The rule of law in Namibia

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Introduction[1]

The Republic of Namibia, as the country is now known, was declared a German Protectorate in 1884 and a Crown Colony in 1890, and thereafter became known as South West Africa. The territory remained a German colony from 1884 until 1915, when it was occupied by South African forces. From 1920 onwards the territory became a Protectorate, or a Mandated Territory of South Africa in terms of the Peace Treaty of Versailles. Namibia achieved its independence in 1990 after a long and protracted struggle, on both diplomatic and military fronts, for the achievement of self-determination and sovereignty. The South African Administration was characterised by patent abuse of the human rights of the indigenous people of Namibia. Apartheid, as a political system, is inconsistent with the rule of law; consequently, any political or a legal system based on apartheid will be devoid of the rule of law. This was the basic characteristic of the South African Administration in Namibia. It was devoid of the rule of law and legitimised by the decisions of a judiciary that justified the racist policies and violations of the rule of law on legislative supremacy and analytical positivism. With the achievement of sovereignty and self-determination, however, Namibia adopted a Constitution which is the supreme law of the nation, and ushered in the principle of constitutional supremacy and a system of governance based on the principles of constitutionalism, the rule of law, and respect for the human rights of the individual.

Constitution

The Namibian Constitution came into force on the eve of the country's independence as the supreme law of the land and, therefore, the ultimate source of law in Namibia.[2] All other laws in Namibia trace their legitimacy and source

1 This article is based on a questionnaire developed for a comparative study among 15 countries on the state of the rule of law. For the study, see Konrad Adenauer Foundation (Eds.). 2006. *Rule of law: The KAF Democracy Report 2006*. Bonn: Bouvier.

2 Article 1(6) of the *Constitution of the Republic of Namibia* provides that "This Constitution

from the Constitution. In order to prevent the creation of a legal vacuum, Article 140 of the Constitution logically provides that all laws in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent court.

Human rights

The Namibian Constitution is a product of a struggle for sovereignty and human rights. This is reflected in the first provision, which states that Namibia is a –[3]

> *... sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all.*

It creates, inter alia, the three organs of state, namely the executive, the judiciary and the legislature; establishes the various service commissions; and defines state responsibility to obligations, succession to treaties, and the status of international law. The Constitution also contains a Bill of Rights that outlines fundamental human rights and freedoms, including the right to administrative justice. These rights and freedoms are protected and entrenched under relevant general provisions.[4] The Constitution does not precisely define the difference between *rights* and *freedoms*, but it may be argued that the difference lies in the extent of permissive derogation.

Under Article 131 of the Constitution, the rights and freedoms contained in Chapter 3 are entrenched, and the provisions may not be repealed or amended insofar as such repeal or amendment detracts or diminishes from such rights and freedoms. The rights contained in Chapter 3 include protection of life; protection of liberty; respect for human dignity; abolition of slavery or forced labour; equality and freedom from discrimination, arbitrary arrest and detention; access to a fair trial; the guaranteeing of privacy and respect for family; the rights of children; the right to acquire property; the right to political activity; the right to administrative justice, culture, and education. The fundamental freedoms contained in Chapter 3 include freedom of speech and expression; freedom of thought, conscience and belief; freedom of religion; freedom to assemble peaceably and without arms;

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shall be the Supreme Law of Namibia".

3 Article 1(1), *The Constitution of the Republic of Namibia*.

4 See Articles 5 and 131, *The Constitution of the Republic of Namibia*.

freedom of association; freedom to withhold labour; freedom to move freely throughout Namibia; freedom to reside and settle in any part of Namibia; freedom to leave and return to Namibia; and freedom to practise any profession, or carry on any occupation, trade or business. The Namibian courts have handed down a number of cases upholding the rights of individuals under the Bill of Rights, including the rights of persons with HIV/AIDS[5] and the right of accused persons to legal representation provided by the state.[6] Under Article 25, the courts are given the power to declare invalid any law or any action of the executive and agencies of the government that is inconsistent with the provisions of Chapter 3.

