims to add a new dimension to the realm of judicial reform.

Accused persons ineligible for plea bargaining

In India, plea bargaining is not available for cases which are already pending before court or which have been disqualified. These are as follows:

- If the accused was involved in an offence which is punishable by death,[81] life imprisonment or of imprisonment of more than 7 years
- Offences which have been notified by the central government as affecting the socio-economic conditions of the country
- Offences against women

77 Ghosh (2008).

78 2000 Cr LJ 384 (386). See Joseph, RA. 2006. "Plea bargaining: A means to an end"; available at http://www.manupatra.com/roundup/326/Articles/Plea%20bargaining.pdf; last accessed 19 June 2012.

79 (ibid.).

80 (2005) Cr LJ 2957.

81 Indian courts are empowered to impose capital punishment as a competent sentence.

- Offences against children below the age of 14, and
- Any accused person who has previously been convicted of a similar offence by any court.

Plea and sentence agreements in South Africa

In 2001, South Africa introduced the Criminal Procedure Amendment Act,[82] which amended the CPA to allow a prosecutor and an accused to enter into a plea and sentence agreement and to provide for associated matters. Thus, the 2001 Amendment Act seeks to legalise and regulate the operation of plea and sentence agreements which, prior to 2001, were said to have been taking place in South Africa in the absence of legislation.[83]

Therefore, the addendum of section 105A to the CPA enables prosecutors, with the approval of the National Director of Public Prosecution, to conclude agreements with accused persons in order to determine which charges will be brought and what sentence will be recommended. However, whenever a prosecutor concludes such an agreement, s/he is obliged to consider at least the following:[84]

- The nature of and circumstances relating to the offence
- The personal circumstances of the accused
- Previous convictions of the accused, if any, and
- The interests of the community.

As a safeguard, a court will first consider whether the person is indeed guilty of the crime to which the agreement relates, and whether the sentence agreed upon is just. If the court is not of the opinion that the sentence is just, the prosecutor and the accused either have to accept the sentence that the judge believes is just, or abandon the agreement and start the trial anew.[85] The importance of this procedure is that sentences following plea agreements are not in the hands of the prosecutor. They rest, as they should, in the hands of the court. Any concern as to the actions of the prosecutor, therefore, needs to be directed at the prosecutor's decision of the crimes with which to charge the accused: that decision is not open for judicial review.

Although the introduction of plea bargaining in South Africa has not been without dissent, prosecutorial authorities there have defended it as being of

82 No. 62 of 2001.

83 Kassan, D & J Gallinetti. 2006. "Sentencing, victim impact statements and plea bargaining", p 3; available at http://www.ghjru.uct.ac.za/sexual-offence-bill/Sentencing-Victim-Impact-Statement-Plea-Bargaining.pdf; last accessed 18 November 2012.

84 Section 105A(1)(b)(ii).

85 Section 105A(9).

tremendous assistance to the prosecution. Woolaver and Bishop argue that, in the context of the fight against organised crime, plea bargaining offers two major benefits, namely –[86]

> … that it allows the prosecution to spend fewer resources on small criminals to go after the big criminals and it makes it easier to bring down the big criminals by offering a carrot to turn their former henchmen against them.

This argument is fortified in *Mohunram v National Director of Public Prosecutions & Another (Law Review Project as Amicus Curiae)*,[87] where Sachs J, writing for a plurality, noted in the context of the forfeiture of assets involved in organised crime that –

> [i]f [the Asset Forfeiture Unit – AFU] is to accomplish the important functions attributed to it, it should not unduly disperse the resources it has at its command. Its manifest function as defined by statute is to serve as a strongly empowered law enforcement agency going after powerful crooks and their multitude of covert or overt subalterns. The danger exists that if the AFU spreads its net too widely so as to catch the small fry, it will make it easier for the big fish and their surrounding shoal of predators to elude the law. This would frustrate rather than further the objectives of POCA [the Prevention of Organised Crime Act].

By way of analogy, the South African National Prosecution Authority argues that the above equally applies to plea bargaining: if it were to prosecute every person whom it suspected of being involved in organised crime, it would not have the resources to prosecute the people at the top of the organised crime pyramid. Commenting on the holding in *Mohunram*,[88] Wooler and Bishop point out the following:[89]

> As Justice Sachs noted, the whole purpose of POCA was to make it easier to target the "big fish" rather than the "small fry" by making it possible to forfeit the assets of people who cannot be convicted and by creating crimes that do not require proof of direct involvement in criminal activity. In addition, plea bargaining– particularly in the form

86 Woolaver, H & M Bishop. 2007. "Submission to the Enquiry into the National Director of Public Prosecutions", p 13; available at http://www.saifac.org.za/docs/2008/SAIFAC%20Submission%20to%20Ginwala%20Commission.pdf; last accessed 18 November 2012.

87 2007 (4) SA 222 (CC) at para 155.

88 (ibid.).

89 (2007:14).

of granting immunity – is a potent weapon that allows a prosecutor to secure testimony of accomplices in order to bring down POCA's real targets – the organized crime kingpins.

The above evidences that the South African National Prosecution Authority has embraced the introduction of plea bargaining as it has greatly benefited the fight against organised crime in South Africa.

Conclusion

Namibia is no exception to the position that developing constitutional democracies face serious challenges in reforming their criminal justice systems to fulfil the dual role of better protecting their citizens from crime and accused persons from human rights violations. Finding more efficient and just ways to resolve criminal cases is a fundamental part of the process of rule of law[90] development.[91] Without an iota of doubt, plea bargaining practices from other jurisdictions indicate that, if such methods are properly understood and administered, they can contribute positively to the efficacy of the administration of justice while protecting the accused's constitutional rights. This paper does not attempt to reach a cul-de-sac to the plea bargaining discussion, but has sought to ignite the debate in Namibia so as to achieve common ground on this issue. Thus, should we decide to turn a blind eye to this critical issue, we risk falling prey to our judicial system and its efficacy remaining dormant in the face of international trends towards change. Undoubtedly, comparative jurisprudence evidences that there has been a worldwide paradigm shift from trial adjudication to consensual adjudication.

It is a platitude that the concept of *plea bargaining* should not be adopted in Namibia; nor should it be dismissed without appropriate thought and research being dedicated to it. The 'full-blown' trial, as described by Damaseb JP,[92] with all is indispensable constitutional guarantees afforded to accused persons comes at an exorbitant price, both in terms of human resource capacity, financial implications and time. With the exponential escalation of crime levels in Namibia, which inevitably results in congested court rolls and the attraction of labour-intensive procedures, priority gradually ought to be given to the principle of 'procedural economy' and to introducing forms of consensual

90 Amoo, SK & Skeffers, I. 2007. "The rule of law in Namibia". In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia.* Windhoek: Macmillan Namibia, p 17 at 37.

91 Alkon, C. 2009. "Plea bargaining as a legal transplant: A good idea for troubled criminal justice systems?"; available at http://works.bepress.com/cynthia_alkon/3; last accessed 23 March 2012.

92 Damaseb (2012).

and abbreviated criminal procedure to deal with the docket overload.[93] As Damaseb JP acknowledges,[94] plea bargaining can potentially reduce court saturations, which will better the efficacy and dispensing of justice through the acceleration of process and the demise of delayed justice, subsequently restoring the full credibility of our justice system in the mind of the public. Nonetheless, this paper reveals that one should tread carefully: a measure to speed up justice may result in speeding up the miscarriage of justice.

Notwithstanding the above, the South African, Indian and US applications point to the fact that austere, tabulated legalism through statutory intervention can be utilised to meet legitimate objectives, meaning that a guided procedure of plea bargaining could eventually be used to improve the effectiveness of the criminal justice system, while still maintaining established principles of protecting the accused person. The Indian approach is especially appealing, given that only certain (lesser) categories of crimes would qualify, while putting in place judicial safeguards to ensure that no constitutional rights violations manifest.

Therefore, after meticulous, open enquiries pondering all eventualities, with the conclusion being that justice is indeed best attainable by plea bargaining, its legal transplantation in Namibia should be permitted so as to nullify the technical and judicial bottlenecks that often throttle justice. This enquiry would necessarily involve establishing whether Namibia should introduce fact, sentence or charge bargaining, as defined above, if at all, as well as the potential legislative safeguards that can be introduced to eradicate the cons, thereby ensuring that constitutional imperatives are never compromised. The onus now lies on the Executive, the Legislature and, perhaps crucially, the Law Reform and Development Commission of Namibia to undertake further investigation and respond accordingly.

93 Thaman (2007:1).
94 Damaseb (2012).

Once jailed, wait for fuzzy mercy: A critical legal analysis of the blurred prison and parole laws of Namibia

***Clever Mapaure**[*] and Raphael T Hamunyela**[**]*

Abstract

The right/privilege dichotomy in the context of parole in Namibian prison laws has always been a contentious issue among jurists and social scientists. The Namibian prison service has spent years without granting parole to prisoners partly because of the uncertainty regarding the right/privilege dichotomy in this context. Even if one is able to draw on this dichotomy and draw conclusions for the context of Namibian parole laws, it is still a convoluted exercise to assess the applicability of due process principles in determining whether or not to grant parole – let alone revoke it. These intricacies have furrowed brows in the Namibian institutions concerned. The Prisons Act, 1998 (No. 17 of 1998) provides for the granting of parole to prisoners, and it creates institutions and sets out certain procedures to be followed when doing so. However, it remains hazy when it comes to the nitty-gritty of such procedures, and worse still, it keeps mum on the substantive parts of the procedures to be followed. To add to these gaps, the Act takes the stance that, just because a prisoner is eligible for release, it does not mean that the release will be granted, and the Minister is not obliged to give reasons why parole has been denied. As illuminated – and, indeed, as technically understood – in the Act is that getting parole does not mean one's sentence has been shortened: it means that the remainder of the sentence could be served in the community under supervision and other specified conditions. This article critically analyses Namibia's parole laws against this backdrop. The discussion starts with an exposition of the law itself. It then moves on to consider the procedures and substantive aspects, and through these it elucidates the pzhilosophy of parole and how Namibia can understand the concept. This analysis aims to answer questions such as whether parole is a right or a privilege; whether the discretional power of the Commissioner-General or the Minister of Prisons and Correctional Services under the Act and now the Minister of Safety and Security, in refusing parole, is subject to review in accordance with Article 18 of the Namibian Constitution; and whether inmates acquire the reasonable right to legitimate expectation in the parole process.

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Introduction

The Namibian prison service[1] is a creature of the Constitution by virtue of Article 121, in terms of which it is to be established by Act of Parliament. The Namibian prison service – also referred to as the *Namibian correctional service* – once fell under the Ministry of Home Affairs. Today, this service is the responsibility of the Ministry of Safety and Security. The latter Ministry was created on 21 March 2005 by Presidential decree as per Article 32(3)(g) of the Namibian Constitution. The new Ministry replaced the Ministry of Prisons and Correctional Services created in 1995.

The main objective of the Ministerial Department of Namibian Correctional Service in terms of the Prisons Act[2] is the safe and humane custody of people committed to imprisonment by the country's courts of law, to ensure their rehabilitation, reformation and ultimate reintegration into society. With this new approach of rehabilitation, all correctional services are conducted in a humane way in accordance with national and international law as well as codes of conduct. In terms of this approach, inmates are supposed to be cared for in a compassionate manner by affording them the opportunity to regain their self-respect as a logical way step towards rehabilitation.

The Prisons Act provides for the establishment, functions and administration of institutions, boards and committees for releasing offenders upon the authority vested in relevant offices within the prisons service. Thus, like most countries, the prisons service has mechanisms in place that allow offenders to be released before the completion of their full sentences. As a form of early release, parole – also referred to as *conditional release* – is an internationally accepted mechanism and effective tool that has been playing a role in inmates' rehabilitation. However, although parole is considered as part of the process of rehabilitation, in the past two years, no prisoner in Namibia has been granted parole.[3] This can be a result of unfettered discretional power on the part

1 The terms *prison service* and *correctional service* and variations thereof can be used interchangeably, as indeed occurs in the applicable legislation. The two terms mean basically the same although there may be some jurisprudential distinction between them. For the purpose of this paper, and to avoid complicating terminologies relating to changes in Ministry and Department names over the years, the phrase [*Namibian*] *prison service* as per Article 121 of the Namibian Constitution will be used, but should be treated as meaning the same as the other variations of the term cited in legislation herein.

2 No. 17 of 1998.

3 Presidential pardon and reprieve to offenders on the commemoration of Heroes' Day, 26 August 2010. One of the requirements under 3(a)(ii) of the Prisons Act states that the following prisoners are to be pardoned with immediate effect on the effective date of the Proclamation: prisoners who, on 26 August 2010 are serving sentences of imprisonment and whose conditional release on parole have

of the officials responsible, i.e. the administrators of parole in the Namibian prison service or other organs or persons responsible for the rehabilitation of offenders. The issue of parole remains a big problem to the Department of Namibian Correctional Service as the 1998 Act is found lacking on the subject in respect of both procedure and substance on the subject.

As already mentioned above, the primary duty of the Namibian prison service is to ensure the safe and humane custody of offenders until they are lawfully released. However, since 1995,[4] the focus of the two respective Ministerial Departments responsible for the correctional service in Namibia was extended to include rehabilitation as one of the main objectives to be achieved. Thus, rehabilitation programmes were created, and sentenced offenders' participation in these programmes began to be used as a yardstick by prison officers to determine whether or not a particular prisoner qualified to be released on parole. This research therefore focused on the process of determining an inmate's eligibility for parole by prison officers by establishing whether or not the officers' actions could be classified as administrative action and, therefore, covered by Article 18 of the Namibian Constitution; and, furthermore, whether or not such actions were reviewable by the court under the said Article or not. The 1998 Act does not offer answers to these questions – hence the significance of this paper.

The current problem facing the Namibian prisons service is whether parole is a right or a privilege, and how to deal with it in either case, and whether or not the correctional authorities are obliged to furnish reasons to a prisoner for not releasing him/her on parole. This lack of clarity will be addressed by the research presented in this article. The 1998 Prisons Act is silent on whether a prisoner should be consulted before s/he is granted parole. However, when it comes to the revocation of parole, the Act requires the Commissioner-General to consult the prisoner first, and give him/her reasons for the decision taken. The prisoner should also be given a hearing in terms of the audi alteram partem rule, which hearing needs to meet the requirements of Article 18 of the Constitution.[5]

Regarding the granting of parole, the Act gives the Minister the final say as to whether or not a prisoner[6] should be released on parole. However, the Act does not oblige the Minister to furnish reasons if parole is refused. Furthermore, the Act does not give the prisoner any remedy in cases where a

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been approved before or on 26 August 2010. However, none of the prisoners was released under this category in any of all the country's 13 institutions.

4 When the then Ministry of Prisons and Correctional Services was created.

5 Section 97(3)(b), 1998 Prisons Act.

6 Board prisoners (the granting of whose parole falls under the rules of the relevant Board or whose cause may be considered by the Board) or long-term prisoners, but not short-term prisoners.

recommendation for release on parole was declined. Moreover, the Act does not give the Institutional Committee or the National Release Board any powers to ask for reasons why the Minister did not accept their recommendations.

The origin of parole and its significance from a jurisprudential perspective

Definition and rationality

Namibia's 1998 Prisons Act does not define *parole*. This is a significant omission on the part of the legislators. As noted above, the latter Act lacks in procedure and substance on a number of issues. Guidance can, however, be obtained from elsewhere. Under South African law, *parole* is defined as follows:[7]

> … a period whereby an offender who has served the prescribed minimum detention period of his sentence in a correctional facility is conditionally released to serve the remaining sentence in the community under the supervision and control of the Department of Correctional Service.

The Namibian Parole Policy[8] defines *parole* as a form of conditional release normally used for the "ordinary criminal".[9] In other words, parole is a treatment programme in which an offender, after serving part of his/her sentence in a correctional institution, is conditionally released under the supervision of a parole officer and whose behaviour is closely supervised; if it is a mental patient released on parole, s/he needs to receive mental supervision/treatment as well. However, the release of the offender is conditional, i.e. contingent on satisfactory behaviour.[10] Parole is considered for a convicted prisoner who has served a specific period of his/her sentence, and who it is believed will not revert to crime. According to Article 10(1) and 10(3) of the International Convention on Civil and Political Rights (ICCPR), parole is regarded as a universally recognised and essential part of the sound administration of a penal institution, specifically in the rehabilitation of offenders.

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7 Louw, FM. 2008. "The parole process from a South African perspective". Unpublished MA thesis, University of South Africa, Pretoria, p 14.

8 GRN/Government of the Republic of Namibia. 2001. *Policy on the Release of a Prisoner*. Windhoek: GRN.

9 *Ordinary*, in the phrase *ordinary criminal*, means a criminal who, before his/her arrest, was a citizen of the country who has already served a portion of his/her sentence, and who eventually (i.e. after the sentence has expired) has to be re-established in society, but who is believed to be able to adapt easily in the community before that time is up.

