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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 second semester edition in 2013 need to reach the editors by 15 September 2013.

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- Only original, unpublished articles and notes are usually accepted by the Editorial Board.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*

Welcome to the ninth edition of the *Namibia Law Journal*. This *Journal* is again packed with interesting articles. Every new edition of the *Journal* reminds us of the fact that Namibia has an academic and legal life of its own.

However, we have not yet achieved all our dreams for a vibrant national law journal. Allow me to mention two unachieved goals. First, there are just not enough senior practitioners who are contributing. While we are more than willing to allow people from all the different legal fraternities – preceding officers, prosecutors, practitioners, government officials, legal advisors and academics – to contribute articles, without the contribution of legal practitioners practising in our courts, the *Journal* can easily alienate those who are looking for answers related to their daily courtroom issues.

Secondly, the *NLJ* has not been successful in facilitating legal debate. In neighbouring South Africa the debate between transformative constitutionalism and positivism has been going on for a long time. The United States journals have not even begun to move away from the debate between the so-called “original intent” school and the progressive interpreters favouring judicial activism in constitutional jurisprudence.

Reading Namibian judgments, which are now readily available as they are given, it is obvious that these different approaches also play a role in our superior courts. But it is hardly discussed in the corridors. Some may think that Namibia is too small for such debates, or that it may undermine the authority of our superior courts. However, without debate, the courts are left without the privilege of listening to those who may not agree with a specific approach or model.

Perhaps this edition could start a debate on feminist legal theory, or the political relevance of positivism, or the need for the adjudication of socio-economic rights. Or if we are really brave, we can discuss the 32nd SADC summit and ask some serious questions on how a new Tribunal will influence the spreading of human rights in the region, or we can begin a debate on euthanasia. These are only some of the topics covered in this edition.

It is now a tradition to publish one of our 80%+ LLB dissertations in the first edition of a new year. This year the honour goes to Ademidun Ogunmokon¹

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

1 Ademidun was a final year LLB student. This is an edited version of her LLB dissertation, for which she obtained an A. All final years must pass a dissertation on an approved topic to graduate. A distinction can only be awarded if the supervisor, an external examiner from another university, and the examination board approves.

INTRODUCTION

with her dissertation on the influence and relevance of the liberal feminist theory in Namibia. While women issues in general are often discussed at conferences and other forums in Namibia, very little has been written on feminist theory within the framework of the legal system.

Ben Nangombe, a University of Namibia (UNAM) graduate working in the Office of the President, contributes an article on the effects of legal positivism in Namibia and South Africa during the apartheid era. The debate on the role of positivism in South Africa is ongoing in academic circles. Nangombe makes a positive (no pun intended) contribution to the Namibian debate.

Another UNAM graduate, Eliaser Nekwaya, asks if defences against personal liability to diligent company directors offer adequate protection in Namibia.

Dennis Zaire of the Konrad Adenauer Foundation in Namibia and Kathrin Schneider of the Julius Maximilian University of Würzburg, Germany, revisit the SADC Tribunal, more specifically the proposed exclusive accessibility suggested by the 32nd summit in Maputo, Mozambique.

Francois Bangamwabo, UNAM academic, raises the important issue of the justiciability of socio-economic rights in Namibia. Socio-economic rights remain a controversial constitutional issue. Mr Bangamwabo comes with an enlightening approach. Instead of looking at the differences between the justiciability of political and civil rights on the one hand and socio-economic rights on the other, he opts to make human dignity the sine qua non of both.

Professor Manfred Hinz returns to a previous note on TFO (The Future [O] Kavango) to teach us something on “the architecture of governance for sustainable development in a globalising world”.

We have two Judgment Notes, one on the question of whether a person has the right to refuse medical treatment even if this could lead to serious health risks or even death, and the other on the failure of our system to bring a simple case to finality within a reasonable time.

We also review the well-known *Commentary on the Criminal Procedure Act*, a loose leaf publication that started in 1987. The publishers now also include a bi-annual online *Criminal Law Review*, which is the focal point of the review.

Enjoy *NLJ* 5(1).

In Ade's case her dissertation was also examined by a second internal moderator to ensure gender balance in our grading.

ARTICLES

An analytical exposition on the influence and relevance of the liberal feminist theory in the Namibian legal framework

Ademidun O Ogunmokun*

Introduction and background

Jurisprudence is philosophy of law, and unlike the other traditional subjects, its study is not based on tenets and case law but rather seeks to provide different perspectives on what law is or could be or is not.¹ This entails various jurists discussing and questioning their understanding of law and developing theories which they feel best describe their interpretation and perception of the philosophical questions that they deal with in their fields. The feminist perspective on the philosophy of law is what gave rise to feminist jurisprudence. Feminist jurisprudence as a discipline is hard to define but can be explained simply as an examination of the relationship between law and society from the point of view of all women.² Its aim is to apply a systematic feminist perspective in the examination and understanding of how women are considered in law and how the law responds to women's reality and needs.³ There are various schools of feminist jurisprudential thought, and although they cannot fit into enclosed and rigid theories, all those that have similar characteristics are placed together generally under several phases or trajectories. Thus the specific theory that will be dealt with is the theory of liberal feminism.

A recent online article published by the Southern African Protocol Alliance reported that during the 2009 parliamentary elections the percentage of women represented in Namibia dropped from 30.8% to 23%.⁴ This occurred in spite of the aim to have a 50% women representation in political positions by 2015, as has been specified by the South African Development Community (herein referred to as SADC) protocol on Gender and Development. Not too encouraging are the statistics on domestic violence and rape, which despite the enactment of statutes has not dropped, as is evident from the fairly recent

* LLB, University of Namibia.

1 McCoubrey, H & ND White. 1996. *Textbook on Jurisprudence*. Second Edition. Great Britain: Blackstone Press, p 1.

2 MacKinnon, C, as cited in H Barnett. 1997. *A Sourcebook on Feminist Jurisprudence*. London: Cavendish Publishing.

3 Dahl, TS. 1987. *Women's Law: An introduction to Feminist Jurisprudence*. Oslo: Norwegian University Press, p 12.

4 Southern Africa Gender Protocol Alliance available at <http://www.genderlinks.org.za>; accessed on 19 March 2012.

Legal Assistance Centre records.⁵ Namibia as a nation has been praised for its enthusiasm and persistence in ensuring the protection of women and their rights, and for the affirmative action taken to ensure the political, social and economic development of women.⁶ The same article that disparages Namibia for its fall in the percentage of women in the parliamentary elections also commends Namibia for the percentage of women represented in local government which currently stands at 42%.⁷ The present position that women enjoy now is obviously - though not exclusively - as a result of laws that have been implemented. The law⁸ in turn is a product of certain jurisprudential views as regards the position of women in modern society. Thus my research considers liberal feminist theory and its applicability in the Namibian environment.

Statement of the problem

As has been stated above, over the years law has resulted in the advancement of women in the public and private spheres of life and this advancement is as a result of certain theories that have been drawn up by persons who believed that women deserved better.

Namibian society is legally and culturally plural and thus a philosophy taking into consideration the realities of its current position is necessary to ensure the vision of gender equality and to achieve egalitarianism. In a bid to correct the social, political and economic inequalities of the past, sometimes certain principles were borrowed without regard to their applicability to Namibian society. The appropriating of methods and mechanisms from another jurisdiction to redress the imbalances of the past may not be what is wrong, but rather the “all or nothing” fashion in which it is borrowed. This dissertation aims to describe the principles of liberal feminism vis-à-vis the legal framework in Namibia. Through the exposition of those principles and a description of their application and practical consequences, I examine the influence of the

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- 5 Recorded in *The Namibian* on the 23rd November 2006 and Namibia Domestic Violence and Sexual Abuse Service Directory Legal Assistance Centre: Windhoek, p 7.
 - 6 Southern Africa Gender Protocol Alliance available at <http://www.genderlinks.org.za>; accessed on 19 March 2012. There are constitutional mechanisms put in place to ensure women empowerment such as Article 14 that provides for equality in marriage; article 23 which includes women as a category for affirmative action, and Article 95(a) which makes the empowerment of women through legislative means one of the policies of the Namibian government. Thus, as a result, the Local Authorities Act applied the principles of affirmative action to ensure an increase in the percentage of women representation in local government.
 - 7 Southern Africa Gender Protocol Alliance (ibid.).
 - 8 Law in this instance refers to laws enacted and case law. The high representation of women in local government may be a result of the Local authorities Act 23 of 1992 which required affirmative action to be applied to the local council elections.

liberal feminist theory. In addition, the relevance of the theory in present day Namibia is questioned in relation to its criticisms.

Literature review

At the realisation of independence in 1990, and with the commencement of the constitutional era, one of the areas recognised as needing intervention was the achievement of gender equality. As a result, the constitution makes explicit provision for the promotion of women and their rights. It is thus necessary, for academic and practical reasons, to conduct an evaluation of Namibia's current attainment of gender equality.

It is impossible to ignore the role that various feminist theories have played in the progress made towards the attainment of gender equality. One such theory is the liberal feminist theory. For a better understanding of liberal feminism, it is important to understand the theory that underlies this jurisprudential school of thought: liberal theory or the theory of liberalism.

Barnett⁹ gives a brief summary of liberal theory and states that the theory "represents the underlying political theory behind much contemporary Western legal theory, including modern positivist theory and the social contract theory". There are various definitions of the theory of liberalism but three principal notions are rationality, the maximisation of individual liberty and the control of government power through law.¹⁰ In emphasising the importance of individual liberty, liberal theory assumes that individuals in society are gender, race, class and age neutral and Barnett points out that in practice, society cannot be and is not viewed in that manner. It is the combining of the general concept of liberalism with the feminist viewpoint that has given birth to liberal feminism.

Some of the earliest writers on liberal feminism are John S Mill and Mary Wollstonecraft. In his book, *The subjection of women*, Mill campaigned for the enfranchisement of women and their entry into professions and public offices, and analysed the social position of women vis-à-vis their husbands.¹¹ He provided a foundational framework for liberal feminism and an in-depth study of how the public and private spheres of liberalism discriminate against women. He advocates circumstances in which it can be modified as a means to promote equal treatment of women and guarantee an end to the inequality

9 Barnett, H. 1998. *Introduction to Feminist Jurisprudence*. Great Britain: Cavendish Publishing, p 96.

10 (ibid.).

11 Mill, JS. 1869. *The Subjection of Women*. Cambridge University Press, as cited in Barnett, H. 1997. *Sourcebook on Feminist Jurisprudence*. Great Britain: Cavendish Publishing, p 135.

that they experience.¹² Despite his propositions, he has been criticised for his masculinist views.¹³

One of the principles of liberal feminism is that women are essentially the same as men and should be treated as such. This principle is discussed from the perspective of equality. Williams¹⁴ explores application of the equal treatment principle to circumstances of pregnancy. In general terms, her argument is that gender equality requires identical treatment of the sexes. For example, instead of viewing pregnancy as a unique condition which requires special treatment, it should be viewed as a physical condition that affects an employer's ability to work.

Littleton¹⁵ considers the concept of equality in a different light. She explains two models of sexual equality under feminism, the symmetrical models consisting of the assimilation and the androgyny model, and the asymmetrical models. Littleton's explanation for equality could provide a critical analysis of the sameness principle as applied under liberal feminism, although it can be argued that she implicitly supports the application of the sameness principle, though in a manner that differs from other liberal feminists.

As with every theory postulated, liberal feminism is not without its critics. MacKinnon criticises the theory through the propagation of dominance theory.¹⁶ Her criticism is based on the argument that the equality doctrine which liberal feminism applies fails in the way it is structured and this failure is permanent. She contends that the failure permits differences between women and men which result in "legitimate unequal and abusive conditions for women" and requires women to measure up to the male standard.¹⁷

As a response to Williams's argument and a general criticism of liberal feminism, Krieger and Cooney¹⁸ discuss what they consider to be the limitations of the equality doctrine in cases of pregnancy through the analysis of an American

12 (ibid.).

13 See section 2 for a more detailed exposition of the criticism.

14 Williams, WW. 1984. "Equality's Riddle: Pregnancy and the Equal treatment/ Special treatment debate", as cited in Weisberg, DK (Ed.). 1993. *Feminist Legal Theory: Foundations*. Philadelphia: Temple University Press, p 128.

15 Littleton, CA. 1987. "Reconstructing Sexual Equality", as cited in Bartlett, KT & R Kennedy, R. 1990. *Feminist Legal Theory: Readings in Law and Gender* Boulder: Westview Press, p 35.

16 MacKinnon, C. 1991. "Difference and Dominance: on Sex Discrimination", as cited in Bartlett, KT & TR Kennedy (Eds). *Feminine Legal Theory*. Boulder: Westview Press, p 81.

17 (ibid.).

18 Krieger, LJ & PN Cooney. 1983. "The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality", as cited in Weisberg (1993: 156).

case. They describe how the equality doctrine applied by liberal feminists promotes the formal appearance of equality over the equality of effect, and provide an alternative method of achieving the equality of effect.

One of the highlighted failures of liberal feminism is its foundational basis having been created on the realities of one group of women. As has been noted earlier, feminist jurisprudence differs from other jurisprudential schools of thought.

Van Blerk¹⁹ gives an African perspective to feminism. She provides a concise and general outline of feminist jurisprudence and makes brief reference to liberal feminism and to the input made by South African feminists, stating in her discussion that this is the position of South African feminism. Considering South Africa and Namibia's close legal ties, this assists in giving a background check on feminism from the Namibian perspective. Roederer and Moellendorf give a more detailed South African perspective on liberal feminism. They consider judgements made in the past that exposed the inequality suffered by women and may have heralded the feminist movement in South Africa. They also consider juristic writings that focus on the school of thought from a South African perspective.²⁰ Despite the writings of these South African authors, there is still no original indigenous theory based on the realities of women. Thus in determining the development of gender equality, it is necessary to gauge the influence of adopted feminist theories and how they have assisted in the attainment of gender equality.

Research question

How has liberal feminism influenced the attainment of gender equality and to what extent is the theory relevant in present day Namibia?

The manner in which feminist jurisprudence, as a general school of jurisprudence, has influenced Namibian legislation and legal practice is of importance. To the lay person, this influence may not be evident and might just be seen as the further movement towards equality in a society and world that is moving towards egalitarianism. However, jurists could argue – and rightly so – that feminist jurisprudence has in fact played an essential role in ensuring the emancipation and equality that women in Namibia and all over the world enjoy. This is evident from the legislation that has been promulgated which ensures the protection of women from violence and ensures they are treated in a manner that respects them as individuals. An example of such legislation in Namibia is the Combating of Domestic Violence Act, 2003²¹ which deals

19 Van Blerk, AE. 1996. *Jurisprudence: An introduction*. Durban: Butterworths, p 174.

20 Roederer, C & D Moellendorf. 2004. *Jurisprudence*. Cape Town: Juta & Co, p 301.

21 Act 4 of 2003.

with violence that women may experience in their domestic homes and offers some degree of protection. On the international level is the 1980 Convention on the Elimination of all Forms of Discrimination against Women (herein referred to as CEDAW) which essentially aims to eradicate every form of discrimination that women may endure. These enactments are as a result of the increasing jurisprudence on feminism and the need for the achievement of equality between men and women. My research is generally based on the assumption that feminist jurisprudence has influenced Namibian legislation and practice because women now have access to opportunities that were not previously available.

To what extent can one argue that legal equality is all that is required to ensure complete emancipation of women from men? Can principles derived from the experiences of women who differ economically, culturally and socially be applied to Namibian women? And if so, how relevant are they and to what extent may these principles be applied?

These are questions that need to be considered not only in the imposing of liberal feminism, but in the application of any theory postulated.

Research methodology

This research was conducted through the qualitative method. I consulted the views and opinions of various authors considered eminent scholars on the subject. These sources included textbooks and articles that are considered authorities. I referred to proponents of liberal feminism and contrasted their views with the views of those who criticise this school of thought. In addition to the juristic writings considered, I accessed legislation relevant to the study and analysed the enactment of such legislation in light of the principles underpinning liberal feminism. In addition, I examined and evaluated certain cases from within and outside Namibia which I assumed applied the feminist perspective, or had elements of feminism, and analysed these in relation to the principles of liberal feminism. I also considered and evaluated the manner in which the Supreme, High and Magistrates' courts in Namibia dealt with the issue of equality, and compared this with the principles of liberal feminism so as to determine the scope and extent of liberal feminist application in Namibian jurisprudence.

Purpose, importance and limitations of the study

Purpose of the study

The study aims to illustrate the important role and influence of feminist jurisprudence, more specifically the liberal feminist theory, in the Namibian context and how this has affected the equality and protection that women presently enjoy. Furthermore, I challenge the sustainability of the theory in the Namibian context on the basis that the theory was developed on realities

that differ from the realities that exist in Namibia. In addition, the study aims to provide a Namibian and African perspective on the application of feminist jurisprudence.

Importance of the study

A study into feminist jurisprudence will aid the Namibian legal system in the attainment of women's rights and the achievement of gender equality. It will also contribute to the study of jurisprudence from a Namibian perspective and raise a debate as regards the application of certain feminist theories to Namibian jurisprudence and their practicality.

Delimitation of the study

I limit the scope of the study to liberal feminist theory and its application and influence in the Namibian context, especially as regards the equality debate.

Organisation of the study

This study is an analytical exposition of the application and the influence of liberal feminism on Namibian legislation and practice. The first section gives a general background to the research and defines its scope. It introduces the reader to a general outline of how the research was conducted, the literature used and the objective of the research.

The second section goes into detail about liberal feminism and equality. I examine this jurisprudential school of thought in relation to the general theory that characterises it – the ideology of liberalism. The section explores the development of liberal feminism by tracing its historical elaboration through writers such as Wollstonecraft and Mill to the writings of recent liberal feminists. In addition, I consider various writings of other jurists who have contributed and expounded on this school of thought, as well as the various forms of liberal feminism. This section aims to inform the reader of liberal feminism as a feminist jurisprudential school of thought and to give the reader an in depth understanding of the theory. Further, it considers equality, a concept important to liberal feminism. I discuss the way in which gender equality has been employed in the Namibian context as well as the opinion of other authors as to how the legal system interprets this concept.

The third section deals with the application of the theory to the Namibian context. I evaluate the application of the theory to legislation which has been enacted, and consider both domestic as well as international legislation which, as per Article 144 of the Namibian Constitution, are part of Namibian law. The section examines the extent to which the theory has been implicit in the legislation considered and how such legislation has brought about a degree of protection and equality to women. I also consider the possible ways in which

the legislators applied the theory in drafting the laws. In addition, I examine the possible implied ways in which the courts may have applied the theory.

The fourth section reviews the criticism of liberal feminism in relation to its viability in the Namibian context. In determining the relevance of the theory in the Namibian context, I evaluate the criticisms of the theory as well as reasons for this criticism.

The fifth section lays down recommendations as regards the application of the theory; discusses reforms regarding application of the theory in Namibia, and concludes the research.

Liberal feminism and the concept of *equality*

Introduction

The debate concerning the status of women dates back to the ancient Greeks.²² Plato and Aristotle, great philosophers of their time, thought it appropriate to analyse the actual and appropriate role of women in society and many of their ideas²³ “continue to exercise feminist scholarship”.²⁴ During the eighteenth, nineteenth and twentieth centuries, an “awareness” about the rights of women was raised and thus began the movement for the emancipation of women and their equality which became known as Feminism in the political and social spheres of society.²⁵ As time progressed, feminist legal scholarship became part of the movement. Feminist jurisprudence reflects the demands of women to be recognised as a legitimate party to the social contract, governing law and society without regard to race, class, age or ability.²⁶ Feminist jurisprudence has various phases which characterise it; these phases are not entirely different from each other and in some instances intertwine.

According to Barnett,²⁷ the first phase is concerned with male dominance and monopoly under the law. Thus, first phase feminists seek to work within the existing legal system and remove the inequalities of the system without necessarily changing the system itself. The second phase of feminism is concerned with the “legal and societal structure that perpetuates the inequalities” and not with the inequalities that may be suffered. Feminists of

22 Barnett, H. 1998. *Introduction to Feminist Jurisprudence*. London: Cavendish Publishing, at p 3.

23 Their misogynist views include that Aristotle considered women to be deformed version of males.

24 (ibid.).

25 (ibid.:124).

26 Barnett (1998:124)

27 (ibid.).

this phase object to the law and the legal system portraying itself as impartial, objective and rational which in fact disguises law that is engrossed with male constructs and standards. Women are compared to men and their standards and are not defined as their own; the inclusion of gender neutral language in law, for example, does not deal with the problem but rather provides for a façade of gender equality. The third and last of the phases accepts law as gendered but unlike the second feminist phase, rejects the idea that laws “operate consistently, inevitably and uniformly to promote male interests”;²⁸ they state that law is too complicated to be approached in such a holistic manner and rather propose that it is the manner in which law deals with various problems and in its operation that its gender bias is exposed. A discussion on liberal feminism and its principles is necessary to determine its scope of influence in the Namibian context.

Liberal feminism

To have a proper understanding of liberal feminist theory, it is important to discuss the philosophy which underlies it. Liberal feminists use the application of liberal theory from a feminist perspective to advance the rights of women.

Liberalism

Liberal theory underlies much of western legal theory.²⁹ It comprises three principal notions and these are rationality, the maximisation of individual liberty and the control of governmental power through law. Liberal theory assumes that individuals in society are gender, race, class and age neutral. In other words, the theory subsumes that each individual shares the same characteristics and has equal capacities to reason.³⁰ Liberals believe that fundamental human rights are universal and inherent in the individual due to his human status rather than her/his social, political or historical conditions. Liberalism sees the individual as an independent being that joins social life for the sole purpose of furthering self-centred interests and values. It treats individual wants and desires as things developed prior to and in isolation from the collective and political sphere. The fundamental thought underlying liberalism is the requirement that the state remain neutral to competing conceptions of “good” as a result of the pluralistic nature of society. Central to western liberalism and the idea of maximisation of individual liberty is regulation of the public sphere of life and the private sphere.³¹ John Locke, an early theorist,

28 (ibid.).

29 (ibid.:121).

30 Baehr, AR. “Liberal Feminism”. In Zalta, EN (Ed.). *The Stanford Encyclopedia of Philosophy*. Available at <http://plato.stanford.edu/archives/fall2008/entries/feminism-liberal/>; accessed on 28 April 2012.

31 Barnett, H. 1997. *Sourcebook on Feminist Jurisprudence*. London: Cavendish Publishing, p 135.

advocated a limited government under contract between government and the people, which if breached by the government legitimated the withdrawal from the contract by the people.³² Therefore, the state must exercise only minimal control over the private sphere, leaving the individual free to fashion his/her own plan and pursue his/her own idea of the good.³³ Liberalism sees the individual as the ultimate subject of moral value. It postulates the idea that moral choices are a private affair. By its uncompromising emphasis on self-interest and individualism, liberalism separates the individual from his community.³⁴

However, Barnett questions the practicality of liberal theory and states that the empirical evidence suggests against true equality as postulated by liberalism, as society in reality is “sexist, racist, ageist and is divided by social class in a manner which confounds classification along the lines of sex, race and age”.³⁵

Liberal feminism

Liberal feminism is a feminist critique of liberalism and its general principles. Liberalism suggests that the achievement of formal legal equality is an adequate truth. However, this notion, as Barnett argues, does not portray the reality of society.³⁶ The relationship that exists between feminism and liberalism can be described as “extremely close but also exceedingly complex”.³⁷ This is understandable as the private/public sphere dichotomy of liberalism is the very principle that feminism rejects. As a result, defining the theory of liberal feminism within certain confines is not advisable as different views from different perspectives make up this jurisprudential school of thought.³⁸ Generally, the theory places emphasis on the fact that men and women are both regarded as human and, as a result, ought to have equal rights and opportunities. Freeman³⁹ states that liberal feminism is rooted in the belief that women have the same reasoning functionalities as men and thus the rights enjoyed by men should be extended to women. On this basis, Freeman explains that women, being just as rational as men, should, based on this same “rationality”, have equal opportunity with their male counterparts in exercising their “rational, self-interested choices”.⁴⁰

32 (ibid.:97).

33 Anyangwe, C. 2005. *An Outline of the Study of Jurisprudence*. Lusaka: UNZA, p 381.

34 (ibid.:382).

35 Barnett (1998:96).

36 (ibid.:96).

37 Pateman, C. 1989. “The Disorder of Women”. In Barnett, H. 1997. *Sourcebook on Feminist Jurisprudence*. London: Cavendish Publishing, p 143.

38 Roederer, C & D Moellendorf. 2004. *Jurisprudence*. Cape Town: Juta & Co., p 301.

39 Freeman, MDA. 1994. *Lloyd’s Introduction to Jurisprudence*. 6th Edition. London: Sweet and Maxwell, p 1106.

40 (ibid.).

Barnett states that liberal feminists see both the merits and demerits of liberal theory and seek to unmask and rectify the inequalities that liberalism disguises. The task is thus to act within the dominant ideology and to seek to eliminate gender-based discrimination without challenging the ideology itself and while remaining faithful to the liberal theory of equality and autonomy.⁴¹ This is attained through the elimination of laws and practices that prevent women from accessing the public sphere.⁴² Cain⁴³ opines that the liberal feminist school of thought builds on the assertion that women are just as rational as men and therefore as a result, should have equal opportunity to exercise their rights to make rational decisions. She also makes reference to the equality doctrine, discussed in greater detail below, which she regards as the major doctrine that underlies the liberal feminist school of thought.⁴⁴ Roederer and Moellendorf characterise liberal feminism by its argument that men and women are considered the same and are considered to be able to do the same things. The theory has as its goal the identification and elimination of gender roles and bias that exist in the law and society through education, legislation, litigation and law reform.⁴⁵

Generally, most of the authors agree that liberal feminism is based on the liberalist theory and that its main concepts are equality based on equal opportunity, autonomy and self-rationality.

PUBLIC/PRIVATE DICHOTOMY

Until very recently women were exclusively portrayed as nurturers and care givers and were relegated to the background of the home. This was as a result of the principle in liberalism which creates different spheres of the public and the private. The public sphere is the sphere where the state may fully intervene while only minimal state intervention is permitted in the private sphere. Lacey⁴⁶ argues that the private/public dichotomy is the government's way of "washing its hands" of any responsibility the state may have in terms of the private world, thus removing the political aspect of the disadvantages that are suffered in that "world" and which "spill" over to the public sphere.

41 Barnett (1998:126).

42 (ibid.).

43 Cain, PA. 1993. "Feminism and the Limits of Equality", as cited in Weisberg, DK (Ed.). 1993. *Feminist Legal Theory: Foundations*. Philadelphia: Temple University Press, p 237.

44 The general principle underlying this theory's equality doctrine is that men and women are essentially the same and should be treated the same.

45 Roederer & Moellendorf (2004: 301-302).

46 Lacey, N. 1998. *Unspeakable Subjects: Feminist essays in Legal and Social Theory*. Oxford: Hart Publishing, p 77.

Taub and Schneider⁴⁷ critically analyse the distinction made between the public and private spheres by the doctrine of liberalism. They argue that the relegation women endured through their exclusion from the public sphere of government has led to the domination of men over women in both the private and public spheres. Through the application of the principles of liberalism, the law regulated only the public aspect of a person's life and left the person to deal with the private sphere as he/she chose. Thus, in reality, the law prevented women from participating in certain public sphere activities but then, on the tenets of freedom and autonomy, stated that it would not interfere in the private sphere. This resulted in a situation where men exercised their dominance in both the private sphere, as the law claimed that it could not interfere, and the public sphere, to which only men had access.⁴⁸

FOUNDATIONAL BASIS OF LIBERAL FEMINISM

Mary Wollstonecraft has been labelled the founder of liberal feminism, although feminist thinking in law was not recognised until the 1960s and 1970s.⁴⁹ In her book *Vindication of the Rights of Women*, Wollstonecraft argued for equality at a time when that was uncommon. However, while rationalising that on an intellectual level, men and women had the same capabilities, Wollstonecraft accepted the traditional role of women. This may have been a result of the influence of the ideology prevalent during that period, where women were regarded as naturally inferior to men.⁵⁰

John Stuart Mill is considered one of the early proponents of feminism and specifically, liberal feminism. In his book, *The Subjection of Women*,⁵¹ he states that the legal subordination of women to men is wrong in itself, and equates such legal subordination as being a chief hindrance to human development. He advocates its replacement with a principle of perfect equality wherein no power or privilege evidently benefits one or causes disability to another.⁵² He argues that if the authority of men over women had been the result of a "conscientious comparison between the different modes of constituting the government of society", or if different social forms of government such as women over men, or equality of both sexes, or a mixed form of such had been

47 Taub, N & EM Schneider. 1993. "Women's Subordination and the Role of Law" as cited in Weisberg, DK (Ed.) 1993. *Feminist Legal Theory: Foundations*. Philadelphia: Temple University Press, p 9.

48 (ibid.:13-19).

49 Roederer & Moellendorf (2004:301).

50 Wollstonecraft, M. 1792. *Vindication of Rights of Women*. New York: WW Norton, as cited in Barnett, H. (1998:38).

51 Mill, JS. 1989. "The subjection of Women", as cited in Mill, JS. 1989. *On liberty and Other Writings*. Cambridge: Cambridge University Press. In Barnett, H. (1997:135-141).

52 Mill (1989:119).

tried and based on experience and it had been concluded that women were “better off” under the rule of men and relegated to the sphere of the private home, and if under such circumstances the authority of men over women was adopted, then such adoption could be considered fair on the basis of its being the best for that particular period.⁵³ However, he states that this has never been the case. He argues that the system that operated at this time, and which was widely supported, in which the weaker sex was subordinate to the stronger one is entirely based on theory as it had never been tested for it to be assumed that that was what was ideal for the society at the time. He further states that the adoption of the system was not deliberate after the consideration of other systems but simply arose from the earliest possible times where every woman was in bondage to some man.⁵⁴

Mill goes even further to explain the plight of women by equating the treatment of women at that time to slavery, most especially in marriage. He reasons the female was still in a state of dependence and it is this dependence that he equated to slavery. During his lifetime, slavery had been abolished, even though it had gone through some mitigation and modifications.⁵⁵ Mill questions the survival of this form of slavery, and he is astonished to find that even the anti-slavery advocates considered the subjection of women to men normal.⁵⁶

Mill⁵⁷ also expresses how marriage has become the required objective of every woman; she is expected to get married, start a family and take care of the family. Prior to marriage, she was subject to the authority of her father and when married, her husband had certain rights over her that she did not have and could exercise prejudiced power over her being, and over her affairs.⁵⁸ This means that women during Mill’s time had no free will before, during or after marriage. The wife and her husband were considered “one” in law, in which the husband implicitly became the couple’s representative. Such treatment, Mill asserts, is to be equated with a deeper, much worse kind of slavery from which the woman has no escape. Mill describes it as follows:

Not so the wife: however brutal a tyrant she may unfortunately be chained to – though she may know he hates her, though it may be his daily pleasure to torture her, even though she may feel it impossible not to loathe him – he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her own inclinations.⁵⁹

53 (ibid.).

54 (ibid.:122).

55 (ibid.:127).

56 (ibid.).

57 (ibid.:146).

58 (ibid.).

59 (ibid.:148).

From his writings, it is clear that Mill criticises the manner in which the public/private sphere division had led to the subjection of women to men and proposes a solution by granting women the same rights that men also enjoy.

Of course, Mill is not without his critics. Mill is criticised for his views on women's domestic functions such as child bearing and child rearing which he describes as an "animal function". Thus, a function in the domestic sphere, traditionally women's preserve, is considered something that falls outside culture; this is considered evidence of "masculinist bias" in Mill's thought.⁶⁰ In addition, he is criticised as accepting the "traditional gender based division of labour within the family".⁶¹ This he does by assuming that equality before the law can still grant women emancipation and equality with men despite the retention of traditional gender roles. Therefore, the woman is granted the right to vote and be active in the public sphere but is still required to attend to taking care of the home and the children. Furthermore, although he is considered the "father" of liberal feminism, I cannot ascertain whether Mill's request for women's rights is for the purpose of women's equality or rather just a means to attaining utilitarianism.