However, the Constitution does draw a distinction between *rights* and *freedoms*. With regard to the latter, Article 21(2),[7] for example, provides that they –

> *... shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*

These permissible restrictions under specific Articles of the Constitution, together with the general nature of the provisions of a constitution, *prima facie*, require the exercise of the constitutional jurisdiction of the courts in interpreting the grey areas of the Constitution, as to what constitutes decency or morality, for example. Since Namibia's independence, the courts have been called upon to interpret similar provisions of the Constitution and have adopted what may, to borrow John Dugard's expression, be termed "a natural law cum realist or a purposive approach",[8] and have developed a particular jurisprudence based on the values of the Namibian people. These cases are concerned with the determination of

5 *Nanditume v Minister of Defence* 2000 NR 103.

6 *Government of the Republic of Namibia & Others v Geofrey Kupuzo Mwilima & Others*, Supreme Court Case No. SA 29/2001.

7 Article 21 provides for the freedom of speech and expression, thought, religion, association, etc.

8 Dugard, J. 1971. "The judicial process, positivism and civil liberty". *South African Law Journal* 88:181–200.

the constitutionality of legislative provisions or practices relating to corporal punishment,[9] the restraining of prisoners by chaining them to each other by means of metal chains,[10] and homosexual relationships.[11]

For example, the provisions of Articles 21(2) and 22 of the Constitution allow for derogation from the stated freedoms on specific grounds. A case in point is *Kauesa v Minister of Home Affairs & Others*,[12] where the court had to rule on the constitutionality of Regulation 58(32) of the Police Regulations deemed to have been made under the Namibian Police Act, 1990 (No. 19 of 1990), which prohibited a member of the Namibian Police from commenting unfavourably in public on the administration of the Namibian Police or any other government department and rendered such conduct an offence.

The central issue to be determined was whether Regulation 58(32) constituted a permissible restriction on the right to freedom of speech of a serving member of the Namibian Police Force. Article 21(1)(a) of the Namibian Constitution provides that –

> *... all persons shall have the right to freedom of speech and expression.*

A limitation on such right could only be permissible if it fell within the terms of Article 21(2) which provides that –

> *The fundamental freedoms ... shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of such rights and freedoms ..., which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*

9 See Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State 1991(3) SA 76 (NmS).

10 See Namunjepo & Others v Commanding Officer, Windhoek Prison & Another 2000 (6) BCLR 671 (NmS).

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

12 *Kauesa v Minister of Home Affairs & Others* 1995 NR 175 (SC); (4) SA 965 (NmS). See also *Fantasy Enterprise CC t/a Hustler The Shop v The Minister of Home Affairs & Another* 1998 NR 96 (HC); *Nasilowski & Others v The Minister of Justice & Others* 1998 NR 97 (HC).

The court held that the limitation in this case was not rationally connected with its objective, and Regulation 58(32) was arbitrary and unfair: it failed to specify the ascertainable extent of the limitation it imposed on the right as required by Article 22 of the Constitution.

It is interesting to note that, on the flip side, the High Court (the court *a quo* in this case) actually ruled that the restriction was a fair one. It is sometimes the case that the High Court and the Supreme Court adopt different interpretations to the same constitutional issue.[13]

Apart from permissible restrictions under specific provisions of the Constitution, it may be added that the derogation from or the suspension of some of these rights and freedoms are permitted under Articles 24 and 26, where a state of emergency, a state of national defence, or martial law have been declared. But the exercise of the power granted to the executive under Chapter 4 has to comply with the provisions of Article 24(2); if these provisions are not complied with, the exercise of these powers can be challenged.

Separation of powers

The doctrine of the separation of powers recognises the existence of three organs of state: the executive, the legislature, and the judiciary, as provided for by Article 1(3) of the Namibian Constitution,[14] but it also recognises the fact that, in order to guarantee and protect the civil liberties of the individual and to prevent dictatorship and absolutism, mechanisms need to be established that are capable of putting constitutional and legal restraints on the powers of government or the various organs of state. In the Namibian Constitution, various mechanisms are provided for in order to ensure that each branch of government remains independent of the other, through a system of checks and balances. The executive consists of the President (elected by public vote) and Cabinet (appointed by the President). The primary legislative power in Namibia is vested in the National Assembly, the members of which are elected by public vote, while the judicial power is vested in the courts, consisting of the Supreme Court, High Court and Lower Courts.