10 Du Preez, N. 2003. "Integrated offender administration through correctional case management". Unpublished Doctoral Thesis, University of South Africa, Pretoria, p 5.

The above entails that parolees are still considered to be serving their sentences, and may be returned to prison if they violate the conditions of their parole. Conditions of parole often include things such as obeying the law, refraining from drug and alcohol use, avoiding contact with the parolee's victims, obtaining employment, and maintaining required contacts with a parole officer. The concept of *parole* is based on the belief that a gradual, supported, and controlled release of offenders helps them rehabilitate and reintegrate into society as law-abiding citizens and that, ideally, this process contributes to a safer society. As a backdrop to this rationale or philosophy, parole plays a crucial role in promoting rehabilitation by progressively facilitating the move from confinement in an artificially created environment to social reintegration and resocialisation into the real world.

Parole further creates the necessary restraint or deterrence in keeping the parolee away from committing further offences, as the parolee knows that breaching the parole conditions will lead him/her back to incarceration. Furthermore, parole is recognised as a mechanism to address the overcrowding of prisons. Thus, parole saves the community the added costs of housing an inmate who may be capable of leading a productive and self-sufficient life outside prison – subject to the necessary parole conditions.[11]

Origins and historical development

Most scholars believe that the concept of *parole* originated from the French term *parole d'honneur* meaning "spoken word", as in giving one's word of honour. The term became associated with the offender's promise or word of honour to behave in a law-abiding manner and according to certain restrictions or conditions in exchange for release.[12] The foundation of parole resulted from conditional pardon, apprenticeship by indenture, the transportation of criminals to Australia, Canada and the United States of America, and the English and Irish experiences with the system of ticket of leave. Reid adds that the concept of *parole* was first introduced in France in about 1830, where it was known as "conditional liberty".[13] The origin and development of the concept of *parole* is further expressed by Smykla,[14] who refers to it as the

11 Moses, JJ. 2009. "Parole in South Africa: Is it a right or privilege? The theory and practice of parole in South African correctional centres with specific focus on the nature of parole under the Correctional Service Act 8 of 1959 (repealed) and the current Correctional Service Act 111 of 1998". Unpublished research, Bachelor of Laws degree, pp 10–11.

12 Petersilia, J. 2002. *Reforming probation and parole in the 21st Century*. Lanham: America Correctional Association, p 129.

13 Reid, ST. 1981. *The correctional system: An introduction*. New York: Holt, Rinehart & Winston, p 324.

14 Smykla, JO. 1984. *Probation and parole: Crime control in the community*. New York: Macmillan, p 70.

product of many minds. According to him, the root concept of what we know as *parole* today originated in some of the penal codes of the 16th and 17th Centuries.

In 1835, the first ever operational system of conditional release was introduced in the prison at Valencia, Spain, by the appointed Governor of the prison, Manuel Montesinos.[15] He advocated this through vocational training and education for prisoners, and by promising that up to one third of each sentence could be reduced for good behaviour and a demonstrated desire to do better. In 1840, France adopted a similar system: by giving their word of honour to obey the law, prisoners were released after showing good behaviour and positive accomplishments in prison.[16]

According to the White Paper on Corrections in South Africa,[17] parole was introduced into South African law by the Prisons and Reformatories Act of 1911, after the unionisation of South Africa in 1910. Since the introduction of parole, the most important requirement has always been the good behaviour of the offender. Moses further states that the implementation of parole in South Africa only really started in the early 1950s.[18] During that decade, the 1911 Act was wholly repealed by the Prisons Act.[19] The latter Act was applied in Namibia before and after Independence, but was only repealed in 1998 by Namibia's own Prisons Act.[20]

Parole in Namibia

Pre-Independence

Before Independence, parole was strictly regulated by the Prison Service Orders, the 1959 Prisons Act, the Prison Regulations, the Parole Policy, and the Criminal Procedure Act (CPA).[21] These laws and the policy lay down procedures for granting parole, and provide for categories of offenders who qualify for such release. Generally, there were two types of parole qualification in relation to the habitual criminal, namely persons who had been convicted and sentenced to imprisonment several times. Some prisoners with a sentence of less than four months could qualify for parole immediately upon admission to prison, and their release was under the jurisdiction of the officers in charge.

15 Ntuli, RM. 2000. "Community corrections: A penological perspective". Unpublished MA dissertation, University of South Africa, Pretoria, p 38.
16 (ibid.).
17 Moses (2009:4).
18 (ibid.:5).
19 No. 8 of 1959.
20 No. 17 of 1998.
21 No. 51 of 1977. The sequence here is in order of gravity.

Those serving a sentence of more than four months would qualify for parole after serving half their sentence. These laws also stipulated that a declared habitual criminal offender was obliged to serve at least seven years of his/her sentence before s/he would be considered for release on parole. Prisoners serving life sentences had to complete half of the 20-year life sentence, i.e. a minimum of ten years, before they could be recommended for parole.

Notwithstanding the category that qualifies a convicted person for release on parole immediately on admission to prison, for an inmate to be eligible for parole, s/he had to satisfy certain requirements. As a result, the process of granting parole ran smoothly, and no unnecessary delays were experienced as it was also in the prisoners' best interest.

Post-Independence

Since Independence, parole in the Namibian prison service has been regulated by the Constitution; the CPA; first the 1959 and then the 1998 Prisons Acts; Prisons Regulations;[22] and the Prison Order passed under the 1959 Act. Parole is also administered under the Parole Policy.[23] All these instruments are applied in conjunction with international instruments signed and ratified by the Republic of Namibia, including the ICCPR and the African Charter on Human and Peoples' Rights.

The Namibian Constitution, which is the Supreme Law of the country,[24] provides that any law in force upon Independence on 21 March 1990 will remain in force until repealed or declared unconstitutional by a competent court in Namibia.[25] Thus, all the legal instruments that had applied before that date remained in force, except that discriminatory clauses based on race, colour or origin were struck out of the laws by the Racial Discrimination Prohibition Act[26] in 1991 already. The same was explained in the case of *S v Smith*.[27] The Prisons Act of 1998 did away with parole granted to an offender

22 Approved by the Minister in terms of section 124 of the 1998 Prisons Act for the administration and control of the Namibian Prison Service.

23 Drafted in accordance with Cabinet Resolution No. 1177/86, and approved on 26 August 1986. It was then submitted to the Permanent Secretary of Home Affairs on 25 April 1990 by the Acting Commissioner of Prisons, Lieutenant-Colonel JE Hoffmann. Then it was again circulated to the respective Prisons until it was accepted and approved.

24 Article 1(6), Namibian Constitution.

25 Article 140 of the Namibian Constitution states the following: "Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court".

26 No. 26 of 1991.

27 1996 NR 367 (HC).

with a sentence of four months or less by the officer in charge of a prison. The 1998 Act further reduced the list of offences that qualify for parole, and it created two bodies made up of prison officers to deal with the initial parole recommendations for each prison, namely –

- the Prison Management Committee, which deals with short-term prisoners in general, and
- the Institutional Committee, which deals with long-term prisoners in general.

The 1998 Act also created two additional bodies to deal with recommendations from the Prison Management Committee and the Institutional Committee, namely –

- the Zonal Release Board, which deals with recommendations from the Prison Management Committee, and
- the National Release Board, which deals with recommendations from the Institutional Committee.

The Zonal and National Release Boards comprise prison service officers as well as members of the public.[28] There are seven Zonal Release Boards in the country,[29] and one National Release Board, appointed on a three-year basis by the Minister. The Zonal Release Boards are authorised to recommend or grant release on parole for certain prisoners. However, the National Release Board only has the authority to recommend a prisoner for parole: it cannot authorise such release.

The Prison Management Committee deals only with short-term prisoners, that is, prisoners with a sentence of less than three years. The Committee also makes recommendations to the Zonal Release Board for a prisoner's release on parole. The Zonal Release Board has the authority to approve the release on parole of prisoners with a sentence of six months or less, and to give such

28 Sections 108 and 110, 1998 Prisons Act.

29 1. The Erongo Region Zonal Release Board, which is responsible for the Omaruru, Swakopmund and Walvis Bay Prisons; 2. the Hardap Region Zonal Release Board, which is responsible for the Hardap Prison only; 3. the Karas Region Zonal Release Board, which is responsible for the Keetmanshoop and Lüderitz Prisons; 4. the Khomas Region Zonal Release Board, which is responsible for the Windhoek Central Prison only; 5. the Kavango and Caprivi Regions Zonal Release Board, responsible for the Elizabeth Nepembe Juvenile Centre and the Divundu Rehabilitation Centre; 6. the Otjozondjupa and Oshikoto Regions Zonal Release Board, responsible for the Scott Farm and Grootfontein Prisons; and 7. the Kunene, Ohangwena, Omusati, Oshana and Oshikoto Regions Zonal Release Board, which is responsible for the Oluno Rehabilitation Centre. The only prison with no Zonal Release Board is the Gobabis Prison in the Omaheke Region. This is perhaps because of its close proximity to the Khomas Region, but efforts are under way to make all Regions the same in terms of the provision of equality under the Namibian Constitution.

approvals to the officer in charge of the prison concerned to release those prisoners. As a matter of good administration, however, a copy of the grant has to be forwarded to the Commissioner-General within a period of 30 days after the parole was authorised.[30] Secondly, the Zonal Release Board has the function of recommending parole for those prisoners who are eligible in terms of the law, i.e. for those prisoners with sentences of more than six months but less than three years to the Commissioner-General for approval.

The Institutional Committee deals with so-called long-term or Board prisoners, namely those with prison terms of three years or more. This Committee makes recommendations for their parole to the National Release Board, which in turn submits a recommendation for the Minister's approval.[31] Similar to the provision of section 111(2) of the 1998 Prisons Act on the granting of parole to prisoners with sentences of no more than six months, for administration purposes, section 109(2) of the Act also provides that a copy of every recommendation made to the President for parole under the relevant subsection (1)(a) of the Act has to be forwarded to the Commissioner-General within a period of 30 days after such recommendation. This provision does not grant the Commissioner-General any authority either to agree or disagree with the Minister's approval. This is done for administration purposes only so as update the Commissioner-General with respect to the approved release of the inmate, given his/her position as head of the Namibian prison service.

The Act vests power in the Zonal Release Board, the Commissioner-General and the Minister to approve and grant parole to different categories of prisoners at the recommendation of the Prison Management Committee, the Zonal Release Boards and the National Release Board, respectively. The questions to be answered, however, are these:

- On what do they base their authority of approving or disapproving of parole?, and
- Is their discretion subject to any provision of the law?

Procedural intricacies in the current system

Exposition of the laws

Section 283 of the CPA provides that the release on parole of a life-sentenced prisoner is to be dealt with under section 64 of the 1959 Prisons Act. The said section 283 goes on to say that the report on the prisoner has to be sent to the Commissioner-General, who will make his/her appropriate recommendations to the Minister. The Minister may then, in turn, make its recommendations to the President to release the prisoner. Thus, before Independence, the Minister

30 Section 111(2), 1998 Prisons Act.
31 Section 105(a) and 109(1)(a), 1998 Prisons Act.

had the discretion either to grant parole, or to recommend to the President to release an eligible prisoner on parole. However, the current Prisons Act makes only three distinctions among criminals: short-term (less than three years), long-term (more than three years), or habitual. This implies that prisoners in the *Long-term* or *Board* category include those with a sentence of life imprisonment.

The 1998 Act provides that a parole recommendation for a short-term prisoner has to be sent to the Zonal Release Board and or to the Commissioner-General, while a parole recommendation for a Board prisoner has to be sent to the Minister for consideration by the National Release Board. Unlike the 1959 Act, in the 1998 Act, the Commissioner-General and the President do not take part in Board prisoners' parole approval processes.

In respect of the power to release prisoners on parole, the 1998 Prisons Act has conferred this onto the Zonal Release Board, the National Release Board, the Commissioner-General of the Namibian Correctional Service, and the Minister. These Boards and persons are covered by the definition of the term *official* as defined under Article 93 of the Constitution. Therefore, they are under obligation to execute their duties according to the provisions of the law.

Section 95(1)(a) and 96(1)(a) of the 1998 Act provide that a prisoner may be recommended to be released on parole after completing half of his/her imposed sentence. Under sections 95(1)(b) and 96(1)(b), the said Act further provides that a prisoner is required to have evidenced certain conduct in order to be recommended for parole. In both the latter sections, the 1998 Act provides that, if the relevant committee is satisfied that such prisoner has displayed meritorious conduct, self-discipline, responsibility and industry during the first half of the sentence in question, then s/he may be recommended for parole. However, section 3(2) of the Parole Policy emphasises that the conditions pertaining to parole are not to be interpreted in such a way that any prisoner is entitled to claim to be released on parole.

Dealing specifically with the Board prisoner's parole conditions, Regulations 285 and 290 of the Prison Regulations oblige the Institutional Committee and the National Release Board to comply with the provisions of Parts VII and VIII of the 1998 Act.[32] The said Committee and Board are required to exercise the functions and comply with the duties assigned to them by the Prison Regulations as well as the directives of the Minister and the Commissioner-General, respectively. As already mentioned, the National Release Board is appointed by the Minister and, under section 122 of the 1998 Act, the Minister in his/her delegation of some of the power or authority conferred upon him/her

32 Part VII of the 1998 Act deals with the admission, custody and treatment of prisoners, while Part VIII deals with penalties for certain offences.

by the Act is not permitted to delegate the power referred to in section 108[33] of the said Act. Section 122 further provides that, in the event of any power so delegated, the Minister shall not be divested of such power, and may amend or withdraw any decision made by such staff member or officer in the Prisons Service or the Commissioner-General in the exercise of power so delegated.

Under the Corrections and Conditional Release Bill tabled in 2010 and still being considered at the time of writing, an officer in charge of a correctional facility is the one charged with making recommendations to the National Release Board for the release on parole of a prisoner who has served half of his/her term of imprisonment, provided that such officer is satisfied that –[34]

- such offender has displayed meritorious conduct, self-discipline, responsibility and industry during the period served
- such offender will not, by re-offending, present an undue risk to society before the expiration of the sentenced s/he is serving, and
- the release of the offender will contribute to the protection of society by facilitating his/her reintegration into society as a law-abiding citizen.

The Bill makes further provision for the National Release Board to authorise the release on parole of inmates serving a sentence of less than five years, and who have served two thirds of that term.[35] The National Release Board is required to submit their recommendation regarding parole for inmates serving a term of more than five years, habitual criminals, or criminals serving a life sentence to the Commissioner-General. Upon receiving the recommendation, the Commissioner-General may authorise the release of an inmate serving a term of less than 20 years' imprisonment. As regards recommendations relating to prisoners serving more than 20 years, habitual criminals, and life-sentenced criminals, the Commissioner-General is obliged to submit the relevant recommendation to the Minister with his/her comment. The Minister may authorise parole for inmates serving a term of more than 20 years[36] and for habitual criminals.[37] As regards criminals sentenced to life imprisonment, the Minister is obliged to submit recommendations for their parole to the President with his/her comments. The President may then authorise such prisoner's release on parole.[38]

33 This section deals with the appointment of the members of the National Release Board, their remuneration, and their release from their duties.

34 Section 110(1), Corrections and Conditional Release Bill.

35 Section 111(1) (ibid.).

36 Provided such inmate has completed two thirds of his/her term; see section 112(3) (ibid.).

37 Provided such inmate has served a term prescribed by the applicable Regulation; see section 113(4) (ibid.).

38 Provided such inmate has served a term prescribed by the applicable Regulation; see section 114(5) (ibid.).

The quandary of parole procedure

There is a dilemma regarding the procedure to follow in respect of the parole recommendations for criminals sentenced to life imprisonment. None of the existing prison-related legal frameworks mention anything about this procedure. Such procedure was strictly regulated by the CPA[39] and the 1959 Prisons Act. Therefore, the procedures followed were very different from what obtains under the 1998 Act, which is the principal piece of legislation regulating this procedure today. Nonetheless, prison administrators continue to use the procedure stipulated in the 1959 Act, which required the relevant recommendation to be sent to the President for approval, first via the Commissioner-General and then via the Minister.

According to section 109 of the 1998 Prisons Act, the National Release Board is required to make recommendations to the Minister, who has the power to grant or not to grant the release of a prisoner on parole. In the event that the Minister has in writing delegated his/her power to the Commissioner-General, as provided for under section 122, then the Commissioner-General can grant or refuse to grant parole, but the latter cannot recommend parole to the Minister simply because the Act does not provide for that to happen – hence the quandary. However, since the Minister is not divested of this specific power, s/he may delegate it to the Commissioner-General. Thus, the Minister is still at liberty to amend or withdraw the decision made by the Commissioner-General. Section 109(2) requires the National Release Board to forward to the Commissioner-General a copy of any recommendation made to the Minister.

