BOOK REVIEWS

Constitutional democracy in Namibia: A critical analysis after two decades; Anton Bösl, Nico Horn & André du Pisani (Eds), Windhoek, Macmillan Education Namibia, 2010, 387 pages

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This book critically evaluates the achievements and lapses of constitutional democracy in Namibia after two decades of independence. It sheds light on the extent to which constitutionality and the rule of law have been embedded in the jurisprudence of Namibian society. The book consists of 20 chapters which are written by highly placed intellectuals. To achieve coherence and consistency, the book is structured into three thematic headings. Section I deals with the concepts of *constitutional democracy* and *good governance*; Section II examines the origin of the Constitution of the Republic of Namibia; while Section III deals with the challenges within the Constitution.

Section I comprises four chapters which examine the concepts of *constitutional democracy* and *good governance* from a historical and definitional perspective. The section lays the foundation for the book by carefully analysing various concepts which form the cornerstones of constitutional democracy. The first chapter is by André du Pisani, who discusses the paradigm of constitutional democracy. The author traces the early origins of democracy and examines its transformation in different societies across the world. Although his genealogy of democracy is quite brief, it gives the reader an insight into the ideological underpinnings and complexities of democracy as applied by pre-20th-century societies. He carefully marries the concepts of *democracy* and *constitutionalism*, and asserts that the key purpose of a constitution in any given society is to bring about stability, predictability and order to the actions of government.[1] In other words, a society's constitution should be seen as a medium through which the conduct of government is regulated and the individual liberty of citizens is guaranteed. This invariably means that the constitution sets the benchmark and parameters through which the rights and duties of the individual and the government are gauged. The author points out that the Namibian Constitution has, to a large extent, been effective and widely accepted by Namibians. However, he suggests that more can be done

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1 Du Pisani, A. 2010. "The paradigm of constitutional democracy: Genesis, implications and limitations". In Bösl, A, N Horn & A du Pisani (Eds). *Constitutional democracy in Namibia: A critical analysis after two decades*. Windhoek: Macmillan Education Namibia, p 8.

to strengthen the efficacy of the Constitution in the area of developing the jurisprudence of the courts, in balancing justifiable limitations of enshrined rights, and in the equality and socio-economic rights of all citizens.[2]

Du Pisani's article is followed by that of Joseph Diescho, who examines the concepts of *rights* and *constitutionalism* in Africa. He works from the premise that, although Africa as we know it today is a creation of European imagination and adventurism, the concept of *human rights* cannot be regarded as alien to Africans because Africans belong to the human family.[3] Based on the universal nature of human rights, he discountenances the notion that international human rights are Western ideologies which do not necessarily fit into the concept of *human rights* in Africa, but acknowledges that Africa should not be held to standards that are culturally incompatible with the African majority.[4] Although this line of reasoning is to a large extent valid, challenges arise in determining the ambits of these 'culturally incompatible standards'. Also, if these 'culturally incompatible standards' are determined by the African majority, it invariably means that the standards of the African minority are deemed irrelevant. This prompts the following question: Are human rights not meant to protect the helpless?

He rightly posits that, to guarantee the human rights of Africans, constitutionalism should be embraced in order to ensure the observance of the rule of law, checks and balances as regards government actions, and an independent judiciary.[5] He views *rights* as –[6]

> … the body of accepted precepts that account for good governance and are necessary conditions for peace, stability and sustainable development … .

He also suggests that Africa may need restorative and social justice to address the unjust experiences in the pre- and postcolonial era. However, he does not fully indicate how social and restorative justice can be used to address these past wrongs.

In discussing constitutional democracy in Namibia, Henning Melber, in his chapter on the impact of the Constitution on state- and nation-building, bases his discussion of the Namibian Constitution on the opinion of Justice Ismael Mahomed. The latter describes the constitution of a nation as "a 'mirror reflecting the national soul', the identification of ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its

2 (ibid.:14).
3 Diescho, J. 2010. "The concept of *rights* and *constitutionalism* in Africa". In Bösl et al. (2010:16–21).
4 (ibid.:23).
5 (ibid.:28).
6 (ibid.:31).

government".[7] Melber opines that the Namibian Constitution codifies the essential values and norms of the Namibian people and, as such, establishes the applicable standard for conducting state affairs. He suggests that even in situations where a particular political party has the requisite representation in Parliament to amend the Constitution to fit its agenda, such temptation must be resisted. From this standpoint, he criticises political office-bearers who voice their frustration when the judiciary applies constitutional principles which do not go in their favour.[8] He suggests that, in order to guard the achievements obtained at Independence, the rules of the game should not be changed by the majority simply to safeguard their political interest. His view clearly opposes the tyranny of the majority – a phenomenon which is popular among African democracies.