13 Another example of such opposite views would be *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Elizabeth Khaxas*, supra.

14 Article 1(3): "The main organs of State shall be the Executive, the Legislature and the Judiciary".

Although the legislative and judicial powers are constitutionally vested in Parliament and the courts, respectively, the separation of powers is threatened by two realities. Firstly, the very ominous situation that 42 of the 72 members of the National Assembly (i.e. the legislative) are simultaneously members of Cabinet (i.e. the executive) does not bode well for the necessity for a clear dividing line between the executive and the legislature. Secondly, the justices of the highest courts of the land (the Supreme and High Courts), are appointed (and dismissed) by the President, albeit on the recommendation of the Judicial Service Commission, as contemplated in Article 32(4) of the Constitution.

Primacy of law

Article 18 of the Namibian Constitution provides that –

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

This Article comes under the entrenched provisions of the Bill of Rights. Therefore, under the Namibian legal system, the jurisdiction of the courts to review administrative action, and the justiciability of this right by any person aggrieved by the exercise of administrative discretion falls come under the regime and protection of the Constitution. Thus, the judicial review of administrative action is one of the constitutional mechanisms meant to protect the rights of the individual, and prevent the potential abuse of discretionary power.

Judicial independence

The independence of the judiciary has been recognised in all democracies as a sine qua non for the promotion of a culture of democracy and human rights. Consequently, under Articles 78(2) and (3), the Constitution guarantees that independence, and provides that the courts –

> *... shall be independent and subject only to the Constitution and the law[,]*

and further that –

> *[n]o member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs*

> *of the State shall accord such assistance as the Courts may require to protect their independence, dignity, and effectiveness, subject to the terms of this Constitution or any other law.*

This judicial independence, therefore, is by no means unfettered: it is fettered by the Constitution and the law. Judicial officers are accountable to the Judicial Service Commission in the performance of their judicial functions, and are subject to the rules relating to professional ethics, discipline and dismissal as stipulated in the Constitution and other law.

Protection of fundamental rights

Article 25(2) of the Constitution provides that –

> *... aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.*

Equality before the law

As part of the Bill of Rights under Chapter 3 of the Constitution, Article 10 provides that –

> *[a]ll persons shall be equal before the law ...*

and that –

> *[no] persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*

Although the Constitution clearly provides for freedom from discrimination on the basis of sex, for example, it is not always clear to what extent these provisions are applied. An example is the case of Muller,[15] where a man sought to acquire the surname of his wife upon marriage but was refused to do so because the practice does not apply to men.

15 *Muller v President of the Republic of Namibia* 2000 (6) BCLR 655 (NmS).

Constitutional privileges

According to Article 31 of the Constitution, –

> *[no] person holding the office of President or performing the functions of President may be sued in any civil proceedings save where such proceedings concern an act done in his or her official capacity as president.*

Furthermore, –

> *[n]o person holding the office of President shall be charged with any criminal offence or be amenable to the criminal jurisdiction of any Court in respect of any act allegedly performed, or any omission to perform any act, during his or her tenure of office as President.*

Control over law enforcement and military

Chapter 15 of the Constitution deals with the Police and Defence Forces and the Prison Service. According to the provisions of this Chapter, the President has the power to appoint and dismiss the Inspector-General of the Police (which is the highest authority in the Police).[16] In addition, the President is the Commander-in-Chief of the Defence Force and –[17]

> *... shall have all the powers and exercise all the functions necessary for that purpose.*

This provision casts the net very wide for the powers granted to the President, but does not include any provision that ultimately fetters this power.

Finally, the Constitution also empowers the President to appoint and dismiss the Chief of the Defence Force (the second in command) and the Commissioner of Prisons.[18] The sum total of these provisions make it clear that the President has the ultimate control over the Police and Defence Forces and the Prison Service, fettered only by the Constitution in general. In addition, there is evidence that, during the state of emergency that was declared in the Caprivi Region, the military – and not the Police – were called upon to take control of the situation. The regulations allowing for this were based on pre-independence regulations.