These copies sent to the Commissioner-General do not in principle confer any authority to the Commissioner-General to grant, deny or forward any recommendation to the Minister.[40] Nor does the National Release Board's obligation to furnish such copies to the Commissioner-General necessarily subject the Board to the Commissioner-General's power. The copies in question are sent purely for information and administration purposes in order to inform the Commissioner-General – as its head and as the officer accounting to the President – of activities taking place within the prison service.

Legally, the provisions of section 109(2) do not render the National Release Board accountable to the Prosecutor-General. This position is made clear by the holding of the Supreme Court of Namibia that the Prosecutor-General is obliged to send the information from his/her Office to the Office of the Attorney-General – albeit for administration purposes only.[41] As all prisoners are under

39 Section 283 of the 1998 Prisons Act read with section 64 of the 1959 Prisons Act.

40 See the same provision under section 111(2) of the 1998 Act in relation to the granting of release on parole of prisoners serving sentences of less than six months.

41 *Ex Parte Attorney General, In re: The Constitutional Relationship between the Attorney General and the Prosecutor General*, 1995 (8) BCLR 1070 NmS.

the control of the Commissioner-General, it is administratively important for the National Release Board to inform him/her about recommendation submitted to the Minister.

Substantive quandaries

Proclamation No. 14 of 2010[42] announces the granting of presidential pardon or reprieve to certain categories of offenders, and provides for pardon to be granted to prisoners whose conditional release on parole was approved prior to or on 26 August 2010.[43] However, no prisoners qualified for pardon under this provision. In this regard the presidential speech remains a political statement which could not be supported by facts and the legal procedure stipulated by the law. The prison service administrative bodies and officials have to accept the full blame for this situation. They all failed to exercise their duties. With all the established Boards and Committees within the prison service, the granting of parole became a matter of theory. Practically no parole has been granted to prisoners in the country's 13 correctional facilities in the past 10 years. Perhaps one of the reasons for this is the doubt among prison service officials as to whether parole is a right or a privilege, and as regards their obligations vis-à-vis prisoners concerning the granting or denial of parole.

Parole: A right or a privilege?

Answers in parole theories

In respect of the substance of the laws concerning parole, the centre of attention is on the question of whether parole is a right or a privilege. Answering this question means that justifications have to emanate from an academic review of parole laws.

The importance of academic sources in respect of parole is explained by Weiss[44] as being vital to a process that attempts to justify to society why only some offenders are given parole. Generally, parole is based on certain

fundamental principles derived from theories formulated over time. These include –[45]

42 *Government Gazette* No. 4552, 26 August 2010, "Proclamation by the President of the Republic of Namibia", No. 14.

43 Section 1(a)(i), Proclamation No. 14.

44 Weiss, S. 1990. "Parole: A study of the parole system in South Africa with special reference to its inadequacies specifically from the parolee's perspective". Unpublished Honours dissertation, University of Cape Town, Cape Town, p 23.

45 Clear, TR & HR Dammer. 2003. *The offender in the community* (Second Edition).

- the Consent (or Contract) Theory
- the Custody Theory, and
- the Theory of Grace or Privilege.

The Consent (or Contract) Theory

This theory explains the voluntariness of the parolee before entering into the parole contract. The contract set out terms and conditions to be met in return for a prisoner's release from prison. Thus, according to Clear and Dammer, the system of parole is an agreement between the state and an offender.[46] When both parties meet their promises, the situation is referred to as a *win–win* state of affairs. [47]

The Custody Theory

This theory implies that the parolee is not free but is in constructive custody, and that the community has become an extension of his/her prison cell. Even though the offender is released from prison, his or her action and conducts are still under the supervision and a responsibility of the Department of Namibian Correctional Service. Parole is just an extension of correctional programmes into the community, and the parolee is said to be *in the legal custody of the community*.[48] Nxumalo describes the parolee as a quasi-prisoner, since his/her constitutional rights are still limited.[49]

The Theory of Grace or Privilege

This theory deals with the concept of *earning*. It explains that parole makes the release from correctional facilities a privilege that has to be earned. The offender has to demonstrate by his/her behaviour and efforts while in prison a readiness to be released on parole. This theory emphasises that the absence of the right to be released on parole means that an offender will walk out of prison only after the expiry of his/her full sentence. The basis of this is that all convicted offenders have the right to be released from prison upon the expiry of their court-imposed sentences.[50] This in turn means that the right to be released only arises at the point of release, namely after serving the full

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Belmont: Wadsworth, p 347.

46 (ibid.).

47 The state promises to release the prisoner on parole, and the offender promises to abide by the law. The state gets to see if the offender becomes a law-abiding citizen, while the offender gets to leave the prison early.

48 Clear & Dammer (2003).

49 Nxumalo, TE. 1997. "Parole supervision: A penological perspective". Unpublished MA dissertation, University of South Africa, Pretoria, p 18.

50 Burke, PB. 1995. *Abolishing parole: Why the emperor has no clothes*. Lexington, KY: American Probation and Parole Association, p 5.

term of imprisonment. This theory seems to be widely followed by the courts across the world[51] and the Namibian Prisons Act of 1998 seems to be oriented towards following this principle as well – as will be made clearer below.

In search of other answers

The three theories above illustrate the process of release on parole. Another attempt to determine whether parole is a right or a privilege is to look at the criteria for granting parole. Witmer discusses the issue of who should be paroled, and draws the following conclusion:[52]

> Parole should be granted to those who by their ability to keep the rules inside prison give evidence of their ability to keep the law outside, who by their life gain the confidence of the management and whose release is not contrary to the public sense of the community from which they come.

Parole – as deduced from the three theories above and Witmer's explanation – is, therefore, a contract between the parolee and the prison service. It is specifically granted as a kind of reward for good conduct or behaviour in prison. It can also be inferred from these theories that prisoners do not have the right to parole when they are admitted to a correctional facility. However, their good behaviour and attitudes during the period of imprisonment can earn them the privilege of being recommended for and granted parole. Arguably, the recommendation for placement on parole is what grants the offender the right to be released on parole. This acquired right is then referred to as *the right to legitimate expectation*. The right to legitimate expectation will be discussed below under the subheading "Parole officials versus the prisoner's right to fairness".

Another aspect of the argument regarding whether parole is a right or a privilege can be found in the language used in the text. As mentioned under the heading "The origin of parole and its significance from a jurisprudential perspective" above, section 3(2) of the Parole Policy, which emphasises that the conditions pertaining to parole are not to be interpreted in such a way that a prisoner has the right to claim release on parole, also raises the question of whether parole is a right or a privilege. To ascertain whether parole is a right or a privilege, one has to look into the legal instruments that regulate

the administration of the prison service. Section 95 of the 1998 Prisons Act provides that the –

51 See *Cooper v Canada (Attorney General)*, 2001 FCT 1329, [2002] 2 FC D–13.

52 Witmer, HL. 1927. "The history, theory and results of parole". *Journal of the American Institute of Criminal Law and Criminology*, 18(1):24–64.

> … institutional committee may submit a report in respect of such prisoner to the National Release Board, in which it recommends that such prisoner be released on parole and the conditions relating to such release as it deem necessary … .

Subsection two of section 95 further provides that –

> [t]he National Release Board may, after considering the report and recommendations referred to in subsection (1) submit a report to the Minister recommending the release on parole or probation of the prisoner concerned and the conditions relating to such release as the National Release Board may deem necessary.

The use of *may* in the above two provisions of the Act makes it clear that neither the Institutional Committee nor the National Release Board is obliged to make a recommendation for a prisoner's release on parole. Both bodies are at liberty to use their discretion as to whether or not to recommend the release of an offender for parole. To shed more light on this argument, one should consult section 73(5)(a)(i) of South African Correctional Services Act,[53] which states as follows:[54]

> … Subject to the conditions of community corrections set by such Board or court –
>
> (i) a prisoner must be placed under correctional supervision or on day parole or on parole on a date determined by the Correctional Supervision and Parole Board.

The interpretation of the word "must" in the South African section 73(5)(a) provision of such Act was given in the case of *Zealand v Minister for Justice and Constitutional Development & Minister of Correctional Services*,[55] where it was said that, the plain meaning of section 73(5)(a)(i), which makes no reference to any suspension of the implementation of the parole board's decision, and, in particular, its peremptory language (the use of the word "must") gives the prisoner the right to be released on parole on the date determined by the parole board, regardless of possible review proceedings to reconsider it.

Yet another approach in determining the issue of whether parole is a right or a privilege is to be found in the difference between the provision of remission and parole by the 1998 Prisons Act. The relevance of drawing this distinction was

53 Correctional Services Act, 1998 (No. 111 of 1998), South Africa.

54 This is the right provided under the doctrine of legitimate expectation as defined by Corbett JA in *Administrator, Transvaal and others v Traub* 1989(4) SA 731 (A) at 758 D–E.

55 Not yet reported, [2008] ZACC 3, Case CCT 54/07, decided on 11 March 2008; cited in the South African High Court case *Appolis v Commissioner of the Correctional Services & Others*, (945/2008) [2008] (12 May 2008).

held in *Sebe v Minister of Correctional Services and Others*.[56] According to the court, remission of sentence is a privilege and not a right, and its purpose is to serve as an incentive to encourage nothing else but good, disciplined behaviour and adherence to prison procedures.[57] The court reasoned that, because this purpose would be negated if the prisoner were permitted to languish in jail, not knowing whether or not his/her exemplary behaviour would be rewarded, remission was in practice granted to any prisoner to whom remission would apply at the stage of the prisoner's admission to jail, or as soon as possible thereafter (although subject, throughout, to his/her continuing good behaviour). The above practice also facilitates forward planning by the prison authorities, it being a notorious fact that prisons tend to be overcrowded.

Similarly, in the Namibian prison service, remission of sentence is provided by the 1998 Act and is granted to prisoners upon their admission to prison, provided their offences qualify to be granted remission. During the admission process, the release date is determined by subtracting one third of the total sentence.[58] Section 92(4)[59] provides that every person eligible for remission under that section will, at the commencement of his/her sentence, be credited with the full remission period to which s/he would be entitled at the end of such period if no remission had been forfeited. Under section 92(4), remission of sentence is a right to those who were eligible to be granted such right at the commencement of their sentence: it is not a privilege, as there are no requirements attached to it. Therefore, when a prisoner who is serving a sentence for an offence which does not qualify to be recommended for parole, as provided for under section 92(2), is recommended for remission of sentence to the Minister, Commissioner-General or Zonal Release Board as provided for under section 92(2)(aa),[60] (bb),[61] and (cc),[62] such prisoner acquires the claimable right after such recommendation has been made. This is then called *the rights acquired through the doctrine of legitimate expectation*.

In contrast to this, parole is historically based on a prisoner's promise of good behaviour in return for release before the expiration of a custodial sentence or, in modern usage, granting a convicted prisoner a conditional release on the basis of a promise to adhere to stipulated conditions in return. Therefore,

56 1999 (1) SACR 244 at 249 E–I.
57 (ibid.).
58 The sentence is calculated by following this formula: One day back from the date of sentence plus the total sentence imposed by the court equals the maximum date of release, which, minus the one third remission, then equals the actual date of release.
59 The 1998 Prisons Act.
60 (ibid.).
61 (ibid.).
62 (ibid.).

in Namibia, the phrase *on parole* applies to the situation of the prisoner being conditionally released from prison against an undertaking to abide by specific terms and conditions.

Thus, it can be authoritatively concluded against this backdrop that parole is a privilege which, subject to a recommendation by Prisons Service bodies and officials, may be granted to a prisoner who meets the prescribed requirements for a conditional release, provided that the knowledge of such recommendation grants the prisoner the claim right to be released on parole. Thus, even though parole in the Namibian Prisons Service is considered as a privilege rather than a right,[63] the process of administering parole also has elements of acquired rights.

This same question as to whether parole is a right or a privilege was brought before the court and decided in *Katalia v The Netherlands*[64] *and Myra Hindley v The United Kingdom*.[65] These cases respectively involved a convicted war criminal and a notorious female offender convicted of participating in child murders. The court stressed that parole was not a right but a privilege, and did not attract the guarantees of Article 5 of the Convention on Human Rights in Prisons. In *Greenhiltz v Inmates of the Nebraska Penal and Correctional Complex*,[66] the Supreme Court held that parole was not a right but a privilege. It further ruled that inmates did not have a constitutionally protected right to expect parole, thereby giving states the freedom to set their own standards for determining parole eligibility. However, in Namibia, the state is under an obligation to apply those determined parole eligibilities in fair, reasonable and lawful procedures[67] in order to meet an inmate's expectation of being released on parole. Similarly, in *Cooper v Canada (Attorney General)*, the court said –[68]

> … parole is a privilege, not a right; it is a privilege conferred or withheld by the exercise of discretion. The conferring or withholding of the privilege affects a liberty interest that has been curtailed, not through calculation of a parole eligibility date or through the exercise of a discretion vested in the National Parole Board, but by the sentencing judge; since the granting or withholding of the privilege of parole affects a liberty interest, the National Parole Board, in the exercise of its discretion, must accord procedural fairness, not the full "gamut" of principles of fundamental justice.

63 *Combrink v Minister of Correctional Services*, 2001 SA 338 (D & CLD) at 341 D–F.
64 Report of the Netherlands of 6 May 1978, SR 14 at 238.
65 (ibid.).
66 442 US I (1979).
67 Article 18, Namibian Constitution.
68 274 FCA (2003) 374 2 FD SC 36.

If parole is a privilege, it means that it can be abolished by the government without further ado. But does this mean a prisoner has no due process rights in determining eligibility for parole if the law does in fact provide for such conditional release? This is an interesting question which will be considered in more detail below. Suffice it to say here that, in an attempt to define the scope of due process protection for the decisions of public officials, a conceptual distinction exists between *rights*, which are protected by due process, and *privileges*, which are not.[69] The source of this distinction was in common law: privilege was treated as a government benefit given to prisoners, which therefore fell outside common law rights as well as the fundamental rights provided for in the Namibian Constitution. Hence, parole is merely a privilege: it is unprotected by the Constitution, and can be curtailed or abolished by the government.[70]

This circular distinction between rights and privileges in the USA has had some strange repercussions. For instance, selling ice was recognised as a fundamental right that one could not be deprived of without due process, yet government employment was not.[71] According to Hugenberger,[72] the privilege/right dichotomy also seemed ill-equipped to handle arbitrary government decision-making that fell outside of the scope of the common law – in particular, the denial of government benefits to persons suspected of subversive communist activity in the 1940s and 1950s. Commentators lambasted the *right/privilege* distinction as circular in logic and unfair in practice.[73] By the late 1960s, the US Supreme Court indicated that it would discard the distinction in favour of a new approach that would allow for greater flexibility in defining the scope of due process protections.[74]

Namibia can follow the new approach which the USA initiated in 1970 in the case of *Goldberg v Kelly*.[75] In the latter case, the US Supreme Court held that,

69 This distinction had been famously set out by Justice Holmes in a Massachusetts case involving a policeman who challenged being fired for political activities: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"; *McAuliffe v Mayor of New Bedford*, 155 Mass. 216, 220 (1892). See also generally William W van Alstyne. 1968. "The demise of the right–privilege distinction in constitutional law". *Harvard Law Review*, 81:1439–1464.

70 See Van Alstyne (1968:1455).

71 Cf. *Bailey v Richardson*, 182 F.2d 46, 57 (DC Cir. 1950), with *New State Ice Co. v Liebman*, 285 US 262, 278 (1932).

72 Hugenberger, J. 2006. "Redefining property under the due process clause: *Town of Castle Rock v Gonzales* and the demise of the positive law approach". *Boston College Law Review*, 47:1–41.

73 (ibid.); see also *Barsky v Bd. of Regents*, 347 US 442, 451 (1954).

74 Hugenberger (2006).

75 397 US at 262.

in the determination of granting or terminating of government benefits, due process should be followed:[76]

> Considered the opening salvo in what became known as the "Due Process Revolution," the decision tore down the last vestiges of the rights–privileges distinction.

As Hugenberger puts it, in its stead, the court in *Goldberg* stated that due process protections extended to interests that adjudicated important rights or, if deprived, imposed a "grievous loss".[77] Thus, "the predictable result of the Court's analysis was a dramatic expansion of the scope of procedural due process",[78] which obviously fits in well with the Namibian system in the context of parole and other privileges.

In light of the above arguments, in determining the privilege of parole in Namibia, certain rights and privileges due to prisoners may be affected or have to be upheld. These rights are mainly affected through the exercise of power and discretionary decisions.