Section I is concluded with Marinus Wiechers' chapter, which reconciles legality and legitimacy in the Namibian Constitution. He suggests that the legality of any legislation in the country is derived from the Constitution. On the concept of *legitimacy*, he adopts Badura's view[9] that, for a constitution to be legitimate, it should assure legality, effectiveness and orderliness; it should also connect political dominance with the individual's social norms and aspirations.[10] From this standpoint he notes that, prior to 1990, the former South West African/ Namibian Administration faced legitimacy challenges. Upon Independence and the drafting of the Constitution, which reflected the social aspiration of Namibians, the legitimacy of the new regime became validated. In reconciling the illegitimate pre-Independence laws in the dispensation of political independence, the Constitution retained all laws enacted by the previous government, but made them subject to the Constitution. The implication was that, if these previously illegitimate laws could stand the litmus test of the Constitution, then they should be deemed legitimate because the laws would be within the ambits of societal norms and aspirations. Wiechers points out that, so far, the Constitution has enjoyed legitimacy; and for it to retain this unquestioned status, the Namibian Government has to ensure that it fulfils its constitutional commitments.

The four chapters which make up Section II give an in-depth analysis of the genesis of the Namibian Constitution. This section brings to light the legal and political manoeuvring that took place prior to Independence and during the drafting of the Constitution. The beauty of this section lies in the fact that most of the chapters were written by those who actively took part both in the struggle for an independent Namibia and in the drafting of the Constitution. This section

7 Melber, H. "The impact of the constitution on state- and nation-building". In Bösl et al. (2010:35).

8 (ibid.:39).

9 Badura (1986); cited in Wiechers, M. "The Namibian Constitution: Reconciling legality and legitimacy". In Bösl et al. (2010:47–48).

10 (ibid.).

starts with a chapter by Nico Horn, who examines some historical documents that not only paved way for independence, but also laid the foundation for discussions as to the nature, form and content of the Constitution. He asserts that constitutional principles formed part of the basic tenets of the South West Africa People's Organisation (SWAPO), and that the participation of the international community in drafting the Constitution did not make it foreign to Namibia. On this note he concludes that, since constitutional principles have always been embraced by Namibians, it cannot be said to be alien to Namibia.

The next chapter is by Hage Geingob, who discusses in detail the drafting of the Constitution. As the Chairperson of the Constituent Assembly that drafted Namibia's Supreme Law, he narrates how they used the art of compromise to strike a balance between vision and various groups' self-interest on issues such as the electoral system, the procedure for amending the Constitution, and the Bill of Rights. The end result was a Constitution that incorporated core constitutional principles protecting the rights of individuals, and curtailing the powers of the state over its citizens. Geingob points out that the Bill of Rights was not necessarily accepted by the political parties on altruistic grounds: it was adopted partly because it fell within the framework of the Universal Declaration of Human Rights. This signifies that parties recognised the universal and inherent nature of rights protected under the Bill of Rights.

This contribution was carefully written. Nonetheless, although the beginning of the chapter indicates that it was lifted verbatim from a previous publication, an effort should have been made to edit parts of the text that made reference to chapters of the book in which it was originally published.

The chapter by Theo-Ben Gurirab also focuses on the genesis of the Namibian Constitution, but he discusses the international and regional landscape within which the Constitution was set. From an insider's perspective, he details the manner in which SWAPO viewed with suspicion the United Nations' interest in the process leading to Namibia's independence. Despite these suspicions, SWAPO and other political parties found a middle ground to agree on the basic tenets of the Constitution that would secure the liberty of the people and enshrine constitutional democracy in the jurisprudence of the nation. In concluding his article, Gurirab points out that, for the Constitution to flourish, it must continually be written in the hearts and minds of the people.

In concluding this section, Dirk Mudge writes on the art of compromise in the drafting of the Constitution by sketching a historical narrative as the background to its adoption. His chapter is quite insightful because he gives an account of the struggle for independence from the perspective of a person who dealt directly with the South African apartheid government. He details various attempts during the struggle to achieve an independent and legitimate government in Namibia. Once the country had gained independence in 1990, he explains from the perspective of an opposition leader the efforts that were

needed and the compromises that had to be reached in order to adopt the Constitution. He concludes by reflecting on the success of the Constitution after 20 years and suggests that, in order to maintain the tempo and success of the Constitution, government has to ensure that the Supreme Law becomes a living document in the heart of the people.[11] He suggests that this can only be done if the people are made aware of the ideals and intentions of those who wrote the Constitution.[12]