In the midst of all this criticism, it should be noted that Mill developed his essay during the Victorian period, yet his principles are still applicable today and still form the bulk of what is now liberal feminism. As Szapuova describes it: "... there is no doubt that *The Subjection of Women* may be regarded as the most important and influential contribution to Enlightenment feminist theory".⁶²

Sameness/difference

Liberal feminism, as has been stated above, has as one of its foundational principles the belief that all women, like men, are rights bearing, autonomous human beings. This entails that rationality, individual choice, equal rights and opportunity, important concepts under liberalism, are also equally important under liberal feminism. Equality is an important concept that is always discussed among liberal feminists especially as regards its definition and scope. Below is a discussion on the scope of equality from the perspective of liberal feminists.

Williams is widely known for her equality discourse from the liberal feminist perspective. She discusses the attainment of equality for women through an

60 Szapuova, M. "Mill's Liberal Feminism: Its Legacy and Current Criticism" from <http://www.google.com.na/url?sa=t&rct=j&q=mill's%20liberal%20feminism&source=web&cd=1&ved=0CE8QFjAA&url=http%3A%2F%2Fhrcak.srce.hr%2Ffile%2F10835&ei=H7UpUJLOEI23hAei7YHoAw&usq=AFQjCNETjrommaBd-Rm5Y1ETP6BpQomVaA>; accessed on 10 May 2012.

61 (ibid.:189).

62 (ibid.:190).

analysis of the relationship that exists between culture and the way that courts have dealt with gender related or sex related cases.⁶³ She states that the courts have always made decisions based on general public opinion prevalent at the time an issue comes before the court, and only in rare cases would the court “temporarily” move ahead of public opinion. On that stance, she states, this has to a certain extent granted a qualified guarantee of equal treatment to women but this move has been in line with changing societal views from one that was predominantly patriarchal to an egalitarian one. She however defends her discussion on the manner in which the courts have dealt with granting women equality by stating that how the courts define equality is in reality important; legal cases are and continue to be a focal point in the debate as to the definition and range of equality.⁶⁴ Through an analysis of the manner in which the courts in the United States have historically dealt with cases about gender and sexual roles, Williams details the progress the courts made in striking down the sex-based classifications and enforcing the equal treatment of women.⁶⁵ She concludes that the courts reached that stage because in reality, outside the court room, things had also changed as women were no longer regarded as home makers or dependants.

I do not entirely agree with her argument as there are many instances where the courts have had to move ahead of public opinion, especially in the defence of the rights of minorities.⁶⁶ Nonetheless, especially under the scope of gender equality, most court decisions are based on the realities that women are already experiencing. Thus, rather than being a game-changer, the court’s decision is in reality a formal declaration and legal acceptance of what already exists.⁶⁷

Williams goes further and concludes that feminists have a choice in that they could claim equality for women on the basis of the similarities they share with men, or they could argue for special treatment for women on the basis of fundamental sexual difference. She contends that women cannot have it both ways and further argues that “in fighting only for the privileges associated with masculinity and not the risks, feminists reinforce cultural assumptions about

63 Williams, W. (1982:15). “The Equality Crisis: Some Reflections on Culture, Courts and Feminism”, as cited in Bartlett, KT & R Kennedy. 1990. *Feminist Legal Theory: Readings in Law and Gender*. Boulder: Westview Press.

64 (ibid.:18).

65 For the detailed discussion check Williams (1982).

66 This comes down to a discussion on the scope of application of value judgments when the courts make a decision especially in difficult cases. The courts are always required to find a balance in the application of value judgments versus their constitutional duty to uphold and protect individual rights. However, this is beyond the scope of my essay.

67 An example of such is the Myburgh case where the courts declared marital power unconstitutional after the promulgation of the Married Persons Equality Act 1 of 1996. The case is dealt with in detail elsewhere in my paper.

femininity which ultimately sustain gender inequalities".⁶⁸ Her choice is more in favour of equality based on the similarities that exist between men and women.

In another article, "Equality's Riddle: Pregnancy and the Equal treatment/ Special Treatment debate", Williams⁶⁹ explores application of the equal treatment principle and illustrates it with reference to circumstances of pregnancy. In her article, she details the doctrinal framework of equal treatment in relation to pregnancy. In general terms, her argument is that gender equality requires identical treatment of the sexes without regard to pregnancy. Instead of viewing pregnancy as a unique condition which requires special treatment, exponents of the equal treatment doctrine contend that pregnancy should rather be viewed as a physical condition that affects an employer's ability to work. She argues that the question should be how pregnancy is different and not whether it is different.⁷⁰ The focus, she states, should be on whether the difference should be deemed relevant in the context of employment rules. Williams considers all the critiques of the equal treatment doctrine vis-à-vis the special treatment doctrine, and concludes that the equal treatment doctrine is preferred. This conclusion she makes on the basis that the equal treatment doctrine applied to pregnancy will discourage employers and the State from placing in force rules that structure the family along traditional sex based lines and would rather encourage them to respond to pregnancy as a "disability" which temporarily affects their workers.

Krieger and Cooney⁷¹ criticise Williams' argument. In their article, the authors discuss what they consider the limitations of the equality doctrine through analysis of an American case.⁷² They describe how the equality doctrine applied by liberal feminists promotes the formal appearance of equality over the equality of effect (that is, substantive equality).

68 Williams (1982:18).

69 Williams, WW. 1984. "Equality's Riddle: Pregnancy and the Equal treatment/ Special treatment debate", as cited in Weisberg, DK (Ed.). 1993. *Feminist Legal Theory: Foundations*. Philadelphia: Temple University Press, p 128.

70 (ibid.).

71 Krieger, LJ & PN Cooney. 1983. "The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality", as cited in Weisberg, DK (Ed.). 1993. *Feminist Legal Theory: Foundations*. Philadelphia: Temple University Press.

72 *Miller-Wohl v Commissioner of Labour & Industry* 685 F.2d 1088 (9th Cir. 1982). In this case, the court in the United States rejected the argument relied on by the plaintiff that the Montana Maternity Leave Act which deals with pregnancy and employment matters was discriminatory in that it was not formally equal.

Littleton,⁷³ on the other hand, approaches the equal treatment/special treatment debate from another angle. She discusses the symmetrical approach which “attempts to equate legal treatment of sex with that of race” and denies that there are in fact any significant natural differences between men and women, whereas the asymmetrical approach accepts that women and men are different or may differ and that women and men are often asymmetrically located in society. She explains that most feminist theorists tend to support the symmetrical approach on the basis that it is the only way one can avoid a return to the separate spheres ideology. There are two models under the symmetrical approach which she classifies as assimilation and androgyny.⁷⁴ The assimilation model, according to her, states that women if given the chance really can be like men and is the one that is usually employed by the courts in issues of sex classifications. The second model, the androgyny model suggests that women and men are or could at least be very similar and thus argues that equality requires that a golden mean be found and both sexes be treated as androgynous persons. Littleton is not in favour of this model as it entails finding a middle path which she believes no person, most especially not the courts, can do.

Further into her article, she lists different models that the asymmetrical approach employs.⁷⁵ These are the special rights, accommodation, acceptance and empowerment models. She develops her own model which is the “equality as acceptance” model and argues that in accepting that women differ, society must do more than just accommodate the difference. The model stipulates that rather than focus on the sources of the differences, focus should be placed on the consequences of the difference.

Catherine Mackinnon⁷⁶ in her article *Difference and Dominance* altogether rejects the same/difference or equal treatment/special treatment debate and states that the problem lies not in the debate but rather in the dominance that men exercise over women. She criticises both the difference doctrine and the sameness doctrine, the latter endorsed by liberal feminism. She rejects this ideology on the basis that the standard against which gender neutrality is measured is the male standard. She criticises the sameness doctrine for granting benefits to men that were meant solely for women. For example, she

73 Littleton, CA. 1987. “Reconstructing Sexual Equality”, as cited in Bartlett, KT & R Kennedy, R. 1990. *Feminist Legal Theory: Readings in Law and Gender* Boulder: Westview Press, p 35.

74 (ibid.:36).

75 (ibid.:37-39).

76 MacKinnon, CA. 1984. “Difference and Dominance: On Sex Discrimination”, as cited in Barnett, H. 1997. *Sourcebook on Feminist Jurisprudence* London: Cavendish Publishing, p 211.

states that as a result of the sameness standard, men now have the same access to being granted custody in a custody battle and they are entitled to the same amount of alimony after divorce. This grants men a certain preference which the courts deny, as doing that will then be taking gender into account which they are not permitted to do. She further contends that the fact that the equality doctrine rests on the basis of liberalist ideology does not help matters, as it is like “liberal idealism talking to itself”. She further condemns the doctrine for its failure to realise that the difference of women from men is equal to the difference of men from women. Mackinnon proposes an approach which she thinks deals better with the granting of equality to women. In this approach, social power that men have over women is said to be the cause of the inequality that exists between them. This approach is termed the “dominance approach” as she argues that rather than focusing on the difference between men and women, feminists should concentrate on identifying how the ways in which men dominate women, and the ways in which women are subordinate to men, have been created and perpetuated.

Joan Williams⁷⁷ also rejects the term equality doctrine. Although Williams is more critical of the differential/special treatment doctrine, she states that assimilationists may have caused women to be more prone to certain gender disabilities that have important economic consequences as a result of their focus on gender neutrality. However, unlike MacKinnon, she does not do away with the gender neutrality concept but rather states that gender should neither be ignored nor misrepresented but that rather it should be deinstitutionalised and deconstructed. In other words, Williams is suggesting a post-modern approach in dealing with the attainment of gender equality.

Most feminist theories that reject the arguments of liberal feminism do so because of its conception of equality and though they praise it for paving the way for equality and the entrenchment of the rights of women, many still debate its relevance. However, from a Namibian perspective, the theory could still be viable. Unfortunately, minimal research has been done on feminism in Namibia and in Africa at large, with the result that feminist jurisprudence in Africa is still in its early developmental stage.

The concept of equality

Equality is the concept that underlies feminism regardless of what form or from what perspective it is considered. Thus it is imperative to consider the manner in which the concept of equality has been applied and interpreted in Namibia. The subject on equality is very broad and much can be said on it. But for purposes of this research, only the general interpretation of the concept and its specific application to sex and gender will be considered.

77 Williams, JC. 1989. “Deconstructing Gender”, as cited in Bartlett, KT & R Kennedy, 1991:95.

Equality is a concept that is difficult to define and this was expressed by O'Linn JA in the case of *S v Vries*⁷⁸ as follows:

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

The principle of equality in Namibia has been exhaustively discussed, and this is not surprising considering the historical social past of the country. Article 10 of the Namibian Constitution provides for equality in Namibia and Hubbard⁷⁹ states that the context in which it is placed in the Constitution connotes substantive rather than formal equality. Article 10 consists of two sub-articles. The first grants to all persons equality before the law, whereas the second prohibits discrimination on the "basis of sex, race, colour, ethnic origin, religion, creed or social or economic status".⁸⁰

Article 10 was first referred to in the case of *S v Damaseb and Another*.⁸¹ In this case, Frank J remarked in passing that the cautionary rule in rape cases could be in violation of the Constitution in that it infringed the right to equality before the law irrespective of one's sex and, because most rape complainants at the time were female, it discriminated against women.⁸² Although the Article was merely referred to in this case and not discussed, the judge implicitly interpreted the cautionary rule to be unconstitutional, making it the first case to interpret Article 10.

Equality can be defined and applied from two perspectives. Mapaure⁸³ lists the formalist approach and the substantive approach that the courts have applied in defining equality as it has been stipulated in the Constitution. The formalist approach, according to Mapaure, is based on the notion of equal treatment and supposes that characteristics peculiar to an individual should not be used in determining that individual's right to a social benefit or gain.⁸⁴ Nevertheless, it disregards the fact that the application of rules to groups or persons who are not of the same level could produce unequal results. On the other hand, the

78 *S v Vries* 1998 NR 24 (HC) at p 276 G-H.

79 Hubbard, D. 2010. "The Paradigm of Equality in the Namibian Constitution: Concept, Contours and Concerns" available at www.kas.de/upload/.../namibialconstitution_2010/hubbard.pdf; accessed on 11 August 2012, p 216.

80 Article 10(1) and 10(2) of the Namibian Constitution.

81 *S v Damaseb and Another* 1991 NR 371 (HC).

82 (*ibid.*:375 C-F).

83 Mapaure, C. 2010. "Decoding the Right to Equality: A Scrutiny of Judiciary Perspicacity over 20 years of Namibia's existence", *Namibia Law Journal* Volume 2(2): 31.

84 Mapaure (2010: 33).

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substantive approach defines equality before the law by acknowledging that persons are different and have differing circumstances that may affect them and thus “seeks to sew the thread of social redistribution into the interpretation and application of the right to equality”.⁸⁵ Mapaure interprets Article 10(1) as granting absolute equality and is subject to Article 10(2) as well as Article 23 of the Constitution which ensures the substantiveness of equality.

However, Hubbard states that the manner in which Article 10 is placed in the constitution implies that it is exclusively substantive.⁸⁶ Either way, both Mapaure and Hubbard come to the conclusion that the application of equality utilised by the courts is the substantive approach, although Mapaure avers that both formal and substantive approaches are applied in Namibia. Mapaure’s approach is preferred as its application would encompass a wider range of cases. The determination must be made on the facts of each individual case and in a manner in which justice is served.

To illustrate the court’s formalist approach to equality, Mapaure makes reference to the *Beukes* case.⁸⁷ In *Beukes & Another v Botha and Others*,⁸⁸ the courts stated that equality as placed in the Constitution requires that the courts must treat all litigants equally. Although the application of equality was not central to the case, the fact that the court stated that fairness and justice required that litigants be treated equally “equal” attests to the court’s opinion on how equality should be defined.

In spite of the formal interpretation of equality in the *Beukes* case, the courts seem to be more in favour of the substantive approach, probably because of Namibia’s historical past.

Article 10(1) was first judicially considered in the case of *Mwellie v Minister of Works, Transport and Communication and Another*.⁸⁹ In this case, the plaintiff challenged the constitutionality of a provision in the Public Service Act⁹⁰ using the formalist approach. Counsel for the plaintiff argued that the short

85 (ibid.:34).

86 Hubbard (2010:216).

87 Mapaure (2010:33).

88 *Beukes and Another v Botha and Others*. Unreported case. High Court (P) 1 111/2004.

89 *Mwellie v Minister of Works, Transport and Communication and Another* 1995 (9) BCLR 1118 (NmH).

90 Act No. 13 of 1995. Section 30(1) of the Act provides “No legal proceedings of whatever nature shall be brought in respect of anything done or omitted under this act: unless the proceedings are brought before the expiry of a period of 12 months after the date upon which the claimant had knowledge, or after the date on which the claimant might reasonably have been expected to have knowledge of that which is alleged to have been done or omitted, whichever is the earlier date”.

prescription period set in the Act in contrast to the normal prescription period⁹¹ violated his right to equality before the law on the basis that he was being treated unequally from persons who had the normal prescription period. The court by making reference to the political past of discrimination stated that an “absolute application of equality” waters down the purpose for which Article 10 was placed in the Constitution. The court applied the rational connection test in reaching its decision. The rational connection test proposes that in legislation, reasonable classification can be made as long as these classifications are rationally connected to the object of the statute.⁹² Accordingly, the court ruled in favour of the defendant who was the plaintiff’s employer and stated that the time limit was rationally connected to the object of the statute.⁹³

Thus in the case of *Muller v President of Namibia*,⁹⁴ the appellant who had not been permitted to use his wife’s surname in terms of the Aliens Act⁹⁵ wanted the particular section in the Act declared unconstitutional on the basis that it violated Articles 10, 13 and 14. It was held by Strydom CJ (as he was then) that equality in terms of Article 10 does not mean absolute equality but rather equality before persons equally placed and that discrimination as it was stated in Article 10(2) of the Constitution had a prerogative meaning. On this basis, appellant’s appeal was dismissed on grounds that although the section allowed for differentiation, the differentiation did not constitute discrimination. In addition, the appellant was not barred from taking up his wife’s surname but only had to endure administrative formalities and this was not discriminatory.

Bonthuys⁹⁶ analyses and criticises the *Muller* case vis-à-vis the case of gender equality. She states that the respondent’s argument in the case was an “oversimplification” of the formalist and substantive approaches to equality in that a rule not being formally equal did not equate to that particular rule representing substantive equality. The concept of substantive equality aims to test whether the result of different treatment to a previously disadvantaged group would advance their interests.⁹⁷ Bonthuys argues that the *Muller* case decision in actual fact permits gender inequality.⁹⁸ Her argument stems from

91 The Public Service Act 13 of 1995 provides for a prescription period of 12 months for civil claims whereas the normal prescription period is 3 years in accordance with the provisions of Prescription Act 68 of 1969.

92 *Mwellie v Ministry of Works, Transport and Communication and Another* 1995 (9) BCLR 1118 (NmH) at p 1131 C-D

93 (ibid.) at 1139 G, 1142.

94 *Muller v President of Namibia* 1999 NR 190 (SC).

95 Section 9 of Act 1 of 1937.

96 Bonthuys, E. 2000. “Deny Thy Father and Refuse Thy Name: Namibian Equality Jurisprudence and Married Women’s surnames” *South African Law Journal* 117:3 464.

97 (ibid.:466).

98 (ibid.:467).

the realisation that although the legislation seems to favour women, it does so by promoting a capacity that came about as a result of patriarchal values.

The application of patriarchal traditions and practices in modern times can give the illusion that these practices or values favour women when in actuality, they discriminate against them. Bonthuys demonstrates her point by making reference to the rule that there was to be no bond between a father and his illegitimate child. The rule was designed not to benefit a woman but was a punishment and a means to coerce her into marriage with the father of her child. However, the punishment through the implicitly forced marriage became outdated when women became more economically stable.⁹⁹ She contends that in determining whether a particular legal rule which has its origins in patriarchal values is indeed favourable to women, its practical effect should be assessed. On this basis she argues that women do not actually choose to adopt their husbands' surname, as factors such as society and official documentation make it difficult for a woman to retain her surname. This discriminates against women in that women who wish to retain their maiden names carry the burden of convincing state and commercial agencies that they have retained their maiden names after marriage. In addition, the requirement that women lose their maiden names is an indication of the higher societal value placed on boys over girls. Thus, prior to marriage, women cannot bear their mother's surname for administrative and social purposes, and after marriage, are forced to bear their husbands' names. Bonthuys presents this as symbolic of the deep rooted patriarchal values in a society trying to move towards egalitarianism.¹⁰⁰

Bonthuys avers that the courts in the *Muller* case erred in using "tradition" as a reason for dismissing the appellant's argument, and attributed the error to possible naivety or cynicism. She comes to this conclusion on the basis that the now-invoked constitutional norms of non-discrimination were a means of practically and symbolically breaking with past traditions of discrimination; accordingly, "tradition", of all rationales for a judgement, should not have been relied on. Bonthuys implies that the real reason for the court's finding is based on the fact that the opportunity which men are being denied by the discriminatory rule is one which is not "highly valued or valuable".¹⁰¹ She states that the formal discrimination that men experience from the rule is inextricably linked to women's substantive inequality in that it reinforces social pressure on women to assume their husbands' names. Such societal norms do not only

99 This rule has been modified in Namibia through the promulgation of the Child Status Act 6 of 2006 and is no longer as described in the paragraph. Fathers to children born out of wedlock have the same rights as fathers of children born in wedlock and the same applies to the rights of Children born out of wedlock vis-à-vis children born in marriage.

100 Bonthuys (2000:471).

101 Bonthuys implies that the court's judgement was based on patriarchal values that underlie the court's mind-set.

limit women but they also require all members of the society to conform to behaviours which perpetuate patriarchy. She suggests that an argument can be brought forward that rules such as Act 1 of 1937 fuel and maintain a sexist social order which some men might not want to be a part of.

I do not completely agree with her line of reasoning. Her argument, that the formal discrimination that men may experience from the rule is linked to the substantive inequality that women experience, is a wild proposition, and she has failed to take into account that the ability to change surname with or without certain formalities, cannot uproot deeply entrenched social structures. Additionally, there is no empirical evidence from the examples she gives as to the effect of the easy surname change for women and thus her example is a little far-fetched. Furthermore, although it is true that one of the reasons for Strydom CJ's decision was that it was socially accepted that upon marriage women automatically change their surnames to their husbands', it was not the main reason for the conclusion reached. Instead, Strydom CJ reached his decision by relying on the discrimination test. Bonthuys's reasoning indicates her intense commitment to liberal feminism. The court's approach was to apply the principles of substantive equality to the case. In the case of *Myburgh v Commercial bank*,¹⁰² the court rejected the argument that a woman could not be sued because of marital power, stating that even prior to the promulgation of the Married Persons Equality Act, which abolished marital power, it was unconstitutional as it was not in conformity with Article 10 of the Constitution. Hence, Bonthuys's claim fails in this regard; nevertheless, I do agree that Strydom CJ should not have relied, even to the slightest degree, on the grounds of traditional roles, whether it was an application of the discrimination test or not.

Hubbard states that men in Namibia are very defensive about gender law reforms because they are of the opinion that the reforms will discriminate against them or be disadvantageous in some way.¹⁰³ She further states that the courts have not done much to help as they tend to have a deferential attitude toward public opinion, as is evidenced from their past rulings. As a result, inequalities based on current norms are further entrenched.¹⁰⁴ She makes reference to the Muller case where the court held that the rule that women could assume their husbands' surnames without formality "gave effect to a tradition of long standing in the Namibian community that the wife normally assumes the surname of the husband" and thus granted weight to the existing state of affairs.¹⁰⁵ Another illustration of the courts' deference to public opinion

102 *Myburgh v Commercial Bank of Namibia* 2000 NR 257 (SC).

103 Hubbard, D. 2007. "Ideas about Equality: Gender, Sexuality and the Law". In LaFont, S & D Hubbard (Eds). *Unravelling Taboos: Gender and Sexuality in Namibia*. Windhoek: LAC, p 86.

104 Hubbard (2007: 87).

105 (ibid.).

is the Supreme court decision on *Chairperson of Immigration Selection Board v Frank and Another*,¹⁰⁶ where O' Linn JA overruled the decision of the High court and held that the definition of family as contained in Article 14 of the Constitution and understood by the Namibian community did not include same-sex relationships.

After a referral to the United Nations Committee, it was decided that the different rules for men and women in the assumption of surnames indeed amounts to unfair sex discrimination and that a justification of long standing tradition was not enough for the differential treatment.¹⁰⁷ The Committee gave Namibia 90 days to report on what has been done to rectify the problem. Unfortunately, this recommendation has not been heeded, although it is doubtful whether any noteworthy action would result. I appreciate the report by the United Nations; however, I contend that Namibia should focus on more significant instances of sex discrimination and that one must commend the country, most especially as a developing African country, for the progress so far made.

Hubbard contends that the court reliance on "values" as a basis for its rulings reinforces existing gender and sexuality notions over "a new world re-fashioned in light of constitutional ideals".¹⁰⁸ She is of the opinion that the courts and the Constitution should be a source of protection to those who are most vulnerable, and the court's reliance on "long-standing" tradition and public opinion will hamper this duty.¹⁰⁹ There is truth in her argument.

Substantive equality seeks to compensate for past inequalities and recognises that the application of formal equality may result in an inequality in reality, entrenching the existing situation.¹¹⁰ The Namibian Constitution has been described as being committed to the notion of equality and non-discrimination, obviously as a result of the apartheid structure that existed prior to independence.¹¹¹ Thus Article 10 of the Namibian Constitution is considered a very important entrenched right.

The case law that has dealt with the application of the right to equality as entrenched in Article 10 has leaned towards a substantive interpretation of the right, as opposed to a formal interpretation. The difference between the two is that the former requires equal outcomes, taking actual circumstance

106 2001 NR 107 (SCA), at 144-145.

107 Hubbard (2007: 88).

108 (ibid.:90).

109 (ibid.91).

110 (ibid.).

111 Cassidy, EK. 2000. "Article 10 of the Namibian Constitution: A look at the first ten years of interpretation of the rights to equality and non-discrimination and the prediction for the future". In Hinz, MO & Amoo, SK (Eds). 2000. *The Constitution at Work: 10 years of Namibian Nationhood*. Windhoek: UNAM, p 168.

into account whilst the latter requires equal treatment of persons according to some general standard or norm, regardless of the actual circumstances.

Conclusion

The principles of liberal feminism have been outlined, and so has Namibia's approach to the interpretation of equality. Liberal Feminism's concept of equality can be described as a hybrid of formal and substantive equality as it requires men and women to be treated equally whilst also advocating the interpretation of equality as those in similar positions treated similarly, the basic tenet of substantive equality.

Liberal feminism in Namibia

Introduction

Liberal feminism as a theory aims to grant equality and emancipation to women through the application of the "law". It would be of no use to propound the theory if it could not be applied to factual situations. Liberal Feminism has been praised for paving the way for the feminist movement, especially from the legal perspective. Thus, in assessing the theory's scope of influence in the Namibian context, it is important to illustrate the ways in which it has been applied. Below is an exposition of legislation and case law that deal with gender and sex equality with respect to the possible application of liberal feminism.

Legislation

The constitutional provisions and the legislation dealing with circumstances related to gender are prima facie proof of the influence that feminist principles have on the government's aim to achieve gender equality.

Constitution

The starting point for analysis is the Constitution as it is the supreme law of the land and every law of the land has to be in conformity with it.¹¹² Article 23(3) expressly provides for women to be fully and equally equipped and engaged in the participation of the "political, social, economic and cultural life of the nation" and recognises the relegation and discrimination that they have suffered. This Article embodies liberal feminism in that liberal feminism suggests the use of legislation to correct the past injustices that women have suffered. In addition, the Article ignores the public/private sphere dichotomy which prejudiced women and encourages the implementation of legislation

112 Article 1(6) of the Namibian Constitution Act 1 of 1990.

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and application of policies that ensure that women are active and protected in both spheres. Article 95 of the constitution stipulates policies which the government is required to implement for the general welfare of the Namibian people. The first that is stipulated in Article 95(a) is a policy directing the government to enact legislation which ensures equal opportunity for women to enable them to participate in all aspects and spheres of Namibian society. The wording used, "equality of opportunity", is the very same phrase that liberal feminists use to explicate the concept of equality. In addition, the use of legislative enactments as a means of achieving the equality of opportunity is the suggestion that liberal feminists propound for the achievement of gender equality. The two articles discussed above directly deal with the achievement of gender equality.

One of the aims of liberal feminism is to guarantee the equality of men and women in marriage. Article 14 of the Constitution expressly provides for the equality of rights at marriage, during the marriage and at its dissolution. In addition, Article 4 of the Constitution prescribes the same formalities for citizenship, irrespective of whether the spouse is male or female; thus trumping the principle which prevented spouses and sometimes children of women nationals from attaining the citizenship of the woman's country.¹¹³ These articles can implicitly be said to be in line with the liberal feminist principle of equality.

In addition, Article 10 provides equality and prohibits discrimination on the grounds enumerated therein. Article 10 has been comprehensively dealt with in the previous section.

Statutes

The Local Authorities Act¹¹⁴ was one of the first legislative enactments of affirmative action for women although it applied only to the first and second local authority elections. The Act had the effect of dramatically increasing women's presence on local councils and thus balancing the proportion of women vis-à-vis men. The Act promotes the representation of women in the public sphere.

The Married Persons' Equality Act¹¹⁵ specifies equality of persons within marriage and does away with the legal definition of men as the head of the

113 See *Attorney-General of Botswana v Unity Dow* (1992) LRC (Const) 623 (Court of Appeal). The High court and court of appeal of Botswana upheld a challenge to the provisions of Botswana's nationality law, which did not permit a Botswana woman married to a non-Botswana national to pass on her citizenship to the children of the marriage. The Convention of the Elimination of all Forms of discrimination against women was relied on to interpret the constitutional guarantee of equality.

114 Local Authorities Act 23 of 1992.

115 Married Person's Equality Act 1 of 1996 herein referred to as Act 1 of 1996.

house. It also provides women who are married in community of property the same access to bank loans and requires that any immoveable property belonging to the estate be registered in both of the spouses' names. The Act abolished marital power and granted equal rights to the spouses in terms of matrimonial property, especially in circumstances where one is married in community of property. Marital power was a principle of Roman Dutch law which allowed a husband to acquire power over the person and property of wife upon marriage.¹¹⁶ The Act granted women equality with men and by abolishing marital power¹¹⁷ recognised the autonomous individuality of women. Women now have their own identity and are recognised as their own person with the choice to do as they legally wish with their property and proprietary rights. This corresponds with the principles of freedom and autonomy postulated by liberal feminists.

Described as one of the most progressive laws on rape,¹¹⁸ the Combating of Rape Act¹¹⁹ is an embodiment of the principles of liberal feminism. The gender neutral definition of rape¹²⁰ contained in it is a demonstration of the principle of liberal feminism that views men and women as equal and the differences between men and women as socially created. Rape, prior to the commencement of the Act, was a crime that was defined as the unlawful sexual intercourse with a woman against her consent. The widened scope of rape as a crime is evidence that the legislation intended recognising the possibility of men being raped. In addition, in expanding the definition, they implicitly reject the idea of women being lesser and weaker beings at the mercy of their higher beings, men. In terms of section 2(3) of the Act, marriage or any other relationship may not be relied on as defence against rape. Namibia is classified one of the few countries that has made marital rape a crime and this goes a long way towards ensuring gender equality as it dispels the notion that women are the sexual property of their husbands.¹²¹ Through the recognition of marital rape in the Act, the legislators also reject the idea of a woman being the sexual object of her husband, and by implication, acknowledge her right to free choice which includes the right mutually to make a decision with her husband when to engage in sexual interaction. This is a clear application of the principles that liberal feminism embodies. In addition, the law imposes stiff sentences for persons who may be found to have violated the Act, thus

116 UNAM & SARDC-WIDSAA. 2005. *Beyond Inequalities: Women in Namibia*. Windhoek & Harare: UNAM & SARDC, p 9.

117 Sections 2 and 3 of the Married Persons Equality Act.

118 Horn, N. 2008. "International human rights norms and standards: The development of Namibian case and statutory law", as cited in Horn, N & A Bosl (Eds). 2008. *Human Rights and the Rule of Law*. Windhoek: MacMillan Namibia, p 106.

119 Combating of Rape Act 8 of 2000 herein referred to as Act 8 of 2000.

120 See section 2 of the Combating of Rape Act for an extensive, gender neutral and broad definition of *rape*.

121 Horn (2008:106).

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implicitly appreciating the gravity of the offence. It also offers protection programmes for persons who are survivors of the rape with regard to their privacy and the delivery of their testimony.

The Combating of Domestic Violence Act¹²² aims to provide protection to those who suffer from domestic violence by explaining what the term entails and providing legal protection for those who may be victims and simpler procedures for their protection. Although the main goal of liberal feminism is gender equality in the public sphere, the theory is concerned with private sphere issues to the extent that they influence women's equality in the public sphere. Domestic violence influences women's equality in the public sphere in that women who are victims of domestic violence may not be able to give optimal performances in the public sphere as a result of the violence. Thus the promulgation of Act 4 of 2003 can be said to be an implicit, although remotely so, application of the principles of liberal feminism.