Parole officials versus the prisoner's right to fairness

After asserting that parole in the Namibian jurisdiction is a privilege rather than a right, an equally important enquiry has to be addressed, namely the nature of the discretion of the Commissioner-General or the Minister in refusing to grant parole, and whether such discretion is subject to the provision of Article 18 of the Namibian Constitution, which 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, … .

This constitutional provision follows upon the realisation that section 97(6) of the 1998 Prisons Act couches the Commissioner-General and Minister's discretion in wide terms: it does not lay down any guidelines or requirements that the Minister should either follow or consult before s/he makes a pronouncement to either grant or refuse the parole. Such unfettered powers

76 (ibid.), cited in Hugenberger (2006:43). See also Griswold, EN. 1971. "The due process revolution and confrontation". *University of Pennsylvania Law Review*, 119:711.

77 *Goldberg*, 397 US at 262–263, cited in Hugenberger (2006). See also *Bell v Burson*, 402 US 535, 539 (1971), where it was held that a driving licence "may become essential in the pursuit of a livelihood", and that its suspension "adjudicates important interests of the licensees".

78 Hugenberger (2006).

and discretion can fall prey to abuse. In this context, therefore, it is necessary to discuss the notion of *fairness* in the context of parole laws.

The right to fairness in general

The Minister and the Commissioner-General are among the administrative officials[79] contemplated in Article 18 of the Namibian Constitution. Moreover, in terms of Article 32 therein, these officials are appointed by the President by the power vested in him to make such appointments.[80] Thus, the power exercised by the Minister or the Commissioner-General is said to be *official*, and constitutes an exercise of public power. This power, therefore, is obliged to comply with the elements of Article 18.

Burns, describes the relationship between the public official and the individual as based on the exercise of public power.[81] Thus, the discretional power of the state officials to grant or not to grant parole has to be exercised in accordance with the law. In the case of *Webster v Correctional Services Commissions*,[82] a decision of the parole board was set aside because the board had failed to exercise their discretion according to law: they had refused to release a prisoner on parole despite his good reports and credits, because he continued to protest his innocence and refused to attend a specific programme on the basis that he had not committed the crime in question and, therefore, did not need the associated therapy. The court referred the case back to the parole board for its proper consideration and to ensure compliance with the law and the principle of natural justice.

The exercise of state power by public officials cannot depend on whether the prisoner has the right or privilege to be released on parole. Instead, it has to be exercised in accordance with the law to satisfy prisoners' rights to liberty, as enshrined in the European Convention on Human Rights.[83]

Legitimate expectation in parole cases

The doctrine of legitimate expectation came into Namibian jurisdiction through the South African judicial system and ultimately from the English jurisdiction.[84]

79 Article 93 of the Namibian Constitution provides that the meaning of the term *official* includes "… any elected or appointed official or employee …, or any officer of the defence force, the police force or the prison service, but shall not include a Judge of the Supreme Court or the High Court …".

80 Article 32(3)(i)(bb) and 32(4)(c)(cc), Namibian Constitution.

81 Burns, Y. 2006. *Administrative law under the 1996 Constitution* (Third Edition). Durban: LexisNexis, p 5.

82 1998 (103) A Crim R 63 (WLD SC) 65.

83 *R v Hull Prison Board of Visitors*, (1979) 1 All ER702 (CA).

84 *Schmidt v Secretary of State of Home Affairs*, (1969) 2 Ch. 149 C.A.

The doctrine was then first used in South Africa in *Traub*,[85] which then found application in various Namibian cases, including that of *West Air Aviation (Pty) Ltd & Others v Namibia Airports Co Ltd & Another*.[86] In this case, the court held that the fundamental nature of the doctrine covered the vacuum where no rights were expressly stated by utilising the principles of natural justice to realise immutable rights. In terms of common law, the expectation is required to be of an administrative or quasi-administrative nature, meaning that the expectation does not apply to a political promise.[87] The doctrine of legitimate expectation is an extension of the doctrine of fairness and the requirements of natural justice. According to Riggs, the doctrine of legitimate expectation has become a rationale for granting a judicial review of administrative decisions in circumstances where the applicant had good reason to anticipate (i.e. a legitimate expectation) that the decision would be favourable or at least that s/he would be properly consulted before the adverse decision was made.[88]

In the *Traub* case,[89] the court recognised that a legitimate expectation might have arisen in at least two circumstances:

- Firstly, where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him/her without a fair hearing, and
- Secondly, in circumstance where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made.

In this regard, a distinction has been drawn between a legitimate expectation, on the one hand, that certain procedures would be followed as a result of some representation, scheme or policy; and on the other, that a substantive benefit or right would be conferred or obtained when some statutory discretion came to be exercised. In this regard, in *Cork Opera House Plc v The Revenue Commissioners*,[90] Justice Hedigan held that legitimate expectation could not prevail against a statute: it could not operate to confer upon a statutory authority a power which that authority did not have under the terms of the relevant statute.

85 1989 (4) SA 731 (A).
86 2001 NR 256 (HC).
87 *Bushback Ridge Border Committee v Government of the Northern Province*, 1999 (2) BCLR 193 (T)
88 Riggs, RE. 1988. "Legitimate expectations and procedural fairness in English law". *American Journal on Comparative Law*, 36:395.
89 *Traub* judgment, cited in Devinish, GE. 2007. "'Legitimate expectation revisited': An apology for the recognition and application of its independent and substantive existence". *De Jure*, 1:113.
90 (2007) IEHC 388.

The above argument was supported by the holding of the Supreme Court in *Greenhiltz v Inmates of the Nebraska Penal and Correctional Complex*.[91] In the latter case, it was held that prisoners' right to expect parole was not protected by the US Constitution as the Constitution had not expressly stated such protection. There is no reason to say that this is not the same position in Namibia, as the Namibian Constitution has overlooked the matter and does not expressly state such protection either. However, in many cases, Namibia's higher courts advocated that the Namibian Constitution should not be interpreted too literally or narrowly.[92] Thus, the point of the omission in the Namibian Constitution was emphasised by two Namibian court decisions. In the first, Strydom CJ held as follows:[93]

> [T]he Constitution of a Nation is not a simple statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspiration of a nation; the articulation of the value bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion.

In the second decision, the late Mahomed CJ reiterated this approach to the interpretation of the Constitution:[94]

> A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must be broadly, liberally and purposively be interpreted as to avoid the 'austerity of tabulated legalism' and as to enable to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the value bonding its people and disciplining its Government.

With these two positions by the Namibian courts, the decision referred to earlier herein from the *Greenhiltz* case regarding prisoners' right to expect parole not being protected by the US Constitution does not pass muster when confronted by the Namibian Constitution. Article 18 therein embodies the principle of natural justice which, together with common law, fully addresses the specific concern prisoners have in regard to natural justice. This means that Article 18 places an obligation on the administrator[95] and, in return, grants

91 442 US I (1979).

92 See *Government of the Republic of Namibia & Another v Cultura 2000*, 1993 NR 328 (SC) and subsequent cases quoting same.

93 Nambian Supreme Court decision in *Minister of Defence v Mwandingi*, 1992 (2) SA 355 (NmSC).

94 *Government of the Republic of Namibia & Another v Cultura 2000*, 1993 NR 328 (SC) at 340, B–D.

95 Being the Zonal Release Boards, the National Release Board, the Commissioner-General, or the Minister.

prisoners protection of their rights and privileges. This protection, delivered in Chapter 3 of the Namibian Constitution, is absolute and cannot be reduced or taken away except by the law.

Thus, the general expectation is that, once a parole system has been created, prisoners have a real interest in ensuring that it be operated in such a way that the possibility that they might be granted parole is properly considered.[96] However, this should not be understood to mean that prisoners have a right to parole. It should be clear that they have the privilege to be released on parole, and that the procedure by means of which parole is determined by public officials is subject to Article 18 of the Namibian Constitution. When this Article is applied to the process of parole, prisoners acquire the right to procedural and substantive fairness and legitimate expectation when it comes to the determination on whether or not to they will be granted parole.

In terms of sections 95(1)(a) and 96(1)(a) of the 1998 Prisons Act, a prisoner may be released on parole after having served half of his/her sentence, and upon meeting all requirements provided by the law. In Namibia, therefore, the substantive benefit in the form of release on parole is statutorily created and promised to prisoners. This is in tandem with the Constitution, which imposes the right to equal treatment to all – and, more importantly, the right not to be discriminated against in terms of the criteria enumerated in Article 10(2).

The Namibian Constitution declares any act of a person or court that imposes the death sentence as unlawful and unconstitutional. The Supreme Court was then confronted with a question as to whether the sentence of life imprisonment deprives a person of his/her right to life and was, therefore, unconstitutional.[97] The court held that the sentence of life imprisonment did not deprive a person of life because the prisoner serving for life is still entitled to parole – as has been explained above. Therefore, parole, as provided for in the law, renders a court's sentence of life imprisonment constitutional because a person who receives such a sentence will not lose hope of perhaps being free again.[98]

In the same vein, a further question is whether a prisoner has the right to the principles of natural justice provided under Article 18. In the case of *Derby-Lewis v Minister of Correctional Services and Others*,[99] it was an accepted argument that –

96 Van Zyl, S. 1992. *South African prison law and practice*. Butterworths: Durban, p 368.
97 *S v Tcoeib*, 1992 NR 198 (HC); 1991 (2) SACR 627 (Nm).
98 (ibid.).
99 2009 (6) SA 205 2009 (2) SACR 522 at 525.

> … at all relevant times the applicant was made aware or became aware of the existence and nature of policies regarding parole and the expectations to be made towards fulfilment of the requirements to be considered for parole.

Conclusions and recommendations

There are major shortcomings which underlie the 1998 Prisons Act and affect the well-being of prisoners who have otherwise qualified for release on parole. Nevertheless, by implication, Article 18 of the Namibian Constitution necessitates offenders to be given relevant information, reasons for decisions, and access to the review of decisions to ensure a fair, reasonable and understandable conditional release process.

Parole is an internationally accepted mechanism used to place offenders under supervision within the community. The role played by the community is significant, especially in assisting these offenders or parolees to readjust to their communities as law-abiding citizens. As corrections are a societal responsibility and not just the responsibility of the Department of Namibian Correctional Service, the community definitely forms part of the rehabilitation of offenders when they are placed on parole. Thus, the success of parole depends on the ability of a parolee to adapt and for society to accept his/her reintegration.[100]

Parole in the Namibian prison service is a privilege and not a right. Notwithstanding the provision of section 95 of the 1998 Prisons Act, a prisoner serving a sentence of three years or more has to complete at least half of that sentence before being eligible for parole. Section 97 read with section 92(2)(a)–(c) of the said Act denied the release on parole of a prisoner sentenced to life imprisonment, a habitual criminal, or anyone convicted of any other serious offence. This provision renders parole to be a privilege instead of a right. If the current position of parole is that the life-sentenced prisoner will never become eligible for parole, then the section is in conformity with the High Court decision in *S v Tcoeib*,[101] which held that such sentence constitutes inhuman and degrading treatment, which is forbidden by the Constitution. These sections of the said Act are unjustified, as they would deprive the accused of the right to be considered for parole when s/he might no longer be dangerous.[102] Therefore, the question to be answered here is whether or not the Supreme Court decision in the *Tcoeib* case was overridden by the provision of section 97(8) of the 1998 Prisons Act. This is the position to be determined by the higher courts of Namibia.

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100 Francois, CML. 2008. "The parole process from a South African perspective". Unpublished MA thesis, University of South Africa, Pretoria, p 161.

101 1992 NR 198 (HC); 1991 (2) SACR 627 (Nm).

102 *S v Chavulla & Others*, 2002 (1) SA 535 at 552–554.

The said Act was supposed to have obliged the Minister to make his/her decision available, as well as the reasons for such decision. This means that the Minister was supposed to be bound to furnish them in writing.[103] Thus, it is recommended that these shortcomings of the Act should be attended to. The approval or granting of parole should not depend on the discretional power of administrative officials – here, the Commissioner-General or the Minister. There should rather be clearly prescribed requirements in terms of which the granting of parole can be framed.

In determining parole for prisoners, public officials are obliged to act in accordance with the requirements of Article 18 of the Namibian Constitution, and the prisoner has a legitimate expectation to be released on parole. It is clear that parole in the Namibian prison service is not a right but a privilege; thus, the understanding from this article is that prisoners have the right to legitimate expectation according to which they can claim their release on parole. It is for the Department of Namibian Correctional Service to train its officials to understand these rights and to uphold them. The legitimate expectation doctrine has become a rationale for granting the judicial review of administrative decisions in circumstances where the applicant has good reason to predict that the decision would be favourable, or at least that s/he would be properly consulted before an unfavourable decision was made.[104]

Legitimate expectation was recognised by Corbett CJ to be both procedural and substantive in form.[105] He concludes that legitimate expectation may arise where a person enjoys an anticipation of a privilege or benefit of which it would not be fair to deprive him/her without a fair hearing, and that, in circumstances where the previous conduct of an official has given rise to an expectation, a particular procedure will be followed before a decision is made.[106] The understanding of *legitimate expectation* is that, whether or not there is an expressed right or the existence of regular practice, the existence of this right has to be immutable.[107] It should be also the obligation of the Department of Namibian Correctional Service to educate prisoners about these specific constitutional rights in order to attain effective administration – and this must also be seen to be done.

103 *Zondi v MEC for Traditional and Local Government Affairs & Others*, 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) para 102.

104 Riggs, RE. 1988. "Legitimate expectations and procedural fairness in English law". *American Journal on Comparative Law*, 36:395.

105 *Traub* judgment, cited in Devinish (2007:113).

106 (ibid.).

107 *Gemi v Minister of Justice*, Transkei 1993 (21) SA 276 (TK).

NOTES AND COMMENTS

What future now for the SADC Tribunal? A plea for a constructive response to regional needs*

Gerhard Erasmus**

The Summit in Maputo last week [August 2012] decided the fate of the Southern African Development Community (SADC) Tribunal – at least as far as individual complaints against governments for human rights violations are concerned. Newspapers reported, somewhat prematurely, the "death" of the Tribunal. The Tribunal is not off the agenda. There is an opportunity now for revisiting its jurisdictional powers in order to give the SADC region an institution for ensuring rules-based trade and integration. Elements of the rule of law can be retained and be improved. This effort should include arrangements for the protection of the rights of natural and legal persons involved in cross-border business.

The SADC political leadership has decided that the region will not have a regional human rights court. This is a very unfortunate development and a blow to the rule of law in this part of the world. The reported reaction of a spokesperson of the Department for International Relations and Cooperation (DIRCO) that the South African position on the future of the Tribunal was "neither here nor there" and that the new decision has to be respected and implemented is of particular concern. This official reaction tells perhaps more about the reality of regional politics than is usually revealed. We now know that the often hailed policy of the South African Government (not to forget the constitutional mandate) to promote respect for human rights has definite limits: regional realpolitik. The latter is about incumbency and immunity – at least in some of the neighbouring states.

For the sake of the record the history behind this saga has to be recalled:

This Tribunal is provided for in the SADC Treaty, the 'constitution' of this organisation. It has been functioning, since 2005, in terms of its own Protocol.

The Protocol is an international agreement in its own right and can only be altered in terms of the applicable amendment clause. The route now being

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followed – a Summit decision in 2010 to suspend the operations of the Tribunal, and another decision now to redesign it so as to limit its jurisdiction – is unlawful in terms of SADC legal instruments and international treaty law.

These developments were triggered by Zimbabwe's objection to decisions by the Tribunal which found it in violation of its obligations under the SADC Treaty.

The correctness of these rulings was confirmed in a subsequent report by an international expert appointed by SADC to investigate the matter.

There were two cases before the Tribunal about human rights violations by Zimbabwe. The *Campbell* judgment involved the unlawful expropriation of private land without compensation. In the *Gondo* case, it was found that a provision of Zimbabwe's State Liability Act was in breach of the SADC Treaty in so far as it provided that state-owned property was immune from execution, attachment or process to satisfy a judgment debt of the state.

These were complaints brought by Zimbabwean nationals. In both instances, the Tribunal determined that Articles 4(c) and 6(2) of the SADC Treaty required SADC member states to comply with human rights, democracy and the rule of law.

The SADC states drafted these provisions and ratified the Treaty which contains them. However, they apparently did not consider their own legal instrument worthy of compliance.

What happens now? The Tribunal will in future function under different jurisdictional rules – still to be drafted. It will only decide intergovernmental disputes, provided they are actually brought. What will such disputes be about?

Interstate disputes are typically about the application or interpretation of the agreements concluded between the parties. In a system based on the rule of law, violations of the applicable law will be adjudicated upon by an independent tribunal and provision will be made for effective remedies. We would like to argue that there is an opportunity now to provide the SADC regime with a judicial arm for deciding disputes about the application or interpretation of SADC legal instruments. This is long overdue and will bring SADC in line with developments in the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC). There has not been a single case before the SADC Tribunal involving interstate disputes. This is not an indication of a splendid record of compliance. Rather, it shows the need for a comprehensive legal regime to allow rules-based trade, integration and dispute settlement in SADC. And there should be awareness and expertise to pursue such opportunities.