Having laid the foundation of constitutional democracy and the genesis of the Namibian Constitution in Sections I and II, respectively, the chapters in Section III highlight some challenges within the Supreme Law. This section comprises 12 chapters. The first is by Manfred Hinz, who deals with the concept of *justice* in relation to the limits of the law in the context of the Namibian Constitution. He uses three cases[13] decided by the post-Independence Namibian judiciary to explain the 'limits of the law' as espoused by Antony Allott.[14] He briefly discusses Allott's notion of *legal pluralism*, which views law as a "complex societal phenomenon to which the state contributes – but so do the people of a society who generate law as an expression of their concepts of *justice*".[15] In this regard, one can posit that the value of the law may be gauged by the amount of justice it affords the society. In other words, a law may be valid in that it passes the legality test, but it may be regarded as unjust. However, this raises the question as to who the law should serve. Should it serve the society or the state? If it is to serve the people, is it possible to have a general standard of justice that will be accepted by every member of the society?

Hinz subtly delves into the question of the efficacy of the law. Drawing examples from the three selected cases, he sheds light on the extent to which a particular type or system of law may not be able to serve the required societal justice as a result of its inherent limitations. He points out that it is important for lawyers to be aware of the limits of the law and proactively accept the role of non-legal principles and rules which, although they affect society, but may be beyond the strict realm of the law.[16] He concludes by suggesting that it is important to acknowledge the limits between legal and non-legal normative systems.[17] This rightly highlights the fact that, although the law is a body of legal rules, its scope of application does not lie in the abstract.

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11 Mudge, D. 2010. "The art of compromise: Constitution-making in Namibia". In Bösl et al. (2010:145).

12 (ibid.).

13 *The State v Glaco*, *Immigration Selection Board v Frank*, and *The Ovaherero Claim for Compensation*.

14 Allott (1980, 1983); cited in Hinz, MO. 2010. "Justice: Beyond the limits of law and the Namibian Constitution". In Bösl et al. (2010:149–167).

15 Hinz (2010:149).

16 (ibid.:163).

17 (ibid.:165).

The next chapter is by Stefan Schulz, who discusses the concept of the *general freedom right* and the Namibian Constitution. He points out that the Namibian Constitution does not draw a clear distinction between *rights* and *freedoms*, but suggests that the distinction may lie in the extent to which the Constitution allows for derogation.[18] He posits that a general freedom right gives citizens the prerogative to choose, think and act for themselves – albeit within the ambits of the constitutional order.[19] He points out that the Constitution neither inhibits nor provides for general freedom rights, but suggests that the court's interpretation of the Bill of Rights in the *Frank* case[20] indicates that the Supreme Court has not made space for general freedom rights in the Namibian Constitution. Schulz convincingly examines general freedom rights from a historical and comparative perspective, and argues that general freedom rights can be protected under Article 7 of the Constitution, which guarantees the liberty of an individual.

In Lazarus Hangula's chapter on the constitutionality of Namibia's territorial integrity, he points out that the territorial space of Namibia is anchored on Article 1 of the Namibian Constitution. He points out various international boundary disputes between Namibia and its neighbours. Although the author clearly presents the importance of ascertaining Namibia's international boundaries, the chapter does not highlight any constitutional challenges that may arise from the uncertainty of these boundaries.

In discussing constitutional jurisprudence in Namibia since independence, George Coleman and Esi Schimming-Chase point out that the first Bill of Rights in Namibia was passed in 1985. Using decided cases prior to and after Independence, the authors illustrate that the Namibian judiciary often tried hard to ensure that these rights were protected. However, their decisions were sometimes reversed by the Appellate Courts in South Africa. Upon Namibia's Independence, the judiciary has relentlessly ensured that the Bill of Rights is protected. However, the authors observe that challenges still remain in the criminal justice system, particularly in the lower courts. They note that, for the principles in the Constitution to be complied with, it is important to adequately fund the criminal justice system and address the gaping shortage of skills.[21] They also suggest some challenges lie in the actual administration of justice, which is manifested in occasional difficulty in accessing the courts, unavailability of judges, and extreme delays in delivering judgments.[22]

18 Schulz, S. 2010. "In dubio pro libertate: The general freedom right and the Namibian Constitution". In Bösl et al. (2010:171).

19 (ibid.:172).

20 *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another*, Supreme Court Case No. SA 8/99.

21 Coleman, G & E Schimming-Chase. 2010. "Constitutional jurisprudence in Namibia since Independence". In Bösl et al. (2010:206).

22 (ibid.:213).