Another legislative piece which brought law reform to the area of gender is the Maintenance Act.¹²³ The Act makes provision for the payment of maintenance and its enforcement. The Act repealed the 1963 Act and changed the way in which maintenance was dealt with legally. For instance, the Act allows for pregnancy and other medical costs related to the pregnancy to be shared between the two parents. It stipulates new methods of enforcement when maintenance orders are not being paid and enforces a duty of maintenance in terms of the Act irrespective of what customary law demands. By requiring that both parents be involved in the costs, it implicitly rejects the idea of child rearing as a solely female function.

The Co-operative Act¹²⁴ requires that any co-operation which has a substantial number of women members must ensure that there is at least one woman on its board, as a means to increase representation of women in management positions. It also provides for women-only co-operatives, as a way to help women become more comfortable with business management. Although not specifically liberal feminist, the requirement that a woman be on the board is an application of feminist jurisprudence methodology which requires that theories be based on the realities of women. Liberal feminism suggests the implementation of law to advance women economically and to balance the economic position that women are in. The requirement that a woman be on the board of the co-operative is an application of a general principle of Feminism where women are used to represent the position of women.

As has been stated above, the Communal Land Reform Act¹²⁵ grants a widow the right to remain on communal land after the death of her husband, regardless

122 Combating of Domestic Violence Act 4 of 2003.

123 Maintenance Act 9 of 2003.

124 Co-operative Act 23 of 1996.

125 Act 5 of 2002.

of whether she remarries or not.¹²⁶ This law is an affirmation and application of the liberal feminist principles of freedom and autonomy of the individual, as women are recognised as autonomous beings and not dependants of either their father or husbands. Consequently, the patriarchal concept of women's dependence on a male figure is dispelled from a customary law perspective, which is a significant step of reform for that aspect of law.

The Children status Act¹²⁷ grants equal rights from childbirth in respect of children born outside of wedlock.¹²⁸ This authorisation granted equally to both parents is the application of liberal feminist principle. By granting equal rights to custody, parliament has tacitly recognised that women are no longer solely nurturers and home-keepers and should not be relegated to the private sphere, and that a man is as capable of raising a child as a woman is; thus the determining factor in custody is what is considered to be in the best interest of the child rather than the marital status of either of the child's parents.

The former Traditional Authorities Act¹²⁹ required that traditional authorities promoted affirmative action amongst the members of that community especially by promoting women to positions of leadership. However, to make the legislation more gender neutral, the presently applicable Act, the Traditional Authorities Act¹³⁰ uses the phrase "promoting gender equality with regard to positions of leadership". The intervention of the law in the election of traditional authorities has economic consequences and politically has provided for a certain level of emancipation for women where previously they were disadvantaged by customary law; a clear application of the principle of liberal feminism and of the law of the constitution.

Another legislative piece that applies the liberal feminist principle is the Affirmative Action (Employment) Act.¹³¹ The Act provides for affirmative action for previously disadvantaged groups – a group to which women belong - in the employment arena. One of the aims of liberal feminism is the elevation of women to a more economically independent position and this is what the Affirmative Action Act does by requiring employers to consider the disadvantaged groups when employing.

The Labour Act¹³² is clearly indicative of the principles of liberal feminism, especially as regards pregnancy laws. First, the Labour Act entrenches a principle applicable in Article 10 of the Namibian Constitution: the prohibition

126 Section 26(2) of the Communal Land Reform Act 5 of 2002.

127 Act 6 of 2006.

128 Section of the Children's Status Act of 2006.

129 Traditional Authorities Act 17 of 1995.

130 Traditional Authorities Act 25 of 2000.

131 Affirmative Action (Employment) Act 29 of 1998.

132 Labour Act 11 of 2007.

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of discrimination on the grounds of sex, among others, thus re-emphasising the non-tolerance for discrimination on whatever grounds it is based. Section 107 of the Act prohibits discrimination or harassment on the grounds enumerated therein and provides for redress from the labour court. It makes specific reference to unfair discrimination based on sex and defines the term. Section 26 states after completing six months' continuous service, a pregnant employee is entitled to four (4) weeks' leave before the expected date of confinement and to at least eight (8) weeks after her date of confinement. The employee must furnish the employer with a signed medical certificate confirming the expected date of confinement before taking maternity leave and a medical certificate confirming the actual date of confinement on her return from leave.

During her maternity leave, an employee is entitled to receive all remuneration payable in terms of her contract of employment except the basic wage. In terms of the Social Security Act,¹³³ the employee may claim payment from the Social Security Commission for the prescribed portion of her basic wage. It should be noted that the Employer is not prohibited from paying an employee her basic wage during the period of maternity leave, but neither is the employer obliged to do so. Should complications arise from pregnancy or delivery which requires extended maternity leave and the employee has no sick leave remaining, the maternity leave may be extended for one (1) month. An employee may not be retrenched during her maternity leave.¹³⁴ Thus it caters for pregnancy, although not as any other disability which proponents of liberal feminism require.

Below is an analysis of legislation which directly or indirectly promotes sex discrimination and the way in which the application of liberal feminism principles may reverse the discrimination.

In Namibia sex work is governed by the Combating of Immoral Practices Act.¹³⁵ The Act criminalises a range of activities around prostitution without directly making sex for reward illegal. Hubbard states that although the Act is intended to be used against both the client and the sex worker, only the sex workers, who are predominantly women, are prosecuted in practice. In 2002, the high court in *Hendricks and Others v Attorney General, Namibia and Others*¹³⁶ found certain aspects of the brothel definition in the Combating of Immoral Practices Act unconstitutional on the grounds that the qualification of the brothel as a place where "persons ... visit for the purpose of having

133 No 34 of 1994.

134 Law Society of Namibia. 2012. *Labour Law: An overview of the relevant provisions of the Labour Act, Act 11 of 2007*. Windhoek: The Law Society of Namibia, p12.

135 20 of 1980.

136 2002 NR 353 (HC).

unlawful carnal intercourse”¹³⁷ was not properly defined, violated certain rights and was not practicable in the present society in which we reside. However, that was the only part of the Act that the court declared unconstitutional. As regards other provisions which were raised as unconstitutional by the plaintiff, the court held that the morals and standard of decency in Namibian society required that a prohibition be placed on the maintaining of brothels. The court has been criticised by Hubbard for reaching its decision by relying on assumptions, rather than the reality of the situation or statistics.¹³⁸

Abortion in Namibia is regulated by the Abortion and Sterilisation Act.¹³⁹ The statute restricts legal abortion to only three circumstances. These circumstances are: where the pregnancy endangers the mother’s life, or poses a threat to her physical or mental health; where there is a serious risk that the child will suffer from a serious, permanent physical or mental defect, or where the pregnancy is as a result of rape or incest.¹⁴⁰ Abortions performed which do not fit under the circumstances mentioned in the relevant section are prohibited and persons involved will be criminally liable. The prohibition on abortion is against a woman’s right to make her own choices privately and thus contravenes the liberal feminist principle of freedom and autonomy. Namibian women sometimes travel to South Africa for abortions, or have backstreet abortions which put their health at risk. The prohibition further perpetuates the inequality that women suffer in that women in circumstances that are uniquely experienced by females are forced to put their lives at risk for a backstreet abortion if they have reasons for it other than the above.

The Native Administrative Proclamation¹⁴¹ affects the marriage and estate devolution of black Namibians. In terms of the ordinance, black persons married north of the police line are automatically married out of community of property.¹⁴² This entails that if a marriage union dissolves, the property which may have been accumulated by the spouses over the years will become the property of the spouse in whose name the property is registered. In most instances, the property is registered in the name of the husband and this indicates that the wife would be at a disadvantage as the ability to own, control, and access property are affected. This results in a situation where the woman is economically dependent on her husband, an indirect violation of her right to equality. And in most instances, women may have contributed to the matrimonial home through the raising of the children and the upkeep of the

137 Section 1 of the Combating of Immoral Practices Act 21 of 1980.

138 Hubbard (2007:123).

139 Act 2 of 1975.

140 Section 3 of the Abortion and Sterilisation Act states the circumstances under which an abortion may be procured and the procedure for the abortion.

141 15 of 1928.

142 Section 17(6) of the Native Administrative Proclamation 15 of 1928.

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home which may not be recognised as substantive in case of divorce, or death of the husband.¹⁴³ This statute not only discriminates on the basis of race but also allows for implied discrimination on the basis of sex.

The Estates and Succession Amendment Act¹⁴⁴ 15 of 2005 repealed section 18 of the Native Proclamation Ordinance which discriminated on the basis of race as regards the devolution of the estate of a person who had died intestate.

The law affected the rights of women in that it requires that the devolution of a black person's estate was to be according to the customary laws of that person. Most customary laws discriminate against women as they are based on patriarchal principles. Hubbard criticises Act 15 of 2005 on the grounds that the rules contained in the previous laws were not expressly and substantively repealed, as parliament stated that these rules would continue to apply to the same people as before, just as if they had not been repealed. She states that the only real change made by the legislation was the harmonisation of the procedural issues for all races.¹⁴⁵

International law

As per Article 144 of the Namibian Constitution, international law forms part of the law of Namibia. Thus all the international instruments which Namibia has ratified or acceded to are part of the law and may be applied. To analyse all the international laws related to the promotion of women's rights would be beyond the scope of this paper. Thus I deal with only the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). The Convention provides for the definition of discrimination, what constitutes discrimination and what action is to be taken to eliminate discriminatory practices. In addition, a report analyses the implementation of CEDAW. In the most recent, Namibia is praised for its success, although it still needs to correct discrimination that arises from customary law, the lack of public knowledge of the law and poverty which affects the majority of Namibian women.¹⁴⁶ The CEDAW is considered to apply the principles of liberal feminism especially in requesting member states to eliminate discrimination and promote women in educational, judicial and economic spheres.

143 LAC. 2008. *Supplementary Submission to the Committee on the Elimination of Racial Discrimination: Supplementing Namibia's 2007 Country Report*, available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/IWHRCNamibia73.pdf>; accessed on 5 September 2012.

144 Act 15 of 2005.

145 Hubbard (2007:115).

146 Ministry of Gender. 2004. *Convention on the Elimination of All Forms of Discrimination Against Women: Second & Third Report*. Windhoek, p 8.

Case law

There are many cases that deal with the issue of gender, some of which have already been discussed above.

The leading case on gender equality is arguably the *Muller* case. I deal with this case in detail in section two. From the criticism weighed by Bonthuys,¹⁴⁷ one can clearly state that the courts did not apply liberal feminist theory.

Another case that deals with gender equality is the *Myburgh v Commercial Bank of Namibia*. The absolute approach to constitutional interpretation was taken in this case. Here the courts held that the marital power that a husband had over his wife was abolished by the Constitution which came into effect at independence. Both the High court and the Supreme court came to the same decision on the same basis; marital abuse could not survive the application of Article 10, Article 14 and Article 16, if heed was taken of Article 66(1) which stated that only customary or common law which was in line with principles of common law was valid at the coming into effect of the Constitution. The court also considered Article 10 in conjunction with Article 8 of the Constitution and held that the rule of Roman-Dutch law which imposed marital power in marriages in community of property was not only unconstitutional but also impaired the dignity of the woman. The court reasoned that “the intelligence, training, qualifications or natural ability or aptitude of the woman may render her a far better administrator of the common estate than the husband” and on this view previous discriminatory rules based on Roman-Dutch law were no longer applicable. The court further argued that the existence of marital power in a marriage could not in any way accord with equal rights and thus now violated the constitution.

Through the realisation that women were capable of the same thinking capabilities as men and could be in an even better position as regards certain choices which would benefit the matrimonial property, the court applied the liberal feminist concept of equality, although it was done tacitly.

Conclusion

My evaluation of Namibian legislation and case law demonstrates that liberal feminism as a theory has been applied in relation to the promotion of women’s rights and emancipation. This application may not have been done expressly, but all the same it has been done. Thus, the liberal feminist theory has been and is still applied in the Namibian legal framework. In addition, I assessed other legislation which adversely affects gender equality and the rights of

147 Bonthuys, E. 2000. “Deny Thy Father and Refuse Thy Name: Namibian Equality Jurisprudence and Married Women’s surnames” *South African Law Journal* 117:3 464.

women and noted the possible ways in which liberal feminist principles can provide a solution.

Viability and relevance of liberal feminism

Introduction

As has been reiterated through this paper, the practicability of the application of liberal feminism is questioned as a means to determine its relevance. This chapter examines the effectiveness of the complete application of liberal feminism in the achievement of gender equality. In order to analyse the viability of liberal feminism in the Namibian legal framework, I investigate the criticisms and shortcomings of western feminism and liberal feminism, and make comparisons between one of the countries where the theory originates, and Namibia, a country onto which the theory has been transposed. By making this comparison and examining the criticisms and their application in the Namibian context, I determine the practicability of the theory in the Namibian framework.

United States of America in relation to Namibia

Liberal feminism as a feminist legal theory originated in the western world with most of its foremost proponents coming in general from the United Kingdom and the United States of America. My choice of the United States for comparison is because most of modern liberal feminism originated there; the country has a written constitution and the political theory underlying its government is determinable and easily accessible. The comparison is between the manner in which equality is worded in the constitutions of these countries and the manner in which the courts have dealt with the interpretation of equality in general and in relation to gender. However, for purposes of the article and to limit the scope, the comparison will be general and basic.

Right to equality

The American Constitution does not expressly grant a right to equality. The closest semblance of this right in section 1 of the 14th amendment (of July 1868) in the United States Constitution, is worded in the following way: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". Thus the Amendment grants all American citizens, nationals and residents "the equal protection of the laws". The ambiguity of the clause has left the interpretation and the qualification of the clause to the discretion of the American judiciary.

Authors who have tried to interpret the clause state that the right has some appearance of equality by requiring that persons similarly placed are to be treated equally under the confines of law.

Namibia, on the other hand, has an express right to equality contained in Article 10 of the Namibian Constitution promulgated in 1990. Article 10 is discussed in detail in section two. The basic content of the Article is the right of equality to all persons and a prohibition of discrimination on the enumerated grounds of inter alia race, sex, religion, creed or ethnicity. The courts, having been tasked with the interpretation of Article 10, have done so in the light of the political past of the country and with the aim of granting substantive equality.

The first thing of note is that the American Constitution does not contain an express right guaranteeing equality, but rather a statement that is interpreted to that effect. Although a move was made towards the implementation of an amendment of the right to equality, especially on the basis of sex and gender, the requirement for its implementation was not met within the specified timeframe.¹⁴⁸ This was the Equal Right Amendment. Thus, the only assurance of equality in the United States is the phrase “the equal protection of the Laws”, although it is open to broad interpretation and may thus accommodate the plurality and complexity of issues that affect or threaten equality. In comparison with Namibia, although the content and wording differ, the effect is essentially the same as Article 10(1) of the Namibian Constitution.

The definition of the implicit right to equality in the American Constitution is broad, leading to ambiguity regarding its scope. The right, unlike that granted in Namibia, South Africa or even Canada, has no specifications as regards its definition. This could be a good thing but as case law stipulates, it has in many instances caused real inequality to take place as the interpretation of the right is left to the discretion of the judiciary. In Namibia, the courts are, to a certain degree, equally required to interpret the right but may not do so although they have some indication/guidance as regards the scope of the right, worded in Article 10(2) of the constitution.

Interpretation of the right to equality

Equality jurisprudence in the United States is immense and analysing the way in which the equality protection clause has been interpreted is beyond the

148 The Equal Rights Amendment, first proposed in 1923 to affirm that women and men have equal rights under the law, is still not part of the U.S. Constitution. The ERA was passed out of Congress in 1972 and has been ratified by 35 of the necessary 38 states. When three more states vote yes, it is possible that the ERA could become the 28th Amendment. The ERA could also be ratified by restarting the traditional process of passage by a two-thirds majority in the Senate and the House of Representatives, followed by ratification by legislatures in three-quarters (38) of the 50 states. Available at <http://www.equalrightsamendment.org/>; accessed 21 September 2012.

scope of this research. The comprehensiveness and ambiguity of the clause has also made its analysis difficult both for the courts and for academics. Nevertheless, I briefly examine the basic interpretive structure that the courts have applied; a task that is not easy but is possible. The equality protection clause is to be interpreted and applied to persons “similarly situated”. In interpreting the clause, there are times where the courts have adopted a formal approach and circumstances where they adopted a substantive approach.

Equal protection of the law means that State laws must provide for equal treatment of similarly situated individuals despite racial, gender or other differences. Through the development of applicable case law on the matter, equal protection of the law was not created to guarantee equality of outcome but to present equal opportunity and aims to avoid the occurrence of intentional discrimination.¹⁴⁹ During the early years, the courts limited the interpretation of the equal protection clause to one parameter (racial discrimination) before broadening the scope to include discrimination against “discrete and insular minorities”, and discrimination based on “immutable” characteristics, thus applying a somewhat substantive approach to the interpretation of the Constitution on the basis of what can be considered the rational connection test.¹⁵⁰ An example of the substantive approach of application by the courts is *Brown v Board of Education, Topeka*¹⁵¹ in which the court said that segregation constituted inequality and could not be defended on the grounds that schools were separate but equal. However, the interpretation of the equality protection clause is dependent on the facts of each case and court will determine which approach is preferred based on the case facts. Past cases have seen the courts apply the formal approach.¹⁵² In relation to gender, this has led to instances where benefits which accrued to women were removed on the basis that it discriminated on the grounds of sex. An example of such a benefit was the requirement that duty of support come exclusively from the husband.¹⁵³

Namibia, as has been stated above, favours a more substantive approach to the interpretation of its equality right as a result of its past, as has been stated above. Although the equality jurisprudence in Namibia is still at an early developmental stage, the determining factor as to what approach should be used should be dependent on the facts of the case although a substantive approach might be more advantageous to women in Namibia - an approach that is slightly contrary to the principle embedded in liberal feminism. The

149 “What is Equal Protection?” available at <http://www.wisegeek.com/what-is-equal-protection-of-the-law.htm>; accessed 20 September 2012.

150 “Learning Centre” available at <http://www.supremecourthistory.org/learning-center/womens-rights/>; accessed 20 September 2012.

151 347 US 483 (1954).

152 Available at <http://www.supremecourthistory.org/learning-center/womens-rights/>; accessed 20 September 2012.

153 Williams (1982:17).

substantive approach is not fault proof either, as the Muller case illustrates. Here, the court's application of value judgement and its interpretation that the application of equality is to be substantive re-enforced patriarchal values that undermine women.¹⁵⁴ A general substantive approach is favoured, though this should be dependent on the facts of each case and where necessary the courts should apply the formal approach. The proposition is cited in relation to gender related cases.

Criticisms of Western feminism

Although my paper does not deal with the general topic of western feminism, it is necessary to examine the criticisms meted against feminism that originated from the western countries. Most criticism of western feminism is criticism of liberal and radical feminist legal thought. Most western feminists have fixed ideas about women in the third world, and reason that the problems facing women in third world countries are sex inequality, and the fact that patriarchal power is more important when women's status is considered. They reason that other categories of possible discrimination are less important than gender and a "joining of forces between first world and third world feminist groups will consolidate the feminist movement and advancement towards the attainment of sex equality and that such feminist action will effectively promote the changes required in the 'sphere of women's rights'".¹⁵⁵

A difference exists between the struggles of western feminists in comparison to their third world counterparts. Sanders states that whilst western feminists aim for the attainment of equality between men and women, third world feminists strive for the satisfaction of basic needs in light of the "disadvantageous international economic order".¹⁵⁶ In other words, the condition that women are in is not considered as a result of the gender imbalance but of other factors such as race, class and so on. Women in third world countries need to be freed from not only gender related inequalities but also race, class and national inequalities as they are interrelated; the injustice suffered by women is not only a result of gender inequality but race and class play a significant role for the oppressive situation that women find themselves in. Crenshaw discusses the failure of feminist theory to recognise the black woman and argues that general feminist theory is not of much value to the black woman because it evolves from the white woman's point of view and ignores black

154 The case has been dealt with in the section entitled "The concept of equality".

155 Sanders, as cited in Bruno, JP. 2006. "Third World Critiques of Western Feminist Theory in the Post Development Era Austin: University of Texas", available at www.ucu.edu.uy/.../Critiques_to_Western_Feminism_JPereira.pdf; accessed on 29 May 2012.

156 (ibid.).

women.¹⁵⁷ In its analysis of the role of patriarchy, sexuality or the separate spheres ideology, the issue of race is not considered. She asserts that the experience of the black woman differs from that of the white woman in that she has to deal with her gender and her race.¹⁵⁸ Although this is applicable to the feminist theory in America, it can be used to illustrate the shortcomings of western feminism in relation to women in the so-called third world countries.

Western feminism has been criticised for its request for global sisterhood on the basis that it is seen as an imposition to local cultural and religious traditions in the name of women's rights. As Moller points out, the debate about women's rights versus religious rights is a significant one.¹⁵⁹ The International community on gender and development clearly stated that although the significance of national religious particularities in various historical, cultural and religious systems must be kept in mind, it is the duty of the state regardless of its political, economic and cultural systems to protect and promote all human rights and fundamental freedoms.¹⁶⁰

Third world feminists do consent to this conception of universal women's rights. Some have even argued against such reasoning and equated it to an act of "intellectual colonialism".¹⁶¹

Aguilar warns of the risk of what could be encountered when uncritically embracing the ideas of western feminism which she likens to a "feminist replication of neo-colonialism". In her perspective, the idea of universalism among all feminists of the globe reinforces the colonial standing of national feminist movements. The author likens the emulation of foreign feminism as the "Trojan horse of feminist ethnocentrism" and an international expression of cultural imperialism.¹⁶²

Criticism of western feminism illustrates the different experiences of the women who propounded the theory and the women who are in Namibia. It does not take into account the multiplicity of factors that affect women and cause their

157 Creshaw, K. 1989. "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist theory and Antiracist Politics", cited in Bartlett et al. (1991: 67).

158 (ibid.).

159 Moller Okin, S. 1999. "Is Multiculturalism bad for Women?" Princeton: Princeton University Press, available at www.bostonreview.net/BR22.5/okin.html; accessed 21 September 2012.

160 Bruno (2006).

161 Moller Okin, S. 1999. "Is Multiculturalism bad for Women?" Princeton: Princeton University Press, available at www.bostonreview.net/BR22.5/okin.html; accessed on 21 September 2012.

162 Aguilar, D. 1995. "Gender, Nation, Colonialism: Lessons from the Philippines" in Visvanathan, N, L Duggan & L Nisonoff (Eds). *The Women, Gender and Development Reader*, as cited in Bruno (2006).

inequality or the plural nature of Namibian women. Namibian women are divided along the lines of race, class and education and when propounding a theory one must be aware of these factors. The discrimination that a white working class woman may experience will differ from the discrimination that a black working woman may endure. On the other hand, the experience of the black urban working class woman differs from the experience of the black rural woman who may not be in formal employment. The failure to recognise the plural nature of women will lead to a situation where a certain group of women attains equality or emancipation whilst another group is still disadvantaged. And as a result of the emancipation of one group, the other remains subordinate. A local example of this occurrence would be the application of the Marriage person's equality Act and the Intestate Succession Ordinance.¹⁶³ These Acts provide for emancipation of women by correcting disabilities that women suffered from as a result of common law. However, the Acts only deal with women in civil marriages and make no provision for women who are married under customary law. The Acts were obviously debated and promulgated on the experience of working urban women. Western feminism does not recognise that more than just sex inequality affects women in third world countries.

Criticism of liberal feminism

Many of the other forms of feminism were developed as a critique of the principles of liberal feminism.

Mackinnon criticises liberal feminism on the basis of its definition of the concept of equality. She states that equality is not to be viewed from the angles of the sameness/difference argument but rather from the view point of dominance of the male over the female. She criticises liberal feminism's definition of equality as sameness by stating that the theory stipulates the acquisition of equality for women by requiring women to step up to the same status as men. In other words, the yardstick for the acquisition of equality is the male standard. She asserts that this understanding of equality embraces masculinity, the male standard of men and then applies it to women. Mackinnon states that the requirement that law be gender neutral as a means for attaining equality "ignores the fact that the indices and injuries of ... sexism often make certain that ... being a woman may mean [rarely] being in a position similar to that of a man ...".¹⁶⁴ Mackinnon states that most women are poor, financially dependent and are the primary caretaker. The liberal feminist approach obscures these factors that determine women's status. Women are women because of poverty, parenting and financial dependency and these are the norm. If men find themselves in the situation described above (that is, in

163 12 of 1946.

164 Mackinnon, C. 1987. *Feminism Unmodified*. Cambridge MA: Harvard University Press, at p 71.

poverty, financial dependency and so on), they are a deviation from the norm, an exception to the general rule. Mackinnon argues that where women wish to match themselves to men and have access to the things previously withheld, they have to be exceptional. Such women will have to measure up to the male standard and not a standard that comes from a woman's perspective.¹⁶⁵ Thus, what liberal feminism does is state that women and men are equal and as such, should be equal without having regard to other factors which hinder the atonement of equality for women. It makes/challenges women who desire to gain access to the things that men enjoy, "step up" to the standard that has been set by the male majority. Women are allowed to compete with men under the same rules and in the same institutions which were designed according to male norms and do nothing to accommodate or apply the "normative needs, values or priorities of women".¹⁶⁶ This prevents women who are unwilling or unable to meet the standard of maleness from attaining equality.

The requirement that women be treated the same as men leads to women being subject to male standards and this ignores the factual ways in which women differ from men, for example, pregnancy. Lacey makes reference to the problem this poses by stating that in a bid to deal with discrimination that stems from such, the discrimination claim is ruled on narrow-minded logic or it is allowed on the basis of classifying pregnancy as a sickness like any other.¹⁶⁷ It also allows for benefits which were solely accrued to women to be accrued to men. Because it is based on the liberal principle that all individuals are inherently equal and have equal rights and thus should not be discriminated against, it has allowed men to question the viability of legislation or certain arrangements which were created to genuinely address discrimination that women were facing.¹⁶⁸

Krieger and Cooney contend that the failure of liberal thought in feminism with regard to equality is its reluctance to realise that there are instances where differential treatment should be allowed for sex differences. This reluctance, they state, has led to the use of the rational connection test in sex discrimination cases and could possibly lead to results which women generally will find unacceptable.¹⁶⁹ The unwillingness to recognise certain real sex differences as a basis for different or special treatment is what Lacey states allows for flawed logic especially when the court deals with cases related to gender inequality or discrimination.¹⁷⁰

These criticisms illustrate that liberal feminist thought, although it is to be praised for the initial advancement in equality for women, is not without its

165 (ibid.:73).

166 Krieger, L & PN Cooney (1993:165).

167 Lacey (1998:24).

168 (ibid.).

169 Krieger & Cooney (1993:165).

170 Lacey (1998:24).

shortcomings, most especially when applied to a state like Namibia, though not all the criticisms are applicable. Firstly, note the fact that the theory is based on the experiences of women who differ considerably in economic, cultural and social status from Namibian women. The theory is prescribed on the experiences of white upper-class women of North America and Central and Scandinavian Europe. Feminist method requires that it be based on the experiences of the women whose equality is being challenged. For example, Mackinnon developed her essay on sexual harassment based on the true experiences of women in the work force and the principles which she proposed were as a result of what women had experienced.

Further, the theory's reliance on the sameness principle may allow results which may not entwine well with the vision for equality contained in the Namibian Constitution. The Constitution has as one of its aims the eradication of inequalities that were as a result of the nation's past, as well as the attainment of a balance in the status of persons who were previously disadvantaged. The formal approach to equality which liberal feminism utilises has been firmly rejected by the court on the basis that its abstractness and technical application can further perpetuate a situation of inequality. That is why the substantive approach is used in the interpretation of equality. Even so, a substantive approach to the interpretation should not be solely relied on but rather the courts should be open to the use of both substantive and formal approaches based on the facts and circumstances of the issue to decide which approach is best.

The theory, also on the basis of its sameness principle, sets the male standard for the attainment of equality. This general criticism of the theory is characterised as one of its worst imperfections. A dependence on the male as the standard or norm for the attainment of equality or emancipation entails that the patriarchal culture that placed woman in a disadvantaged position is not eliminated but rather re-enforced under the guise of the attainment of egalitarianism. Consequently, any woman who is not able to meet this norm remains discriminated against. As Mackinnon described it, the woman who meets the standard is not the norm but rather the exception to the norm. This creates an insurmountable obstacle to the attainment of gender equality on the basis of this theory because women, like Namibian women, who have multiple factors affecting their equality will never be able to attain equality as it is required as they will have to meet the male standard. Although there is no suggested standard, if a male standard is used, it begs the question as a plurality of male standards also exist.

Transposed and still relevant?

In light of the above criticisms of liberal feminism, the next question is whether it is still relevant in the Namibian context. Chapter 3 illustrated that although not implicitly applied, liberal feminist thought has definitely influenced the

Namibian legal framework, most especially the legislation. The issue is whether it has been practical and whether it is still relevant in present day Namibia.

Much has been written about the attainment of gender equality in Namibia, Namibia having been praised for its focus on this. Many policies of the government have made the achievement of gender equality, amongst other things, priority. An example is Vision 2030 where the plan for the attainment of gender equality is clearly detailed. Namibia has some very progressive laws which have been praised. However, one of the criticisms of liberal feminism is that laws are implemented for the attainment of gender equality without considering women's social contexts that may ensure men's dominance. Thus, despite the law that has been put in place in Namibia, there are still complaints on the position of women in Namibia, and the way in which they are treated.

For example, although the Combating of Rape Act is amongst the most progressive rape laws in the world, a study conducted by the LAC presents the view of some women that the Combating of Rape Act has "invented" the crime of marital rape, rather than as having changed a biased law to include a crime that was previously discounted. Namibians generally do not see that rape between previously intimate partners deserves severe criminal sanctions.¹⁷¹ In another LAC study regarding the effectiveness of the Combating of Domestic Violence Act, one of the problems cited is that domestic violence often remains "completely hidden because it is shrouded in shame and secrecy, or because it is considered to be a private matter; it is seldom discussed and usually not reported to police".¹⁷² External studies show that most women do not report at all and a higher percentage do not get any help concerning violence they may have suffered.¹⁷³ These studies exemplify the failure of legislation in the attainment of absolute equality.

171 LAC. 2009. "Withdrawn: Why complainants withdraw rape cases in Namibia", available at <http://www.lac.org.na/projects/grap/Pdf/rapeWithdrawn.pdf>; accessed 29 August 2012.

172 LAC. 2012. "Seeking safety: Domestic Violence in Namibia and the Combating of Domestic Violence Act 4 of 2003", available at <http://www.lac.org.na/projects/grap/grapviolence.html>; accessed 4 August 2012.

173 A Namibian study found that 21% of women who had experienced physical violence from intimate partners had never told anyone about it – and those who did speak out tended to talk only to family or friends; only 10%-20% of these women had reported their cases to the police, and about 21% had gone to a hospital or health centre. This same study found that over 60% of the women who experienced physical violence from intimate partners had never sought help from any agency. Women who do seek help tend to do so only after the violence has become severe or life-threatening, often only after they have been badly injured.

Conclusion

Clearly one theory may influence the jurisprudence of gender equality but cannot solve all the issues related to it. Liberal feminism has undoubtedly influenced Namibia in the attainment of gender equality. It may be considered relevant on the basis that it has set a foundation for the development of feminist jurisprudence in Namibia and in the rest of the world. However, its principles cannot be holistically and singularly applied in Namibia or in any other nation if “real and true” gender equality is to be attained.

Recommendations and conclusion

Recommendations

The obvious solution will be the postulation of a theory that is based on the practical realities of women in Namibia and that will adequately address the problems they experience and the hindrances to the attainment of gender equality. Whether such a theory will be postulated is a moot point as Namibian feminist jurisprudence is practically non-existent. One would expect Namibia to have feminist jurisprudence but it does not. Foreign feminist theories have influenced Namibian legislation on gender equality but Namibians are complacent about how these theories have influenced our law. In spite of the successes of the Acts discussed in the previous section (or perhaps because of it), no work is being done to develop an indigenous feminist jurisprudence based on local realities. Nevertheless, with time the plight of women and the desire to see them emancipated should lead to the proposition of a legal theory suggested by the experience and social, economic and cultural plurality of Namibian women. The task will not in any way be easy, but African and Post-colonial feminist principles have laid a foundation. However, it will still be necessary to construct an indigenous jurisprudential thought for the purpose of research and practice.