Will private parties be protected when involved in trade and doing business in the SADC region? We sincerely hope so. The traditional approach is that governments bring international claims on behalf of their nationals. In this day and age, direct standing is often provided when it comes to trade and related disciplines – or governments accept the duty to give effect to private needs for judicial settlement. There are many examples to learn from. The fact is that the global economy, regional trade arrangements and international supply chains have altered the traditional approaches to international disputes developed a few centuries ago. World Trade Organization (WTO) dispute settlement panels and the Appellate Body have created a rich jurisprudence which has elevated international commercial disputes to a level of certainty about rights in international agreements and predictability about their effect. The member states litigate on behalf of their nationals, but the considerations are not about diplomatic offence – as seems to be the concern in our part of the world. It is about promoting the rules of the game about fair trade which all the parties have accepted, and protecting the rights of domestic players engaged in international markets. Brazil has recently started dispute settlement proceedings against South Africa for anti-dumping duties on imported chicken. There is no reason why that should unduly sour their joint political endeavours as members of the BRICS Group comprising Brazil, Russia, India, China and South Africa. The European Union, Japan and the United States of America frequently litigate against each other in Geneva.

Governments do not, as a rule, trade. They create the legal frameworks in terms of which private parties sell goods and services across borders and invest in foreign jurisdictions. The protection of such private rights via dispute settlement procedures is not a revolutionary idea. It is a necessary development in regional and global markets. In southern Africa, private rights are already protected with regard to uncompetitive behaviour involving extraterritorial elements and effects. Other regional economic communities, such as COMESA and the EAC, have tribunals with jurisdiction over international disputes and where individuals enjoy standing.

Dispute settlement is a vital element of rules-based trade and integration. The SADC instruments, e.g. the Trade Protocol and the Protocol on Finance and Investment, repeatedly refer to dispute settlement and a role for the Tribunal in settling disputes. Annex Six to the SADC Trade Protocol provides for a panel procedure which resembles that of the WTO. SADC should retain and clarify these aspects and the hints that it will have a rules-based regime.

The SADC legal arrangement will, as a result of the Maputo decision, require fundamental formal change, amendment and redrafting. Presumably all references in the Treaty about respect for democracy and human rights will now have to be eradicated. It will be a sad day if nothing is retained in respect of other aspects of the rule of law. On paper, SADC purports to be a rules-based regime. There is an opportunity now to salvage some of this promise.

As far as the protection of basic human rights in certain neighbouring countries is concerned the struggle has to continue. It will require fundamental domestic political reform. It will probably never be feasible to protect such rights before international fora in the absence of a national legal regime permitting the same. Why would these governments accept the jurisdiction of regional (supranational) tribunals if the obvious answer lies in the adoption of a national Bill of Rights and allowing domestic courts to apply it? The saga of the SADC Tribunal has taught that lesson again. Hopefully it will not be the only outcome.

More than one hundred years after Ohamakari, or: How to deal with the genocide committed by Imperial Germany

Manfred O Hinz*

Introduction: Okakarara, 14 August 2004

The centenary of the battle of Ohamakari (or *Waterberg*, as it is more commonly known) marked the peak of many efforts to commemorate what happened in colonial times in what was then German South West Africa (GSWA) in the run-up to the battle, during the battle itself, and in its aftermath, when the inhabitants of the central part of GSWA, namely the *Ovaherero*,[1] were to a high degree physically, socially and culturally extinguished.[2] Other

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1 Including the *Ovambanderu*, a distinct *Otjiherero*-speaking ethnic group. Whenever reference is made in the following to *Ovaherero* only, *Ovambanderu* are meant to be included.

2 With this, reference is made to the definition of *genocide* in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (UN GA Resolution 260 (III) of 9 December 1948, in force since 12 January 1951). Taking note of the fact that genocide is a given when, "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group", e.g. members of the group are killed; serious bodily harm is caused to members of the group; conditions of life are inflicted on the group that are meant to bring about its physical destruction in whole or part, then the question of whether or not Germany committed genocide must consider not only the battle of Ohamakari or the infamous extermination order by General Lothar von Trotha, but also a whole range of measures against the *Ovaherero* as an ethnic group. Notably, very often literature that presents research on the events between 1904 and 1907 offers its findings without considering the complexity of the crime of genocide. This applies to both pro- and anti-genocide authors. (Cf. e.g. the widely read publications by Schneider-Waterberg, HR. 2008. *Der Wahrheit eine Gasse: Zur Geschichte des Hererokrieges in Deutsch-Südwestafrika 1904–1907* (Fifth Edition). Windhoek: Namibia Scientific Society; Olusoga, D & CW Erichsen. 2011. *The Kaiser's holocaust: Germany's forgotten genocide*. London: Faber and Faber; and the very recent booklet by Tröndle, R. 2012. *Gewisse Ungewissheiten: Überlegungen zu Krieg der Herero gegen die Deutschen, insbesondere zu den Ereignissen am Waterberg und danach*. Windhoek: Namibia Scientific Society.) Cf. also Schober, D. "Projektionsfläche 'Hererokrieg'. Die Berichterstattung in Wiener Tageszeitungen von 1903 bis 1906". In Sauer, W (Ed.). 2008. Wien – Windhoek retour. 150 Jahre Beziehungen zwischen Österreich und Namibia, Wien: Dokumentations- und Kooperationszentrum Südliches Afrika (SADOCC):63-86.

ethnic groups – the Nama, the Damara and the San – were also victims of the same policy of the German Empire, the goal of which was to clean the central lands of the colony from the indigenous inhabitants for colonial settlement and exploitation.[3]

Although the colonial events lived on in the memories of the victims' families, it was only after the independence of Namibia that 1904[4] received public prominence – with the *Ovaherero* in the forefront. When German Chancellor Helmut Kohl visited Namibia in 1995 and the German President Roman Herzog in 1998, the *Ovaherero* approached the two representatives of Germany and petitioned for restitution for the brutalities committed by Imperial Germany against them. The failure to engage Germany in negotiations to settle the colonial crime led the *Ovaherero* to a charge in court, first against (still existing) enterprises which were active in Namibia during colonial times, and later against the Federal Republic of Germany.[5] Interviews conducted in 2004 revealed that not all *Ovaherero* supported the lawsuit.[6] However, the

3 It is not the task of this comment to recall the details of the German interventions in GSWA between 1904 and 1908. Reference is made to the literature quoted in the previous footnote and to earlier articles by the author of this comment, namely Hinz, MO. 2004. "Der Krieg gegen die Herero: Friedensschluss hundert Jahre danach?". In Paech, N, A Rinken, D Schefhold & E Wesslau (Eds). *Völkerrecht statt Machtpolitik: Beiträge für Gerhard Stuby*. Hamburg: VSA Verlag, pp 148–171; Hinz, MO. 2004. "One hundred years later: Germany on trial in the USA – The Herero reparation claim for genocide". In Schöck-Quinteros, E, H Kloft, F Kopitzsch & H-J Steinberg (Eds). *Bürgerliche Gesellschaft – Idee und Wirklichkeit. Festschrift für Manfred Hahn*. Berlin: trafo Verlag, pp 375–390.

4 Again: the run-up to 1904, the battle of Ohamakari and its aftermath.

5 The lawsuit eventually failed. (Cf. Sarkin, J. 2009. *Colonial genocide and reparation claims in the 21st Century. The socio-legal context of claims under international law by the Herero against Germany for genocide in Namibia, 1904–1908*. Westport: Praeger Security International; Hinz, MO. 2010. "Herero". In Max Planck Institute (Eds). *Encyclopedia of Public International Law*. Oxford: Oxford University Press; see also Sarkin, J. 2011. *Germany's genocide of the Herero: Kaiser Wihelm II, his general, his settlers, his soldiers*. Cape Town: James Currey.) The main mover behind the lawsuit is *Ovaherero* Paramount Chief Kuaima Riruako. Riruako claims to be the Paramount Chief of the *Ovaherero*, succeeding to the paramount leadership going back to Samuel Maharero who led the *Ovaherero* in the battles against the German occupiers. The legislation regulating traditional authority (Traditional Authorities Act, 2000 [No. 25 of 2000]) does not provide for the position of Paramount Chief, however. After a long battle, Paramount Chief Riruako was gazetted as the Chief of the Ovaherero Traditional Authority, being one of the *Ovaherero* traditional communities. Since Riruako is currently a Member of Parliament in Namibia, he had to take leave of absence from his traditional position (see section 15, Traditional Authorities Act). Paramount Chief Riruako is a widely respected leader and, although not all members of the *Ovaherero* supported the lawsuit, his attempts to move the genocide case are appreciated by the majority of them.

6 Interviews (unpublished, but on file with the author), which Thomas Gatter and

interviews also confirmed that, for the majority of the *Ovaherero*, the events of 1904 were genocide, for which an apology and compensation were expected.[7]

In June 2004, the German Parliament adopted a resolution titled "Remembering the victims of the colonial war in the then German South West Africa".[8] This resolution avoided any reference to genocide as well as to any apology, thus following the then policy of the Ministry of Foreign Affairs according to which any "compensation-relevant statement" had to be avoided.[9] Bishop Zephania Kameeta, Bishop of the Evangelical Lutheran Church in the Republic of Namibia (ELCRN)[10] and Chairperson of one of the two committees on the commemoration of 1904, termed the resolution to be "ill-starred".[11] The commemoration committee close to Paramount Chief Riruako reacted by organising a public meeting in which the majority of participants qualified the resolution as a slap in the victims' faces.[12]

When the people in Namibia learned that the German Government would be represented at the centenary commemoration of 1904 to be held in Okakarara on 14 August 2004 by the German Minister of Economic Cooperation and Development, Heidemarie Wieczorek-Zeul, many people anxiously awaited what the Minister would say. Would she just repeat what the German Parliament had stated in its 2004 resolution, or would she go beyond the limits set by the German Foreign Ministry? To the great surprise (and relief) of many, the Minister did the latter: she said that what had happened then would qualify as genocide if it had happened today. Referring to the words in the Lord's Prayer, she asked for forgiveness:[13]

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the author conducted in 2004 as part of a University of Bremen-funded project, "Remembering for the Future", refer.

7 (ibid.).

8 Resolution of 17 June 2004, Deutscher Bundestag, 15. Wahlperiode. 114. Sitzung:151114.

9 The phrase *Entschädigungsrelevante Stellungnahme* was coined by the then German Foreign Minister J Fischer; cf. *Die Zeit*, 5 August 2004.

10 One of the three Lutheran Churches in Namibia.

11 *The Namibian*, 23 June 2004.

12 See the invitation to the meeting on 4 August 2004 (on file with the author). Attempts to have one committee for the commemoration of 2004 failed. The National Committee for the Commemoration of 1904 was established under Bishop Kameeta, while the Co-ordinating Committee for the First Official Commemoration of the Ovaherero Genocide (1904–1908): Hundred Years After worked in close cooperation with Paramount Chief Riruako. Whereas the latter had only *Ovaherero* as members, the former also counted on Nama, Damara, German- and Afrikaans-speaking members. In preparing for the commemoration event, the two committees worked together through a Joint Technical Committee.

13 Wieczorek-Zeul, H. 2007. *Welt bewegen. Erfahrungen und Begegnungen*. Berlin: Vorwärts Buch, p 47.

> In the words of the Lord's Prayer that we share, I ask you to forgive us our trespasses and our guilt.

When participants in the gathering called out to the Minister, asking whether this was meant to be an apology, the Minister added this:[14]

> Everything I said was an apology for the crimes committed by German troops.

The then Minister of Lands, Resettlement and Rehabilitation, Hifikepunye Pohamba, who represented the Namibian Government at the Okakarara meeting, expressed the Government's acceptance of the apology in his speech after Minister Wieczorek-Zeul's words. Paramount Chief Riruako also expressed acceptance of the apology. Theo-Ben Gurirab, then Prime Minister of Namibia, spoke to the Namibian Parliament shortly thereafter, on 17 August 2004,[15] noting that Germany had taken 100 years to say words for which Namibians had been waiting and which were of importance for the recognition of the dignity of the peoples involved. Gurirab called on all Namibians to accept the German apology.

It is noteworthy to refer to the autobiographical afterthoughts expressed by former Minister Wieczorek-Zeul. In the chapter titled "In the words of the Lord's Prayer", the former Minister writes that she had asked herself on the way back from Okakarara to Windhoek whether her speech in Okakarara would mean the end of her time as a Minister. Anticipating this as a possible consequence, she reports that she answered this question as follows:[16]

> Even if I am dismissed from Government – [what I said] was correct and necessary. It was, indeed, worth it.

Whatever the discussion in the German Cabinet may have raised – objections, unhappiness, lukewarm acceptance – the fact is that Minister Wieczorek-Zeul did not lose her job: she instead received full support when she reported back to Parliament on her return to Germany.[17]

The apology by Germany certainly closed one chapter of the history that Namibia and Germany share, but others remained unresolved. For example, when Prime Minister Gurirab called for acceptance of the apology, he also

14 (ibid.:49).
15 *Allgemeine Zeitung*, 18 August 2004.
16 Wieczorek-Zeul (2007:49).
17 The fact is also that a high representative of the Ministry of Foreign Affairs confirmed in an international conference on 1904 that his Ministry had accepted Minister Wieczorek-Zeul's Okakarara speech; see Hinz, MO. 2005. "Vergeben und vergessen? Anmerkungen zu einer Rede, die Geschichte machte". *Recht in Afrika*, 122f.

expressed concern that the confession of guilt did not solve a number of "unanswered questions", which would still require "constructive exchange". The purpose of this comment is to ask to what extent the claimed hoped-for "constructive exchange" has taken place since 14 August 2004.[18]

The difficult path to "constructive exchange"

The international conference in Bremen, 18–24 November 2004

The most tangible post-2004 attempt of the German Government to contribute to "constructive exchange" was the German–Namibian Special Initiative, as it is commonly known, which offered an amount of €20 million for projects in areas and for communities that were particularly affected by acts of the German colonial government.[19] The Special Initiative was welcomed by the Namibian Government. It was, nevertheless, also emphasised that this offer was not what was demanded by the *Ovaherero* and others who had suffered

18 This comment is based on previous work by its author; see, in particular, Hinz, MO. 2003. "'Thou shalt not kill memory': The German–Herero war of 1904 – One hundred years later". In United Nations Educational Scientific and Cultural Organisation (UNESCO) Chairs in Human Rights, Democracy, Peace and Tolerance (Eds). *Bulletin*, 5:127–129; Hinz, MO, together with H Patemann. 2006. "Okupiona omahoze – Wiping the tears. Anthropological and legal anthropological remarks". In Hinz, MO (Ed.), in cooperation with H Patemann. *The shade of new leaves. Governance in traditional authority: A southern African perspective*. Münster: Lit Verlag, pp 471–488; Hinz, MO. 2010. "'In view of the difficult legal question, I beg you to understand …': Political ethics and the Herero–German War one hundred years later". In Hinz, MO (Ed.), in cooperation with C Mapaure. *In search of justice and peace. Traditional and informal justice systems in Africa*. Windhoek: Namibia Scientific Society, pp 395–412. It is in particular the last-quoted article that pleads for dialogue as the most important means to settle the "unanswered questions", which, for the author, are "beyond the limits of the law". See here also Hinz, MO. 2010. "Justice: Beyond the limits of law and the Namibian Constitution". In Bösl, A, N Horn & A du Pisani (Eds). *Constitutional democracy in Namibia. A critical analysis after two decades*. Windhoek: Macmillan Education Namibia, pp 161ff. This position corresponds to what Wieczorek-Zeul writes in her autobiographic reflection on the Okakarara event: to her, referring to the Lord's Prayer in her request for forgiveness appeared more "far-reaching" instead of "merely" expressing an apology (2007:49). The reference to the Lord's Prayer placed the Minister's plea in a broader and jointly supported Christian context. This resembles the position of the Namibian lawyer and politician RV Rukoro, who before 14 August 2004 said the following: "As much as I am convinced that we have good legal reasons for our claim for compensation, I am even more convinced by its moral justification" (*Die Republikein*, 12 July 2004; translation from the Afrikaans original by MO Hinz).

19 See *The Namibian*, 4 January 2007.

under colonialism.[20] In essence, it was only the international conference entitled "The German Herero War – One Hundred Years After 1904–2004: Realities, Traumas, Perspectives", which took place in Bremen from 18 to 21 November 2004, that attempted to move the mentioned unsolved questions closer to the "constructive exchange".