16 Articles 116 and 117.
17 Article 118.
18 Articles 119–123.

Executive privilege

The Constitution does not afford the president legislative power in the form of decrees that can sideline the ordinary legislative process. During the law-making process, however, the President does have the power to veto a Bill which is sent to him or her for approval by the National Assembly, if in his/her opinion the Bill would, upon adoption, conflict with the provisions of the Constitution. However, this power is fettered by the provision that the National Assembly can still resend the Bill to the President for signature, where s/he would not have the veto option for the second time. Nonetheless, in practice it is not clear how much these provisions help, as the majority of the National Assembly consist of Cabinet Ministers and the National Council plays a mere advisory role to the National Assembly.

Changes in the past five years

As was mentioned earlier, to date, the Constitution has only been amended once, namely in 1998, to allow for an additional term of office for the Founding President, Dr Sam Nujoma. No amendments to the Constitution have taken place since, including the past five years.

Non-state parallel judicial systems

Article 66(1) of the Constitution provides that –

> *[b]oth the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.*

Furthermore, in Article 66(2), power is granted to Parliament to repeal or modify any part of the common law or customary law, and –

> *... the application thereof may be confined to particular parts of Namibia or to particular periods.*

Therefore, the Constitution creates more of a hierarchical system than a parallel one, with the Constitution being the highest in the hierarchy, then legislation, followed by customary and common law on the same tier. Namibia is a country rich in cultural diversity, with customary (or traditional) law being a very real

part of that diversity. In addition, the vast majority of the Namibian population lives in the rural areas, where customary law is practised on a daily basis. This reality necessitated the drafters of the Constitution to constitutionally recognise customary law. In recent years, the conflict with the 'formal' legal system and that of customary law has become more apparent. It has been argued that various customary law practices are in conflict with the Constitution, especially regarding the provisions in the Bill of Rights. Therefore, Parliament has passed certain laws in an attempt to harmonise customary law practices with the ideals enshrined in the Constitution. These laws include The Traditional Authorities Act, 2000 (No. 25 of 2000), the Communal Land Reform Act, 2002 (No. 5 of 2002), and the Community Courts Act, 2003 (No. 10 of 2003). The Community Courts Act provides a mechanism for parties aggrieved by proceedings of a traditional court to be able to appeal to the 'formal' court system.

Legislation

Access to information

The Constitution does not provide for an express right of citizens to gather information on legislation. However, it is within the interests of democracy, legal certainty and Parliamentary accountability that legislation be readily available to all citizens. In Namibia, laws are published in the *Government Gazette* upon promulgation. These Acts can then be bought from the Ministry of Justice offices. Persons with Internet connectivity can also obtain certain Acts online. In addition, debates on laws that have taken place in the National Assembly and National Council are compiled in what is known as the *Hansard*, which can be obtained from Parliament for a fee.

Although information on legislation is available in these formats, it is still very difficult for most Namibians to use effectively: the official language in Namibia is English and, therefore, all Acts of Parliament are printed in that language. The problem with this is that the majority of the Namibian population lives in rural areas, where most of them do not speak or read the English language. In addition, the Acts are not available in Braille.

Retroactive legislation

Retroactive legislation is prohibited by Article 12(3) (Fair Trial) of the Constitution, which provides that –

> *[n]o persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed.*

As is apparent, this provision only applies to criminal legislation.

Discriminatory legislation

Certain conditions make it difficult for certain persons to comply with the laws. For example, as has been outlined above, information on legislation is not readily available to all citizens. Consequently, one cannot obey a law that one does not know exists. Except for this concern, there is no particular law which Namibian citizens cannot comply with for legitimate reasons.

Legal certainty

Despite a high degree of legal certainty in Namibia, there are some areas and practices which pose a challenge to that certainty. Firstly, certain practices under customary law – a system being practised by many inhabitants of the country – are still not in line with the Constitution. Deserving special consideration in this regard are the property and inheritance rights of women, and the recognition of customary marriages. It is uncertain, therefore, what legal force or validity these practices have.