Conclusion

The liberal feminist theory was advocated by persons who sought the emancipation of women mainly in the public sphere on the basis that men and women were equal and had equal capabilities. The theory as has been stated above was premised on the philosophy of liberalism which espouses belief in the autonomy, freedom and rationality of every individual. What liberal feminism does is to apply the basic tenets of liberalism to women and argue for equal treatment of women based on those tenets. The means through which this is to be achieved is in the promulgation of legislation, empowerment and education.

ARTICLES

Generally, it is accepted that equality is a concept that is central to the idea of feminism and thus every feminist school of thought aims to enlighten the causes of women's inequality and to prescribe approaches that seem most appropriate in achieving the equality women seek. Liberal feminism, in applying its principles of inherent human rights, rationality and freedom, interprets equality as equal treatment; thus women are to be treated the same way men are treated. I analysed approaches to the interpretation of equality in Namibia and found that interpretation leans towards a substantive approach as a result of Namibia's past and the same applies with regard to gender equality.

However, legislation applied the principles of liberal feminism in some statutes by granting gender equality to women and in achieving the emancipation and elevation of their status. Although there is no express application of the principles of liberal feminism, its application is implied. Liberal feminism may not have been the sole influence in the legislators' promulgation of the statutes but it was definitely an influence. The influence of liberal feminism in case law is scarce and almost non-existent, although this finding may be an artefact of the few cases that have dealt with gender equality.

The proof that the theory is applicable in Namibia allows for an assessment and analysis as to its relevance. The analysis revealed that the application of the principles of liberal feminism and the criticism it has received makes it unsuitable for holistic application, especially in relation to a nation like Namibia that has undergone the abuses that it did prior to the attainment of independence. The statistics on law that deal with gender equality demonstrate that, contrary to what liberal feminism postulates, a great deal more than legislative reform is required to achieve gender equality. It should be noted at this juncture that the immense success that liberal feminism has achieved is not underrated but rather characterised as dated and it is now evident that the equality that women desire most especially in the Namibian context will not be reached through the sole application of liberal feminism. The inadequacies of liberal feminism may be as a result of its transposition into Namibian society without considering the audience to which it is applied. As critics of the theory and of western feminism have clearly stated, the issues that affect women of colour and women in Africa is more than gender alone, but rather an intersection of other factors, something that liberal feminists do not consider. As stated above, the proffered solution would be the creation of an indigenous theory, but until that time, the application of liberal feminism with other feminist theories is welcome.

The effects of legal positivism¹ in Namibia and South Africa during the apartheid era

Ben Nangombe*

Introduction

The constitutional doctrine of parliamentary sovereignty, the jurisprudence of positivism and the political hegemony of Afrikaner Nationalism have greatly influenced the methodology and theory of interpretation in South Africa.²

... the advocacy of the subjective or intention of theory of interpretation facilitated a sympathetic interpretation of apartheid and draconian security legislation.³

The above quotations encapsulate the profound effect that the theory of legal positivism has had on the South African legal system and, by extension, on Namibia as a colony of South Africa. In fact, as the latter section of the quotation indicates, parliamentary sovereignty and the jurisprudence of positivism did not influence only the methodology and theory of interpretation; the influence reached other aspects of law and went beyond even the legal realm, to affect all aspects of the lives of all South Africans and, of course, Namibians. The choice of legal positivism in South Africa was motivated and underpinned by the social and political realities which characterised that country following the ascendance of the National Party and the adoption of apartheid or separate development as the central pillar of state policy.

A way had to be found by the architects of apartheid through which legal rules that advance the agenda of separateness, segregation and discrimination could be enforced through the institutions of the state. Hence, there developed in South Africa, what became internationally known as and universally

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1 With regard to law, *positivism* is defined as a theory that laws are to be understood as social rules, valid because they are enacted by authority or derive logically from existing decisions, and that ideal or moral considerations (e.g. that a rule is unjust) should not limit the scope or operation of the law (Apple Inc MacBook Built-In Dictionary, 2009).

2 Devenish, GE. 1992. Interpretation of Statutes. In Botha, C. 2005. *Statutory Interpretation: An Introduction for Students*, Fourth Edition. Cape Town: Juta, p 4.

3 (ibid.).

condemned, institutionalised racism.⁴ Its cornerstone was the policy of apartheid. The apartheid state and its proponents faced a political dilemma in seeking to actualise the philosophical underpinnings of apartheid, knowing full well that to achieve their ends, they had to harness the law and use it in such a manner that it rendered their social and political designs lawful. In other words, they had to find acceptable justifications for the implementation of laws, regulations and state policies that were patently immoral, especially when viewed through the prism of accepted international norms, obligations erga omnes, and the jus cogens⁵ governing the conduct of states vis-à-vis their citizens. These values have crystallised clearly through the pronouncement of international organisations and agencies such as the United Nations and the International Court of Justice (ICJ). For instance, in the case of *Barcelona Traction, Light and Power Company Ltd*,⁶ a principle of law was established stating that in contemporary international law, such obligations include outlawing acts of aggression, genocide, as well as from the principles and rules concerning the basic rights of the human person, protection from slavery and racial discrimination.⁷

The solution for South Africa to circumvent these international obligations and to justify its racist policies was the adoption of the political system of parliamentary sovereignty and the philosophy of legal positivism. As political system, parliamentary sovereignty means that law is an absolute expression of the sovereign and, through the latter, moral considerations are expunged from the interpretation of laws. Thus, laws are interpreted not in terms of

4 On 20 November 1963, the General Assembly adopted the UN Declaration on the Elimination of All Forms of Racial Discrimination. In Article 1, it reaffirms the principles of the UN Charter and the Universal Declaration of Human Rights, and their fundamental importance to good international relations. It states that "Discrimination between human beings on the ground of race, colour, or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among nations". See <http://www.un.org/WCAR/e-kit/fact2.htm>; last accessed on 10 July 2010.

5 The enforcement of the policy of apartheid in South Africa became one of the most notorious subjects in international law, attracting the attention of the UN General Assembly and Security Council which adopted numerous Resolutions condemning the practice of apartheid in Namibia and South Africa, as well as what eventually became an illegal colonial occupation of Namibia by South Africa.

6 *Barcelona Traction, Light and Power Company Ltd*. Second Phase Judgment. ICJ Reports 1970, p 32, para.'s 33-34. As found at http://www.google.com.na/#hl=en&source=hp&q=obligations+erga+omnes&aq=f&aql=g1&aql=&oq=&gs_rfai=&fp=be1cf7734628ad6a; last accessed on 10 July 2010. The Original ICJ Judgment is in the French language.

7 Apartheid was a form of institutionalised and officially sanctioned racial discrimination.

normative considerations but as a command of the sovereign directed at the citizenry who are in the habit of obeying. This is the basis of legal positivism.

What then, is *legal positivism*?

Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits. Thus, according to legal positivism, a law, which actually exists, is a law, even though some people may happen to dislike it. Hence, what the law *is* and what law *ought* to be are separate questions. Although a law can be consistent with morality, it is a condition sine qua non that it must always be so. As such, a law or a set of legal rules, or an entire legal system, which is immoral in content or effect, can nonetheless be valid law. Throughout history, there are long lists of immoral laws, which were nonetheless considered to be legal at that time. These include slavery and segregation laws in the United States, the laws enforced by Adolf Hitler in Nazi Germany and of course the apartheid laws in South Africa.

The positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems *exist*. The English jurist John Austin (1790-1859) formulated it thus: "...the existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry". Essentially, the positivist approach excludes value considerations from a study of the law. Positivist philosopher, John Austin made a radical separation of jurisprudence from morals. According to him, law is the command of the sovereign.⁸ It confines its inquiry to an analysis of law as it is. Thus, it holds that law is what it is, not what it *ought* to be. This is diametrically opposed to the natural law normative proposition that "law is not what it is, but what it ought to be".⁹ The positivist philosophy equates positive law with the judicial norms laid down by the state. According to positivism, law is a matter of what has been posited (ordered, decided, practised, tolerated). In terms of a more modern idiom, positivism is the view that law is a social construction.

In the book titled *An Introduction to South African Law and Legal Theory*, the major underpinnings of legal positivism are underscored.¹⁰ Firstly, there is contention that the validity of laws emanates from a properly constituted source. In the case of South Africa during the apartheid era, the expression of this fact could be found in parliamentary sovereignty. The laws passed by parliament and promulgated are then seen as the command of the sovereign

8 <http://philosophyfaculty.ucsd.edu/faculty/dbrink/courses/168-06/Handout-1.pdf>; accessed on 17 July 2013.

9 Amoo, S. *Introduction to Law Class Notes*, University of Namibia 2006 and 2010.

10 Hosten, WJ, AB Edwards, C Nathan & F Bosman. 1977. *An Introduction to South African Law and Legal Theory*. Durban: Butterworths.

and they must be obeyed. Secondly, it is contended that there is no connection between law and morality. Thus, as earlier positivist philosophers have argued, law is what it is, not what it ought to be. In this way, the normative propositions of natural law theorists are expunged from law.

Thirdly, a legal system is viewed in terms of its being a closed logical system. In such a system, correct legal decisions can be deduced through logical means from predetermined legal rules. Thus, as laws are being enforced, there is no need for law enforcers and interpreters to refer to social aims or moral standards. It follows, therefore, that a law that was duly passed by parliament duly constituted must be enforced and obeyed, regardless of the collateral effects that it may have for some members of society. It is for this reason that discriminatory laws and overtly racist laws could be promulgated for both South Africa and Namibia for decades. A discussion of some of these laws follows below (see “Legal positivism in action”). Fourthly, legal positivists also hold the view that moral judgments cannot be established or defended as a matter of fact, by rational argument, evidence or proof. This is also referred to as the theory of non-cognitivism.¹¹

The epistemological thesis is based on the positivist assertion that knowledge of facts and knowledge of values are acquired in different ways and therefore the description of the facts of law must be distinguished from the description of the values or morality of a person or legal system. Hence, it is necessary to provide a value-free description of law.¹² This is the basis for the distinction between law and morality. The theory is also known as the separability thesis. The social thesis holds that what law is and what it is not, depends not on metaphysical considerations, but on social facts prevailing in a particular society at any given time. In turn, these social facts influence and shape what is to be considered as law in that society from time to time. According to Roederer and Moellendorf, this is also referred to as the sources thesis. The command thesis is based on the premise that law is essentially a command by a sovereign to those who are in the habit of obedience. This line of logic further stipulates that the command of the sovereign must be obeyed at all times. Disobedience is surely to be visited with the requisite sanction and punishment.¹³

Another description of positivism is that of utility. The argument here is that law and legal institutions must be measured on the basis of their utility, that is,

11 (ibid.). According to non-cognitivists, when people utter moral sentences they are not typically expressing states of mind which are beliefs or which are cognitive in the way that beliefs are. Rather they are expressing non-cognitive attitudes more similar to desires, approval or disapproval. See discussion at <http://plato.stanford.edu/entries/moral-cognitivism/>; accessed 10 July 2010.

12 Roederer, C & D Moellendorf. 2007. *Jurisprudence*. Cape Town: Juta, p 64.

13 (ibid.).

the capacity of laws and legal institutions to achieve the greatest happiness of the greatest number. Of course, in South Africa and Namibia, utility was not measured in terms of numerical strength but on the basis of who wielded the most political and economic power. In the two countries, the discussion of legal positivism among jurists and academic circles has centred mostly on the role of the judiciary during the apartheid era.¹⁴ The predominant view on the role of the judiciary was that the judges and legal officers were not censor morum.¹⁵ In other words, they were not triers of morals, merely enforcers of the law as they found it. It was the view of the court in *S v Adams*¹⁶ that an Act of Parliament creates the law, but not necessarily equity.

What negative effects has legal positivism had in Namibia and South Africa?

The implementation of the philosophy of legal positivism has had a profound effect on both the jurisprudence and legal practices of both Namibia and South Africa. In South Africa, and by extension in Namibia as the erstwhile colony, the adoption of and choice of the positivist philosophy was, in the main, informed by the existing socio-political realities in the two countries. For historical reasons, the subject is treated jointly since there are fundamental commonalities between the two jurisdictions. Moreover, as far as Namibia is concerned, legal positivism ended in our jurisdiction with the end of apartheid colonialism in 1990. This does not mean that the impact of positivist legal thinking and the tentacles of court decisions have ceased to be felt in Namibia after that date. The Administration of Justice Proclamation No. 21 of 1919¹⁷ introduced Roman-Dutch law and other laws applicable in South Africa to South West Africa. As a result, up to 1990, many of the laws promulgated in South Africa were made applicable in Namibia through specific or general legislative tools. South African court decisions were also competent sources of law for Namibian courts. Legal positivism became a legal philosophy of choice in South Africa mainly because it best suited the apartheid philosophical underpinnings. Given its reliance on positivist man-made law, it was seen as a natural choice to back up the justification for the enforcement of laws that were valid but not necessarily ethical or morally tenable.

Largely, it was a matter of existential necessity for Afrikaner nationalists who commandeered the legal system to achieve their own ends. As a

14 (ibid.:74).

15 *Censor morum* is a Latin phrase meaning censor or critic of morals.

16 *S v Adams* 1979 (4) SA 793 (T), as quoted in Roederer and Moellendorf at page 74. They have added that the attitude that Acts of Parliament create laws and not equity was confirmed by the South African Appellate Division in other cases such as *S v Werner* 1981 (1) SA 187 (A).

17 Administration of Justice Proclamation No. 21 of 1919.

result, under the guise of legal positivism, the apartheid state, under the agency of parliamentary supremacy enacted some of the harshest laws and implemented countless inhumane laws, in the unabashed belief that laws that the sovereign has commanded through the legislature had to be enforced and obeyed. In other words, they operated under the positivist creed that “the law is what it is, not what it ought to be”. Demonstrably, the enforcement of these laws caused great hardship for indigenous Namibians and undermined any pretence towards the rule of law.

Amoo argues that the South African administration in Namibia, underpinned by the austere certainty of Austinian legal positivism was characterised by patent abuse of the human rights of the indigenous people of Namibia.¹⁸ While apartheid lacked the basic tenets of the rule of law, it was legitimised by the decisions of a judiciary that justified the racist policies and violations of the rule of law and human rights on the strength of legislative supremacy and analytical positivism. Today, a catalogue of cases that were decided on the basis of countless unjust laws and legal principles are an ignominious monument to the legacy of apartheid in the compendia of Namibia’s case law. In fact, the enforcement of positivist apartheid laws in both Namibia and South Africa even bordered on the absurd, as discriminatory, segregationist and draconian pieces of legislation were enacted and enforced through the courts.

The glaring audacity of legal positivism in South Africa is demonstrated by the events and politico-legal shenanigans surrounding the case of *Harris v Minister of Interior* (Coloured Vote Case)¹⁹ as recounted by eminent writer and scholar, John Dugard, in his book titled *Human Rights and the South African Legal Order*.²⁰ For the sake of completeness, the events are paraphrased below. In 1948, having adopted the word “apartheid” as its slogan, the National Party came to power. A few years later in 1951, they stripped Coloured voters of their right to elect members of their own race to Parliament by enacting the Separate Representation of Voters Act.²¹

The Appellate Division, South Africa’s highest court, promptly invalidated that Act in the *Coloured Vote*²² case on the grounds that each House had passed the Act separately rather than sitting together as the entrenched clauses required. The National Party quickly responded by passing the High Court of Parliament Act, which provided that if the Appellate Division invalidated an Act

18 Amoo, SK. 2009. The Constitutional Jurisprudential development in Namibia since 1985. In Horn, N & A Bösl. *Human Rights and the Rule of Law in Namibia*, 2nd Edition. Windhoek: Konrad Adenauer Stiftung.

19 *Harris v Minister of the Interior* 1952 (2) SA 428.

20 Dugard, J. 1978. *Human Rights and the South African Legal Order*. Princeton: Princeton University Press.

21 Separate Representation of Voters Act (No. 46) of 1951.

22 (ibid.).

of Parliament, then Parliament, sitting as the High Court of Parliament, could review the Appellate Division's decision. The newly established High Court of Parliament immediately reversed the Appellate Division's decision in the *Coloured Vote* case.

In turn, the Appellate Division invalidated the High Court of Parliament Act, on the grounds that the entrenched clauses provided for judicial review by a real court, not by Parliament disguised as a court. Lacking the votes in Parliament to eliminate the Coloured franchise by the necessary two-thirds majority of both Houses, the National Party decided to load both the Appellate Division and the Senate (the upper house of Parliament). As a result, the Appellate Division was increased from five to eleven members for any case where the constitutionality of an Act of Parliament was at issue. The size of the Senate was almost doubled and the methods for selecting the new Senators ensured the National Party a two-thirds majority of both Houses sitting together. After that was done, Coloured voters were only allowed to elect token Whites to represent them in Parliament, and the courts were barred from ruling on the validity of any Act of Parliament. By a ten-to-one vote, the newly reconstituted Appellate Division sustained (upheld?) these laws.

Another form of draconian enforcement of laws dealt with the so-called security as well as anti-terrorist and anti-communist measures. Fearing what was known at the time as the communist threat, the apartheid state enacted a battery of security-related legislation. One of the most notorious was the Suppression of Terrorism Act,²³ which provided for indefinite periods of detention for people charged with the violation of its provisions. In terms of the Act, only government officials were entitled to access information relating to or obtained from any detainee. On this legal positively construed authority, the police could refuse to identify those detained, and the Minister of Justice even refused to divulge to members of Parliament the identities of persons being detained. That secret detention process often led to torture and death of detainees. The well-publicised torture and death of prominent anti-apartheid icon, Steve Biko²⁴ in the 1970s, and those of countless other persons in both Namibia and South Africa while under such detention, highlighted the excesses and abuse of political and state power under the aegis of legal positivism and the law being what it was.

Legal positivism in action

Following below is a discussion of some laws that the apartheid state promulgated in furtherance of the apartheid ideology, aided by a belief in legal

23 Suppression of Terrorism Act (No. 44) of 1950.

24 Stephen Bantu Biko was leader of the Black Consciousness Movement in South Africa and a prominent anti-apartheid activist. He was arrested by the apartheid police and died in detention at the age of 30 on 12 September 1977. See www.britannica.com/EBchecked/topic/65183/Steve-Biko; accessed on 10 July 2010.

positivism.²⁵ As stated earlier in this essay, the basis for legal positivism in South African law was underpinned by the political ideology and social philosophy of apartheid. The supreme goal of apartheid, according to the Nationalist Party, was to establish racial separation legally and maintain White authority and privileges. In order to give effect to this strategy, apartheid was then clothed in the notion of legitimacy. Laws were designed to create restrictions based upon race and made South Africa the first country in the world to officially legalize racism. The restrictions placed on the black people of South Africa and Namibia dealt with mundane and not-so mundane matters such as land ownership and use thereof, jobs, housing, living areas, personal relationships, constitutional rights and general rights. An abridged discussion of some of the apartheid laws follows below. As absurd as some may sound, they were strictly enforced by the justice system, with the courts interpreting laws from a positivist perspective.

The Group Areas Act of 1950²⁶ divided the neighbourhoods in which Blacks and Whites resided into distinct residential zones. It established distinct areas of South Africa in which members of each race could live and work, typically setting aside the best urban, industrial and agricultural areas for Whites. Blacks were restricted from renting or even occupying property in the areas deemed as “White zones”, unless they had received permission from the state to do so.

Blacks were stripped of their rights to participate in the national government of South Africa when the Bantu Authorities Act²⁷ was passed. It created a basis for ethnic government in designated reserves for Blacks, known as the homelands. Blacks were assigned to a homeland based on their tribal grouping, which was in accordance with their record of origin. Their political rights were restricted to their designated homeland only. Along with their loss of citizenship of South Africa, Blacks lost every right to take part in South African government. Over time, these laws became so strict and severe that passports were required for Black Africans to enter into South Africa, the land that formerly had been their country of birth.

Under the Immorality Act of 1950²⁸ and the Prohibition of Mixed Marriages Act of 1949,²⁹ marrying a person of a different race was illegal. In addition, with the enactment of the Immorality Amendment Act of 1957,³⁰ showing or

25 The summaries of the laws discussed in this section were paraphrased from an article found at <http://home.snu.edu/~dwilliam/f97/projects/apartheid/laws.htm>; accessed on 10 July 2010.

26 Group Areas Act (No. 41) of 1950.

27 Bantu Authorities Act (No. 68) of 1951.

28 Immorality Amendment Act (No. 21) of 1950.

29 Prohibition of Mixed Marriages Act (No. 55) of 1949.

30 Immorality Amendment (No. 23) of 1957.

even having intentions to have any type of relationship between members of a different race became a crime. The Bantu Education Act of 1953³¹ was enacted to provide black pupils with different expectations and future goals from White students and to make sure that Blacks had different syllabi and schooling facilities from White children. For Black students, emphasis was placed on basic technical education, equipping them for practical work as opposed to the education received by white students equipping them for professional jobs. The job reservation laws set aside elite jobs and professions for Whites. Blacks were primarily trained to become artisans, tradesmen and semi-skilled labourers. As a result of this psychological conditioning, only a few of the Black students in the public schools aspired beyond their mediocre training to higher education levels. Those that did were segregated into Black universities under the Extension to University Education Act.³²

The Pass Laws Act of 1952³³ required Black South Africans over the age of 16 to carry a pass book, everywhere and at all times. The passbook contained extensive information about the holder, such as the individual's fingerprints, photograph, personal details of employment, permission from the government to be in a particular part of the country, qualifications to work or seek work in the area, and an employer's reports on worker performance and behaviour. If a worker displeased an employer who in turn declined to endorse the book for the pertinent time period, the worker's right to stay in the area was jeopardised. Forgetting to carry the passbook, misplacing it, or having it stolen rendered a worker liable to arrest and imprisonment.

Any type of political opposition to apartheid was outlawed within the enactment of the Suppression of Terrorism Act of 1950.³⁴ The Act banned any type of opposition, whether it was Communist or otherwise. It enabled the South African government to oppress any one person or group whom they felt posed a threat to their system of apartheid. The Separate Representation of Voters Act³⁵ terminated the rights of Blacks to vote in the national government elections. Those who resisted the restrictions faced imprisonment and even death. The statute permitted the South African government to incarcerate any citizen in a remote region of the country. This harsh banishment meant Blacks were forbidden by state mandate to travel, write, or speak publicly, to name just a few sanctions. They had no power to appeal against these sanctions.

The Population Registration Act of 1950³⁶ required all citizens of South Africa to be classified into categories according to their race. The categories established

31 Bantu Education Act (No. 47) of 1953.

32 Extension to University Education Act (No. 45) of 1959.

33 Native Abolition of Passes and Co-ordination of Documents Act (No. 67) of 1952.

34 Suppression of Terrorism Act (No. 44) of 1950.

35 Separate Representation of Voters Act (No. 46) of 1951.

36 Population Registration Act (No. 30) of 1950.

were White, Black (African), and Coloured (people of mixed descent). The Reservation of Separate Amenities Act of 1953³⁷ created separate public facilities to be used by Whites and Blacks. Workers, Africans or Coloureds were restricted by law from protesting the enactment of the Native Labour Act of 1953.³⁸ Government officials, under the Public Safety and Criminal Law Amendment Acts, possessed the power to declare states of emergency and increase the penalties for protesting against any or supporting the repeal of any government established law. Imprisonment, whippings and fines were a few of the penalties the government could inflict. One such state of emergency was declared in 1960, to counter a peaceful protest at Sharpeville. Large groups of Blacks refused to carry their passbooks in terms of the *Pass Law*.

Were there alternatives to legal positivism for South Africa?

Indeed, there is an alternative to legal positivism. Examples to this effect have abounded for decades in western democracies such as the United States of America, Australia and England where legal systems have placed emphasis on the protection of human rights and promoted the interpretation of laws in a broad, liberal and purposive manner. In 1990, the adoption of a democratic constitution in Namibia followed a trajectory of the human rights orientation of a constitutional democracy. And this was not by coincidence. In 1982, the UN Security Council adopted the “Principles concerning the Constituent Assembly and the Constitution for an independent Namibia. This document introduced two sets of important conditions: the rules and procedures for the election, under UN supervision and several “Constitutional Principles” determining the content of the constitution and the nature of the future political dispensation in Namibia. The principles provided amongst others, for a unitary state, a supreme and entrenched constitution, parliamentary democracy, separation of powers, judicial independence and constitutional review, and regular and “genuine” elections, an electoral system based on universal, adult franchise, a secret ballot, and proportional representation, an enforceable and comprehensive Bill of Rights, a balanced public service, Police and defence service, and fair administration, and elected local and/or regional councils.³⁹

It was on the basis of these principles that the constitutional framework for Namibia was negotiated and finally adopted by the Constituent Assembly in 1989. What followed is a new and enlightened jurisprudence as Namibian courts started to cultivate a human rights-centred legal culture. This was demonstrated in a number of post-independence court decisions in cases

37 Reservation of Separate Amenities Act (No. 49) of 1953.

38 Native Labour (Settlement of Disputes) Act (No. 48) of 1953.

39 www.kas.de/upload/auslandshomepages/namibia/State.../chapter3.pdf; accessed on 17 July 2013.

such as *Government of the Republic of Namibia and Another v Cultura 2000*, *S v Acheson*, and others.⁴⁰ In the *Cultura 2000* case, the late Chief Justice Mahomed reiterated this (new) approach⁴¹ to the interpretation of the Constitution, as follows:

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

Moreover, in the case of *Minister of Defence v Mwandighi*⁴² the Supreme Court approved the dictum in *State v Acheson*⁴³ that:

[t]he Constitution of a nation is not simply a 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 aspirations of a nation, the articulation of the values 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.⁴⁴

Similarly, the adoption of a new constitution with an entrenched Bill of Rights in South Africa, four years after the attainment of Namibia’s nationhood, ushered in a new era which meant that henceforth it was both impossible and undesirable to interpret and apply South African common law in a positivist way.

It was in this light that instead of positivism, a jurisprudence promoting the protection and entrenchment of fundamental human rights would not only

40 *S v Acheson* 1991 (2) SA 805 (Nm). Other cases that were decided by Namibian courts and reflected this enlightened jurisprudence include *Ex Parte Attorney-General, Namibia. In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS); *Namunjepo & Others v Commanding Officer, Windhoek Prison and Another* 2000 (6) BCLR 671 (NmS); *Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and Another*, Supreme Court of Namibia Case No. SA 8/99; *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC); (4) SA 965 (NmS); *Fantasy Enterprise CC t/a Hustler The Shop v The Minister of Home Affairs and Another* 1998 NR 96 (HC); *Nasilowski and Others v The Minister of Justice and Others* 1998 NR 97, and others.

41 Horn, N. 2008. “International Human Rights Norms and Standards: The Development of Namibian Case and Statutory Law”. In Horn, N & A Bösl (Eds). *Human Rights and the Rule of Law in Namibia*. Windhoek: Konrad Adenauer Stiftung, pp 141-164, http://www.kas.de/wf/doc/kas_16045-544-2-30.pdf; last accessed 10 July 2013.

42 *Minister of Defence, Namibia v Mwandighi* 1993 NR 63 (SC), at 68–71.

43 *S v Acheson* 1991 (2) SA 805 (Nm).

44 Horn (2008:141-164).

have tempered, but would have prevented the excesses of apartheid. A system of the rule of law based on constitutional supremacy, the separation of powers and checks and balances would not have countenanced any attempts to ride rough shod over the widely accepted principles under which human rights are promoted and protected. At the time of the inception of apartheid, to an era when it reached its peak during the 1970s and 1980s, these principles were widely applied and practised in many democracies around the world. The architects of apartheid and the South African legal fraternity were not unaware of the existence of these enlightened legal orders; they simply chose to ignore them in the futile and short-sighted belief that apartheid could be sustained over the long term.

Conclusion

Legal positivism has had a profound impact in both South Africa and Namibia. On the basis of this legal philosophical underpinning, oppressive laws and regulations were passed and enforced, thus clothing apartheid in the attire of legality and the force of law. The enforcement of apartheid rules caused untold hardships to the black inhabitants of Namibia and South Africa. However, the oppressed people stood firm in their determination to break the chain of apartheid and usher in a democratic dispensation underpinned by a respect for human rights and the rule of law. In Namibia, the epoch-making events on 21 March 1990 ushered in a new era of constitutionality and the beginning of the end of legal positivism in our jurisdiction. Six years later, following the sometimes, tumultuous negotiations, South Africans of all races went to the polls, in the first ever democratic elections following the adoption of a new constitution. Although the scars will take long to clear, the spectre of legal positivism in the two jurisdictions has been dealt a final blow.

Defences against personal liability to diligent company directors in Namibia: Does it offer adequate protection?¹

Eliaser Ilithilwa Nekwaya*

Abstract

Directors of companies face numerous challenges in the execution of their enormous duties. One of these is the consequences for personal liability as a result of collapse of their business decisions. Our legal system has developed defences for innocent company directors to ensure that they take calculated commercial risks without fear of personal liability. The business judgment rule is a corporate law doctrine, persistently affecting the roles and duties of directors and officers of companies. The business judgment rule applies to the process of directors' decision-making, and consists of a rebuttable presumption that in making business decisions, the directors of a company have acted on an informed basis, in good faith, and in the honest belief that the business decision taken was in the best interests of the company. Developments in company law have seen the codification of the common law rules into domestic legislations with the main object of creating legal certainty, and presumably offer adequate protection to directors. Section 256 of the Companies Act, Act 24 of 2004, appears to be a defence to this effect. The section authorises a competent court, to relieve from liability, a director who has acted honestly and reasonably and in its opinion ought to be fairly excused when proceedings are pending against him for negligence, default, and breach of duty or trust. In views of the two defences, one would have to investigate whether they are adequate for the protection of innocent company directors.

Introduction

It is widely accepted that company directors bear enormous responsibilities in corporate law. Justice Stegmann in the foreword to the work of van Dorsten² correctly summarised it as follows:

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1 This is part of a dissertation submitted in fulfilment of the requirements for the degree of Bachelor of Laws, Faculty of Law, University of Namibia, Windhoek, in October 2011.

2 Van Dorsten, JL. 1992. *Rights, Powers and Duties of Directors*. Sandton: Obiter.

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Corporate business is now so pervasive in our society... The responsibilities of company directors as a class are awesome. What regulates the exercise of their powers? It is a generally accepted proposition that the duty of the directors of a company is to run the business of the company in the best interests of the company. It is the mission of every company director to make and implement all operations and decisions that allow the companies to develop its social and commercial purposes. Directors oversee performance and operations of companies; they appoint and remove the senior managers, they draw and execute company's financial objectives and in general, the major operations of the company.

It is due to directors' enormous responsibilities with regards to management of companies that they may attract personal liabilities. Directors may well be concerned that their conduct will be scrutinised should they be involved in a corporate collapse. Honest directors risk becoming entwined in litigation and face the associated reputational damage and the potential for ultimate financial ruin as a result of their decisions which may have led to corporate collapse.³ Furthermore, for a company to become a successful concern, directors have to make commercial decisions which aim to maximise profits, and sometimes this requires a director to take risks. Directors need legal protection because decisions often involve some form of commercial risk and are sometimes made on the basis of limited information. One would assume that in order to encourage reasonable and calculated commercial risk-taking, some form of insurance or security should be afforded to directors in case the risk undertaken leads to corporate collapse. It is against this background that the law developed mechanisms such as the business judgment rule⁴ and statutory relief in terms of section 256 of the Companies Act⁵ in order to protect innocent directors from attracting personal liability arising out of corporate decisions collapse.