The conference was initiated and jointly organised by the Bremen Africa Archives in the Faculty of Law of the University of Bremen and the Centre for Applied Social Sciences in the Faculty of Law of the University of Namibia, under the patronage of the President of the Senate and Mayor of the Free Hanseatic City of Bremen.[21] The conference was attended by high-ranking officials of the Governments of Namibia and of Germany.[22] The *Ovaherero*/*Ovambanderu*,[23] the two abovementioned Namibian commemoration committees, certain Namibian churches,[24] and the German-speaking community[25] of Namibia were represented. A wide range of internationally recognised scholars of history, sociology, philosophy, anthropology, law and

20 The Memorandum on the Special Initiative was signed by the Namibian and German Governments on 6 November 2006 (cf. *Allgemeine Zeitung*, 7 November 2006). That the Special Initiative was not seen to be a response to the claim for reparation as demanded by members of the *Ovaherero* communities was also noted in a comment by President Pohamba reported in *The Namibian* of 2 March 2006. Cf. also Katjavivi, P. 2007. "Current affairs in Namibia and the Namibian–German cooperation" (speech given in Bayreuth, October 2007, p 3; copy on file with the author). Deputy Prime Minister L Amathila had the task of collecting suggestions from the various communities to be addressed by the Special Initiative; she reports on her experience with this task in her 2012 autobiography entitled *Making a difference* (Windhoek: University of Namibia Press, pp 188ff). She writes (ibid.:189): "The affected groups felt that this allocation of money did not come out of genuine concern, but was meant to avoid Namibian demands that the German Government pay reparations like those they have paid to Israelis after the Second World War. The Hereros in particular were furious with the Special Initiative and saw it as a ploy by the German Government to avoid talks about reparations".

21 To this and the following, see the unpublished "Document summarising results of the International Conference *The German–Herero War – One Hundred Years After 1904–2004: Realities, Traumas, Perspectives*", on file with the author.

22 N Mbumba, then Minister of Information and Broadcasting, for the Republic of Namibia; H Wieczorek-Zeul, Minister of Economic Cooperation and Development, and Ambassador Dr H-J Vergau from the Ministry of Foreign Affairs, for the Republic of Germany.

23 Paramount Chief Riruako, accompanied by his then senior advisor Prof. M Kerina as well as Ombara TD Kambazembi of the Kambazembi Royal House, Chairperson of the six royal houses of the *Ovaherero* which do not follow Paramount Chief Riruako.

24 The ELCRN's Bishop Kameeta, Bishop A Kamburona of the Oruuano Church, and Bishop R Keding of the German Evangelical Lutheran Church of Namibia.

25 By HE Staby, Chairperson of the Namibian–German Foundation.

theology, as well as representatives from German and Namibian civil society contributed to the conference.

Guided by a broad variety of academic papers, the conference participants deliberated on the conference topic by looking at the following:

- What happened in 1904 and its aftermath?
- What does 1904 mean to us today?
- What is required to achieve healing, reconciliation, and exoneration in the historical and political context?

The history-making statement by Wieczorek-Zeul at Okakarara on 14 August 2004 was the conference's focal point of departure. The apology extended by the Minister was appreciated as the opening of new avenues for debate and negotiation in respect of the Herero–German war and its consequences. The conference noted the words of the Minister with deep appreciation, in particular her clear verdict according to which the atrocities committed in 1904–1907 would now be called *genocide* – a crime for which General Von Trotha would be convicted if brought to court today.[26] The conference noted all the suggestions and proposals submitted – particularly those by the traditional leaders of the *Ovaherero*, the two 1904 commemoration committees, and the Churches – which were deemed necessary for healing the wounds of the past injustices. Upon its conclusion, the conference recommended that the two governments lend their support to a process of "meaningful and structured dialogue" of all concerned,[27] leading to a mutually acceptable solution of the historic injustices. As a tangible manifestation of the desire to reach reconciliation, the conference expressed its appreciation for the suggestion to establish a specific memorial in Bremen, right next to the re-dedicated anti-colonial "Elephant" monument there, to commemorate the genocide perpetrated in Namibia between 1904 and 1907.[28]

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26 Wieczorek-Zeul (2007:47), quoted from her Okakarara speech in 2004.

27 Thus, including the Nama, Damara and San, who had not participated in the conference. On the involvement of these three communities, see Hinz (2005:124f).

28 The Bremen colonial monument, the "colonial Elephant" was re-dedicated on 18 May 1990 to instead serve as an anti-colonial memorial, and on 21 June 1996, it was re-inaugurated by the then President of Namibia SS Nujoma; cf. Dahlberg, K, G Hilliges, R Gramatzki, MO Hinz, N Noisser & H Müller (Eds). 1990. *Vom Kolonial-Ehrenmal zum Anti-Kolonial-Denkmal*. Bremen: Landesamt für Entwicklungszusammenarbeit; Bessling, R. 2010. "'Der Elefant!' Vom Kolonial-Denkmal zum Ort für Vielfalt, Toleranz und Kreativität in Bremen". In Der Elefant eV (Ed.). *Der Elefant! Bilder-Gedichte-Dokumente zum Antikolonialdenkmal in Bremen*. Bremen: Sujet-Verlag, pp 74–79. The suggested memorial site was erected close to the "Elephant" and inaugurated on 11 August 2009 (Cf. Gatter, T. 2011. "A memorial dedicated to the victims of the genocide of 1904–1908 in Namibia". In Ruppel, OC & G Winter (Eds). *Justice from within: Legal pluralism in Africa and beyond. Liber amicorum Manfred O Hinz in celebration of his 75th birthday*. Hamburg: Verlag Dr Kovač, pp 53–59).

Although the conference suggested a unanimously agreed framework for what could have become the foundation of the expected "constructive exchange", the achievements of the conference did not bear immediate results. Its rather unusual attempt to opt for consultations between "all concerned" – going beyond the conventionally accepted subject of international law: the states and, thus, including the representatives of the communities who had suffered from the wrongs of the past – needed time to be appreciated.

The Namibian Parliament's resolution on genocide

It was in 2006, i.e. at a time when the bilateral memorandum on the Special Initiative was about to be signed, that Namibia's National Assembly debated and adopted a motion on the "genocide on the Namibian people" put forward by Paramount Chief Riruako.[29] The intention of the motion was to provide the background for the demand for reparations for the genocide committed by Germany.

In his presentation to the National Assembly, Riruako recounted what had happened in 1904 and the years thereafter. He argues that what had happened then would not only qualify as genocide if one applied the rules of the Convention on the Prevention and Punishment of the Crime of Genocide,[30] but also in terms of international law in place at the time the events occurred. Riruako states the following belief:[31]

> ... that significant parts of the Geneva and other similar treaties of the late 1940's were merely codifications of pre-existing legal principles governing *"unjust wars"* and the consequences thereof. ... Crimes against peace and crimes against humanity are all included in the Genocide Convention of 1948. [Emphasis in original]

The many governmental payments made to compensate for unjust acts committed by states after World War II[32] is proof to Riruako that this legal position is internationally accepted. He quotes what Minister Wieczorek-Zeul stated on 14 August 2004 in Okakarara regarding the "atrocities" by the German colonial government, and also the Minister's plea for forgiveness.[33] He, however, adds the following:[34]

29 Cf. Debates of the National Assembly of the Republic of Namibia of 19 September, 18 October and 26 October 2006. The motion and its justification can be found in the Debates of 19 September 2006, pp 32–42.
30 UN GA Resolution 260 (III) of 9 December 1948, in force since 12 January 1951.
31 Debates of the National Assembly of the Republic of Namibia of 19 September 2006, p 38.
32 (ibid.:38f).
33 (ibid.:40).
34 (ibid.).

> Forgiveness we can give, but how are they going to go about endorsing the forgiveness? That is the query. Without a conscious process of remaining without sorrow, there can be no true reconciliation.

For Riruako, Germany's Special Initiative is "one-sided".[35] As he puts it, –[36]

> ... the Namibians have accepted Germany's apology and they are now calling upon Germany to sit around the table with them and work out the future together. This is our demand.

The demand to sit around the table would include all the descendants of those who suffered under colonialism – not only the *Ovaherero*.[37]

The subsequent debate basically shows agreement with Riruako's motion. The main respondents to Riruako emphasised, in particular, the need for dialogue. A "pre-dialogue" and an "inter-dialogue" were proposed in order to clarify the way forward that the Namibian Government, the opposition parties, and the "affected communities" would wish to entertain.[38] Deputy Minister K Kazenambo, of Regional and Local Government, Housing and Rural Development, placed the need for dialogue in a wider national and international context:[39]

> The best practical option necessary to exit out of the legacy of the distasteful past is to embark upon on a constructive dialogue between the descendants of the victims or the survivors of Genocide and the descendants of perpetrators or those who have inherited power from the perpetrators of Genocide in order to try and reach a permanent amicable solution to the problem. ....
>
> The issue of reparation for human rights violations committed by the German Colonial troops in the then German South West Africa will not die away and it is therefore counterproductive to try and avoid this issue. The more you try and avoid the issue, the more you harden views and contribute to the creation of [a] negative perspective which will undermine the Policy of National Reconciliation in this country. Let the various stakeholders get serious while the situation is very fresh and controllable.

It is also worthwhile to quote from the summary with which Paramount Chief Riruako concluded the debate. The highlights of the debate, according to him, were as follows:[40]

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35 (ibid.:42).
36 (ibid.:41).
37 (ibid.).
38 McHenry Venaani, cited in Debates of the National Assembly of the Republic of Namibia of 18 October 2006, p 104.
39 (ibid.:114f).
40 Debates of the National Assembly of the Republic of Namibia of 26 October 2006, p 226.

- That what happened to our people during 1904 to 1908 as a result of General von Trotha's Extermination Order was a brutal act of Genocide sanctioned by the German Government of the day.
- That our people are entitled to demand the payment of reparations from the German Government.
- That the Namibian Government should be an interested party in any discussion between its nationals and the German Government on the issue of reparations.
- That dialogue be convened between, on the one hand, the German Government and, on the other hand, the Namibian Government and representatives of the affected parties to try and resolve this matter amicably and thereby strengthening and solidifying the existing excellent relationship between the two countries (Germany and Namibia).

The way forward?

Is there a way forward? Is there a chance for "constructive exchange"? If one looks at how the repatriation of the remains of colonial victims from Germany to Namibia was done in Germany, i.e. without using the chance of the presence of a broad delegation of Namibian political and traditional leaders in Germany;[41] and if one looks at the decisions of the German Parliament, which – at the beginning of 2012 – rejected two motions concerning the German genocide in Namibia, then one has reason to express doubt about the possibility of a "constructive" way forward. However, looking more closely at the debate of the two motions, a more optimistic assessment appears to be possible.

The first motion was put forward by the parliamentary group of *Die Linke* (The Left) party.[42] They stated that the genocide committed by Germany was a fact for which Germany had to accept its responsibility. The motion called on the German Government to acknowledge that what had happened in 1904 was genocide; to express an apology to Namibia, the *Ovaherero*, Damara and San; and to set a process in motion that would honour Germany's responsibility to remedy the acts they had committed. Part of the motion also entailed a call on the German Parliament to propose to Namibia's National Assembly to establish a joint parliamentary dialogue, the principal task of which would be to represent the Namibian parties in negotiating on all questions concerning the process of reconciliation.

41 Minister Wieczorek-Zeul termed the way the Namibian delegation – which had come to Germany to collect the skulls of Namibians and to return them to Namibia – were treated as being "insensitive" and "disrespectful"; see Protokolle, Deutscher Bundestag – 17. Wahlperiode – 162. Sitzung:19357. A detailed analysis of the repatriation 'project' is a task that cannot be done for this comment.

42 The title of the motion is "To recognise the colonial crimes of Germany in German South West Africa as genocide and to compensate for them"; Deutscher Bundestag. 17. Wahlperiode. Drucksache 17/8767, 28 February 2012.

The debate of the motion did not lead to an immediate decision by the German Parliament; instead, the matter was referred to three Parliamentary Committees, namely the Committee for Human Rights and Humanitarian Aid, the Committee for Economic Cooperation and Development, and the Committee on Foreign Affairs. The Committees to whom the resolution was transferred recommended to Parliament to reject the motion. This recommendation was carried by the votes of the ruling parties, namely the Christians (CDU/CSU)[43] and the Free Democrats (FDP)[44] against the vote of The Left, while the Social Democrats (SPD)[45] and the Greens (Bündnis 90/ Die Grünen) abstained.

The Committees' recommendations were noted by the German Parliament, together with an alternative motion submitted by the Social Democrats and the Greens.[46] This second motion resembles the first one to a high degree. It refers to accepted opinion that what happened in Namibia between 1904 and 1907 was genocide, and calls on the Parliament to recognise the seriousness of the guilt for the crimes committed against the *Ovaherero*, Nama, Damara and San. The motion calls for an apology by the German Parliament. The Government is requested to pursue initiatives to achieve reconciliation, as it set out to do in 2004. The resolution also recommends the establishment of a German–Namibian group of parliamentarians whose task would be intensify the contacts and consultations between the two Parliaments.[47] The motion expects Parliament to support the dialogue between parliamentarians and the representatives of all the peoples who suffered under German colonialism to work through the past, for reconciliation and a joint vision for the future.

Both motions were rejected by the German Parliament: the first motion was rejected by The Left, with abstentions by the Social Democrats and the Greens. The second motion was rejected by virtue of the votes of the Social Democrats and the Greens and the abstention of The Left. However, if one reads the statements made during the two debates, it becomes clear that the rejection of the two motions will most probably not close the debate for too long. In view of the motion of The Left, Wieczorek-Zeul referred to her own involvement as the then Minister of Economic Cooperation and Development,

43 Christian Democratic Union (CDU), and Christian Social Union (CSU).
44 Free Democratic Party (FDP).
45 Social Democratic Party of Germany (SPD).
46 See Protokolle, Deutscher Bundestag. 17. Wahlperiode. 168. Sitzung:19988ff. The motion of the SPD/Bündnis 90/Die Grünen is titled "To strengthen the relationship between Germany and Namibia and to do justice to Germany's responsibility" (Deutscher Bundestag. 17. Wahlperiode. Drucksache 17/9033 of 28 February 2012).
47 At this point, the motion notes a respective suggestion that members of the Namibian Parliament had forwarded during their visit to the German Parliament.

and called for a "joint parliamentary motion".[48] Members of the ruling coalition did not reject the contents of the motions per se, but nevertheless argued very moderately against them by partly referring to the fact that, although the need to deal with the brutalities during German colonialism was accepted, reparations had not been on the bilateral agenda so far.[49] Interestingly, one of the speakers, who belongs to the ruling coalition, expressed his hope that a joint German–Namibian group of parliamentarians would be established by the next Parliament.[50] Although other parliamentarians tried to impress upon this fellow member that it was, indeed, the purpose of the motions to have such a group of parliamentarians, the very same member eventually voted against both motions. In other words, there is good reason to believe that this view – namely that the burden of the past for which Germany is responsible requires joint consultations – will transgress the lines set out by party politics.

In a recent meeting between President Pohamba and a delegation led by Paramount Chief Riruako, Chief D Frederick of the Nama Traditional Authorities Association, and a senior representative of the *Ovambanderu*, the plea for consultations was repeated.[51] The traditional leaders submitted their wish to participate in a "discussion forum" – one that would comprise Members of Parliament from each of the political parties in Germany and Namibia, but would also include representatives of the affected communities in Namibia. Genocide would be the main issue of the discussion group, but also reparation, "which is inseparable from genocide".[52]

48 The second motion, submitted by the Social Democrats and the Greens, was obviously the result of the response to this statement.

49 Cf. the statement by M Schuster – FDP (Protokolle, Deutscher Bundestag – 17. Wahlperiode – 162. Sitzung:19357), but also the statement by H Fischer – CDU/CSU (ibid.:19354). As to reparations not having been on the agenda of the bilateral negotiations, see W Götzer – CDU/CSU (Protokolle, Deutscher Bundestag – 17. Wahlperiode – 162. Sitzung:19355). Cf. also Wieczorek-Zeul (2007:50) and at Protokolle, Deutscher Bundestag – 17. Wahlperiode – 162. Sitzung:19356.

50 See the statement by M Kauch of the FDP in Protokolle, Deutscher Bundestag – 17. Wahlperiode – 168. Sitzung:19995.

51 *New Era*, 18 June 2012.

52 (ibid.).

LEGISLATION

Three important yet unknown or ignored facts about the Namibian Constitution*

Sacky Shanghala**

Introduction

The purpose of this paper is to correct the oft-utilised citation of the Constitution of the Republic of Namibia as the *Namibian Constitution Act, 1990*, the *Constitution of Namibia Act 1 of 1990* or the *Constitution of the Republic of Namibia, 1990 (Act No. 1 of 1990).* These citations have occurred in court processes, judgments, academic syllabi and academic publications.