Secondly, Article 16(2) of the Constitution provides that –

> *[t]he State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.*

Since before independence, the Namibian government has been concerned with the situation of land ownership in the country, which culminated in the promulgation of the Agricultural (Commercial) Land Reform Act, 1995 (No. 6 of 1995) and the drafting of the Land Reform Policy White Paper (1998) by the Ministry of Lands, Resettlement and Rehabilitation.[19] The Act was designed to bridge the gap between the landless black majority and white minority who

19 For a comprehensive review of the land reform process in Namibia, see the report by the Legal Assistance Centre, at www.lac.org.na (last accessed 15 March 2008).

own the bulk of commercial farmland in Namibia, by expropriating the land from the latter and redistributing it to the former. The Land Reform Policy is not without its problems, however. The implementation of the Act has left many questions. For instance, who exactly benefits from expropriated property? Shortly after the inception of the Land Reform Policy, newspaper reports were published suggesting that the persons who were on the list of beneficiaries for expropriated farmland were not necessarily those whom the policy initially intended to benefit.

A third issue which should be considered with regard to legal certainty is the applicability in Namibia of some apartheid legislation. Upon independence, Namibia inherited various statutes from South Africa, some of which were repealed by the Constitution because of their apartheid and, therefore discriminatory, character. However, one noticeable example of such a law which was not repealed is the Native Administration Proclamation (No. 15 of 1928). This Proclamation provides for different marital property regimes depending on the colour of a person's skin, and whether that person lives north or south of the colonial 'Red Line' or 'Police Zone'.[20]

Courts

Government accountability in court

Article 5 in Chapter 3 of the Constitution provides that –

> *[t]he fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner herein prescribed.*

Access to justice and legal representation

Costs of litigation, especially in civil suits, are relatively high in Namibia. In order to have a successful civil suit, one has to have a private lawyer – in itself an expensive exercise. In criminal cases, the complainant is represented by a public

20 The Police Zone consisted of southern and central Namibia to which white settlement was directed. Unlike the territories north of this so-called Red Line, which were governed through a system of indirect rule, in the Police Zone the Administration employed policies of direct control.

prosecutor who is paid by government. In the case of the accused, however, s/he has the right (according to Article 12(1)(e)) to be defended by a legal practitioner of his/her choice. However, this is not possible for accused persons who are less privileged and cannot afford a legal practitioner of their choice. Therefore, Article 95 of the Constitution generally provides for the promotion of the welfare of the people. Article 95(h) specifically provides for a –

> *... legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State.*

The binding effect of the provisions of Article 95 was one of the issues that had to be determined by the Supreme Court of Namibia in the case of *Government of the Republic of Namibia & Others v Mwilima & all other accused in the Caprivi treason trial.*[21] As was discussed earlier, the Supreme Court ruled that in so far as the services impinged on the fundamental rights of the individual as enshrined under Chapter 3 of the Constitution, the government was under a constitutional obligation to provide such services and the judiciary had the obligation to enforce and protect the fundamental rights of the individual as enshrined in the Constitution. In the case of *State v Kau & Others*,[22] the Supreme Court ruled that the failure to inform appellants of their rights to legal representation is an irregularity. Defendants also have the right to represent themselves in court, that is, after they have been informed of their right to legal representation.

Fair trial

Article 12 of the Namibian Constitution contains the provisions for fair trial. The criminal procedure in Namibia is governed by the Criminal Procedure Act, 1977 (No. 51 of 1977). The effectiveness of the judiciary in Namibia is basically respected and all persons generally have an equal opportunity in court for a fair trial. Double jeopardy is forbidden in the Constitution in Article 12(2). According to Article 12(1)(d) of the Constitution, –

> *[a]ll persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.*

21 2002 NR 235 (SC).
22 1995 NR 1 (SC).

Indeed, the perception by the Namibian on the street seems to be that the 'criminals' (as accused persons are commonly referred to) are given more rights than they deserve.

Judicial biases

There are no reports of judicial bias when it comes to the Namibian judiciary. However, a recent Article argues that foreign judges tend to decide in favour of government more than local judges.[23]

Proportionality

In respect of statutory offences, the legislature normally provides minimum or maximum sentences (usually a fine and time for imprisonment, or both) to be imposed by the courts when sentencing a convicted person. Common law offences are different, however, in that the presiding officer has more discretion on the sentence to be imposed. In the latter case, the judge would be guided by previous decisions, although each case is judged on its own merits. Nonetheless, some pieces of legislation are disproportionate in the sentences they prescribe to certain offences. An example of such legislation is the contentious Stock Theft Act, 1990 (No. 12 of 1990), which prescribes a minimum sentence of 30 years' imprisonment for a repeat offender for stealing livestock. It has been the case that some rapists and murderers have not received a sentence of 30 years' imprisonment for their crimes. Therefore, the question remains whether the life of a human being can be regarded as less valuable than that of an animal.