The business judgement rule

It has been argued that the main challenge to corporate governance is the complicated "balance between maximizing the efficiencies necessary to create wealth and ensuring that the controlling parties are accountable to the company".⁶ Having different examples of alleged corporate collapse

3 Stephen, M & B Bainbridge. 2004. "The Business Judgments Rule as Abstention Doctrine". *Vanderbilt Law Review* 57(1):83.

4 Hereinafter "the rule".

5 Companies Act No. 28 of 2004; this provision applies to directors, officers and auditors of the company. The position regarding the directors of companies is the only aspect that is relevant for the purposes of this study and the way in which other parties are affected in terms of this provision does not form part of its scope.

6 Lombard, S. 2007. *Directors' Duties to Creditors*. LLD thesis, University of Pretoria Faculty of Law, at 332.

as a result of negligent management of affairs of companies in Namibia⁷ lately, a consistent and explicit standard of director's liability has become an urgent issue in my view. Directors shall at all times act with due care, skill and diligence in conducting the business affairs of the company. A director owes the company a duty to act in good faith and with care, skill and diligence.⁸ Directors who breach their duty to act with care, skill and diligence shall be personally liable for the damages suffered as a result of their conducts.⁹ In determining the liability of directors for breach of duty of care, skill and diligence, the King Committee¹⁰ recommended the use of the so-called "business judgment rule" as a test for determination of a director's personal liability for corporate collapse resulting from the breach of duty of care, skill and diligence.

Origin of the rule

The business judgment rule was developed in the United States of America alongside the duty of care, skill and diligence and relates to one aspect of this duty, namely, decision making. The rule is a concept in company law whereby *a court will refuse to review the actions* of a company's board of directors in managing the company unless there is some allegation of *conduct that violates the director's duty of care, loyalty, or good faith or the decisions of the directors lack a rational basis*.¹¹ The rule creates a presumption in favour of the board of directors, freeing the members of the board of directors from possible personal liability for decisions that result in harm to the company.¹²

Meaning and application

The business judgment rule can be outlined as a standard of non-review, entailing no review of the merits of a business decision by corporate officials.¹³

7 Some of the notable cases in Namibia are: National Petroleum Corporation of Namibia (NAMCOR) whereby allegations of mismanagement led to the dismissal of the company's managing director (see <http://www.economist.com.na/special-focus/80-beukes-axed-as-namcor-md>; last accessed 09 February 2012; Road Fund Administration (RFA) where allegations of mismanagement of funds led to the suspension of RFA Chief Executive Officer and two other senior officials of the company, and his subsequent resignation from the company (see <http://www.namibiansun.com/node/9510>; last accessed 08 July 2013).

8 Lombard (2007:note 5).

9 (ibid.:note 6).

10 *King III Report on Corporate Governance in South Africa*. 25 February 2009, Chapter 5: para. 39.

11 Italicised words are my emphasis.

12 Malokane, M. 2010. "The Introduction of Business Judgment Rule by The New Companies Act". *De Rebus*, June 2013:53.

13 Lombard (2007:note 15).

Business judgment rule entails that a director should not be liable for a breach of duty¹⁴ if he/she made a business judgment in good faith and if such decision was an informed decision, the decision which has taken all relevant factors including those beyond the business core values and risk into consideration, and a decision which is rational and taken in the best interest of the Company. Furthermore, in applying this rule in any judicial proceedings, courts will not interfere in matters of business judgment, in which it is presumed that in exercising business judgments, reasonable care, skill and diligence has in fact been exercised. Consequently, a director cannot close his eyes to what is going on about him/her in the conduct of business judgments that may have serious effects or implications on the company operations and thereby undermine the company's prospect of success.

The rule applies to the process of directors' decision-making, and consists of a rebuttable presumption that in making business decisions, the directors of a company have acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.¹⁵ Havenga¹⁶ argued that the rule addresses the issues of both the honesty of directors and, to a limited extent (i.e. whether they have properly informed themselves as to the circumstances surrounding the particular decision), whether the director has breached the duty of care. This means that the rule usually serves to protect directors from liability to the company or to its shareholders for losses resulting from poor decision-making.

In order to encourage directors to act innovatively and efficiently, adequate protection to company directors in cases of collapse of reasonable and informed business deals is required in our law. The business judgment rule is one of the safe havens to directors, or rather, a defence in any proceedings of breach of duty of care, skill and diligence. As an alternative, some academic commentators¹⁷ proposed that one should look at corporate law measures providing relief from liability under specified circumstances. Measures such as these play an important role in striking the balance between imposing liability on diligent directors, thus ensuring accountability, while providing freedom to take calculated business risks without the threat of personal liability, should the corporation fail. Furthermore, it is safe to assume that protections such as these may serve to attract persons of the right calibre to serve on the boards of companies.¹⁸

14 This duty implies either the breach of a duty of care, skill and diligence or breach of fiduciary duties.

15 Jones, E. 2007. "Directors' duties: negligence and the Business Judgment Rule". *South African Mercantile Law Journal* 19(3):326-336.

16 Havenga, M. 2000. "The Business Judgment Rule – Should We Follow the Australian Example?" *South African Mercantile Law Journal* 12(28).

17 Lombard (2007:333).

18 Lombard (2007:note 14).

The rule only protects judgments made by directors, auditors and officers of companies, especially decisions which are consciously made and involve the exercise of corporate judgments. I submit that failure to act (omission) seems not protected under the rule unless it is a decision taken by exercise of judgment. Accordingly, the rule does not protect omissions to act such as failure in oversight or monitoring.¹⁹ Thus, where directors have failed to exercise any financial oversight functions and the lack of any such system has enabled fraud by a subordinate official to occur, the rule's protection is unavailable and directors' conduct would be judged by reference to the duty of care standard.²⁰

The Standard of Care Test

In applying the business judgment rule, an action based on a director's breach of the duty of care, skill and diligence must necessarily involve an inquiry into the relevant standard of care. In South Africa (including Namibia) and the United Kingdom, the standard of care test is based on dictum in *Re City Equitable Fire Insurance Co Ltd*²¹ as approved in *Fisheries Development Corporation of SA Ltd v Jorgensen*²² where Justice Romer concluded that, firstly, "a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience", and secondly, a director is "not bound to give continuous attention to the affairs of his company".²³ It is submitted that the first part of Romer J's judgment could be justified and reasonable. However, in view of the fact that the directors are imposed with the duty of care, skill and diligence, it is imperative that an executive director shall give continuous attention to the affairs of the company. The court is not concerned to enquire on the financial wisdom of the director's decisions. But in deciding whether the duty of care, skill and diligence has been observed, the court may properly consider whether in the circumstances a reasonable man could have believed a particular act was in the best interest of the company.²⁴

In respect of all duties that may properly be left to some other official, a director is, in the absence of specific grounds for suspicion, justified in trusting certain officials to perform such duties honestly. A director is entitled to accept and rely on the judgment, information and advice of the management, unless there

19 Redmond, P. 1997. "Safe Harbours or Sleepy Hollows: Does Australia Need a Statutory Business Judgment Rule?" In Ramsay, IM (Ed.). *Corporate Governance and the Duties of Company Directors*. Melbourne: Centre for Corporate Law and Securities Regulation, University of Melbourne, p 200.

20 Redmond, P (1997:note 18).

21 (1925) Ch 407, at 428.

22 1980 (4) SA 156 (W) 165.

23 Jones, E. (2007:335).

24 *Charterbridge Corporation Ltd v Lloyds Bank Ltd* (1970) Ch 62, at 74.

are proper reasons for questioning such advice and reasonable grounds to divert therefrom. Obviously, a director exercising reasonable care, skill and diligence would not accept information and advice blindly.²⁵ He would accept it, and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment accordingly. This argument is based on the director's reliance on professional advice from the officials who are equipped with special expertise in specific subject matters that affect the operations and profit margins of the company, i.e. a director would rely on the professional legal advice provided by the company's legal advisor. A prudent director holding the office of directorship would evaluate the advice provided, and weigh its implications before taking a business judgment. It would thus follow that the decision to be taken will be an informed one and in the best interest of the company.

Section 256 defence

It is generally accepted that directors may be personally liable for any civil damages suffered by the company in cases where they are in breach of their duty of care, skill and diligence in managing the affairs of the companies they are entrusted with. As discussed in the introductory part of this article, our law employed a mechanism²⁶ which aims to protect honest directors whose decisions have led to corporate collapse. In terms of section 256 (1) of the Companies Act,²⁷ regarding any proceedings for breach of duty or negligence, if it appears to court that a director acted honestly and reasonably, he may be excused from personal liability if, in the opinion of the court and all surrounding circumstances, he/she ought fairly to be excused. This section is similar to section 248²⁸ of the previous Companies Act.²⁹ It should be noted that any reference to section 248 in this chapter shall be construed or bear the same meaning as section 256 of the 2004 Companies Act which is the current legislation in Namibia.³⁰ Section 256 (1) provides as follows:

25 *Benson v De Beers Consolidated Mines Ltd* 1988 (1) 834 (NC), at 836.

26 The Business Judgment rule specifically.

27 Act no 28 of 2004 (the new companies Act).

28 Section 248 (1) provides as follows: "Relief of directors and others by Court in certain cases:

(1) If in any proceedings for negligence, default, breach of duty or breach of trust against any director, officer or auditor of a company it appears to the Court that the person concerned is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, the Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit".

29 Act No 61 of 1977 (the Old Companies Act).

30 The Old Companies Act (Old Act).

- 256.(1) If in any proceedings for negligence, default, breach of duty or breach of trust against any director, officer or auditor of a company it appears to the Court that the person concerned is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he or she has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his or her appointment, he or she ought fairly to be excused for the negligence, default, breach of duty or breach of trust, the Court may relieve him or her, either wholly or partly, from his or her liability on terms which the Court considers appropriate.
- (2) Any director, officer or auditor who has reason to believe that any claim will be made against him or her in respect of any negligence, default, breach of duty or breach of trust, may apply to the Court for relief, and the Court has, on that application, the same powers to grant relief as are by subsection (1) conferred on it with reference to proceedings referred to in that subsection.

It is submitted that the new Companies Act thus introduces or codifies the business judgment rule into Namibian Company law. The section enables total or partial relief from liability in proceedings or apprehended proceedings for negligence to be granted to a director of a company where it appears to the court that he acted honestly and reasonably in the circumstance the court thinks fit.³¹ It should be noted that special circumstances must exist for the above provision to be applicable. This provision may not apply to all cases involving director's breach of duties which causes damages to the company.

In *Niagara Ltd v Langerman*,³² the court held that special circumstances would have to prevail before the court could grant this relief. The court should establish that a “*director acted honestly and reasonably*,”³³ and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused”.³⁴

Application of section 256

As a general rule, it is beyond dispute that anyone who injures another either by fraud (*dolus*) or negligence (*culpa*) is of course personally liable to the victim in terms of common law remedies deriving from respectively the *actio doli* and the *actio legis Aquiliae* and for the patrimonial loss resulting from the fraud or negligence.³⁵ Section 256³⁶ allows the court to enquire on the reasonability

31 Phillip, M, MS Blackman, MD Glaser, IE Konyn & SF Mullins. 1985. *Henochsberg on the Companies Act* 4th Edition. Durban: Butterworths, at 385.

32 1913 WLD188.

33 My emphasis.

34 Cilliers, HS, ML Benade, JJ Hennung, JJ Du Plessis, PA Delpont, L De Koker & JT Pretorius. 2000. *Corporate Law* 3rd Edition. Durban: Butterworths, at 160.

35 *Ex Parte Lebowa Development Corporation Ltd* 1989 (3) SA 71, at 106I-J.

36 Section 248 of the Old Act.

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of the business decision that injures another and where it is found that the directors acted unreasonably, the court will refuse to grant the relief and the director's immunity to liability flows away. The relief may be granted on such terms as the court thinks fit. A director accused of breach of duty of care, skill and diligence, and breach of any other fiduciary duty at common law, should therefore be entitled to the relief in terms of the provisions of section 256.

Henochsberg³⁷ suggests that, on the ordinary meaning of the language in section 248,³⁸ the provision of the Act applies to proceedings by *anyone* against a director, provided that they are proceedings for *negligence, breach of duty or breach of trust*³⁹ by the defendant in the capacity as director of a company. However, In *Ex Parte Lebowa Development Corporation Ltd*⁴⁰ the court concluded that section 248 empowers the court to grant relief, firstly against a claim by the *company itself* (or its liquidators) and secondly, against *criminal liability*. The court further held that section 248⁴¹ does not empower the court to grant relief to a director against claims by *third parties* such as creditors of the company.⁴²

This section therefore, is of no comfort to a director or other officers of a company when faced with a claim made against them personally by creditors of the company for damages suffered by the creditors as a result of the negligence or breach of duty by that director. The only relief a director can get under section 248 (if any relief at all can be justified) is the relief from liability to the company itself (not outsiders) and from criminal accountability in term of the *Ex Parte Lebowa* case above.

I submit, however, that there seems to be an oversight in respect of the application of section 248 in *Ex Parte Lebowa* case.⁴³ The remedy as provided for in the context of the provision, in my view, shall not only be available to proceedings brought by the company itself. Reasonably speaking, the grammatical meaning of the later provision relates to the court's power to relieve directors from personal liability. I submit that it is immaterial whether such proceedings were brought by the company itself and its members or by the creditors.

There are three requirements that a director who seeks relief must satisfy before such relief is granted, namely, that the person concerned:

37 Phillip et al. (1985:note 29, at 385).

38 With specific reference to section 248 of the Old Act.

39 My emphasis.

40 *Ex Parte Lebowa Development Corporation Ltd*, note 35, at 107 F-G.

41 Section 256 of the New Act.

42 *Ex Parte Lebowa Development Corporation Ltd*, note 32, at 107H.

43 (*ibid.*:note 39).

Defences against personal liability to diligent company directors in Namibia

- Acted honestly;⁴⁴
- Reasonably and
- Ought fairly to be excused.

The requirement that the director acted honestly and reasonably means that the court is not empowered to relieve a director from any liability resulting from *fraudulent conduct*.

However, difficulty arises with the requirement that the director must have acted *reasonably* where such liability sought to be relieved from by the director arises from negligence. Stegmann J⁴⁵ expressed this difficulty in the following terms:

The provision...envisages a situation in which a director's act or omission may be found to be both *negligent and reasonable*⁴⁶ at one and the same time. Since an act (or omission) is only negligent if it is something which would not be done (or left undone) by a reasonable man acting reasonably, there is some uncertainty as to what the legislature have had in mind when it empowered the court to relieve a director from liability to the company for his negligence, provided that he acted 'reasonably'. The concept of reasonable negligence appears on the face of it to be self-contradictory.

It has been suggested that the legislature may have intended that the court's readiness to find that a director who has been guilty of negligence has nevertheless acted reasonably, should vary inversely to the degree of negligence proved. Even where it is accepted that the person concerned acted honestly and reasonably, a technical effect may in the circumstances be such that he ought not fairly to be excused.⁴⁷

Furthermore, the protection envisaged in subsection (1)⁴⁸ has to be made by way of a defence. The burden of proof then rests on the person seeking relief to establish on a balance of probabilities his entitlement to such relief. The defendant has to show that he acted *honestly, reasonably and that he ought fairly to be excused*.⁴⁹

44 In *Re J Franklin & Son Ltd* 1937 4 All ER 43-47, it was said by way of an obiter dictum that honesty in this section means "without direct motive", and that where directors act recklessly, but without considering the interest of the company, they may be said to have acted dishonestly.

45 In *Ex Parte Lebowa*, at 108 E-F.

46 My emphasis.

47 Blackman, MS. 2003. "Commentary on the Companies Act". In Joubert, WA (Ed.). *The Law of South Africa*. Durban: Butterworths, Vol. 4, part 2, at 288 in para. 158.

48 As quoted herein above.

49 *Niagara Ltd v Langerman* 1913 WLD188.

On the other hand, subsection (2) gives the right to a director to mero motu ask the court to excuse him/her from personal liability as a result of corporate collapse of his/her commercial decisions. It is submitted that sub-rule (2) is applied by way of motion proceedings. That is to say that, an application brought by notice of motion accompanied by an affidavit setting out the grounds upon which the court shall exercise its discretion to relieve him/her. It is suggested herein that some trends in the exercise of judicial discretion can be identified.

In summary, a director may partially succeed under section 256 and the business judgment rule if:

- the director (or a related party) did not stand personally to benefit from the breach;
- the director did not actually know or was not wilfully blind as to the “wrongfulness” of his conduct;
- The director did not deviate greatly from commercial standards of reasonableness.

Conclusion: Adequate protection to diligent company directors?

Following the interpretation and application of the rule and statutory relief in terms of section 256 above, the following could be possible threats to the protection afforded to directors in terms of the business judgment rule and section 256:

It is clear from above that there is an uncertainty on the application of the statutory provision to relieve directors from personal liability. In *Ex Parte Lebowa Development Corporation Ltd*⁵⁰ the court concluded that the section empowers the court to grant relief, firstly *against a claim by the company itself* (or its liquidators) and secondly, *against criminal liability*. Whereas in *Customs and Excise Commissioners v Heldon Alpha Ltd*⁵¹ the court opines that the remedy as provided for in the context of the provision shall only be available to proceedings brought by the company itself, uncertainty therefore exists as to whether the remedy is applicable in all proceedings against directors by anyone (including the third parties, i.e. creditors) or whether their application is limited to proceedings against directors specifically instituted by the company itself.⁵² I submit that, although there may be uncertainty in respect of the application of section 256, most commentators⁵³ are of the view

50 *Niagara Ltd v Langerman* 1913, note 32, 1061-J.

51 (1981) 2 All ER 697 (CA).

52 *Customs and Excise Commissioners v Heldon Alpha Ltd*, note 51 at 697.

53 Lombard (2007:note 5, at 332).

that this remedy should be available to actions of directors on the basis that they breached their duty of care, skill and diligence and therefore, any action brought by anyone including third parties shall be tested against section 256. It thus follows to say that section 256 and the business judgment rule shall protect diligent company directors provided that they have acted honestly and reasonably in making the business decisions in question. This provision is yet to be tested in our courts.

Another possible argued threat to the directors against the defence of the business judgement rule and section 256 is the position that a person who acted *negligently* may be relieved from liability if it can be shown that he acted *reasonably*.⁵⁴ The question that may be challenging in our law is that – *how can one be reasonable if he/she has already been found negligent, which presupposes a deviation from the standard of the reasonable man/director?*⁵⁵ Lombard⁵⁶ suggests that, when a decision has to be made on whether relief should be granted in respect of *negligence*, the term ‘*reasonably*’ should be interpreted to mean understandably. Lord Hoffman in one of the English courts⁵⁷ expressed the above difficulty in the following terms:

It may seem odd that a person found to have been guilty of negligence, which involves failing to take reasonable care, can ever satisfy a court that he acted reasonably. Nevertheless, the section clearly contemplates that he may do so and it follows that conduct may be reasonable for the purposes of s727⁵⁸ despite amounting to lack of reasonable care at common law. Whether this suggestion adequately protects the innocent directors, is a question which requires further research and/or judicial interpretation.

A further challenge that seems to threaten directors’ protection is the uncertainty as to the extent of the court’s discretion to grant relief to the directors. This is indicated by phrases granting a wide and flexible discretion to the court hearing the matter, for example, that a director ought “fairly be excused ..., having regard all circumstances of the case”. Lombard⁵⁹ further argued that the absolute discretion in the provision of section 256 is that a court “may relieve” a director under these circumstances. Therefore, even if the director acted honestly and reasonably, there seems to be no legal certainty that he/

54 My emphasis.

55 My emphasis.

56 Lombard (2007:note 5, at 342-343), quoting with approval Henochsberg at 461, with reference to *Niagra Ltd v Langerman* 1913 WLD 188; *Selangor United Rubber Estates Ltd v Cradock* (3) (1968) ALL ER 1073, a director wishing to avail himself of the relief offered in terms of s128 will have to prove on a balance of probabilities that he acted honestly, reasonably and he ought fairly to be excused.

57 *Re D’Jan of London Ltd; Copp v D’Jan* (1994) 1 BCLC 561.

58 Companies Act 1985.

59 Lombard (2007:note 5, at 344).

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she will escape personal liability. However, I submit that even though the discretion of the court to excuse directors may appear wide and absolute, it should be exercised judiciously. That is to say, that the court is bound to consider all the relevant factors and having investigated the circumstances upon which the director made the business judgment and so acted honestly and reasonably, the court will have no other choice than to excuse such a director.

Moreover, if we take the business judgment rule which is a policy of judicial non-review in light of the fact that the courts are reluctant to pronounce on the wisdom of managerial decisions, it is quite possible that directors are in a much more favourable position to obtain relief from personal liability where the relief depends on the discretion of the court. Therefore, a strict statutory framework in respect of which circumstances the court is placed under the obligation to grant relief may work against innocent directors. I submit that the fact that the relief granted by the court is discretionary does not justify the conclusion that the protection afforded in terms of both common law business judgment rule and statutory relief under section 256 is inadequate. In my view, discretion in the hands of the courts potentially affords directors a wider protection than would have been available had the court been constrained to grant relief within a strict regulatory framework and under regulated circumstances.

It is now clear that directors owe their companies the duty of care, skill and diligence, in terms of which directors must manage the business of the company as a reasonably prudent person would manage his own affairs. The standard of care is a mixed objective and subjective test, in the sense that the minimum standard is that of a reasonably prudent person but a director who has greater skills, knowledge or experience than the reasonable person must give to the company the benefit of those greater skills, knowledge and experience. However, it is also clear that directors need protection against action of the companies which may attract personal liabilities. I submit that innovations, imitations and profitability are some of the features that dominate the minds of diligent directors in running company operations. It should be noted that, as much as the directors are charged with the duty to act with care, skill and diligence in managing company affairs, they are equally required to ensure that the entities they manage become successful concerns and therefore, pressure is placed on directors to maximise all efforts to clinch profitability, including taking calculated commercial risks.

I further submit that, in any proceedings involving breach of duty or negligence by directors of any company, the courts should not only consider the decision taken by the directors, but in totality, the court must look at the nature of complexity of the company operations, extent of the risk taken, and evaluate the implications to the company; should the directors' decision be found irresponsible, any defence raised in terms of either the business judgment rule or section 256 shall fail.

The SADC Tribunal: Exclusive access?

Dennis U Zaire* and Kathrin Schneider**

Introduction

Recently, at the 32nd Summit of SADC Heads of States and Government held in Maputo, Mozambique,¹ the Member States resolved that a “new Protocol on the Tribunal should be negotiated and that its mandate should be confined to the interpretation of the SADC Treaty and Protocols relating to disputes between Member States”.² This implies that in future the jurisdiction of the SADC Tribunal would apply only to disputes arising between Member States, once the new Protocol is completed. This position is contrary to the previous Tribunal mandate that allowed and extended jurisdiction between natural or legal persons and states.³ What does the Summit decision mean to the citizens in the region? What effects would the decision to call for a new Protocol have on issues of human rights across the region? What impacts would it have on the jurisprudence of the Tribunal and the rule of law? More importantly, would the Tribunal only be accessible exclusively by Member States?

This paper constitutes an attempt to analyse the impact of the decision to propose a new SADC Protocol on the Tribunal as far as it relates to issues of accessing the regional court and the impact of the decision on issues of human rights. Moreover, it will look at the implications of the aforementioned decision on the limitation of the Tribunal’s power to matters arising between states. The paper argues that the decision by the SADC Heads of States and Government to propose a new Protocol with mandate between Member States is short sighted and implies a serious setback not only for the rule of law, but also for issues of human rights in the region.

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1 18 August 2012.

2 Final Communiqué of the 32nd Summit of SADC Heads of States and Government, Maputo – Mozambique on 18 August 2012, page 24. Available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Communique_32nd_Summit_of_Heads_of_States.pdf; last accessed on 12 September 2012.

3 Refer to the Protocol on Tribunal and Rules of Procedure, Article 15 (1) which states that “the Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States”. Also refer to article 14 (Scope of Jurisdiction) of the same protocol, article 18 (disputes between natural or legal persons and community) also of the Tribunal’s Protocol, and article 16 of the SADC Treaty.

At the outset, the paper offers a brief history of the Tribunal. Secondly, it discusses the achievements of the Tribunal under the current Protocol by considering a number of cases. Thirdly, the implications of the Tribunal's suspension will be reviewed. Fourthly, this chapter deals with the question whether the new Protocol definitely means exclusive access to the Tribunal. Finally, the paper provides an analysis of the Tribunal's future before concluding.

Brief history

The SADC Tribunal was created in 1992⁴ as an independent legal body constituted under Article 9 (1) (G) of the SADC Treaty. It is tasked⁵ with ensuring that SADC Member States adhere to and observe the SADC Treaty and all SADC Protocols. It has jurisdiction to give preliminary rulings in proceedings of any issue and between any parties before the courts or tribunals of States.⁶ Its jurisdiction extends to all disputes and all applications referred to it in accordance with the Treaty and the Tribunal's Protocol which relates to the application and interpretation of the Treaty,⁷ the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the community, and acts of the institutions of the states.⁸ Under Article 18 of the Protocol on the Tribunal and Rules of Procedures, the Tribunal has exclusive jurisdiction over all disputes between the state and the community, and between natural or legal persons and the community.⁹

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- 4 The inauguration and swearing in of the Members of the Tribunal took place on 18 November 2005, in Windhoek, Namibia. The seat of the Tribunal is designated by the Council to be Windhoek, Namibia.
- 5 Under Article 3 (1) of the SADC Tribunal protocol, the Tribunal consists of ten (10) judges, of which five are designated by the Council as members who sit regularly at the Tribunal. The remaining five (5) constitute a pool from which, under Article 3 (2), a president may invite a member to sit on the Tribunal in case a regular member is not available. Moreover, under Article 3 (3) the Tribunal is constituted by three (3) members, with the provision that the tribunal may decide to constitute a full bench consisting of five (5) members. Currently, until its suspension, the regular members were: H.E. Dr Rigoberto Kambovo (Angola), H.E. Justice Dr Onkemetse B. Tshosa (Botswana), H.E. Justice Isaac Jamu Mtambo, SC (Malawi), H.E. Justice Ariranga Govindasamy Pillay (President - Mauritius), H.E. Justice Dr Luis Antonio Mondlane (Mozambique). The other five (5) members were: H.E. Justice Petrus T. Damaseb (Namibia), H.E. Justice Stanley B Maphalala (Swaziland), H.E. Justice Frederick B. Werema (Tanzania), H.E. Justice Frederic Mwela Chomba (Zambia), H.E. Justice Antonia Guvava (Zimbabwe).
- 6 See Article 16 (1) of the Protocol on the Tribunal and the Rules of Procedure. All listed Articles of the Protocol are available at <http://www.sadc.int/english/key-documents/protocols/protocol-on-tribunal-and-the-rules-of-procedure-thereof/>.
- 7 See Article 14 (a) of the Protocol on the Tribunal and the Rules of Procedure.
- 8 See Article 14 (b) of the Protocol on the Tribunal and the Rules of Procedure.
- 9 See Article 18 of the Protocol on the Tribunal and the Rules of Procedure.

Between 2007 and 2010, the Tribunal has heard 20 cases in total with 11 of those cases involving issues of human rights violations brought up by Zimbabwean nationals. These statistics prove that SADC citizens used the Tribunal to hold their governments to account on issues of human rights violations and the rule of law.

Ultimately, following intensive lobbying by the Government of Zimbabwe,¹⁰ in August 2011 the Heads of States and Government decided to suspend the Tribunal and to review its mandate. Looking at the cases that appeared before the Tribunal as recorded in its records, it must be asked whether the Tribunal can be considered successful or whether it has let down the people of the region, and therefore rendering its establishment and performance a waste of financial resources.

SADC Tribunal achievements: The cases

After the SADC Tribunal became operational in 2005, the juridical organ started its activities comparatively late in September 2007, when the first case between the applicant Ernest Francis Mtingwi, a national of Malawi and the SADC Secretariat as respondent was brought to justice. The primary cause of the aforementioned case was a vacancy advertisement for the position of Senior Programme Manager, Custom Cooperation and Modernisation offered by the SADC Secretariat. The applicant Mtingwi successfully applied for the offered position and signed the contract of employment in February 2006. He was, however, not provided with an original letter of contract and informed the Secretariat accordingly. While preparing to report to the SADC Secretariat based in Gaborone, Botswana and without having received any further instructions by the Secretariat up to March 2006, Mtingwi was suddenly charged by the Government of the Republic of Malawi with the offence of lying under oath in a Court of Law. In April, the SADC Secretariat informed the applicant via a letter saying that they had been instructed to withdraw his candidature for any possible consideration for the position in question and consequently had to dissolve the labour agreement through the request of the Government of Malawi.

As a result, the applicant challenged the legality of the premature contract termination by invoking the rules of natural justice. He considered the Secretariat's decision illegal and unreasonable, as he was not accorded the opportunity to be heard and no reasons were given for this decision, which therefore was *ultra vires*. Hence, Mtingwi demanded either to be reinstated into his affirmed position as Senior Programme Manager or to be compensated

¹⁰ The huge number of cases involving the government of Zimbabwe may help explain the anti-tribunal attitude the government of Zimbabwe has adopted and why it has successfully campaigned for its suspension or complete disbandment in the past.

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in lieu of the reinstatement. By contrast, the Secretariat as the counterparty confirmed the offer of employment, but also stated that under the terms of Rule 14.2.6 of the SADC Administration Rules and Procedures Handbook, the contract only became effective from the moment the applicant was physically present in Gaborone which had not occurred before the Government of Malawi pressed charges against Mtingwi.

After hearing both parties, the SADC Tribunal, which took jurisdiction of this case through Article 18 of the Protocol on Tribunal and Rules of Procedure,¹¹ finally ruled that Mtingwi's application had failed and he was dismissed. The Tribunal justified its decision by saying that the alleged contract of employment in the present case did not take effect on account of failure by the applicant to report to the duty station. Furthermore, the court agreed with the respondent – based on the abovementioned Rule 14.2.6 – that the applicant was still a candidate for as long as he did not report to the duty station for commencement of duties. As a candidate, therefore, he was neither an employee nor a staff member of the respondent and consequently not entitled to the rights that accrue to employees or staff under the Treaty and other instruments.¹²

In the same year (2007), Mike Campbell Limited and William Michael Campbell brought a new case to the SADC Tribunal relating to the land reform controversies in Zimbabwe.¹³ In probably the most well-known case, properly named *Mike Campbell (Pvt) Ltd and 78 Others versus the Republic of Zimbabwe*, the claimant challenged the expropriation of agricultural land known as Mount Carmel in the District of Chegutu in the Republic of Zimbabwe by the Zimbabwean Government. The main reason for bringing this case to court was a demand by the Zimbabwean government that Mike Campbell hand back his land acquired in 1974 to the Government through the fast-track resettlement program. In July 2001, amid large-scale land invasions, Campbell received the first government notice to acquire his property which was declared invalid by the High Court. This was followed by five further notices, until Campbell applied to the High Court for a protection order in 2004 as he feared a violent

11 See Article 18 of the Protocol on Tribunal and the Rules of Procedure.

12 Cf. Case "Ernest Francis Mtingwi vs. SADC Secretariat", available at <http://www.sadc-tribunal.org/docs/case012007.pdf>; accessed on 4 October 2012.