The paper attempts to dispel this incorrect statement of law by explaining how the Namibian Constitution came into being, how it requires us to refer to it, and what Act 1 of 1990 actually is.

The making of the Namibian Constitution

In the beginning, there was a Constitution before there was a Parliament. The best judicial summation recorded of this historical and legal fact is what Mahomed CJ wrote in his judgment in the *Cultura 2000* case:[1]

> The Constituent Assembly of Namibia adopted the Namibian Constitution on 9th February 1990. This Constitution was published in the Government Gazette of the 21rd [sic] March 1990. Namibia became an independence [sic] State on that day.

Another germane historical and legal fact worth noting is one that Naldi points out:[2]

> Namibia has avoided the fate of many former colonies in Africa which had 'Westminster' type constitutional models imposed upon them at independence …

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* Prepared for the legal profession in response to recurrent erroneous citations of the Constitution of the Republic of Namibia in court processes, academic writings, and other publications.

** Chairperson of the Law Reform and Development Commission.

1 *Government of the Republic of Namibia & Another v Cultura 2000 & Another*, (SA 2/92) [1993] NASC1; 1994 (A1) SA 407 (NASC)(15 October 1993), at 5.

2 Naldi, GJ. 1995. *Constitutional rights in Namibia: A comparative analysis with international human rights*. Cape Town: Juta & Co Ltd, p 10.

What are these 'Westminster'-type constitutional models of which Naldi speaks? The Union of South Africa came into being on 31 May 1910 as a result of the British Parliament's South Africa Act, 1910.[3] The Palace of Westminster houses the British House of Lords and House of Commons, together being the Parliament of the United Kingdom.

Namibia's path to independence was different from that of other territories under the dominion of the British Empire.[4] What exemplifies this are the United Nations Security Council's resolutions that the Constituent Assembly develop a Constitution for a new democratic state, the Republic of Namibia, under the supervision of the United Nations Transition Assistance Group (UNTAG).[5]

The Namibian Constitution was, therefore, not a product of the Parliament of the Republic of Namibia, but rather a product of the Constituent Assembly. This latter body was chaired by Hage G Geingob of SWAPO[6] of Namibia, and included representatives of the DTA[7] of Namibia, the United Democratic Front of Namibia, Aksie Christelik Nasionaal, the National Patriotic Front of Namibia, the Federal Convention of Namibia, and the Namibia National Front.

Parliament only existed from 21 March 1990, when Members of the Constituent Assembly, by virtue of Article 133 of the Namibian Constitution, became Members of Parliament.

How should the Namibian Constitution be cited?

With Westminster-type constitutional drafting, existing legislative bodies in the territories concerned attain independence and declare this by law authorised by their ruling-power states. The case of the Republic of Namibia is different. The Republic only came into existence on 21 March 1990, the date of Independence. Before that, there existed the German Protectorate of South

3 See Southgate, GW. 1953. *The British Empire and Commonwealth*. London: JM Dent & Sons, p 163. The same author details how the Australian Commonwealth Act, 1900 was passed by the British Parliament (ibid.:115–116).

4 Namibia, then referred to as the *German Protectorate of South West Africa*, became a subject of British control by virtue of Article 1 of the Mandate for German South West Africa of the Decision of the Council of the League of Nations adopted in Geneva on 17 December 1920.

5 Cf. Resolution 435 of 29 September 1978 and the Principles Concerning the Constituent Assembly and the Constitution of an Independent Namibia (popularly known as *the 1982 Constitutional Principles*), United Nations Document General s/15287, 12 July 1982.

6 South West African People's Organisation.

7 Democratic Turnhalle Alliance.

West Africa and the Territory of South West Africa, later on known as *SWA/ Namibia* under South African rule.[8]

The Constitution adopted by the Constituent Assembly under Article 148 states the following:

> This Constitution shall be called the Namibian Constitution.

Notwithstanding this clear, simple and unambiguous command of the Supreme Law of the land, successive Chief Justices, judges of the High and Supreme Courts, legal practitioners and academics have misleadingly cited the Namibian Constitution with reference to an Act of a Parliament that was created under that Constitution.[9]

I do not concur with Mahomed CJ that the Constitution is "enacted in the form of a statute", if he means that it is an Act of Parliament, for *Parliament* is defined under Article 146(2)(a) of the Namibian Constitution as follows:

> The word "Parliament" shall mean the National Assembly and, once the first National Council has been elected, shall mean the National Assembly acting, when so required by this Constitution, subject to the review of the National Council.

Mahomed CJ is, however, correct to assert that the Namibian Constitution is sui generis in the *Cultura 2000* case.

However, amendments to the Namibian Constitution are indeed Acts of Parliament.[10]

Therefore, it is wrong to refer to the Namibian Constitution as Act 1 of 1990: it should be cited as *Namibian Constitution* by virtue of Article 148 therein.

What is Act 1 of 1990?

The first thing that needs to be said about Act 1 of 1990 is that it actually exists, but that it is not the Constitution of the Republic of Namibia Act.

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8 It is trite that a League of Nations Mandate existed, and that the South African authorities changed from a Union to a Republic during the period in question.

9 See *Minister of Defence v Mwandingi*, (1993) NR 63 (HC); *Kauesa v Minister of Home Affairs and 6 Others*, (1995) 1 SA 51 (NM) HC; *S v Bruwer*, (1993) NR 219 (HC); *S v Mwambazi* (1990) NR 353 (HC); *Vaatz v Law Society of Namibia*, (1990) NR 332 (HC); to mention but a few. There is no need to cite the academic articles which abound; even the oldest publisher in South Africa – Juta – makes the error!

10 Cf. also Namibian Constitution First Amendment Act, 1998 (No. 34 of 1998), and Namibian Constitution Second Amendment Act, 2010 (No. 7 of 2010).

The said Act 1 of 1990 determines under section 5 that it shall be called and cited as the *National Coat of Arms of the Republic of Namibia Act, 1990*. It is not surprising that the first order of business of the Parliament of an independent Republic of Namibia was to create the national coat of arms.

This legislation was printed in *Government Gazette* No. 4 of 1990 as Government Notice No. 2, whereas the Namibian Constitution was printed in *Government Gazette* No. 2 of 1990 as Government Notice No. 1. Perhaps herein lies the source of the confusion: the Government Notice numbers might have been read to be the numbers of the published statutes!

Conclusion

With this short exposition of the law, it should be clear that –

- the Namibian Constitution is not an Act of Parliament
- the Namibian Constitution is also not Act 1 of 1990, and
- the constitutionally dictated way to refer to the Supreme Law of the land is *Namibian Constitution*.

Although this paper does not intend laying blame at anyone's door, an understanding of the law of Namibia cannot allow Act 1 of 1990 to be referenced as the Namibian Constitution when it clearly is not.

JUDGMENT NOTES

Becoming Fred Rodell: Predicting the result of the Second Supreme Court Appeal on the 2009 Election

*Nico Horn**

> The last thing any court will ever admit, even when it is being quite practical about what it decides, is that practical considerations have anything to do with the decision.
>
> Fred Rodell

In 1962, the controversial Yale Constitutional Law Professor and leading American realist Fred Rodell angered the Supreme Court of the United States (US) and caused a legal earthquake by predicting the outcome of the important redistricting case of *Baker v Carr*[1] after the completion of the argument, while everyone was waiting for the ruling.[2]

Rodell was not the first Law Professor to predict the outcome of a Supreme Court case. But what made his prediction extraordinary was his approach: he predicted a 5–4 split in favour of the redistricting, and indicated how each judge would vote. Rodell went beyond the typical US division between liberals (usually Democrats) and conservatives of different degrees (usually Republicans).

Rodell was adamant not to stick to the basic judicial issues that usually divide judges: activism or restraint, federalism as a constitutional principle, political conservatism or liberalism. He opted to look much deeper than that, bending over to his arch-enemies, the judicial behavioralists.[3] However, Rodell was too much of a maverick to be held captive by any scientific approach: the one he chose was much more basic. He refers to "a vast complex of personal factors: temperament, background, education, economic status, pre-Court career – of whose influence on his thinking even the most sophisticated of Justices can never be wholly aware", or – as Rodell summarises his examination method – "the Justices individually as whole human beings".[4]

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1 82 S CT 691, 1962.

2 Rodell, F. 1962. "For every justice, judicial deference is a sometime thing". *Geological Journal*, 50:707–708.

3 Schubert, G. 1963. "Judicial attitudes and voting behavior: The 1961 term of the United States Supreme Court". *Law and Contemporary Problems*, 28:100–142.

4 Rodell (1962:700).

Rodell argues that the interpreter needs to understand the judge by "examining the Justices individually as whole human beings, by probing beneath the protective shell of principles expressed in opinions, to try to find what made or makes each Justice really tick".[5]

The point that Rodell makes is that the judge, like anyone else, is a human being, and that his/her judgments are the result not only of his/her legal understanding and philosophical approach, but also of his/her background, political views, and some unconscious beliefs that even the judge "can never be wholly aware of".

Rodell was extremely successful in his prediction. The Supreme Court ruled in favour of redistricting with a 6/2 split. One of the judges whom Rodell suspected would support the rejection of redistricting was three days away from retiring and backed out of the case, while only one judge, Justice Clark, supported the redistricting – contrary to Rodell's prediction. But even with Clark, Rodell was not too far off target: Clark wrote an independent view on the case, indicating that he did not share the opinions of the majority.

In Namibia, when it recently became known that the judgment of the second Supreme Court appeal on the result of the 2009 elections was imminent, I was approached by students, the press, national radio, and some independent radio stations to give them a preview of my expectation. On national radio, my interviewer opted not to put me on the spot.

The general public had its own preconceived ideas and wanted me to confirm them. They wanted me to agree with their opinion of judicial bias in favour of either the ruling party or the opposition.

The group of students who met me in front of my office were more concerned about the law. After all, I lecture in constitutional law, and the students wanted to know how constitutional adjudication worked. I decided to go beyond the usual "the court may ... or maybe they will not because they can also look at ... and decide the opposite ...": I decided to do a 'Fred Rodell'.

To copy Fred Rodell in Namibia is not an easy assignment. To begin with, under the present Chief Justice, we have become used to unanimous judgments from the Supreme Court. How can we know who initially said what? What compromises were made before all five judges were willing to agree on one judgment? Are careful wording or sentences that sound contradictory the result of the necessary horse-trading in getting five people to agree to one judgment?

5 (ibid.).

Even when a court has the practice of allowing dissenting voices, it is not always clear who has contributed to the majority opinion and who has concurred without making a contribution. South African Constitutional Court Judge Johan van der Westhuizen told me off at the Anton Lubowski Memorial Lecture in 2011 when I criticised Judge O'Regan in a question. Judge Van der Westhuizen explained that the judge who wrote the majority opinion was often just one of a few contributors; not every word in the *Mazibuko*[6] judgment had come from Judge O'Regan, therefore.

And in a country where judges are not celebrities – indeed, they are hardly recognised by the general public, very little is known about the personality and personal life of the judiciary, especially High and Supreme Court judges. Their appointment is shrouded in mystery and secrecy. The Judicial Service Commission does not conduct public interviews. We do not even know if they conduct interviews at all. The position of a judge is not advertised and no one can apply to become one. If there is a process of recommendation – such as the recently controversial one after which the Judicial Service Commission of South Africa rejected the recommendation by retired Supreme Court of Appeal Judge Louis Harms for Adv. Jeremy Gauntlett to serve as a judge – it is not known to the public. So the US questionnaire regarding appointment as a judge does not fit Namibia; the public does not know where the potential candidate stands on political or moral issues, i.e. whether s/he is left or right, liberal or conservative, pro-life or pro-choice, pro-capital or pro-labour, etc. And finally, we do not have many cases where judges gave independent opinions, i.e. where they do not concur with the delivery of a unanimous judgment.

Knowing all the traps of being Fred Rodell in Namibia, and with the limited knowledge we have of the judges of the Namibian High and Supreme Court benches (mostly based on previous judgments), I nevertheless opted to make a prediction, knowing full well that there would be a unanimous judgment. My first prediction was that the Supreme Court in Namibia would repeat its first judgment and send the amplified papers – those documents that were not filed on 4 January 2010 but only ten days later – back to the High Court to consider them. In the initial application by nine opposition parties, the High Court had ruled out the amplified papers (hereafter *the first High Court judgment*, or *HC1*). So my prediction meant the appeal would be successful.

My prediction, however, was based on a wrong presumption. A year is a long time, and it had slipped my mind that the Bench in the second case was different from the one in the first: Acting SC Judge Langa had meanwhile been replaced by SC Judge Mainga.

6 *Mazibuko & Others v City of Johannesburg & Others*, 2010 (4) SA 1 (CC) (8 October 2009).

At face value, the replacement does not need to make a big difference: Judge Mainga is a progressive member of the Supreme Court Bench and, like Judge Langa, very sensitive to human rights, constitutional matters and the rule of law. Judge Mainga was also the one who had written the judgment in the well-known *Sikunda* case.[7] His dignity and competence as a Supreme Court Judge, like the other Judges on the Bench in this case, are beyond reproach. Yet, when I realised that Pius Langa was not on the Bench, I phoned the 'leader' of the student group and informed him that I had revisited my prediction: I now expected the appeal to fail.

I have pointed out in discussing[8] the 2011 Supreme Court judgment (hereafter *SC1*),[9] and the second High Court judgment on the 2009 elections[10] (hereafter *HC2*) that there is an obvious difference in the philosophical approaches to constitutional issues between HC1 and HC2 on the one hand, and SC1 on the other.[11] While HC1 gave no attention to the Constitution, SC1 laid strong emphasis on the constitutional value of elections. Under the significant heading "The Court", the judgment begins with a long introduction on how important –[12]

> … suffrage and regular, free and fair elections are in Namibian society as a means to constitute representative structures of Government and to influence their policies.

I, rightly or wrongly, saw the footprints of Judge Langa all over the strong rights approach and the emphasis on constitutional values in SC1. Langa, always larger than life, popularised the term *transformative constitutionalism*

7 *Sikunda v Government of the Republic of Namibia*, (3) 2001 NR 181 (HC). In this case, Judge Mainga not only ordered a Minister to release Sikunda – a decision that the then Judge President Pio Teek was reluctant to make and had avoided by postponing the case several times – he also found the Minister to be in contempt.

8 Horn, N. 2011a. "*Rally for Democracy and Progress & Seventeen Others v Electoral Commission of Namibia & Nine Others*; unreported judgment of the Supreme Court of Namibia". *Namibia Law Journal*, 3(1):115–122.

9 *Rally for Democracy and Progress & Seventeen Others v Electoral Commission of Namibia & Nine Others*; unreported judgment of the Supreme Court of Namibia, unreported case of the Supreme Court of Namibia.

10 Horn, N. 2011b. "*Rally for Democracy and Progress & Others v The Electoral Commission of Namibia & Others* – A victory for the positivist approach". *Namibia Law Journal*, 3(2):125–129.

11 *Rally for Democracy and Progress & Others v The Electoral Commission of Namibia & Others,* unreported appeal case of the Supreme Court of Namibia, Case No. SA 6/2010.

12 *RDP v EC*, SC1, p 6.

in a lecture at Stellenbosch University.[13] Langa articulated the onus of judges to deliver transformative constitutional value judgments as follows:[14]

> The Constitution demands that all decisions be capable of being substantively defended in terms of [the] rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justification for their decisions. Under a transformative constitution judges bear the ultimate responsibility to justify their decision not only by referring to authority, but by reference to ideas and values.

This approach was clearly seen in SC1 and, in my opinion, is lacking in the Supreme Court judgment of 25 October 2012 (hereafter *SC2*). I will restrict myself to the so-called amplified papers or "amplified motion application", as the High Court opted to call it. I have written extensively on the HC2 and will not repeat myself here.[15] Suffice it to say that HC2, in line with HC1, more or less ignored the constitutional importance of the election cases and concentrated on the importance of laws and rules. In this regard, HC1 quotes Judge O'Linn, as follows:[16]

> … if the Courts do not apply the rules and the laws, the rule of law will be abrogated and justice will be unattainable.

SC2 struggles with the dichotomous nature of being a judge in a constitutional democracy, namely between applying the rules and laws, as suggested by the High Court, and being transformative, as suggested by Langa.

Following the structure of SC1, SC2 – after a brief introduction to the case – discusses the significance of the issues at stake in the light of the Namibian Constitution, the importance of elections for democracy, and the necessity to protect the right of voters.[17] Yet, one never gets the feeling that constitutionality was at the heart of what was to come, as it had been with the SC1. It felt more like a quick introduction before getting to the real issues.