Discriminatory justice

There are no specific groups of persons who, from the outset of a trial, can expect a higher or lower sentence than for the same offence committed by other people. However, this does not exclude the usual principles and mitigating factors taken into consideration during sentencing. Nonetheless, these factors do not guarantee a convicted person a lesser sentence.

Namibia's Constitution provides for the practice of presidential pardon in Article 32(3)(d). Although such pardons are discriminatory by nature, there are no

23 Von Doepp, P. 2006. "Politics and judicial decision making in Namibia: Separate or connected realms?". *IPPR Briefing Paper No. 39*, October, p 5. Available at www.ippr.org.na*;* last accessed 14 March 2008.

reported cases of some persons being privileged or discriminated against during this process.

Judicial independence

Appointment of judges

According to Sub-article 32(4)(a) of the Constitution, the President has the power, upon recommendation of the Judicial Service Commission, to appoint the Chief Justice, the Judge-President of the High Court, and other judges of the Supreme Court and the High Court. Furthermore, Article 82(4) provides that all judges, except acting judges, are permitted to hold office until the age of 65, but the President is entitled to extend the retiring age of any judge to 70.[24] The Sub-article also provides that provision can be made by Act of Parliament for retirement at ages higher than those specified in the Constitution.

Article 84 of the Constitution provides for the removal of judges from office. According to Sub-article 84(1), only the President may remove a judge from office before the expiry of his or her tenure, on the recommendation of the Judicial Service Commission. Furthermore, Sub-article 84(2) stipulates that judges may only be removed from office on the ground of mental incapacity or for gross misconduct, and only after the Judicial Service Commission has investigated whether or not the judge should be removed. The Article further empowers the President, again on recommendation of the Judicial Service Commission, to suspend a judge pending the investigations.

Government interference

Article 78(3) of the Namibian Constitution expressly states that –

> *[n]o member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.*

24 The work of the Judicial Service Commission is regulated by the Judicial Service Commission Act, 1995 (No. 18 of 1995). Statutes dealing with ancillary issues pertaining to judges are the Judges' Pension Act, 1990 (No. 28 of 1990); Medical Aid Scheme for Members of the National Assembly, Judges and Other Office Bearers Act, 1990 (No. 23 of 1990); Judges' Remuneration Act, 1990 (No. 18 of 1990).

The Institute for Public Policy Research (IPPR) undertook a statistical analysis of judicial independence in Namibia.[25] As part of the research, the extent to which Namibian judges were susceptible to government interference in their decision-making process on the bench was questioned. Generally, the study indicates that, as a whole, the Namibian judiciary has performed quite admirably in terms of independence from the other branches.[26]

Changes in the past five years

In the past five years, there has been no tangible change in the frequency or nature of government interference in judges' adjudication. However, an interesting display of tension between government and the judiciary could be observed in the Caprivi treason trial, especially regarding the issue of legal representation of the accused persons.

Non-state actor interference

Non-state actor interference is virtually non-existent when it comes to exerting influence on the process of adjudication, whether in a legal or illegal manner. However, certain cases attract more public attention and consequent advocacy than others, which in some instances necessitates legislative reform – rather than the judiciary succumbing to non-state actor interference.

Changes in the past five years

In recent years, the issues surrounding women's and children's rights, especially issues concerning the safety of women and children (e.g. domestic violence), have obtained much public attention with calls for stiffer sentences to be imposed by the judiciary.

Criminal justice

The criminal justice system of Namibia is governed by the Constitution, legislation, and the common law. Criminal jurisdiction is vested generally in the judiciary and, in the exercise of this jurisdiction, the courts and the law enforcement agents are bound by the Constitution and all other relevant laws.