13 "Land reform in Zimbabwe began after the signing of the Lancaster House Agreement in 1979 which assured special protection to white Zimbabweans for the first ten years of independence in 1980. These included provisions that the government would not engage in any compulsory land acquisition and that the government was prompted to pay an adequate compensation for the property in case of land acquisition. Government-orchestrated land invasions began in 2000 when the Zimbabwean government formally announced a 'fast track' resettlement program, stating that it would acquire more than 3,000 farms for redistribution". See http://www.hrw.org/legacy/reports/2002/zimbabwe/ZimLand0302-02.htm#P112_20168; accessed on 8th September 2012.

seizure of his property. On the basis of Amendment 17¹⁴ which was added to Zimbabwe's Constitution in September 2005 to vest ownership of certain categories of land in the Zimbabwean Government and to eliminate the courts' jurisdiction to hear any challenge to the land acquisitions, the Supreme Court of Zimbabwe had no other choice but to dismiss Campbell's challenge.¹⁵

In the interim, Campbell had already filed an application with the SADC Tribunal referring to Article 15(1)¹⁶ of the Declaration and Treaty of SADC, as the dispute concerned the infringement of human rights and broke with the SADC principles such as democracy and the rule of law. Furthermore, the applicant declared the land acquisition by the Zimbabwean Government racist and illegal by virtue of Article 6 of the SADC Treaty and the African Union Charter, as only white farmers were affected by this expropriation. Subsequently, Seventy-Eight other persons who were also requested by the Zimbabwean Government to restore their land joined Campbell's party to intervene in the proceedings against the Government of Zimbabwe.

A first decision was made in December 2007 when the Tribunal granted an interim measure ordering the Government of Zimbabwe to take no steps, directly or indirectly, to evict Campbell from the farm or interfere with his use of the land.¹⁷ Finally, the last decision in this dispute was made on 28 November 2008. Among other things, the Tribunal held that the Zimbabwean Government had violated the SADC Treaty by denying access to domestic courts through Amendment 17 of the Constitution which automatically entitled Campbell as plaintiff to seek remedy before the Tribunal as the responsible judicial authority. It stated that Article 4 (c) of the Treaty obliges Member States of SADC to respect principles of "human rights, democracy and the rule of law" and to undertake in terms of Article 6 (1) of the Treaty "to refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty".¹⁸

Moreover, the Tribunal charged the Zimbabwean Government with racial discrimination as only land belonging to white farmers had been confiscated

14 See Amendment 17 at <http://aceproject.org/ero-en/regions/africa/ZW/Constitution%20of%20Zimbabwe%201980.pdf>; accessed on 9 September 2012.

15 See Case "Mike Campbell (Pvt) Ltd and 78 Others versus the Republic of Zimbabwe", available at <http://www.sadc-tribunal.org/docs/case022007.pdf>.

16 See Article 15(1) of the Declaration and Treaty of SADC, available at <http://www.sadc.int/english/key-documents/protocols/protocol-on-tribunal-and-the-rules-of-procedure-thereof/>; accessed on 9 September 2012.

17 SADCT: Case no. 2 of 2007.

18 See Article 4 (c) of the Declaration and Treaty of SADC, available at <http://www.sadc.int/english/key-documents/declaration-and-treaty-of-sadc/#article4>; accessed on 5 October 2012.

under the land reform program in Zimbabwe. Finally, the Tribunal held that the plaintiffs were entitled to claim a fair compensation with respect to their expropriated lands. These judgments given by the Tribunal finally closed the case in favour of Campbell Limited and the other 78 applicants.¹⁹ Zimbabwe refused to enforce the judgments of the Tribunal saying that it did not recognise its (tribunal's) jurisdiction²⁰ as it had not ratified the Tribunal protocol. However, the South African Supreme Court of Appeal (SCA) recently emphasised that according to article 32 of the SADC Treaty, "decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the Member States concerned".

After these two cases, the Tribunal ruled in 18 other cases until the juridical organ was suspended in 2010. Private individuals brought in a total of 16 cases before the Tribunal. Of particular note is that twelve of these cases dealt with issues involving the Government of Zimbabwe as the only Member State of the Community resisting the principles of the SADC Treaty and Protocols.²¹ This fact clearly explains the Zimbabwean Government's interest in fiercely lobbying for the suspension of the SADC Tribunal.²² The majority of

19 For the decision see, Case "Mike Campbell (Pvt) Ltd and 78 Others versus the Republic of Zimbabwe", available at <http://www.sadc-tribunal.org/docs/case022007.pdf>; accessed on 4 October 2012.

20 Recently in the Supreme Court of Appeal (SCA) Case 657/11 (para. 31), Zimbabwe appealed against the North Gauteng High Court registration and enforcement of the SADC Tribunal rulings and the subsequent attachment of Zimbabwean government owned property in Cape Town. Appeal Judge Nugent RW said, "it is surprising that the jurisdiction of the Tribunal should be contested by Zimbabwe, bearing in mind that its Deputy-Attorney General raised no such objections when he appeared before the Tribunal on behalf of Zimbabwe, that Zimbabwe nominated one of its judges to membership of the body, and that its own high court has rejected the contention". In that case the court found that, "there is no merit in the submission that Zimbabwe is not bound by the Treaty as amended, or by the Protocol as amended". It emphasised that "(The Government of Zimbabwe's) position in this regard, premised on the *ex post facto* official pronouncement repudiating the Tribunal's jurisdiction, is essentially erroneous and misconceived. Their position is rendered even more untenable by the conduct of SADC governments, including the government of Zimbabwe, subsequent to the adoption of the Amendment agreement, which conduct has been entirely consistent with the provisions of the treaty as amended by the agreement". The Judgment was delivered on 20 September 2012, available at: http://www.justice.gov.za/sca/judgments/sca_2012/sca2012-122.pdf.

21 See list of all cases at <http://www.sadc-tribunal.org/pages/decisions.htm>; accessed on 4 October 2012.

22 The composition of the Tribunal is diverse (see footnote 5 above) and under article 3 (6) of the Tribunal Protocol, no two or more members may, at any time, be nationals of the same country. In fact Zimbabwe has a member serving on the Tribunal, although not on a regular basis, H.E. Justice Antonia Guvava (Zimbabwe). Hence, any argument(s) of bias against Zimbabwe by the Tribunal in its rulings are eliminated.

disputes being taken to the Tribunal by legal and private persons dealt, among others, with acts of violence by the National Police and the National Army of the Republic of Zimbabwe²³ or monetary compensations through unlawful impoundments by civil servants of the Democratic Republic of Congo.²⁴

Only a single case was brought by a State before the Tribunal.²⁵ However, out of 13 cases, two were defended by other states, the Kingdom of Lesotho²⁶ and the Democratic Republic of Congo.²⁷ The Republic of Zimbabwe defended the remaining 11 cases. In all cases in which Zimbabwe appeared as respondent, no single ruling was in its favour. Apart from the states and private individuals, two cases were brought by firms, the Bach's²⁸ and Swissbrough²⁹ cases. Finally, one case was brought by a political party, the United People's Party of Zimbabwe.³⁰ The above shows that the SADC States have a very poor record of utilising the Tribunal. It also shows that no single case was brought by one state against the other. The two cases brought by States were against private companies.

In addition, the Tribunal started operating in September 2007 dealing with three cases until the end of that year. In 2008, the Tribunal delivered nine judgments followed by a further seven judgments in 2009. It recorded only one judgment in 2010 before it was suspended. The 2010 record should be viewed against the prevailing political developments at the time, in particular, the fact that the Tribunal was prevented from hearing any new cases. The record above shows that the Tribunal was effective as well as efficient. The diverse judgments of the court also support the view that it was committed to upholding the rule of law and human rights without fear or favour. Given its achievements in areas of human rights and the rule of law in its short lifespan, it is only fair to state that the Tribunal left a good legacy that is seriously under threat.

23 See Case "Gondo and Others vs. Republic of Zimbabwe", available at http://www.sadc-tribunal.org/docs/Case_052008.pdf; accessed on 10 October 2012.

24 See Case "Bach's Transport (PTY) LTD vs. Democratic Republic of Congo", available at <http://www.sadc-tribunal.org/docs/case142008.pdf>; accessed on 10 October 2012.

25 See Case "United Republic of Tanzania versus Cimexpan (Mauritius) Ltd & Others", available at <http://www.sadc-tribunal.org/docs/case012009.pdf>; accessed on 10 October 2012.

26 See Case "Swissbrough Diamont Mines and Others v The Kingdom of Lesotho", available at <http://www.sadc-tribunal.org/docs/case042009.pdf>; accessed on 10 October 2012.

27 See Case "Bach's Transport (PTY) LTD v Democratic Republic of Congo", available at <http://www.sadc-tribunal.org/docs/case142008.pdf>; accessed on 10 October 2012.

28 (*ibid.*:footnote 22).

29 (*ibid.*:footnote 24).

30 See Case "United People's Party of Zimbabwe v SADC and Others", available at <http://www.sadc-tribunal.org/docs/case122008.pdf>; accessed on 10 October 2012.

The view held by some critics of the Tribunal, that it let down the people of the region, is misplaced and contrary to the court's achievements as stated above. We submit that in terms of the speed, efficiency and effectiveness in dealing with cases before it and the delivery of its judgments, as the statistics above indicate, the Tribunal has performed well. One may further posit that, in fact, the Tribunal dealt with cases more efficiently and better than some jurisdictions in certain SADC countries where cases are sometimes delayed for many years, resulting in delayed justice to the parties involved.

Moreover, the Tribunal referred a number of cases to the SADC Summit for action to be taken (for enforcement). Sadly, the Summit decided to act against the Tribunal by suspending it instead of enforcing its judgments. Hence, it constitutes unfairness and improper conclusions if one blames the Tribunal for letting down both the parties who brought the case(s) and the people of the region in general, while enforcement of its decision lies with the Summit of Heads of States and Government. The blame should be directed at the way in which the SADC Treaty is constructed as it allows for the Summit to enforce the Tribunal decision without outlining the sanctions, if any, to be taken in cases of State non-compliance with the court ruling. The consensus nature of decision making at the Summit level is an additional factor that poses a problem, in particular when action against a Member State is to be taken.

The suspension

The actual cause of the Tribunal's suspension took place in November 2008 when the Tribunal pronounced its judgment in the landmark case of *Campbell Ltd and Others vs The Republic of Zimbabwe and Others*.³¹ In its final decision as mentioned above, the Tribunal ruled that the Government of Zimbabwe had violated the human rights provisions of the SADC Treaty as the Zimbabwean land acquisition process was racist and illegal. As a result, Campbell was allowed to remain on his expropriated farm until the dispute in the main case had been resolved by the Tribunal.

Since the Zimbabwe Government twice refused to accept the Tribunal's judgment, the Tribunal referred each instance of non-compliance to the SADC Summit for "appropriate action". This proposal did not have any effects. The Zimbabwean Government justified its refusal with the explanation that neither the 2001 Amendment Treaty nor the Tribunal Protocol had been ratified by Zimbabwe and therefore could not be brought into force.

After the Zimbabwean Government's stubbornly challenging the validity of the Tribunal Protocol, following this with intense lobbying, participants of the

31 See Case "Mike Campbell (Pvt) Ltd and 78 Others versus the Republic of Zimbabwe", available at <http://www.sadc-tribunal.org/docs/case022007.pdf>; accessed on 4 October 2012.

30th SADC Summit in Windhoek in August 2010 took the decision to limit the operations of the Tribunal. To this end, it commissioned “a review of the role, functions and terms of reference of the SADC Tribunal should be undertaken and concluded within 6 months”.³² From then on, the Tribunal became defunct and was enjoined not to entertain any new cases in the interim. During an extraordinary Summit held in Windhoek in May 2011, a further significant step towards the dissolution of the Tribunal was made. Contrary to the recommendations of an independent study into the Tribunal commissioned by SADC itself, the Heads of State and Government announced the extension of the Tribunal’s suspension for a further year. Armando Guebuza, current President of Mozambique, submitted that this latest decision was made through the complexity of the matter. Ministers of the area also supported this statement and advised that they “should provide more time, in order to go into questions more deeply”.³³

The suspension had and continues to have negative effects on the rule of law in SADC as the Tribunal is no longer entitled to hear and solve cases. This juridical limitation up to the final dissolution of the Tribunal automatically led to the withdrawal of human rights cases. In other words, people are no longer able and encouraged to act against injustices. Another essential negative effect can be found in the lack of continuity of the SADC Tribunal’s jurisprudence, initiated through its suspension. These controversial circumstances surrounding the suspension damage the image and reputation of SADC. It also uncovers the drawback that SADC leaders as political organs of the Community possess more decision-making power than key juridical institutions, such as the Tribunal. Hence, SADC can be considered as a model example, in which key institutions can be dissolved primarily by political instances.

With focus on the international sphere, the Tribunal’s suspension implies a loss of international reputation for the Tribunal and the whole SADC Community. Nowadays, foreign investors prefer to expand in regions where human rights are protected and the rule of law is observed. These conditions guarantee investors a healthy, creative and innovative citizenry and therefore, a better output. By scorning these conditions, the SADC community risks losing its status as an attractive destination for foreign investment and aid. Thus, it can be assumed that the suspension damages both the mutual trust of the SADC Member States and their standing in the international community.

32 See “Final Communiqué of the 30th Jubilee Summit of SADC Heads and States and Government, Windhoek – Republic of Namibia”, available at <http://www.sadc.int/index/browse/page/782>; accessed on 19 September 2012.

33 See Article “Southern Africa: SADC Tribunal Suspended for a Further Year” from 22 May 2011, available at <http://allafrica.com/stories/201105230449.html>; accessed on 18 September 2012.

Decision to call for a new Protocol: Exclusive access?

The background

Ten years after the publication of the original Protocol, SADC Heads of State and Government met in Maputo, Mozambique on 18 August 2012 to discuss current issues such as Zimbabwe's political fallout, the search for resolution of the Harare crisis and the harmonised elections in 2013. When the Communiqué of this 32nd Summit was released, it was not the arrangements relating to the abovementioned issues that attracted attention, but rather point 24 of the Final Communiqué. In point 24, leaders of SADC Member States demanded the negotiation of a New Protocol for the Tribunal and added that, "its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes arising between Member States".³⁴

This momentous decision implies, in particular, that once the new protocol is completed, only SADC Member States, exclusively, will be entitled to make use of the Tribunal and that jurisdiction will apply only to disputes arising between them. This decision is contrary to the previous Tribunal Protocol that allowed and extended jurisdiction between natural or legal persons and states, as outlined above. Therefore, it is in order to consider the effects this controversial development – often labeled as a set-back for regional integration – will cause to the future functions of the SADC Tribunal, the role of the SADC citizens and the guarantee of human rights across the region.

Consequences of a new Protocol on Human Rights and Rule of Law

When the SADC Treaty was signed in 1992, leaders of the Member States made it clear that human rights were part of the integration agenda. This is not only written down in the Preamble of the SADC Treaty which underlines "the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law", but is also incorporated in Article 4c which demands that "SADC and its Member States shall act in accordance with ... human rights, democracy and the rule of law".³⁵

34 See "Final Communiqué of the 32nd Summit of SADC Heads of States and Government, Maputo – Mozambique" available at http://www.sadc.int/files/7713/4545/0483/Communique_32nd_Summit_of_Heads_of_States.pdf; accessed on 19 September 2012.

35 See "Preamble of the SADC Treaty and Declaration", available at: <http://www.sadc.int/english/key-documents/declaration-and-treaty-of-sadc/#preamble>; accessed on 20 September 2012.

Moreover, the Treaty's authors developed articles such as Article 6(1) and 23(1), in which the Member States "shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty"³⁶ and "SADC shall seek to involve fully, the people of the Region and non-governmental organizations in the process of regional integration".³⁷

By comparing these paragraphs with the proposed new amendment it becomes clear that the new protocol is completely contrary to these fundamental principles of SADC that aim to protect as well as promote respect for human rights and human dignity. The new amendment also does not respect the above provisions in as far as the rule of law is concerned.

Specific effects on issues of human rights of the SADC people in particular

Strictly speaking, all the above-mentioned articles that enforce human rights protection at the sub-regional level will lose their validity.

The SADC People will lose their right to seek justice before the SADC Tribunal once they have exhausted all national remedies – a right previously guaranteed through Article 18 of the Tribunal Protocol.

Natural and legal persons are no longer encouraged to act against injustice on part of the SADC Member States. Moreover, citizens will no longer be integrated into the so- called Processes of Development and Integration in the region.

While constraining the legitimation of withdrawing peoples' right of access to justice, it can be added that it entirely removes the fundamental principles of human rights. This includes notions of equal treatment by the law, fairness and the right to have one's case heard. Access to justice is a key component of good governance and adherence to the rule of law, and promotes development, responsible investment, economic and social reform and safeguards the protection of human and peoples' rights as guaranteed in the African Charter on Human and Peoples' Rights and other regional and international instruments.

The creation of strong, independent and accessible courts that enable participation by citizens is the key to economic growth and poverty reduction.

36 See Article 6 of the SADC Treaty and Declaration. Available at <http://www.sadc.int/index/browse/page/119#article6>; accessed on 22 September 2012.

37 See Article 23 of the SADC Treaty and Declaration, available at <http://www.sadc.int/index/browse/page/119#article23>; accessed on 22 September 2012.

Once the human right of participation is withdrawn, individuals would no longer be allowed to take part in economic decisions either.

The economic, social and cultural development across the region would be subject to political organs and the state.

Negotiations about land distributions as discussed in the Campbell Case would always be decided in favour of the SADC Member States at the cost of the rule of law and individual human rights. Exclusive power vested in the SADC Member States – without any judicial checks and balances – will automatically lead to a broader enrichment of the States and wealthy people, while the majority of the population will be prejudiced

The absence of SADC Peoples' right to access justice, and the violation of their acquired rights will ensure that there would be no human rights protection for SADC citizens at the regional level. Therefore, the demand for exclusive access to the Tribunal for the SADC Member States will inevitably lead to a limitation of the jurisdiction of the Tribunal, while disputes between natural or legal persons and states will no longer fall under its control.

Some Critical Voices against the Decision to call for a new Protocol

The violation of the SADC Treaty objectives and the irrefutable withdrawal of human rights in particular, incited legal institutions and influential members of the public to raise their voices and take up a critical position. For instance, Nicole Fritz, director of the Southern Africa Litigation Centre (SALC), says that “the decision to deny the region’s inhabitants any access to the Tribunal is astounding and entirely without any lawful basis. ... Civil society groups were worried that SADC leaders would conspire to weaken the Tribunal but this is far worse than we had feared. SADC has destroyed it”.³⁸

A coalition of legal organisations, including the Southern Africa Litigation Centre (SALC), the International Commission of Jurists (ICJ) and the SADC Lawyers Association (SADC LA) expressed their deepest disappointment at the decision taken by the SADC Summit of Heads of State and Government on the SADC Tribunal. In response to the Communiqué the legal cooperation released a statement at the civil society forum in which they finally demanded the SADC Heads “...to immediately reinstate an accessible regional court ..., ensure that the SADC Tribunal has an explicit human rights protection

38 See newspaper article “SADC leaders neuter Tribunal” by Catherine Sasman in *The Namibian* (page 2, 21.09.2012), available at: <http://www.cfuzim.org/index.php/newspaper-articles-2/the-courts/2876-sadc-leaders-deal-fatal-blow-to-sadc-tribunal-shock-decision-denies-citizen-s-access-to-court>; accessed on 22 September 2012.

mandate ... and allow the SADC Tribunal to operate whilst amendments to the protocol are being effected”.³⁹ In other words, they demanded the SADC Heads to reverse their decision by negotiating a new protocol on the Tribunal predominantly to reassure southern African citizens the right of access to the Tribunal.⁴⁰ To underline the fury about the Summit’s decision, SALC declares in a more detailed declaration that the limited access to the Tribunal by natural and legal persons in respect to human rights matters can be seen as an “affront to the rule of law, as it extinguishes an existing remedy for human rights infringement”.⁴¹

As well as this campaign by civil society organisations, well-known individuals such as Archbishop Emeritus Desmond Tutu also observed the decision of the SADC leaders as, “a tragedy. It is a blow against accountable government and individual rights”.⁴²

Moreover, Henning Melber, the executive director of the Dag Hammarskjöld Foundation exclaims that “the rule of law has once again been perverted into the law of the rulers. If anything, this is an invitation not only to civil outrage but also civil governance at its worst”.⁴³ He adds that the limitation of the tribunal will lead to the elimination of potential protection of individuals and their right of access to an independent judiciary which also means a serious set-back to regional integration.⁴⁴ Reviewing the controversial issue and the Summit’s decision, SADC and its leaders have already manifested – without ambiguity – that essential principles of democracy and human rights do not play an essential role within their political efforts; they prefer to set their own sovereignty above justice and the public good.

Conclusion

In this paper we have established that the SADC Tribunal record in terms of its effectiveness and efficiency in dealing with cases ensured speedy delivery of

39 See <http://www.cfuzim.org/images/sadctaug22stat.pdf> Published; last accessed on 23 September 2012.

40 See joint paper by the Southern Africa Litigation Centre, SADC Lawyers Association and International Commission of Jurists, titled “The Legal and policy Considerations Militating against Limitations on the Human Rights Jurisdiction of the SADC Tribunal”, available at <http://www.southernafricalitigationcentre.org/library/folder/30> SALC; accessed on 23 September 2012.

41 (ibid.).

42 See Article “Southern Africa: SADC Tribunal Suspended for a Further Year” from 22 May 2011, available at <http://allafrica.com/stories/201105230449.html>; accessed on 18 September 2012.

43 See: <http://www.namibian.com.na/columns/full-story/archive/2012/august/article/save-the-sadc-tribunal/> and/or, <http://www.naforum.org/2012/08/save-the-sadc-tribunal/>.

44 (ibid.:footnote 42).

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justice to the citizenry across the region. It upheld the rule of law and human rights without fear or favour, and it was utilized mostly by private citizens. Its suspension was therefore a setback on those and many other fronts.

We have also showed that the Tribunal was an important institution and an ally of the citizenry in the region. Without it or with its powers reduced, the citizenry across the region would lose a vital ally and victims of state-sponsored violence in the regions will have nowhere to turn, now or in future.

With the new protocol, the Southern African region has failed to preserve its status as an attractive destination for foreign investment and aid. This may have negative long term economic consequences for the whole region and ultimately also affect regional economic integration in SADC.

The sad reality is that, with the new Protocol, SADC Member States have succeeded in denying the citizenry across the region access to justice and preservation of the rule of law. With that, human rights violations in the SADC countries may continue with no outside remedy if domestic means are exhausted. The attempts at regional integration will retreat into the far distance as well. Certainly, SADC has created an unfortunate precedent that may have future repercussions. With the new Protocol SADC citizens have much to fear and nothing to hope for. The future, in terms of human rights protection and the rule of law in the region, is regrettably bleak.

The justiciability of socio-economic rights in Namibia: Legal challenges and opportunities

Francois-Xavier Bangamwabo*

Introduction

The respect for and protection of human rights is one of the major developments of contemporary international law in the aftermath of World War II. True, the concept of human rights was almost unknown in the pre-war era. However, the drafters of the United Nations Charter at the conference in San Francisco in 1945 felt that the maintenance of international peace and security could not be achieved without respect for, and observance of fundamental human rights and freedoms. Thus, the preamble to the United Nations (UN) Charter begins with the following words:

We the people of the UN determined [t]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...¹

The above wording is buttressed by Article 1 which lays down the purposes of the UN, inter alia, “[t]he promotion of and encouragement for respect of human rights and fundamental freedoms without distinction as to race, sex, language, and or religion”.² There is now a common consensus that respect for human rights and fundamental freedoms contributes to the stability and well-being necessary for peaceful and friendly relations among nations.³

The crux of human rights law is centred on respect for human dignity and the right to life of all human persons wherever they may be, and whatever may be their race, religion, origin or sex. Because of the universal nature of human rights, the classical theory that international law is solely a state-based system no longer holds water. Private individuals, like states and international organisations, have therefore become subjects and or objects of international law. As a result, a State can no longer hide behind the shield

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1 See the Preamble to the UN Charter, 1945.

2 See Article 1, para.3 of the UN Charter.

3 This was reiterated in the Vienna Declaration and Programme of Action 1993, para.6, 32 ILM (1993) 1661.

of sovereignty or invoke Article 2(7) of the UN Charter whilst gross violations of human rights are occurring within its territory.⁴ Instead, how a State treats all persons within its own territory is not a matter for that state alone but is a matter of international law. In this regard the Vienna Declaration is emphatic, i.e. the promotion and protection of human rights is a legitimate concern of the international community.⁵

The theory of human rights originated from western societies. This western concept of human rights is liberty-centrism-oriented. The liberty-centrism approach to human rights exclusively over-emphasised the significance of civil and political rights to the detriment of socio-economic rights.⁶ Thus, economic and social rights were referred to *en passant* or as a supplement in that these are not rights *sensu stricto*. When the Universal Declaration of Human Rights was drafted and adopted by all members of the UN in 1948, there was a general agreement that a single treaty protecting all human rights would be drafted soon after, based on the Universal Declaration.⁷ Nearly twenty years later, the drafting was completed, and due to ideological differences prevailing at that time between the western liberal democracies and the socialist-communist states, instead of a single treaty, two treaties (herein called Covenants) were created dealing with different rights. These are: The International Covenant on Civil and Political Rights (herein ICCPR) and the International Covenant of Economic, Social Rights and Cultural Rights (herein ICESCR).⁸

The “official” position is that the above two covenants and sets of rights therein are “universal, individual and interdependent and interrelated. The international community must therefore treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.⁹ However, this

4 Article 2(7) of the UN Charter is the so-called non-intervention rule of customary international law. This article prevents or prohibits the UN from intervening in matters which are essentially within the domestic jurisdiction of its member states. It can however be argued that, in as far as respect for, and observance of human rights is concerned, the non-intervention rule has been overruled by the state practice as embodied in the Vienna Declaration and Programme of Action of 1993. It is worth noting that this conference which was organised by the UN was attended by all states and many non-governmental organisations.

5 See para. 4 of the Vienna Declaration and Programme of Action, note 4.

6 For an excellent debate on this, see OnumaYasuaki. 2010. *A Transcivilizational Perspective on International Law*. Leiden/Boston: Martinus Nijhoff Publishers, pp 398–405.

7 See Dixon, M, R McCorquodale & S Williams. 1995. *Cases and Materials on International Law*, 2nd Edition. London: Blackstone Press, p 209.

8 These two instruments which were adopted in 1966 and came into force in 1976 are commonly referred to as international bills of rights.

9 Vienna Declaration and Programme of Action (1993:para. 5, note 4). This position is also reflected in the Universal Declaration of Human Rights which does not make a distinction between civil and political rights and socio-economic rights.

formal consensus masks a deep and enduring disagreement over the proper legal status of economic, social, and cultural rights. On the one hand there is the argument that socio-economic rights are more relevant and thus superior to civil and political rights, both in terms of an appropriate value hierarchy and in chronological terms. For instance, as the argument goes, of what use is the right to free speech to those who are starving, homeless, and illiterate? On the other hand, there is another view that economic and social rights do not constitute rights (as properly understood) at all; and treating them as rights undermines the enjoyment of individual freedoms and distorts the functioning of free markets by justifying state intervention in the economy.¹⁰

Like most countries in the world, Namibia ratified the ICESCR and is thus expected to comply with legal obligations as spelt out in the Covenant. This, Namibia can do in two ways: either by observing or respecting national laws (the Constitution and or statutes) which are consistent with the obligations in the Covenant, or by making these international norms part of the national legal or political order, that is, the international rules become domesticated or internalised within the Namibian legal system.¹¹ This is the only way Namibian nationals can enjoy and enforce the rights contained in the ICESCR.

This paper attempts to address the following conundrums: (i) what is the scope and nature of economic and social rights?; (ii) what are the specific obligations under the Covenant which are to be complied with by member States?; (iii) what is the place, if any, of the socio-economic rights within Namibian legal order, and the availability or otherwise of remedies in cases of violations? In addressing the foregoing issues, the paper will explore the jurisprudence of both foreign domestic courts and international tribunals on the topic, the ultimate purpose being to determine whether Namibia can learn some lessons from this.

The nature and scope of socio-economic rights and states' obligations

The Covenant on socio-economic rights entered into force on 3 January 1976. Article 2 of the Covenant describes the nature of the general legal obligations undertaken by States parties to the Covenant.¹² Articles 6 to 15 set out the economic, social and cultural rights which are protected by the

10 For a detailed discussion on this, see Steiner, HJ & P. Alston. 2000. *International Human Rights in Context: Law, Politics and Morals*, 2nd Edition. Oxford: Oxford University Press, pp 237–320.

11 See Bangamwabo, F-X. 2008. "The implementation of international and regional human rights instruments in the Namibian legal framework". In Horn, N & A. Bösl (Eds). *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Namibia, p 165.

12 See a detailed discussion of this Article below in this paper.

Covenant. These are: the right to work (article 6); right to just and favourable conditions of work (article 7); right to form and join trade unions (article 8); right to social security (article 9); protection of the family (article 10); right to adequate standard of living (article 11); right to physical and mental health (article 12); right to education (article 13); adoption of compulsory, free, and primary education (article 14), and the rights to take part in cultural life, benefit from scientific progress and protection of copyright (article 15).

One of the arguments against the justiciability¹³ of socio-economic rights is that these rights are vague or uncertain, in that their content cannot easily be ascertained or defined. As a result, such rights are impossible to adjudicate. For instance, it is frequently said that “the right to health” or “the right to housing” has no clear meaning since they do not offer clear standards by which one can determine whether an act or omission conforms to or violates the rights in question.¹⁴ Certainly, without clear requirements for the content and scope of a given right, judicial enforcement of such a right would be difficult and problematic. Hence the need to understand the content and scope of socio-economic rights, as this is a *conditio sine qua non* for their justiciability. In order to overcome challenges and problems relating to the content and scope of ESC rights, courts in various jurisdictions have resorted to different mechanisms. These are examined in the ensuing paragraphs.

The concept of ‘minimum core content’

The concept of “minimum core content” is also referred to as “core obligation”, or “essential content”, or “vital minimum”, or “*Existenzminimum*”, or “*conditions minimales d’existence*”. According to this concept, in any right, there is an absolute minimum which is needed, without which the right in issue would be meaningless.¹⁵ To ascertain the minimum core obligation which is contained in a given right, courts normally use the threshold of human dignity or the vital minimum or “survival kit” approach. Thus, in relation to some rights, such as the right to education, there is a widespread consensus on the “minimum core content” of the service to be provided by the State, that is, the universal, free, and compulsory primary education.¹⁶

13 The term *justiciability* means that people who claim that their rights have been violated are able to file a complaint before an independent and impartial body in order to seek remedies. If a violation has occurred or is likely to occur, then such remedies shall be granted and subsequently enforced.

14 See International Commission of Jurists. 2006. *Courts and the Legal Enforcement of Economic, Social, and Cultural Rights: Comparative experiences of justiciability*. Geneva, p 15.

15 (*ibid.*:23).

16 (*ibid.*).

In Germany, the Constitutional Court of that country has used the concept of *Existenzminimum* to give effect to and determine the content of socio-economic rights. On numerous occasions, the Constitutional Court has held that “assistance to the people in need is surely among the evident obligations of a welfare state. The state must therefore ensure persons the minimum conditions for a dignified existence”.¹⁷ According to the same Court, the duty to secure the minimum existential conditions for the needy persons is grounded in the principle (the right) to human dignity which is protected by Article 1(1) of German Basic Law.¹⁸ In applying the doctrine of “vital minimum”, the German Constitutional Court has held inter alia that “the state must provide social assistance to those who face difficulties in their personal and social development and are not in position to take care of themselves”.¹⁹ Rather than a privilege, it is a duty upon any welfare state to provide such social services or benefits. In most cases, the vital minimum will be understood as comprising access to food, medical treatment, housing and any other social assistance to persons in need.