Dianne Hubbard deals thoroughly with the question of equality in the Namibian Constitution. She highlights the existing shortcomings in the manner in which Article 10 has been applied by the judiciary. She notes that any Namibian case law that shows a discriminatory provision that derives its source from statutory law will remain in force until it is repealed, amended or declared unconstitutional by a court of law. On the other hand, discriminatory provisions that emanated from common law were automatically declared invalid from the date on which the Constitution became effective. She opines that legal certainty is breached where the effective invalidation date of a discriminatory provision differs according to the source of law in question. She also suggests that there are two constitutional interpretations to the equality jurisprudence in Namibia. She indicates that the choice of interpretation rests on whether the right in question is absolute or such that it requires a value judgment to give it specific meaning.[23] She questions the manner in which the courts have approached the interpretation of various equality rights that have been in dispute. She concludes by emphasising that Namibia's freedom can only be guaranteed if equality is evenly applied to both the majority and minority.

Francois-Xavier Bangamwabo examines constitutional supremacy in the context of the right of Parliament to contradict the decision of the Supreme Court via the provision of Article 81 of the Constitution. He suggests that, although Article 81 gives Parliament the power to contradict a Supreme Court decision, such contradiction can only be achieved through a constitutional amendment. He justifies his assertion through a purposive reading of the Constitution. This argument is valid in light of the doctrine of constitutional supremacy. If the Supreme Court reaches a decision on the extent to which a piece of legislation complies with the Constitution, such a decision cannot be contradicted by legislation. This is because the validity of any legislation in a constitutional democracy is tested by the Constitution. However, this argument might not suffice when the decision does not entail a constitutional issue.

Yvonne Dausab examines the application of international law in terms of Article 144 of the Constitution. Dausab suggests that, in view of Article 144, the only exception to the automatic application of international law in Namibia is when an international law rule contravenes the Constitution or where an Act of Parliament has expressly excluded the rule. She points out, however, that decided cases show that Namibian courts have not directly applied international law when it comes to human rights: they have instead used international law as an interpretative tool. She suggests that a declaratory order may be needed to offer guidance as regards the meaning and effect of Article 144.

23 Hubbard, D. 2010. "The paradigm of equality in the Namibian Constitution: Concept, contours and concerns". In Bösl et al. (2010:238).

Gerhard Tötemeyer examines democracy and the electoral process. He discusses various impediments that affect the smooth running of the electoral system and suggests that these impediments be rectified to ensure the efficacy of the democratic process. He also points out the uncertainty raised by Articles 29, 57 and 58 of the Constitution and its effect on the democratic and electoral processes.

In the chapter by Sam Amoo and Sidney Harring, Article 16 is examined in the light of intellectual property rights. They argue that Article 16 can be extended to protect intellectual property rights as an 'incorporeal right'. They suggest that a more robust framework is needed, however, in order to protect the intellectual property of poor and indigenous people in Namibia because the existing statutory laws cannot protect black property rights.

In the chapter by Fritz Nghiishililwa, he discusses the concept of *labour hire* in Namibia. He shows that, although labour hire was initially outlawed by the International Labour Organisation (ILO), subsequent events have led the ILO to remove the ban. Presently, the ILO has guidelines which regulate the conduct of those engaged in labour hire. Using the theory of necessity and reasonableness, he calls for the regulation of the practice of labour hire in Namibia.

Oliver Ruppel discusses environmental rights and justice. He points out that environmental rights provided for in the Constitution fall under principles of state policy and are, as such, not justiciable. He argues that environmental rights can instead be tied to some fundamental rights guaranteed in Chapter 3 of the Constitution. He draws a nexus between environmental rights and the right to life, human dignity, equality and freedom, culture, and property, as well as children's rights. He suggests that the Ombudsman could be used as a tool for protecting environmental rights and ensuring environmental justice. In light of Article 144, he suggests that judicial notice should be taken of environmental rights in international instruments which Namibia has ratified. The question that comes to mind in this regard is whether the courts are obliged to accord environmental rights the status of fundamental rights if international law says they should. This question is most likely to be answered in the negative because Article 144 is limited by constitutional and parliamentary authority. Thus, as long as environmental rights remain principles of state policy, they cannot be accorded the status of fundamental rights – irrespective of what international law dictates.

Section III is concluded by Sacky Shanghala, who discusses the objectives, motivations and implications of amendments to the Constitution. The author outlines the procedure for amending the Constitution and discusses the various amendments that have taken place in its 20-year history. In addition, the author raises questions about social issues in society which the Constitution has not addressed.

In general, the book makes for an interesting read. Most of the chapters are written in such a way that any literate person, irrespective of their background, can read and understand the legal principles discussed. Moreover, because the chapters are written in a narrative form, the book can serve as a good historical source for those who wish to dig more deeply into the origins of the Namibian Constitution. I recommend this book to anyone who enjoys reading about the world in general, and I earnestly look forward to the year 2020 when the Namibian Constitution will be 30 years old.