25 Von Doepp (2006:5).
26 (ibid.:1).

These include the Criminal Procedure Act, the Police Act, and their respective regulations. The underlying constitutional principles of the criminal justice system of Namibia are the presumption of innocence and legal subjectivity. From these basic presumptions other constitutional provisions are derived which relate to arrest and detention (Article 11); fair trial (Article 12); the right to adequate time and facilities to prepare and present a defence (Article 12(1)(e)); the right to legal representation (Article 12(1)(e)); the privilege against self-incriminating statements (Article 12(1)(f)); and the admissibility of testimony obtained in contravention of Article 8(2)(b).

Law enforcement abuses

Article 12(1)(b) of the Constitution provides that an accused person has to be tried –

> *... within a reasonable time, failing which the accused shall be released.*

However, this excludes the requirement contained in the Constitution that an accused person has to have his/her first appearance before a magistrate within 48 hours of arrest. Although the Constitution is clear as to the requirements for the treatment of detainees, these tenets are not always followed through in practice. A major problem in the prison system in Namibia right now is the treatment of detainees in prisons and holding cells. In addition to the Constitution, the Namibian legislature has passed several statutes to regulate the prison service, including how prisoners should be treated. In terms of these laws, various requirements are laid out, including the segregation of prisoners (male and female prisoners, juvenile and adult persons, prisoners suffering from mental illnesses, and first and subsequent offenders), and sanitary and other health requirements. However, the question begs to be answered whether these requirements are complied with in practice. In 2006, the Ombudsman of Namibia embarked upon an investigation in order to answer this question.[27] The results of that investigation make it clear that the conditions in prisons in Namibia leave much to be desired, especially as regards overcrowding in cells and the length of time both trial-awaiting prisoners and convicted persons are kept in cells which are meant for 48-hour occupation only.

27 Walters, JR. 2006. *Special report on conditions prevailing at police cells throughout Namibia*. Windhoek: Office of the Ombudsman.

Corruption in law enforcement and the judiciary

In Namibia, corruption is a problem perceived to be on the increase.[28] In 2003, the legislature responded with the promulgation of the Anti-corruption Act, 2003.[29] The Act provides for the establishment of the Anti-corruption Commission, which opened its offices on 1 February 2006. Consequently, President Pohamba has embarked on a campaign of zero tolerance for corruption, which also aims at sensitising the citizenry about the scourge of corruption.

Levels of corruption

According to an Afrobarometer[30] survey in Namibia in 2006, 41% of the respondents interviewed thought that police officers were involved in corruption, while 57% of the same respondents had never paid a bribe to a police officer to avoid problems with the police. Although perception indices are usually hard to rely on, it should be stated that the Namibian police system is one generally burdened by a lack of resources, particularly human resources.

Judges in Namibia are highly respected and well-paid individuals in society. This, however, should be considered in light of the fact that magistrates, who are also part of the judiciary, are not as well paid as judges. As has been stated above, judicial independence in Namibia is widely observed, and this means that corruption in the judiciary is very rare.

Main causes of corruption

As has been stated above, corruption in Namibia is perceived to be on the increase. However, it is not clear whether corruption is actually on the increase or whether there is just more awareness about the problem. Besides the Anti-corruption Commission, various non-state actors are also involved in the monitoring of

28 According to Transparency International's Corruption Perceptions Index, Namibia ranked 55 out of 163 countries in 2006 and 57 out of 179 countries in 2007 in respect of how corrupt it was perceived to be by expert assessments and opinion surveys. See www.transparency.org; last accessed 14 March 2008.

29 Anti-corruption Act, 2003 (No. 8 of 2003).

30 The Afrobarometer is a research project aimed at garnering information in order to measure the political, social and economic state of affairs in Africa. The research is done through standardised country surveys that are conducted in more than 12 countries. For further reading, see www.afrobarometer.org; last accessed 10 March 2008.

corruption.[31] It is also a general perception that the Namibian public sector is prone to nepotism and tribalism, which is the perfect recipe for a corrupt system. Reported instances of corruption seem to be at upper-administration level, sometimes with high-ranking government officials allegedly being involved. However, it is not clear what happens to these allegations after they get reported in the media; indeed, the perception is that when high-ranking government officials are involved, nothing happens to these cases.