In the final analysis of the High Court's rejection of the amplified notice of motion, the Supreme Court got stuck on two issues:

13 Langa, P. 2006. "Transformative constitutionalism"; Prestige Lecture, University of Stellenbosch, South Africa; available at http://law.sun.ac.za/LangSpeech.pdf; last accessed 7 November 2012.
14 (ibid.:4).
15 Horn (2011b).
16 Point 45, HC2, quoting *Minister of Home Affairs, Minister Ekandjo v Van der Berg*, 2008 (2) NR 548 (SC) at 561 G.
17 Points 2–10, SC2.

- Who should be believed when the applicants and respondents present contradictory evidence and no viva voce evidence is led by either party?
- Who is to blame for the inability of the appellants to file all their papers within 30 days: the Electoral Commission, who made it impossible for the appellant to obtain the material, or the appellants wanting too much and fishing for facts?

Both questions are answered by strictly formalist approaches. As far as the contradictory evidence is concerned, the High Court opted for the test in the *Plascon-Evans* case in South Africa.[18] The judgment in that case boils down to accepting the respondent's version if the parties present the court with two opposing views and no viva voce evidence is led. The Supreme Court also approved of this ruling by the High Court.[19]

As far as the second question is concerned, the Supreme Court understood the High Court to have exercised its discretion:[20]

> The Court a quo's refusal to grant the appellants leave to supplement their papers in the election application, is premised on the assumption that the requirement in s110 of the [Electoral] Act that an election application "shall" be presented within 30 days after the day on which the result of the election in question has been declared, is directory rather than mandatory.

Discussing HC2, one also gets the feeling that the wording of the unanimous Supreme Court Bench in SC2 is a compromise – if not carefully chosen to get all the judges to concur, then at least an attempt to give credence to both the importance of laws and rules on the one hand, and constitutional norms and values on the other. Or, to put it in legal terms, cognisance is taken of both formal and substantive law:[21]

> We have carefully considered the reasoning of the Court a quo on the merits of the appellants' application to supplement the election application to ascertain whether it falls short of these criteria. Although we might have placed more emphasis on the constitutional importance of the principle at stake and may not necessarily have arrived at the same conclusion, it would not be proper for us to interfere with the exercise of judicial discretion by the High Court simply because we would have made a different value judgment on the facts. We are not persuaded that the Court a quo exercised its discretion in a manner which would justify interference on appeal when it refused the application to supplement the election application.

18 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A).
19 Points 100 and 101 of the Supreme Court ruling in the *Plascon-Evans* Case.
20 (ibid.:Point 105).
21 Point 107, SC2.

However, SC2 is neither a compromise nor a balanced approach. The SC2 eventually paid lip service to the constitutional importance of the case, but opted for a judgment based purely on formal law. Does it make sense for the highest court in the country dealing with an issue that has been popping up at one election after the other to say that constitutional issues are important, and that the judges may have arrived at a conclusion that differs from the High Court's formalist approach, and then make a 180° turn and dismiss the appeal without even considering the substantive issues involved?

The Supreme Court's option to leave several issues unanswered does not help Namibia to get clarity on the issues before court and develop a clear jurisprudence for future reference. Is it possible that jurisprudential development and legal clarity were sacrificed for the sake of a unanimous judgment? While we will never be sure of the reasons, a minimalist approach – when there is still so much uncertainty in the application of election law – will not assist a High Court that is bound to follow rules.[22]

The Supreme Court's minimalist approach becomes especially questionable when it opts not to –[23]

> … deal with the reasoning of the Court a quo that the appellants should have brought an urgent application for amplification to allow the Court to deal upfront with the issues raised therein.

Not only does it deprive future litigants of clear guidelines, but it also contradicts the Supreme Court's statement that the High Court's analogy with its SC1 is out of place:[24]

> We note, however, that the procedural analogy which the Court a quo sought to draw to the reasoning of this Court in the previous election case (i.e. that the second respondent could have challenged the validity of the registrar's decision in an urgent review application) is misplaced: it loses sight of the fact that the registrar was not a party to the election application in which the validity of her decision to receive the application outside office hours was challenged – unlike

22 See Point 45, SC2.

23 Point 108, SC2.

24 (ibid.:Point 108). See also Horn (2011b:115):
"The next section of the court's argument raises the old issue of previous hearings. Quoting the Supreme Court's reasoning, the applicants argued that, if the respondents had been of the opinion that the filing of the amplified papers and the acceptance thereof by the registrar were in breach of Rule 53 of the Rules, they were supposed to have approached the court on a matter of urgency. However, the High Court turned the Supreme Court's argument around in a way that would imbue with pride any proponent of deconstruction as an interpretive tool. If one applies the dictum of the Supreme Court to the issue of the amplified papers, the onus is on the applicant to bring an urgent application for the acceptance of such papers".

> in this case where all parties with an interest in the relief prayed for have been cited.

It came as no surprise that the Supreme Court also denied the appeal on the merits of the election applications, i.e. those issues that were in the appellants' papers filed on 4 January 2010. Suffice it to say that the case of the opposition political parties was ill prepared and while containing alarming allegations, it did not move beyond just that: alarming allegations.

We still need to answer one more question: Would the presence of Pius Langa have resulted in a different outcome? No one will ever know. What we do know is that, in terms of Langa's transformative vision, –[25]

> … judges bear the ultimate responsibility to justify their decision not only by referring to authority, but by reference to ideas and values.

Transformative constitutionalism and a purposive interpretation of rights at least make it possible to reject the High Court's execution of its discretion in the light of the constitutional mandate to ensure fairness and justice in democratic elections. It should be borne in mind that the Supreme Court was not asked to decide if election fraud or irregularities had taken place: the only question in this case was whether or not a competent court should consider the amplified papers. Then it would have been in the hands of the High Court to analyse the amplified papers.

After SC2, the 2009 election case was put to rest. Whether or not we agree with the judgment, this is the final word and, in terms of Article 81 of the Namibian Constitution, the guiding principles of the judgment are to be followed by all courts in Namibia.[26]

The last word on predicting judgment comes from Fred Rodell:[27]

> … the infinite variety of quirks and causes that may determine human choice on any matter where man is at the mercy of his own mind are fortunately far beyond the predictive capacity of even the most intricately attuned and adjusted calculating machine … [H]e who would analyze, predict or understand the Supreme Court's constitutional decisions will fare considerably better if he concentrates on that same infinite variety of human factors which makes precise prediction impossible.

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25 Langa (2006:4).

26 Article 81 reads as follows: "A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted".

27 Rodell (1962:708).

BOOK REVIEW

Environmental law and policy in Namibia; Oliver C Ruppel & Katharina Ruppel-Schlichting (Eds), Windhoek/Essen: OrumbondePress & Welwitschia Verlag Dr A Eckl, 2011, 425 pages

Cord Luedemann*

Environmental concerns are increasingly present on the international agenda. In southern Africa, these concerns often appear to be in conflict with the need for economic development. In this light, the recent publication gives a comprehensive insight into environmental laws and policy in Namibia which have become a dynamic field of interest for lawyers, politicians and other stakeholders. The publication elaborates on Namibia's main environmental concerns, and presents them in their regional and international context. As most southern African states share certain developmental features and environmental concerns, the relevance of the publication is not limited to a Namibian context. The compilation of relevant legal texts and policies also provides useful insights and guidance for other southern African states and, thus, promotes the harmonisation of environmental law and policies in the member states of the Southern African Development Community (SADC) and the African Union (AU). In a nutshell, the publication focuses on the following areas of interest:

- National environmental law and policy
- International environmental law
- Environmental management
- Water law
- Conservation of biodiversity
- Mining and energy law
- Customary law, common law, and criminal law aspects of environmental law
- Intellectual property rights and traditional knowledge
- Climate change
- Environmental justice and human rights, and
- International trade, sustainable development and the environment.

The publication divides these key features into an Introduction and 14 Chapters. In the Introduction, the editors familiarise the readership with Namibia and its

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legal set-up. Various facts and figures are presented to give the historical, economic and sociocultural background on Namibia. The introduction to the country is completed by a description of the legal set-up, including the sources of Namibian law and the court system. The information provided in the introduction facilitates the compilation's accessibility to readers who may be less familiar with the Namibian context.

The first Chapter, written by Katharina Ruppel-Schlichting, offers an introduction to environmental law. The Chapter starts with terminology and describes the peculiarities of defining the terms *environment* and *environmental law*. The discussion then focuses on the foundations of environmental protection which are laid down in various fields and disciplines such as religion, philosophy, science, economics, and law. After describing the functions of environmental law, the Chapter delivers a comprehensive insight into the historic development of this field of law. The Chapter concludes by identifying land degradation and soil erosion, water management, climate change, and waste and pollution as Namibia's principal environmental challenges.

Chapter 2 is entitled "International Environmental Law from a Namibian Perspective". Its author, Oliver C Ruppel, firstly describes the application of international law according to the Namibian Constitution. The Chapter then gives a helpful overview of the sources of international environmental law, homing in on multilateral environmental agreements, international customary law, and the fundamental and general principles of international environmental law. Finally, various summaries and a table usefully illustrate the relevance of multilateral environmental agreements for Namibia, while relevant environmental regulations in the legal and political frameworks of both the AU and SADC are presented, together with a list of environmental projects funded by international environmental institutions.

Chapter 3, also by Oliver C Ruppel, familiarises the reader with "Foundations, Sources and Implications of National Environmental Law". It briefly sets out the Namibian legal framework, referring to constitutional, Roman–Dutch, common, and statutory law, and allowing the reader comprehensive insight into the country's environmental legislation and environmental policies. The Chapter discusses selected policies, strategies and action plans and, in doing so, pays due attention to Namibia's developmental framework.

Chapter 4, written by Peter Koep and Hugo Meyer van den Berg, is entitled "Practical Implications of Environmental Management in Namibia: The Case Study of Ohorongo". This Chapter describes the course of an environmental impact assessment and the required rehabilitation activity by using the practical case of Ohorongo Cement (Pty) Ltd.

Chapter 5 is entitled "Selected Sectoral Aspects of Environmental Law in Namibia" and consists of five separate components. The first contribution,

"Legal Protection of Biodiversity in Namibia", is co-written by Manfred O Hinz and Oliver C Ruppel. In this component, the protection of biodiversity is discussed comprehensively. The authors competently analyse national and international environmental law pertaining to biodiversity protection in Namibia. The second component, "Water and Fisheries Related Statutory Law and Policy in Namibia: An Overview", is co-authored by Shirley Bethune and Oliver C Ruppel. The policy and statutory frameworks of water resources and fisheries management are broadly discussed. The co-authors expose the relevant national policies and legal regulations on the protection, utilisation and conservation of water and fisheries resources. The third component of Chapter 5 is entitled "Reform of Rural Water Supply", and complements the previous contribution. Co-authors Thomas Falk, Bernadette Bock and Michael Kirk outline Namibian reforms in rural water supply and management, paying due regard to the manifold challenges in this field. The fourth component of the Chapter, again co-written by Shirley Bethune and Oliver C Ruppel, provides an insight into "Land and Agricultural Laws and Policies Relevant for Environmental Protection in Namibia". As land degradation is one of the key environmental challenges for Namibia, the authors present the relevant provisions on environmental protection within the broader legal and policy framework. In the final contribution to Chapter 5, Peter Koep and Hugo Meyer van den Berg analyse the framework for "Mining and Energy in Namibia". They competently describe mining laws and policy, focusing on the provisions aimed at protecting the environment. Additionally, they briefly refer to the SADC Protocol on Mining. This component comprehensively introduces Namibia's energy laws and policies. After illustrating the relevant legal sources in the energy sector, the authors conclude the Chapter by outlining Namibia's energy policy and then, more specifically, Namibia's nuclear energy policy.

Chapter 6, by Manfred O Hinz, is entitled "Customary Law and the Environment". The Chapter discusses customary law as an integral part of the legal systems of Africa. The analysis begins with describing the post-Independence conservation policy as a gateway to customary international law. Subsequently, the author sets out how customary law and customary environmental law cooperate within the general legal system, the conservation policy, and the Biodiversity Monitoring Transect Analysis in Africa (BIOTA) research project. In completing the chapter, the author points to the protection of traditional knowledge on a national and international level.

Chapter 7, entitled "Western Intellectual Property Rights Regimes and Traditional Knowledge Protection Systems in Africa", is closely related to the previous Chapter. Eliamani Laltaika profoundly explores the challenges of protecting the traditional knowledge of indigenous communities in Africa, and outlines the inherent differences between Western intellectual property regimes and traditional communities' perceptions. In this context, the author emphasises the contribution of customary law to overcome gaps in the protection of traditional knowledge.

Chapter 8 is entitled "Human Rights and the Environment". Its author, Oliver C Ruppel, offers a sound explanation of the categorisation of environmental human rights. After examining the concept and categorisation of *human rights* in general, the author analyses the constitutionality of environmental human rights. In this regard, the Chapter specifically determines the extent of recognition afforded to environmental concerns in the Namibian Constitution.

Chapter 9 highlights the triangle "Trade, Environment and Sustainable Development". After illustrating the trade environment in Namibia, Oliver C Ruppel persuasively elaborates on the interrelatedness of international trade, the environment, and the development debate. The final part of this Chapter offers a comprehensive description of the World Trade Organization's (WTO) relationship to environmental concerns. This exposition includes the environment-related disputes brought before the General Agreement on Tariffs and Trade (GATT)/WTO dispute settlement mechanism.

Chapter 10, on "Environmental Justice: Advocacy, Litigation and Mediation", again written by Oliver C Ruppel, comfortably complements previous discussions concerning human rights and sustainable development. The author introduces the concept of *environmental justice* and elaborates on environmental rights litigation and advocacy.

Chapter 11 which follows is entitled "Climate Change" and consists of three components. The profound illustration of this issue is probably the centrepiece of the publication. The first contribution to this Chapter concerns "Climate Change in Namibia: Projected Trends and Effects" and is written by Isaac Mapaure. The author highlights the projected changes in climate in southern Africa and Namibia in particular. He elaborates on Namibia's vulnerability, specifically spotlighting the climate change impacts on various sectors of the economy, society and ecosystems. This part of the Chapter concludes with an examination of mitigations and adaptations to climate change in Namibia. In the second contribution to the Chapter, Oliver C Ruppel discusses "Climate Change and Human Vulnerability in Africa". In this context, the author illustrates the role of the Intergovernmental Panel on Climate Change (IPCC) and its predictions for Africa. This part of the Chapter maintains the specific African perspective on climate change introduced in the first contribution by analysing the vulnerability of African peoples. This focus is much needed – and underlines the inherent value of this publication. The final contribution to Chapter 11, entitled "International Climate Change Policy and Legislation: Where Do We Stand?", is written by Nadia von Bassewitz. This part of the Chapter allows the reader comprehensive insight into the international climate change debate. After illustrating the relevant framework, the author elaborates on the performance of various parties under the Kyoto Protocol. The Chapter concludes with an assessment of recent developments in international climate change negotiations.

In Chapter 12, Oliver C Ruppel addresses "Teaching and Research in Environmental Law in Africa and Namibia". The Chapter focuses on recent trends in the teaching of and research into environmental law in the light of capacity-building and cooperation.

Chapter 13, written by Katharina Ruppel-Schlichting, on "The Ombudsman and the Environment", introduces the institution of the Ombudsman and its legal foundation in the Namibian Constitution and the Ombudsman Act.[1] The Chapter presents the basic characteristics of the Namibian Ombudsman and then highlights the Ombudsman's environmental mandate and the institution's investigative powers and enforcement procedures.

The final Chapter, "Environmental Journalism in Namibia", joins the two previous chapters in presenting topics which are often neglected in environmental law publications and which, therefore, add distinct value to this publication. Namibian journalist Absalom Shigwedha ably reflects on the essential role journalism is currently playing in the protection and management of the environment in Namibia.

In an overall appraisal, the publication deserves appreciation and close attention for giving comprehensive insight into Namibian environmental laws and policies. The editors have gathered a group of authors who competently expose Namibia and southern Africa's roles in the arena of regional and international environmental law. The editors manage to integrate the fundamentals as well as the diverse angles of environmental law, with the satisfactory result of presenting an exceptional publication which encapsulates a vast amount of specialised knowledge on environmental law. Some negligible drawbacks of the publication are repeated typing errors and minor layout flaws. In conclusion, this publication can be unreservedly recommended to a large audience locally and abroad. Academics, branches of government, legal practitioners, students and the general public will gain a comprehensive, up-to-date insight into the fast evolving field of environmental law and policy.

Finally, it remains noteworthy that the publication – supplemented by an accompanying CD–ROM – is a product of German–Namibian development cooperation made available by the Hanns-Seidel-Stiftung and the Gesellschaft für Internationale Zusammenarbeit (GIZ). As a very useful addition, the publication and the CD–ROM are supported by a dedicated website entitled "Environmental Law and Policy in Namibia" (http://www.environment-namibia.net/; last accessed 21 November 2012).

1 No. 7 of 1990.