Similarly, the Swiss Federal Court has also urged Swiss courts to apply the concept of “*conditions minimales d’existence*” when defining the content of ESC rights.²⁰ Equally, in Latin America, courts have used the concept of “minimum core content” to define the scope of socio-economic rights.²¹

Defining the content of socio-economic rights through civil and political rights

To date, there is general agreement that all human rights are interdependent and indivisible and therefore should be judicially protected. In some cases, violations of ESC rights may entail violations of civil and political rights. This is so because duties stemming from both ESC rights and civil and political rights may overlap. Thus, in some jurisdictions where ESC rights are not given same and equal treatment, the indirect protection of socio-economic rights has been made possible through the judicial enforcement of duties arising from civil and political rights. This approach is, however, not without shortcomings since not all aspects of ESC rights can be framed in terms of civil and political rights.²²

17 BVerfGE 40, 121 (133).

18 “The right to human dignity” is provided for in Article 8 of the Namibian Constitution.

19 (ibid:note 18).

20 Swiss Federal Court, *V. V. Einwohnergemeine X und Regierungsrat des Kanton Bern*, BGE/ATF 121/367, 27 October 1995.

21 See e.g. The Supreme Court of Argentina, *Reynoso, Nida Noemi c/INSS/P s/ amparo*, 16 May 2006; The Brazilian Federal Supreme Court, RE 436996/SP, 26 October 2005.

22 For a detailed discussion on this, see the International Commission of Jurists (2006:65–75).

Thus, indirect judicial protection of “the right to health” has been achieved through the right to life, the right to be free from torture or cruel, inhuman and degrading treatment and or the right to the respect of private and family life. In this regard, the Indian Supreme Court held that the right to primary health care is implied in the constitutional right to life, at least in cases of emergencies.²³ In the same vein, on numerous occasions, the Columbian Constitutional Court has asserted that the failure to provide health care services may entail a violation of the fundamental right to life which is protected by the Columbian Constitution.²⁴

Likewise, the European Court of Human Rights stressed the *nexus* between the maintenance of health care services and the prohibition of cruel, inhuman and degrading treatment. In *D v. the United Kingdom*,²⁵ the European Court therefore held that the deportation of a prison inmate who was benefiting from an HIV treatment to a country where such treatment was not available amounted to a violation of the right to be free from inhuman or degrading treatment or punished as provided for in the European Convention on Human Rights.

The “right to housing” has also been read into civil and political rights. The Inter-American Court of Human Rights has thus decided that forced evictions and displacements, and the destruction of homes constitute a violation of the right to private property, the right to privacy, and freedom of residence and movement.²⁶ Equally, the European Court of Human Rights has arrived at the same conclusions in cases of forced evictions, forced displacements and destruction of homes.²⁷

In *Olga Tellis et al. v Bombay Municipal Corporation et al.*,²⁸ the Supreme Court of India decided that the eviction of pavement and slum dwellers violated the petitioners’ fundamental right to life which is protected by Article 21 of the Indian Constitution. The Supreme Court reasoned that such removals

23 See Supreme Court of India, *PaschimBangaKhetMajoorSamity and Others v State of West Bengal and Another* (1996) 4 SCC 37, AIR 1996 Supreme Court 2426, June 5, 1996.

24 See e.g. Columbian Constitutional Court: cases T-484/1992, 11 August 1992; T-328/1993, 12 August 1993.

25 European Court of Human Rights, *D v United Kingdom*, 2 May 1997, para.’s 51–53.

26 See Inter-American Court of Human Rights, *Moiwana Community v Suriname*, 15 July 2005, para.’s 127–135; *Ituango Massacres v Colombia*, 1 July 2006, para.’s 175–188.

27 See e.g. *Aakdivar and Others v Turkey*, 16 September 1996, para. 88; *Yoyler v Turkey*, 10 May 2001, para.’s 74–76. There were many other Turkish cases on this topic which were decided by the European Court of Human Rights.

28 See Supreme Court of India, *Olga Tellis et al. v Bombay Municipal Corporation et al.* 10 July 1985.

and evictions would lead to the deprivation of livelihood, and consequently a violation of the fundamental right to life. According to the same Court, the right to livelihood is an important facet of the constitutional right to life in that no person can live without means of living, that is, the means of livelihood.

Similarly, the right to form and join trade unions is expressly part of the right to freedom of association, which freedom is conferred by most, if not all, modern constitutions. The rights to work and to fair conditions of work have been protected through the prohibition of slavery, servitude and forced labour.²⁹

States' Obligations in relation to ESC rights

The whole system of international law is based on consent. This is so because international obligations are created through either treaties which are freely concluded between States or state practice which may give birth to rules of customary international law. Unlike national legal systems which operate vertically, international legal order is horizontal and the bulk of its obligations are fulfilled through the principles of "pacta sunt servanda" and "good faith". The obligations contained in the ICESCR are therefore treaty-based norms which were freely and consensually laid down by States parties that signed and ratified or accessed to the Covenant.

Article 2(1) of the ICESCR lays down the core obligations in relation to the observance and realisation of socio-economic rights by member States. This provision reads as follows:

Each State Party to the present Covenant undertakes to *take steps*, individually and through international cooperation, especially economic and technical, to the *maximum of its available resource*, with a view to achieving *progressively* the full realization of the rights recognized in the present Covenant by *all appropriate means*, including particularly the adoption of *legislative measures*. [Emphases added]

Article 2(1) is a pillar to the Covenant in that it describes the nature of general legal obligations undertaken by States parties. This article must be seen as having a dynamic relationship with all other provisions to the ICESCR.³⁰ A

29 For a detailed discussion on this, see International Commission of Jurists (2006:68–72).

30 See The Committee on Economic, Social, and Cultural Rights (CESCR). 1990. General Comment No. 3, The Nature of States' Obligations. 5th Session. UN Doc E/1991/23, para. 1. The CESCR is a UN body which is established in terms of the Covenant and its mandate is mainly to monitor the compliance with and observance of the Covenant by member States. To this end, it regularly issues "general comments" in the form of interpretation of the Covenant's provisions so as to assist and guide State parties in their efforts to meet their legal obligations.

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careful reading of the above provision shows that it creates various obligations, some of which may be termed “duties of immediate effect” and others which are qualified by “the concept of progress realization”.

Thus, the use of the phrase “*to take steps*” (in French “*s’engager à agir*”) means that while full realisation of some ESC rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant has entered into force in respect to a given State. The obligation to “take steps” is not qualified or limited by any other consideration. In addition, such steps shall be deliberate, concrete and targeted towards meeting the obligations as spelt out in the Covenant.³¹

The ICESCR, however, acknowledges that the full realisation of some rights contained therein may require “progressive” and gradual implementation. This would give some leeway to States parties in deciding the proper timeframe and allocation of resources according to their available means. While duties of immediate effect can easily be assessed by adjudicatory bodies, duties linked with progressive realisation are subject to a less stringent and, possibly, less coercive standard of scrutiny.³² The CESCR has made it clear that “progressive realization” shall not be misinterpreted so as to deprive the obligations of all meaningful content. The phrase must be read in the light of the overall objective and the *raison d’être* of the Covenant.³³

Other duties of immediate effect under the Covenant include ‘the duty to take steps’ by ‘all appropriate means’ in putting in place not only some legislation but also the provision of judicial remedies, and the adoption of administrative, financial, educational and social measures.³⁴ The obligation to take steps also includes the duty to draft and adopt a detailed plan of action for progressive implementation.³⁵ Equally, the CESCR has stated that the same provisions of the Covenant are capable of immediate application by judicial organs in national legal systems. These are: articles 3, 7(a) (i), 8, 10(3), 13(2) (a), (3) and (4) and 15 (3). The above provisions should be considered as self-executing within domestic laws.³⁶

Concerning duties relating to progressive realisation of ESC rights, it is important to note that adjudication may not be the best way of monitoring their evolution and realisation. Some of the recent developments in this

31 See The Committee on Economic, Social, and Cultural Rights (CESCR). General Comment No. 3 (1990:para. 2).

32 See The International Commission of Jurists Report (2006:26).

33 See CESCR. General Comment No. 3 (1990:para. 9).

34 (*ibid.*:para.’s 3, 4, 5, and 7).

35 See CESCR. 1989. General Comment No.1, Reporting by States Parties. 3rd Session. UN Doc. E/1989/22, para. 4.

36 See CESCR. General Comment No. 3 (1990:para. 5).

area concern the establishment of indicators and benchmarks to assess the improvement, stability or deterioration of the enjoyment of rights or the goals enshrined in the Covenant.³⁷ Corollary to ‘the concept of progressive realization’ is the ‘prohibition of retrogressive measures’. The ‘prohibition of retrogression’ means that any measure adopted by the State that suppresses, restricts or limits the content of rights already guaranteed by law constitutes a *prima facie* violation. This process entails a comparison between the previously existing legislation, regulations or practices and the newly passed legislation or adopted measures or policies, so as to assess their retrogressive character.³⁸ Domestic courts in some jurisdictions have used “the prohibition of retrogression” while determining the compliance or otherwise of the ESC rights.³⁹

The place and justiciability of ESC rights within the Namibian legal system

As aforementioned, Namibia ratified the ICESCR in February 1995. Namibia as a State party must therefore use all the means at its disposal to give effect to the rights recognised in the Covenant. Thus the Covenant’s norms must be recognised in appropriate ways within the Namibian domestic legal order, and appropriate means of redress or remedies must be available to any aggrieved individual or group.⁴⁰ In addition, appropriate means of ensuring governmental accountability must be put in place.⁴¹ To enable Namibian nationals to seek judicial enforcement of the rights contained in the Covenant before Namibian courts, the ICESCR should operate directly and immediately within the Namibian legal order.⁴² Additionally, to properly and adequately give effect to the rights guaranteed in the Covenant, Namibia is expected to modify its laws which may be in conflict with the Covenant’s provisions. This is so because “[a] State party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty obligation”.⁴³

37 See International Commission of Jurists Report (2006:27).

38 (ibid.:29).

39 See e.g. Portuguese Constitutional Tribunal, Decision (Acórdão) No. 509/2002, 19 December 2002; Argentine Supreme court, *Aquino, Isacio C. Cargo Services Industriales S.A s/accidents* ley 9.688, 21 September 2004.

40 It is important to remark en passant that “the right to a remedy or compensation” is a cornerstone of international human rights law, without which this field of law would become illusory. This right is provided in all international human rights instruments as well as national constitutions.

41 See CESCR, General Comment No. 9, The Domestic application of the Covenant, 3 December 1998. UN Doc. E/C.12/1998/24, para. 2.

42 (ibid.:para. 4).

43 See Article 27 of the Vienna Convention on the Law of Treaties, 1969. The content of this article is considered a rule of customary international law.

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The place and relevance of the ICESCR within Namibian law can only be ascertained from the reading of the Namibian supreme law, the Constitution. This is so because the Covenant does not stipulate the specific means by which it is to be domesticated or internalised within national legal systems. Article 144 of the Namibia Constitution determines the place and relevance of international law within Namibian law. This Article provides that:

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

Article 144 therefore makes international law directly applicable in the national legal order without a need for any domestic implementing legislation. In other words international law is immediately applicable within the national legal system. Thus, all human rights instruments or any international treaty ratified or acceded to by Namibia form part of its domestic law and should be applied as such, unless they are in conflict with an existing Act of Parliament, or where they are not in conformity with the Constitution. Thus, through Article 144 of its Constitution, Namibia has adopted the *monist approach*. The *Monist school* considers international and national law as part of a single legal order. Under this approach, international law is directly applicable in the national legal order. There is no need for any domestic implementing legislation: international law is immediately applicable within national legal systems. Indeed, to monists, international law is superior to national law.⁴⁴ This approach is common in France, Holland, Switzerland, the USA, many Latin American countries, and some francophone African countries.

There is no doubt that the obligations and norms contained in the Covenant are part of Namibian Law and thus binding upon Namibia by virtue of Article 144. Having said that, it is worth noting that socio-economic rights are not treated in the same way as civil and political rights within the Namibian legal system. Whilst all civil and political rights as spelt out in the ICCPR are provided in the Bill of Rights, Chapter 3 of the Namibian Constitution – and thus justiciable – the ESC rights are included in Chapter 11 and are referred to as “State Policies”. In Namibia, it is thus generally accepted that the justiciability or the judicial enforcement of civil and political rights is essential, whereas the contrary assumption is often made in relation to ESC rights.⁴⁵

The ESC rights as contained in articles 6–15 of the Covenant are repeated, almost verbatim, in Article 95 of the Namibian Constitution.⁴⁶ Briefly, Article 95

44 See McDougal, MS. 1959. The impact of international law upon national law: A policy-oriented perspective. *South Dakota Law Review*, Volume 4(25):27–31.

45 See Article 25 (2), (3) and (4) of the Namibian Constitution.

46 Except the right to education which is included in the Bill of Rights; see Article 20 of the Constitution.

(titled “promotion of welfare of the People”) provides for labour related rights, right to access to public facilities and services, right to a decent standard of living, right of needy persons to social benefits and amenities, right to legal aid, right to food and public health, and the collective right to a clean and decent environment. However, article 101 of the Constitution makes it loudly clear that the above ‘state policies’ are not enforceable or justiciable by any court.⁴⁷ Courts may however use these policies as interpretative instruments.

On numerous occasions, Article 101 of the Namibian Constitution has been invoked or used by some circles to the effect that ESC rights are not judicially enforceable in Namibia. The conundrum here is whether the Namibian State can hide behind this article to avoid or violate its international obligations as contained in the Covenant which it freely and voluntarily ratified. If indeed it does, then a violation of Article 27 of the Vienna Convention on the Law of Treaties of 1969 would ensue.⁴⁸ Additionally, the use of article 101 to deny would-be-victims from seeking remedies where their socio-economic rights have been allegedly violated, would amount to a gross violation of the fundamental right to a remedy or redress as provided in article 8 of the Universal Declaration of Human Rights of 1948.⁴⁹

It is thus my thesis that ESC rights are – and should be – justiciable within Namibian legal order subject to some exceptions, e.g. “the doctrine of progressive realisation”. The socio-economic rights’ status in the Namibian legal system is not unique. In fact, most common law jurisdictions have adopted the same approach as Namibia. We have however seen how courts in those other jurisdictions have invented some ingenious mechanisms to give effect to the rights contained in the Covenant. Both regional and foreign domestic courts have initiated concepts such as: “core content” or “core obligation” and indirect protection of ESC rights through civil and political rights. The Namibian judiciary should not therefore shy away from following this approach. Without judicial enforcement in Namibia, the realisation of ESC rights would be left to the discretion of the political authorities (the Executive and the Legislature).

The widespread argument that judges lack practical legitimacy to implement socio-economic rights is not valid. In this regard the CESCR’s remarks are noteworthy:

47 Article 101 reads as follows: “The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The courts are entitled to have regard to the said principles in interpreting any laws based on them” [Emphasis added].

48 I have mentioned that this article is a reflection of customary international law. In addition, Namibia is a state party to the Vienna Convention of 1969.

49 Article 8 of the UDHR reads: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law”.

While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not [b]e considered to possess at least some significant justiciable dimensions. [W]hile the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resources implications. The adoption of a rigid classification of ESC rights which put them beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁵⁰

Once a judge has determined and defined the content of any right – be it civil, political, economic, social, or cultural – and the right holder, the same judge should be in position to decide upon matters relating to its violation or otherwise and subsequently order appropriate remedies or compensation. The question is not whether the Namibian judiciary should have some role in the implementation of public policies; rather the fundamental question is what role the Namibian courts should have in supervising the implementation and realisation of these policies in accordance with national laws as well as international law.

Conclusion

This paper has examined the content and scope of ESC rights, their relevance and justiciability in Namibia. I have explored the legal challenges and opportunities relating to the judicial enforcement of socio-economic rights in general, with particular emphasis on Namibia. I submit that the Namibian judiciary should learn from the experiences and mechanisms which have been adopted and applied by other national courts and international or regional tribunals on the subject-matter. Namibian courts should take account of Covenant rights where this is necessary to ensure that Namibia's conduct is consistent with its obligations under the Covenant. Neglect by our courts of this responsibility is incompatible with the principle of rule of law, which encompasses the respect for international legal obligations.

Finally, Namibian laws should be interpreted as far as possible in a way which conforms to Namibia's legal obligations as laid down in the Covenant. Thus, where a Namibian judicial officer is faced with a choice between an interpretation of a domestic law that would place the Namibian state in breach of the Covenant and one that would enable Namibia to comply with the Covenant, international law requires the choice of the latter.⁵¹

50 See CESCR General Comment No. 9 (1998:para. 10).

51 See CESCR, General Comment No. 9 (1998:para. 15). This is the "pro homine" principle of interpretation, which imposes a preference for the more protective human rights clause in case of overlap.

The architecture of governance for sustainable development in a globalising world: Jurisprudential observations from the ongoing TFO research project¹

Manfred O Hinz*

What is *architecture of governance*?

It was due in particular to the difficulty experienced with achieving tangible results in the worldwide efforts to deal with the deterioration of the climate that challenged scholars in political science, legal sociology and related disciplines to brainstorm what is called the “architecture of governance for sustainable development in a globalising world”.²

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- 1 The TFO (The Future [O]Kavango) project was introduced to the readers of the *Namibia Law Journal* by MO Hinz and C Mapaure in their note: “Water is life: Customary and statutory water law, a problematic relationship – Ongoing research in the Kavango River Basin”, in *Namibia Law Journal* 2012 4(1):189ff. The following note reflects some of the research done in the TFO project and relies on the author’s earlier work: “Findings and the way forward”, in MO Hinz & OC Ruppel (Eds), 2008, *Biodiversity and the ancestors: Challenges to customary and environmental law – Case studies from Namibia*, Windhoek, Namibia Scientific Society, 211ff.; id, Agenda 21 – or: “The legal obligation to strengthen local levels of societies (including traditional authorities in support of sustainable development)”, in MO Hinz, OC Ruppel & C Mapaure (Eds), 2012, *Knowledge lives in the lake: Case studies in environmental and customary law from Southern Africa*, Windhoek, Namibia Scientific Society, 1ff.; the amended version of the latter: “Agenda 21 and climate protection: The development of global and local governance for environment and development - Observations from research in Namibia”, in OC Ruppel, C Roschmann & K Ruppel-Schlichting, (Eds), *Climate change policy. International diplomacy and global governance*, Baden-Baden: Nomos Verlag (forthcoming) and the author’s presentation to the international conference on Sustainable Land Management organised by the German Ministry of Education and Research and held in Berlin from 17 to 19 April 2013.
- 2 Cf. here Biermann, F, P Pattberg & F Zelli (Eds). 2010. *Global climate governance beyond 2012: Architecture, agency and adaptation*. Cambridge: Cambridge University Press; Winter, G. 2006. “Introduction”. In Winter, G (Ed.). *Multilevel governance of global environmental change: Perspectives from science, sociology and the law*. Cambridge: Cambridge University Press, 1ff. and Winter, G. 2012. “Zur Architektur globaler Governance des Klimaschutzes”. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 72 (1):103ff.

The orientation towards an architecture of governance for sustainable development in a globalising world denotes more than an enquiry into the functioning of international law, international policies, and their transformation into political and legal instruments of the state. *Architecture* denotes a comprehensive, multilevel construct in which the various political levels are interlinked, like the storeys of a building. Frank Biermann and his co-authors introduce the concept of *global governance architecture* as follows:³

There is no commonly agreed definition of the term 'global governance architecture'. We define the term in this book as the overarching system of public and private institutions – that is, organisations, regimes and other forms of principles, norms, regulations and decision-making procedures – that are valid or active in a given issue of world politics. Architecture can thus be described as the meta-level of governance.

This would be *governance*, indeed, in the broadest possible manner; and this without any normative focus on public institutions such as the state or what is normally given the centre of attention – the law of the state. The reference to “architecture” is – in this sense, for the authors of the quoted definition of *architecture*, and different from what the reference to international order would be – value-neutral.⁴ This specifically allows one to take note of the fragmentation of governance without judging such fragmentation to be negative and/or dysfunctional for the society concerned only because of the fragmentation’s existence. According to Biermann et al.⁵

... all global governance architectures are fragmented to some degree; that is[,] they consist of distinct parts that are hardly ever fully interlinked and integrated.

Non-fragmented structures of governance are conceivable, but they most probably do not exist in practice. Biermann et al. distinguish between governmental fragmentations that may be synergistic, cooperative or conflictive.⁶ In other words, fragmentation is not bad per se: it may be either good or bad, depending on the repercussions involved.⁷

3 Biermann et al. (2010:16).

4 (ibid.:17).

5 (ibid.).

6 (ibid.).

7 To which special attention has to be given in developing countries for which social cohesion is, indeed, a matter of concern. Cf. here e.g. Barolsky, V. 2013. “The ‘state’ of social cohesion: Re-stating the question of social cohesion and ‘nationbuilding’”. In Pillay, U, G Hagg & F Nyamnjoh (Eds). *State of the nation South Africa 2012-2013*. Cape Town: Human Sciences Research Council, 378ff. and also Struwig, J, B Roberts, YD Davids, MM Sithole, G Weir-Smith & T Mokhele. 2013. “Toward a social cohesion barometer for South Africa”. In Pillay, U, G Hagg & F. Nyamnjoh. 2013, 399ff.

The architectural approach to global governance as a consortium of governmental entities that extends from public and private international regimes to public and private local actors is very close to what emerged from the work by scholars of legal and political pluralism informed by the, again, basically globally prevailing existence of interwoven (semi-) autonomous social fields. These various (semi-)autonomous social fields have their own systems of governance, including arrangements with the other fields to which they are linked.⁸

In line with what has been said so far, Gerd Winter submitted a diagram showing the various levels in the architecture of global governance with regard to the planet's protection against the harsh effects of climate change.⁹ He places international state organisations at the top of the hierarchy, followed by contractual or non-contractual interstate arrangements. Below that we find state law. Next to state law we see public actors. Transnational public and private governance also appears in the structure, while private actors are located at the base of the diagram. Parallel to this formalised structure of governance, we are informed that the orientation of the various levels will differ as to whether they consume or protect resources.¹⁰

The sociological functional or legal-normative question in view of architectures of this kind is to what extent the plurality (or fragmentation) contributes to the functioning of the interwoven set of rules and institutions. Philipp Pattberg, one of the co-editors of *Global climate governance beyond 2012*, notes the following in his chapter therein:¹¹

Recent scholarly debate within the discipline of international relations has focused on the transformation of the global order from a territorial-based one to one of multiple spheres of authority in flexible and issue-specific arrangements.

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- 8 Cf. Moore, SF. 1978. *Law as process: An anthropological approach*. London: Routledge, 54ff; Menski, W. 2006. *Comparative law in a global context: The legal systems of Asia and Africa*. Second Edition. Cambridge: Cambridge University Press, 82ff. It would be worthwhile to juxtapose the just mentioned social cohesion approach to the theory of legal and political pluralism. This note will not allow for this, but forthcoming work in the TFO will.
- 9 Winter, G. 2012; cf. also Börzel, TA & T Risse. 2005. "Public-private partnership: Effect and legitimate tools of international governance". In Grande, E & LW Pauly (Eds). *Reconstituting political authority: Complex sovereignty and the foundation of global governance*. Toronto: University of Toronto Press, 195ff.; Sand, PH. 2006. "Global environmental change and the nation state: Sovereignty bounded". In Winter, G (Ed.). *Multilevel governance of global environmental change: Perspectives from science, sociology and the law*. Cambridge: Cambridge University Press, 519ff.
- 10 Winter (2006:114ff.).
- 11 Pattberg, P. 2010. "The role and relevance of networked climate governance". In Biermann, F, P Pattberg & F Zelli (Eds). *Global climate governance beyond 2012: Architecture, agency and adaptation*. Cambridge: Cambridge University Press, 147.

... Reflecting debates about the organisational transformation of the modern nation state, theorists of international relations have begun to reflect on the changing nature of the Westphalian system itself One central empirical observation is the emergence of networked forms of organisation that operate under a different logic compared to other types of social organisations, such as markets and hierarchies. Whereas network governance has been discussed as a complementation and gradual innovation of older forms of policy-making (for example[,] corporatism) within the domestic context, networks at the transnational and global level have been largely conceptualised as new forms of governance that potentially overcome the limitation of more traditional approaches.

In his focus on networked climate governance, Pattberg analyses three distinct types: public non-state governance, public private networks, and private networks.¹² In looking at the first type, Pattberg refers to two initiatives of local authorities which became most remarkable in networking for climate change and protection, namely the Cities for Climate Protection Programme initiated by Local Governments for Sustainability, and the C40 network initiated by the Large Cities Climate Leadership Group.

These climate-specific initiatives by local authorities, started in 1991 and 2006 respectively,¹³ are part of the earlier global movement to engage local authorities in matters of development. The organisation Towns and Development entered the scene and became an international initiative of far-reaching importance.¹⁴ The Cologne Appeal, adopted in 1985, called for charity to be replaced by justice.¹⁵ The Towns and Development Conference in Cologne launched a process that engaged the linking of local authorities not only among developed and developing countries, but also between the two country categories.¹⁶ After Cologne, the Charter of Berlin was agreed in 1992

12 (ibid.:149ff.).

13 Cf. here also Bulkeley, H & MM Betsill. 2003. *Cities and climate change: Urban sustainability and global environmental governance*. London: Routledge; and C40. 2008. History of the C40. Available at www.c40cities.org; accessed in May 2012.

14 A Local Authorities Conference held in Florence, Italy, in 1983, gave rise to what became the international organisation now known as Towns and Development; see Shuman, M.1994. *Towards a global village: International community development initiatives*. London/Boulder: Pluto Press.

15 See Shuman (1994:5ff). The Cologne Conference was initiated by Gunther Hilliges from the State Office for Development Cooperation in Bremen, Germany, and Paul van Tongeren from the Dutch National Commission for Development Education in Amsterdam, The Netherlands.

16 Cf. Hilliges, G & U Nitschke. 2007. *Städte als Partner für nachhaltige Entwicklung von Rio de Janeiro. Material No. 15*, Bonn, Servicestelle Kommunen in der einen Welt.

by local authorities from developed and developing countries.¹⁷ “Joint Action for Sustainable Development” was chosen as the document’s title. With the establishment of the International Council for Local Environmental Initiatives (ICLEI) at the World Congress of Local Governments for a Sustainable Future at the United Nations (UN) in New York in 1990, a world structure emerged that has remained active ever since.¹⁸ Today, ICLEI has more than 1,000 members from 70 countries, representing more than 500 million people.¹⁹

Agenda 21 and its concept of *governance*

The political way to the 1992 Rio Conference was, on the one hand, facilitated by movements of the nature described above; on the other, the broad governmental and non-governmental support for the Earth Summit and its messages, culminating in Agenda 21, was also instrumental for strengthening these movements.

Chapter 1.1 of Agenda 21 offers an insight into its vision:

Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own; but together we can – in a global partnership for sustainable development.

Chapter 1.3 adds the following:

Agenda 21 addresses the pressing problems of today and also aims at preparing the world for the challenges of the next century. It reflects a global consensus and political commitment at the highest level on development and environment cooperation. Its successful implementation is first and foremost the responsibility of Governments. National strategies, plans, policies and processes are crucial in achieving this. International cooperation should support and supplement such national efforts. In this context, the United Nations system has a key role to play. Other international, regional and sub-regional organisations are also called upon to contribute to this effort. The broadest public participation and the

17 The Charter is contained as Appendix II in Shuman (1994:150ff.). Appendix II (Shuman 1994:144ff.) also contains an African and an Asian Towns and Development document, namely “The Bulawayo Appeal: From Dependence to Justice”, which was adopted by the Bulawayo Towns and Development Conference in 1990, and the Sevagram Declaration (India).

18 See <http://www.iclei.org>; accessed May 2012.

19 (ibid.).

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active involvement of the non-governmental organisations and other groups should also be encouraged.

At the end of Chapter 1,²⁰ Agenda 21 is said to be a “dynamic programme”:

It will be carried out by the various actors according to the different situations, capacities and priorities of countries and regions in full respect of all the principles contained in the Rio Declaration on Environment and Development. It could evolve over time in the light of changing needs and circumstances. This process marks the beginning of a new global partnership for sustainable development.

In its first chapter, Section I of Agenda 21, titled “Social and Economic Dimensions”, focuses on international cooperation, states’ role in such cooperation, and the expected consequences from these levels of governance for the promotion of sustainable development. Section III is devoted to “Major Groups”. Nine “Major Groups” are identified by Agenda 21 as playing a special role on the road towards sustainable development:

- Women (Chapter 24)
- Children (Chapter 25)
- Indigenous peoples and their communities (Chapter 26)
- Non-governmental organisations (Chapter 27)
- Local authorities (Chapter 28)
- Workers and trade unions (Chapter 29)
- Business and industry (Chapter 30)
- The scientific and technological community (Chapter 31), and
- Farmers (Chapter 32).

The Preamble to Section III addresses how to strengthen the contribution of the groups to sustainable development:

- 23.1. Critical to the effective implementation of the objectives, policies and mechanisms agreed to by Governments in all programme areas of Agenda 21 will be the commitment and genuine involvement of all social groups.
- 23.2. One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organisations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work. Individuals, groups and organisations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.

20 Chapter 1.6.

In view of the special interest of the current discussion in the role of local structures and their placement in the overall governmental architecture, the position of indigenous communities and of local authorities is of particular relevance. As to indigenous peoples, Agenda 21 states:²¹

Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands. ... [T]he term “lands” is understood to include the environment of the areas which the people concerned traditionally occupy. ... They [the indigenous people] have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.

As to local authorities, Agenda 21 has the following to say:²²

Because so many of the problems and solutions being addressed by Agenda 21 have their roots in local activities, the participation and cooperation of local authorities will be a determining factor in fulfilling its objectives. Local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and subnational environmental policies. As the level of governance closest to the people, they play a vital role in educating, mobilising and responding to the public to promote sustainable development.

Traditional authorities and the architecture of governance

In southern Africa, in countries such as Botswana, Namibia and South Africa, traditional authorities perform, to a large extent, functions and tasks which are performed elsewhere by local authorities. This is so because in many areas of the countries mentioned, local authorities are either remote or non-existent.²³ The “level of governance closest to the people”, are, using words of Agenda 21,²⁴ the traditional authorities.²⁵

21 See Chapter 26.1.

22 Chapter 28.1.

23 This note does not give space for details on the relationship between local and traditional authorities. The references in footnote 1 contain some on the situation in Namibia. See also Hagg, G & M H Kanyane (2013) “Traditional institutions of governance or democracy compromised?” In Pillay et al., pp 141ff. who analyse the relation between the two forms of authority with respect to South Africa in a way that also has relevance for Namibia.

24 Cf. Agenda 21, Chapter 28.1.

25 Cf. here Hinz, MO & B Katjaerua (assisted by M Kalondo). 1998. *To promote peace and welfare: The political and economic sustainability of traditional authorities*. Windhoek: Centre for Applied Social Sciences, University of Namibia.; Keulder, C. 1997. *Traditional authorities and regional councils in Southern Namibia*. Windhoek: Friedrich Ebert Foundation.

Although the majority of the traditional communities in southern Africa are not *indigenous* in terms of the Declaration on the Rights of Indigenous Peoples,²⁶ there are many similarities between traditional authorities as regulated in the laws such as the Traditional Authorities Act of Namibia²⁷ and indigenous communities. The above quoted concept of *land* of indigenous communities is one example.²⁸ The concept of land of traditional communities does not differ from that understood by indigenous peoples in terms of Agenda 21. The holistic understanding of *land* is, in a more general sense, particularly true with respect to the holistic ecological cosmologies that are shared by indigenous and traditional communities. These cosmologies are at the foundation of indigenous/traditional environmental ethics and contribute to the very special relationship between indigenous/traditional communities and their environment.