Public administration

Legality of public administration

The Constitution, being the supreme law of the land, expects all components of the state – including public administration – to be subject to it. Theoretically, access to an office in public administration is open to everybody. However, there are some instances where the public feels that nepotism and tribalism play a role in the appointment of public servants. Public servants are remunerated according to the Public Service Act, 1995 (No. 13 of 1995), which creates salary scales commensurate with performance and qualifications. However, instances of corruption are still reported, even involving higher-ranking officials. Notable examples are the Social Security Commission and Avid Investment case, and that of the Offshore Development Company.

Remedies

Article 18 of the Namibian Constitution requires administrative bodies and administrative officials to –

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

31 See for example www.insight.com.na, which seeks to report on actual instances of corruption. The Namibia Institute for Democracy (NID) also publishes information on actual instances of corruption. The report (*Actual instances of corruption as reported in the Namibian print media)*, as well as other publications dealing with good governance topics, are available on the NID website, www.nid.org.na.

Since Namibia's judicial system ranks generally well when it comes to independence, transparency and competence, one may expect success by using this process, depending on the merits of the particular case.

Lack of compliance with the principles of natural justice will justify the intervention of the courts by nullifying and setting aside the decision. However, as stated by Chief Justice Strydom in *Chairperson of the Immigration Selection Board v Frank & Another*,[32] as a general principle the courts are not permitted to substitute their decisions for the decision of the administrator because the discretion is granted to the administrator, and to do otherwise would amount to usurpation of the power of the administrator and a breach of the principles of separation of powers. However, a court would exercise the discretion itself where there are exceptional circumstances.[33] Examples of instances where the courts have exercised their jurisdiction not to refer a matter back include cases where there were long periods of delay, where the applicant would suffer prejudice, or where it would be grossly unfair.[34]

General assessment

Rule of law: General situation

The rule of law in Namibia exists with few restrictions, with no significant changes in the past five years.

Major obstacles

Namibia's legal and political clime has remained largely unchanged throughout its 18 years of independence. However, it remains to be seen how much the current political atmosphere will have an effect on change when the next elections take place.

32 2001 NR 107 (SC).

33 See *WC Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & Others* 1982 (4) SA 427.

34 See *Greyling (*ibid.), *Dawlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange (Edms) Bpk & Others* 1983 (3) SA 344 (WLD) at 369 G–H, and *Local Road Transportation Board & Another v Durban City Council & Another* 1965 (1) SA 586 (AD) at 598–599.

What could also be considered as an impediment to the full realisation of the rule of law in Namibia is the virtual lack of engaging political debate amongst the citizens. This lack of debate is a symptom of the lack of knowledge amongst citizens, however, due to their limited access to information on the operations of government and what they may rightfully expect from government.

Konrad Adenauer Foundation support in Namibia

The principal obstacle to the full realisation of the rule of law in Namibia is the lack of education and information amongst a large group of the country's population. Due to limited resources and the allocation of state funds into certain sectors only, civic education does not receive the priority that it should. The rule of law can only be fully realised once the citizens know their rights and know how to enforce and protect those rights. In addition, only then can a proper culture of accountability be fostered and maintained. This is where the support of an organisation such as the Konrad Adenauer Foundation (KAF) proves invaluable through activities such as civic education, seminars, workshops and training.

Conclusion

The constitutional history of Namibia, prior to the promulgation of the 1990 independence Constitution, depicts a legal and judicial system that was constrained by the concept of legislative supremacy and analytical positivism. The promulgation of the Constitution saw the evolution of a new constitutional paradigm oriented towards the achievement of the rule of law and the promotion and maintenance of human rights.

Dicey's (1915) [35] definition of the rule of law lays down general principles as prerequisites for the achievement of the rule of law, namely –

- fair trial and punishment by ordinary courts of the land
- equality before the law, and
- the provision and enforcement of human rights.

The constitutional order that has existed since independence indicates that governance in Namibia has by and large been conducted within the ambit of

35 Dicey, AV. 1915. *An introduction to the study of the law of the constitution.* Oxford: Oxford University Press.

the definition of the rule of law, as expounded by Dicey.[36] Against the backdrop of what has been expounded in this paper, it is submitted that the current Namibian government has shown a strong commitment to the maintenance of the rule of law in the country.

36 (ibid.).