Although even international organisations have begun to acknowledge that traditional authorities cannot be ignored when it comes to development in rural areas, the jurisprudential conceptualisation of this acknowledgment has not advanced much. The basic obstacle in advancing conceptualisation is that traditional authorities have developed from sovereign institutions into systems governed by states – which see themselves as the sole and overall representatives of sovereignty.²⁹ Before colonialism and in the years of colonial subjugation, the kings and queens of communities were the sovereign holders of authority over such communities. Their authority is not delegated by the state but original, entrusted to them by their ancestors. Modern state centralism would like to see traditional authorities as part of the administration of the state. To date, traditional authorities have seen themselves as bearers of ancestral authority. The different statutory models which the various states have pursued in dealing with traditional authorities point to the unsolved political question as to how to deal with political plurality represented by such indigenous bodies.

Whether observations of this kind were also behind the fact that Agenda 21 did not explicitly consider traditional authorities is worthy of speculation,³⁰ but be that as it may: the aforementioned fact that traditional authorities share many criteria described by Agenda 21 with indigenous communities prompts

26 UNGA Res. 61/295 and other international instruments on indigenous people, such as the International Labour Organization's Conventions 107 of 1957 and 169 of 1989.

27 Act 25 of 2000.

28 See above quoted statement of Agenda 21 (footnote 21).

29 Here and in respect of what follows, cf. Hinz, MO. 2009. "Traditional governance and African customary law: Comparative observations from a Namibian perspective". In Horn, N & A Bösl (Eds). 2009. *Human rights and the rule of law in Namibia* Second Edition. Windhoek: Macmillan Namibia, 59ff.

30 See Hinz (2008: 221ff.).

the suggestion to include traditional authorities in the list of Agenda 21's major groups. The de facto closeness of traditional authorities to local authorities prompts a further step forward: allowing traditional authorities to be interpreted as falling under local authorities in terms of the Agenda 21 classifications.³¹

Agenda 21: A soft law obligation?

Although there is no legally binding rule to translate the architecture of governance of Agenda 21 from soft law³² into binding state law, there is a clear indication that states would be well-advised to consider such a translation. However, it will be particularly difficult for states that have achieved their independence – and with this, their statehood, after long anticolonial struggles and the loss of many lives – to accept that their sovereignty is and will be further limited by a structure of governance in which the Westphalian model of statehood and sovereignty has lost importance. The globalising world has had its input everywhere and *sovereignty*, as it used to be defined, is a thing of the past. The focus today is increasingly on participation, local empowerment, supporting local responsibility, and accepting existing local structures.

In other words, Agenda 21 is not only the political anticipation of what researchers have described as the architecture of global governance with respect to sustainable development: it is also a normative, quasi-constitutional political charter of good governance in matters of sustainable development, demanding not only that the structures already reflecting the global architecture of governance be respected, but also that their extension and strengthening be supported.

31 This view corrects the more cautious approach expressed in Hinz (2008).

32 On Agenda 21 as soft law, see: Paech, N & G Stuby. 2001. *Völkerrecht und Machtpolitik in den internationalen Beziehungen*. Hamburg: VSA, 482ff.

ARTICLES



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***Ex parte Chingufo. In re E Semente; E Semente v Chingufo:*¹ Another unfortunate victory for formalist law**

Nico Horn*

The *Chingufo* case is one of those where the significance of the judgment is not to be found in the ruling, but hidden in the arguments of the Court.

The facts

The applicant, Mr Chingufo, is the brother of Ms Efigenia Semente. After Ms Semente had given birth to a child, her physician, Dr Burmeister, was ready to administer a blood transfusion. However, before Ms Semente went into the theatre, she gave him a copy of what is called “Durable Power of Attorney for Health”. He concluded from the document that Ms Semente was a Jehovah’s Witness and did not want a blood transfusion since it would compromise her religious beliefs.

On 13 September 2012, Mr Chingufo, appearing on behalf of the family, was appointed as a curator to the person of Ms Semente, being authorised to instruct a medical practitioner(s) to render appropriate medical treatment to Ms Semente and consent to any such medical procedure on her behalf, including a blood transfusion and other treatment considered necessary by a medical practitioner. On 15 September 2012 Ms Semente brought an urgent application seeking the rescission and setting aside of the 13 September 2012 order. Chingufo opposed the rescission application, and brought a counter application.

Ms Semente’s legal team based their case on her freedom to practise any religion and manifest such practice guaranteed to her by Article 21(1)(c) of the Namibian Constitution. Ms Semente also asked the Court to protect her personal liberty under Articles 7 and 8 of the Namibian Constitution, conflated by her legal team as freedom of “individual autonomy”. However, Mr Chingufo never disputed that Ms Semente was entitled to these constitutional rights and the Court found that there is no law in Namibia restricting her enjoyment of her Article 21(1)(c) right. Neither did the Court dispute Ms Semente’s personal liberty or her freedom of individual autonomy.

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1 Unreported case of the High Court, (A16/2012) (2012) NHCMD 2 (25 September 2012). Available on South African Legal Information Institute, accessed at <http://www.saflii.org/na/cases/NAHC/2012/247.html>; last accessed on 13 July 2013.

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The court dealt with two questions, or two pillars, of the applicant's case:

The first pillar is that Mrs Semente is not *compos mentis* to exercise her right to refuse treatment in the form of blood transfusion.

The second pillar is that Mrs Semente's enjoyment of her freedom of individual autonomy should be considered against the child rights of Mrs Semente's eight-day's old baby boy that was delivered by Caesarian [sic] section and, indeed, the child rights of her other two children and the interests of the larger family and society in general.²

The Court was confronted with two medical reports, the first from Ms Semente's doctor, Dr Burmeister, who gave evidence that Ms Semente's Caesarean operation and a subsequent removal of her uterus caused her blood count to fall below the normal count of 7, which meant that she was not getting enough oxygen to the brain and other vital organs and "she is not 100% functioning mentally". The Court interpreted Dr Burmeister's words to mean Ms Semente was not *compos mentis*.³

Ms Semente's counsel handed in an affidavit of a psychiatric evaluation of Ms Semente by Dr Sieberhagen. She was not his patient; he did not practise at the hospital and he did not ask Dr Burmeister permission to perform a psychiatric evaluation. Consequently, Dr Burmeister stated in an answer to a question of the Court that it was not permissible and was therefore "unethical in medical practice for a doctor to have a professional consultation with a patient in a hospital that he or she is not treating".⁴

The Court ruled out the report of the psychiatrist, based on the answer of Dr Burmeister:

I accept Dr Burmeister's evidence (given in response to the court's question) that it is not permissible and, therefore is unethical in medical practice for a doctor to have professional consultation with a patient in a hospital that he or she is not treating. On that account it would be unjudicial for this court to accept Dr Sieberhagen's affidavit on any "psychiatric evaluation" that, he says, he performed on Mrs Semente. To accept the affidavit and deal with it as evidence in this court would amount to judicial encouragement of unethical behaviour in the medical profession and bring the administration of justice into disrepute. Accordingly, I reject Dr Sieberhagen's affidavit as irrelevant. It cannot be admitted into evidence in this proceeding.⁵

The Court found it unnecessary to deal with the second pillar after finding that Ms Semente was not *compos mentis*. The decision of the Court to rule

2 (ibid.:para. 10).

3 (ibid.:para. 15).

4 (ibid.:para. 11).

5 (ibid.:para. 17).

out the affidavit of the psychiatrist on the grounds of his “unethical behaviour” is problematic. Let us first consider the position of Dr Burmeister. While his evidence may indicate that a low blood count can affect the functions of body organs, and that “she is not 100% functioning mentally” it is by no means clear that the doctor concluded that Ms Semente was not *compos mentis*. The Court did not tell us what expert knowledge Dr Burmeister had to draw psychological conclusions. We know he is not a psychiatrist and the Court accepted him as “...the Specialist doctor treating Mrs [sic] Semente”.⁶ We do not know what his specialisation entails, except that he was the doctor who treated Ms Semente.

If Dr Burmeister was the only medical practitioner on record, the conclusion of the Court that “Dr Burmeister’s evidence on the point under consideration is not so far-fetched that it can be rejected”⁷ may be acceptable, albeit thin. But the Court also had an affidavit from Dr Sieberhagen, a psychiatrist who was requested by Ms Semente to do a psychiatric evaluation. However, as noted above, that evaluation report was ruled inadmissible by the Court. I am not convinced that the Court was correct in this ruling merely on the evidence of Dr Burmeister that Dr Sieberhagen acted unethically.

It is important to note that there was no finding that Dr Sieberhagen acted on his own and without any interest in the case. His affidavit was handed in by Ms Semente’s counsel. He performed the psychiatric evaluation upon invitation of Ms Semente. And being a psychiatrist, he possessed expertise on mental conditions. Again, the only evidence of Dr Sieberhagen’s unethical conduct was an answer from Dr Burmeister, who cannot be perceived as an independent voice in the case. We do not know if Dr Burmeister is a member of the Medical Council and there is no evidence of any charges laid against Dr Sieberhagen. Yet the Court made a factual finding that Dr Sieberhagen had acted unethically and ruled out his affidavit because “(t)o accept the affidavit and deal with it as evidence in this court would amount to judicial encouragement of unethical behaviour in the medical profession and bring the administration of justice into disrepute”.⁸ One wonders what the effect on the administration of justice would be if someone were to lay a charge against Dr Sieberhagen at the Medical and Dental Council of Namibia, and he were to be found not guilty of unethical conduct in a subsequent disciplinary hearing. In short, it is questionable if the Court can make a finding of unethical conduct based only on the evidence of a medical doctor testifying for the applicant.

But even if the Court was correct in its finding that Ms Semente was not *compos mentis* when she gave birth and lost blood, she had given a Durable Power of Attorney for Health to Dr Burmeister while he was preparing her for a Caesarean.

6 (ibid.:para. 15).

7 (ibid.:para. 17).

8 (ibid.:para. 16).

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Dr Burmeister understood that document to indicate that upon her religious beliefs as a member of the Jehova's (sic) Witness, Mrs Semente did not want a blood transfusion.⁹

At that stage Semente had not lost any blood. She needed "a blood transfusion to survive after a Caesarian section to deliver her baby and thereafter an operation to remove her uterus".¹⁰ It is not clear why the Court did not take cognisance of the Durable Power of Attorney for Health.

Almost thirty years ago, SA Strauss in his authoritative book on the relationship between doctor and patient (quoted by the Court)¹¹ made the following comment:

...in principle every person is legally entitled to refuse medical attention, even if it has the effect of expediting his death. In this sense, the individual has a right to die. All that is required is that the declarant at the time of making his refusal known is *compos mentis*. The declaration remains valid even though the declarant may at a later stage become *non compos mentis* as a result of physical or mental illness, or for any other reason.¹²

If Strauss's comment is still a valid interpretation of Namibian law in post-independent Namibia, then the Court erred in not finding that in terms of the Durable Power of Attorney, Ms Semente was *compos mentis* when she handed the document to Dr Burmeister, and in the absence of any contradicting evidence, also when she drafted or signed it. If there was a legal reason for the Court to reject the Power of Attorney, it is not reflected in the judgment.

It is unfortunate that such an important issue was again dealt with by choosing a formalist approach rather than allowing substantive legal argument. The minimalist approach of the Court not to consider the second pillar of the application since it would have made no difference to the outcome is general practice in Namibian and other common law courts. Yet it does not contribute to transformation of a constitutional state. While the case was loaded with constitutional issues, and ready for a transformative judgment - to use the vocabulary of former South African chief justice and acting judge of the Namibian Supreme Court, Justice Pius Langa,¹³ and American academic Karl Klare¹⁴ - it all came to naught. No guidelines for the future regarding

9 (ibid.:para. 7).

10 (ibid.).

11 (ibid.:para 9).

12 Strauss, SA.1991. *Doctor and Patient Law*. 3rd Edition. (First Edition 1984). Pretoria: J L van Schaik Publishers, p 32.

13 Langa, P. 2006. "Transformative Constitutionalism", *Stellenbosch Law Review* 17:351.

14 Klare, K. 1998. "Legal Culture and Transformative Constitutionalism", *South African Journal on Human Rights* 14:146.

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the conflict between the constitutional rights of the individual and her legal obligations towards her children.

However, on one point the case was clear. Hidden between the statement of the problem and the final findings, one finds substantive argumentation in favour of the right of a person to deny medical treatment, be it for religious or any other conviction or belief and even if it may result in a serious health risk or even death.

The Court used an English QC¹⁵ and an English case¹⁶ as authority for its obiter dictum that a person has the right to deny medical treatment no matter the cost. The principle is, as I indicated above, not totally new in Namibia.¹⁷

The significance of this case, however, is the fact that the Court linked it with articles 7 and 8 of the Namibian Constitution. The Court refers to these rights as “freedom of individual autonomy”.¹⁸ Some may argue that it is only an obiter. I do not agree with that position, but even if it is, it is still an important development in Namibian law.

If we indeed have freedom of individual autonomy, based on articles 7 and 8 of the Constitution, it can serve as an impetus for further development of the right to live with dignity, as it is known in some circles, or the freedom to assist terminally ill patients who do not wish to live a life he/she perceives to be without dignity.

The debate has already started in philosophical and ethical circles in Namibia when Professor Sean Davids - known for the criminal case against him in New Zealand for assisting his terminally ill mother to end her life - addressed the Socrates Society at the University of Namibia in 2012. Since the issue is not only philosophical, but primarily legal, the Chingufo case will hopefully open the constitutional debate.

The multilayered architecture of globalised environmental governance requires new approaches to legitimacy. Only new approaches can provide answers to the new questions that are being raised by the new dispensation. Since the discovery of “living law”, we know that the demands for unrestricted priority of state law lose their power where people insist on their own ways of doing things. In view of this, the issue on the table is how a society will deal with the realities in which such living law is applied.

15 Robertson, G. (QC). 1993. *Freedom, the Individual and the Law*. 7th Edition. (First Edition 1987). Harmondsworth: Penguin.

16 *Re T* (Adult: refusal of medical treatment) (1992) EWCA Civ 18; (1992) 4 ALL ER 649 (CA).

17 See Strauss (1991:32).

18 *Ex parte Chingufo*, para. 9.

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This is a political issue to which basically two answers are possible. One would be to go the easy route, i.e. to reject the results of the non-statal/non-official formations of governance as not legitimised by Parliament. However, research on legal pluralism has shown that decisions of this kind will not end the matter, but rather lead to conflict.¹⁹ The other answer is to open up not only space for negotiation, but also for remedies within the parameters set for a specific legal environment.²⁰ The Agenda 21 Preamble declares that the document is a “dynamic programme”.²¹ Its dynamism requires political creativity.

19 Which one finds, for example, where African states have tried to abolish customary law!

20 See Winter (2012:145).

21 Chapter 1, section 1, paragraph 1.6.

S v Hoabeb: A Dummy's Guide on How to Avoid Justice in Namibia for Ten Years

Nico Horn*

The legal question in this case is uncomplicated. The suspect appeared in the Windhoek Magistrates' Court on 16 July 2003 on several charges related to the Legal Practitioners Act 15 of 1995. After ten appearances and three legal representatives he eventually pleaded guilty of contravening the provisions of s 21(1)(c) of the said Act on 5 June 2006. The Act prohibits any person who is not enrolled as a legal practitioner to perform certain specified actions on behalf of another person.

The accused admitted that he had acted wrongfully in performing the prohibited actions in the High Court on behalf of another person. The accused acknowledged knowledge of the wrongfulness of his actions at the relevant times. He also complied with all the other requirements for a plea of guilty to be accepted by the presiding officer.

The accused was convicted in terms of section 112 (2) of the Criminal Procedure Act, Act 51 of 1977. The State presented arguments in mitigation of sentence before the matter was postponed to 30 June 2006 for sentencing. On the said date the accused asked for a postponement because his legal representative withdrew and he needed time to get another legal representative. At the next appearance on 24 August 2006 the accused was not in court and the case was postponed to 13 October 2006, on which date both the accused and his legal representative were absent. The matter was postponed five more times.

On 30 May 2007 the legal representative of the accused informed the court that on 5 June, the day of his client's conviction, the Court refused a request of the then legal representative to postpone the case since he wanted to get a second opinion. The postponement was denied and the accused convicted. In the light of the uncertainty, and the fact that there was possibly a difference of opinion between the accused and his then legal representative, the Court was asked to "set aside" the plea of guilty in terms of section 113 of the Criminal Procedure Act so that the case could start *de novo*. The Court agreed despite the fact that the case record of 5 June does not reflect a request for a postponement and clearly does not fall within the ambit of section 113.

The fourth legal representative then informed the Court that he was withdrawing and the case was postponed to 18 June 2007. The case record is silent on what happened on 18 June 2007, but it seems as if the case was eventually struck from the roll a year later on 20 June 2008 and restarted

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with a new case number, the fourth case number for this criminal matter. The case was postponed for plea and trial to 24 October 2008. Between October 2008 and September 2012 the case was postponed more than twenty five times for different reasons. Several more legal representatives withdrew, the accused terminated the mandate of one, the accused was not present on several occasions, several legal representatives asked for a postponement because the Legal Aid Board appointed them shortly before the trial date and the accused asked for postponements to obtain the services of a legal representative.

On 29 May 2012 the accused, and later an (again) new legal representative informed the Court that the accused had challenged the constitutionality of the provisions of the Act under which he was charged. The case was then postponed to 30 September 2012.

At this stage the case was referred to the High Court by the control magistrate for a special review in terms of section 304(4) of the said Criminal Procedure Act. Despite the fact that section 304(4) makes provision for a review only after sentencing, the Court referred to several cases where gross irregularities were attended to even where superior courts, including the Supreme Court of Namibia, used its inherent jurisdiction to review cases where the accused were not yet sentenced.

The Court elaborated on the reasons for its decision to go beyond the text of section 304(4) in the best tradition of judicial activism in its service of justice. It used its inherent jurisdiction to review the case. It is worth quoting the reasoning of the Court here verbatim:

- [54] This is an unusual case having regard to the numerous postponements, the large number of legal practitioners who at different stages appeared for the accused persons and the reasons why this matter has not yet been finalised.
- [55] It may be so that this case has on occasions been postponed due to the fact that the accused did not consult with his legal representatives, but the impression I gained from perusing the record was that the accused person embarked upon exercises of delaying tactics, in the light of the protestations of the accused and his insistence that he would not receive a fair trial if he was not represented by a legal practitioner *of his choice*. The constant turnover of legal practitioners instructed by the Directorate of Legal Aid, resulted in various defence counsel not being ready to proceed when the state was ready, with the result that the state witnesses who had on numerous occasions attended the court proceedings, had been greatly inconvenienced and had to return to court without any prospect that their testimonies would be heard.
- [56] I am further of the view that the conduct of the accused person over the years unmistakably amounted to an abuse of process and is still an abuse of process.

- [57] The interests of justice, so aptly stated in *Makopu supra*, includes justice not only to an accused person but to the prosecution as well. Is this not a prime example that, due to policy considerations which require certainty and finality in criminal cases, this case should be concluded immediately? I am convinced this to be the case having regard to the specific circumstances of this case. What other remedy is there available?
- [58] I am further of the view that the accused person is not prejudiced (in view of the fact that he had pleaded guilty) if the recorded plea of not guilty is set aside.²²

The Court then made a ruling that is so obvious even a pre-graduate law student would have had little problem in coming to the same conclusion:

The entry of a plea of not guilty in terms of s 113 of Act 51 of 1977 entered by Magistrate Muchali on 30 June 2007 is hereby set aside.

The record of the proceedings is returned to the clerk of the court, Windhoek for the finalisation of the case before another magistrate in terms of the provisions of s 275 of Act 51 of 1977.²³

No one will disagree with the review judges that the accused abused the process. However, it does not bear favourably on the legal process in this country that one person can play cat and mouse with a Namibian court for almost ten years, ignoring court dates and is then allowed a postponement without being held responsible for his disregard of the system. If the ordinary woman on the street could read this judgment, she could only conclude that the criminal justice system in the lower courts is totally dysfunctional.

Let us begin with the magistrates. Several magistrates, based on the names mentioned in the High Court judgment, including some respected, experienced presiding officers, postponed the case at least twenty five times after the incorrect application of section 113 of the Criminal Procedure Act. And we do not even know what happened in Court for one full year between 18 June 2007 and 20 June 2008. Since the magistrates are not on trial here, we do not know why none of them realised that there was no legal justification for the Court to set aside a legally recorded plea of guilty on 30 May 2005, a year after the initial conviction of the accused.

Is it possible that magistrates do not have time to read the records of cases that have been on the roll for long periods before they are expected to preside over a trial? If so, it is a sad reflection of the rule of law in Namibia where the vast majority of citizens never get the opportunity to engage with the well-organised, functional High and Supreme Courts. What they experience is

22 *S v Hoabeb*, pp 231ff., para.'s 54–58.

23 (ibid.:232).

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cases that never seem to come to a conclusion. The High Court made mention of the time wasted by the witnesses in this case who attended a hearing, only to be told again and again that the case had been postponed.

One is astonished by the fact that the accused found it so easy to get one postponement after the other. The general public may well blame the Constitution or “human rights” for this failure. However, reading the record as reflected in the review case does not give one a sense of any constitutional challenge by the accused before May 2012.

One gets the impression that the accused was allowed to fire Legal Aid representatives, or cross swords with them, or give them conflicting instructions, just to get a new one at the tax payer’s expense. Surely, not even the broadest interpretation of Article 12(1)(e) of the Constitution can tolerate a situation where an accused can get twelve legal representatives, at least eight of them instructed by the Directorate Legal Aid, and more than forty postponements, mostly as a result of conflicts between the accused and his legal representative, or because the accused terminated the services of his representatives, or because of conflicting instructions.

I apologise if I am wrong, but the scant information that we find in the High Court case does not give me the impression that either the prosecutors or the Directorate of Legal Aid played any active role in ending the endless abuse of process. Did the legal practitioners and the administrative staff of the Directorate at any stage try to find out why respected members of the legal fraternity withdrew, or why the accused terminated the services of an assigned legal practitioner before they instructed a new one? Was the process of new appointments ever explained to the Court? Did the different prosecutors object to requests for postponements? Did the prosecutor address the Court on 30 May 2007 before the magistrate set aside the plea of guilty? Was the case referred to a control prosecutor to consider an appeal?

The administration of the case record also leaves much to be desired. The case had four different case numbers and a part of the record covering one year was not part of the documentation presented to the review judges. Given all the unanswered questions one can only speculate on what the reasons and significance were of the different case numbers.

A word needs to be said on the abilities of law graduates to enter the profession as prosecutors and magistrates. Members of the legal fraternity, more specifically the Office of the Prosecutor-General, have complained on several occasions over the last few years that the students joining them do not meet the expectations of the profession. The practice of allowing graduates to prosecute immediately after completing four or five years of academic studies needs to be reviewed. It does not make sense to distinguish between those entering private practice and those entering the profession as representatives

of the State. And allowing graduates without at least five years' court experience on the bench will always compromise standards, no matter how good the practical training of the Ministry may be.

On 29 May 2013 the South African Law Deans Association (SALDA), the Law Society of South Africa and the General Council of the Bar met to discuss what is perceived to be a crisis in legal training in South African universities. The speakers and participants were extremely critical and negative about the products coming from South African law faculties.²⁴ The South African legal academics did not excuse themselves.

It will be naive for the Law Faculty at the University of Namibia to wash our hands in the proverbial Pilate's bowl. The student body in the Faculty increased fourfold in the last five years. In 2012 the Faculty had thirteen full time lecturers – two were on study leave, one was appointed in the middle of the year but resigned before the end of the year – to teach more than 600 students. One does not have to be a rocket scientist to know that a lecturer supervising up to fifteen LLB dissertations (the fate of some of the faculty members in 2012) cannot produce the same results as an academic working with two students – the maximum when I joined the Faculty in 2002. Somewhere standards will be compromised and the end product will be magistrates who do not know how to break the chain of abuse and prosecutors who never object to unnecessary postponements.

There is at least something positive to be said about the *Hoabeb* case. The review procedures of our criminal justice system are often criticised for delaying the finality of cases and not having faith in the abilities of the lower court magistrates. In this case it was as often in the past again the safety net to prevent further humiliation to the justice system. The activist approach of the judges to bring this embarrassing case to a just conclusion is commendable and a sign that the superior courts are functioning well. Their approach in opting to describe the flawed history of this case rather than writing a four paragraph judgment sends a clear message to all the different role players in the judicial system that all is not well in the magistrates' courts.

24 The South African Law Deans Association, the Law Society of South Africa and the General Council of the Bar. 2013. "LLB summit: Legal education in crisis?" In *De Rebus* 113, July 2013:8, available at <http://www.saflii.org/za/journals/DEREBUS/2013/113.html>; last accessed on 1 July 2013.

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BOOK REVIEW

***Commentary on the Criminal Procedure Act;*
LLE du Toit , FJ de Jager, A Paizes, A St Q
Skeen & SE van der Merwe (Eds), Cape Town:
Juta Law, 1987, Loose-leaf format, 1,700 pages,
ISBN 9780702119620¹**

Nico Horn*

Reviewing a book that was published in 1987, with a principal editor that passed away in 2005? Well, this is not the usual statutory law book that becomes defunct as soon as three or four amendments have been made to the specific Act. The *Commentary on the Criminal Procedure Act* (hereafter the Commentary) has been updated annually since 1988. Presently it is updated twice a year. Professor Steph van der Merwe of Stellenbosch has replaced the late Etienne du Toit as General Editor.

For many years the Commentary has been part of every Namibian prosecutor, magistrate and criminal lawyer's main research source before and during a criminal trial. It had some important advantages over its competitors in the market. The first was that Du Toit's work was in English – the sole official language in Namibia after 1990. The second was that the loose-leaf format could be updated annually. And finally, Etienne du Toit, the General Editor and main contributor, was a regular visitor to Namibia until his untimely death in 2005. Consequently, his commentary contained more references to Namibian cases than other books and commentaries on criminal procedure.

In the meantime Hiemstra's Criminal Procedure has also been published in English under the editorship of A Kruger with added loose-leaf and online options.² The Commentary has, however, remained popular in Namibia. The charismatic character of Etienne du Toit surely has something to with it. In my last appearance against him shortly before he passed away, a dispute came up on whether the State was obliged to answer Advocate Du Toit's lengthy request for further particulars, seeing that the police docket was disclosed. I quoted from the Commentary to make my point and Adv. Du Toit responded that the judgment I quoted was overturned by the Supreme Court of Appeal in South Africa and then added politely that it was not my fault since the latest

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1 Also available on CD ROM and online.

2 Kruger, A. 2008. *Hiemstra's Criminal Procedure*. Durban: Lexis Nexis. See also my review in the *Namibia Law Journal* Vol. 2, no. 1, January 2010, p 132.

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loose-leaf addition was still with the printers. Judge Mavis Gibson asked me to take notice of the comment and move on since Adv. Du Toit was, after all, the expert on the Commentary!

Since Namibian cases are no longer included in the SA Law Reports, and in the absence of a close observer of Namibian law, Namibian cases no longer feature in the Commentary as much as they used to. Both South Africa and Namibia have amended the initial Act 51 of 1977 several times. Both countries have also adopted legislation related to criminal procedure issues that are either dealt with differently in the other country, or not at all.

So, why take any notice of the Commentary at all in Namibia? Well, the Commentary remains an important source for criminal law practitioners in Namibia. One of the reasons is the fact that the South African courts have dealt with issues such as asset forfeiture identified as proceeds of crime, and cross border crime legislation - to mention only two - much longer than Namibia has. And since some of our legislation is similar to that of South Africa, their judgments still carry some weight.

Under the editorship of Van der Merwe constitutional issues related to criminal procedure receive more prominence than before in the Commentary. While Namibian and South African constitutional jurisprudence are developing alongside each other, the bulk of South African cases remain a source of information, even if it does not carry any authoritative value.

Then there is the fact that Namibia does not have its own commentary. When the Namibia Parliament adopted the Criminal Procedure Act, Act 25 of 2004, Professor Pamela Schwikkard, Dean of the Faculty of Law at the University of Cape Town, and I co-edited the first edition of a commentary on the new Act.³ It was unfortunately also the last. Nine years after the promulgation, the Act is still not in force. Some students at the University of Namibia drafted a commentary on the present Act, Act 51 of 1977, but the uncertainty on the future of the 2004 Act makes it difficult for publishers to lay out the money for a work that may become defunct once the "Act-in-waiting" is eventually enacted. (Note: The Act was passed in 2004, all legal formalities complied with and signed in law by the President with a note that it would come in force on a date to be published in the Gazette. It never happened; the Act was never enacted).

There is another reason why the Commentary remains a good investment for anyone involved in criminal procedure legislation. Juta has just launched a freebie for all subscribers to the Commentary: an online bi-annual booklet, *Criminal Justice Review* that will arrive in our mailboxes more or less the time

3 Horn, JN & PJ Schwikkard. 2007. *Commentary on the Criminal Procedure Act of 2004*. Windhoek: OrumbondePress.Namibia, p 157.

we get our latest loose leaves. Judging from the first edition, it promises to be an exciting development.

The editor of the Review, Wits academic and long-time contributor to the Commentary, Prof. Andrew Paizes (working with Prof. Van der Merwe) explains the objective of the Review:

The Review will cover, selectively, developments in areas of criminal justice outside the scope of Commentary. It will, in particular, pay close attention to developments in the substantive criminal law as well as those areas of the law of evidence not dealt with in Commentary. Subscribers will also have the benefit of self-contained, critical feature articles which would not necessarily appear in Commentary at all.⁴

The first edition begins with two articles on recent contentious South African cases. The first, with the challenging title “The conundrum of the Marikana miners: Can there be liability for murder in such cases?” deals with the decision of the South African prosecutor in the Marikana case to prosecute the striking miners whose colleagues were shot and killed by the police, for the murder of their colleagues. One is almost shocked by the idea. To stand in the dock for the murder of your comrades with whom you stood in the trenches in the battle with the police? Or as Paizes puts it: “One’s sense of justice is, however, offended by this proposition”. He goes on to discuss the common purpose theory in detail and comes up with enlightening conclusions.

In the second article Paizes looks at the different judgments of the Western Cape High Court and the Supreme Court of Appeal in *S v Humphreys*.⁵ In this case Humphreys was convicted of the murder of ten passengers of his minibus, all learners. The accused neglected a red warning light at a railway crossing. He passed several vehicles waiting for a train to pass. When he entered the intersection, the minibus was hit by the train. The issue in both courts was the question whether the actions of the accused met the demands of *dolus eventualis*.

Both articles are of a general criminal procedural nature of interest for practitioners in many common law jurisdictions, including Namibia. The section on legislation deals with the latest forensic legislation in South Africa and can be of immense value to the Law Reform and Development Commission. Finally, the Review discusses several recent South African cases dealing with more than thirty relevant procedural issues.

4 Paizes, A. 2012. Editorial Note. In Paizes, A & S Van der Merwe. 2012. *Criminal Justice Review 1 of 2013*. Bi-annual addition to the Commentary on the Criminal Procedure Act 51 of 1977.

5 2013 (2) SACR 1 (SCA).

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As far as the content and the basic outline are concerned, the tested approach used in 1987 remains unchanged. The Commentary follows the chronological order of the Act. This may be a frustrating approach for a researcher who needs jump from one section to another if she researches a criminal or procedural topic. But for a practitioner the approach works well. The lawyer only needs to page to the section dealing with her client's case to find an interpretation and all the recent case law dealing with the issue.

The academic researcher has a solution too. She can opt for the digital version, do a search on her topic and get every relevant judgment and discussion related to her field of interest. The hard copy has several cross references to other sections of the Act, which assist and topical research.

In summary, the new Criminal Justice Review is a welcome addition to an already good commentary. Even at N\$2195.00, it is still value for money if you are interested in criminal justice.