Constitutional supremacy or parliamentary sovereignty through back doors: Understanding Article 81 of the Namibian Constitution

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Introduction

Before Independence, Namibia (then South West Africa/SWA) applied the Westminster system of government, that is, parliamentary sovereignty. This system was imported from South Africa[1] into SWA by the Administration of Justice Proclamation, No. 21 of 1919.[2] Under parliamentary sovereignty, the legislature is empowered to make or repeal any law whatsoever on any subject, with no corresponding competence on the courts to question the validity of any law so made.

A good example of the application of sovereignty of Parliament is the United Kingdom (UK). In the Constitution of the United Kingdom, the courts are bound to take the validity of every Act of Parliament for granted, and there could be no question of non-compliance with any constitutionally prescribed procedure. Therefore, the UK Parliament is not only sovereign but also supreme, i.e. there is no law to which it is subject as regards either the content of its power or the procedure for exercising it, and it is this supremacy that excludes the supremacy of the Constitution.[3]

The opposite of parliamentary sovereignty is constitutional supremacy. The supremacy of the Constitution demands that the court should hold void any exercise of power (either by the executive or legislature) which does not comply with the prescribed manner and form or which is otherwise not in accordance with the Constitution from which the power derives.[4] Whilst the supremacy of the Constitution can coexist with the sovereignty of Parliament, the former necessarily excludes the latter.

Upon attainment of political independence, Namibia discarded the sovereignty of Parliament, and rather opted for the supremacy of the Constitution. Article 1(6) of the

1 It is noteworthy that South Africa has since discarded this system with the new constitutional order which came into existence in the mid-1990s after democratic elections which put an end to the horrendous system of apartheid. See e.g. ruling by Mohamed, then CJ, in *Speaker of the National Assembly v De Lille* 1999 (4) SA 863.

2 Briefly, the effect of this Proclamation was to introduce both Roman–Dutch Law and Anglo–Saxon common law as they were applied in the then Union of South Africa. For more on this, see Tshosa (2010:7). See also the ruling by Claassen JP, as he then was, in *R v Goseb*, 1956 (1) SA (SWA), at 666.

3 Wheare (1954:8).

4 (ibid.:10).

Constitution of the Republic of Namibia provides for the supremacy of the Constitution over all other laws. The implication of the supremacy clause is that any law enacted by the legislature or any action taken by the executive must comply with the dictates of the Constitution since, within the hierarchy of laws, the Constitution, the organic basic law, is the apex norm, the Grundnorm.

In addition, Article 25(1) reads as follows:

> Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid ...

Clearly, the above constitutional provision supplements the supremacy clause: it is, thus, unconstitutional and invalid for the legislature to enact any law in excess of powers granted to it by the Constitution.

Notwithstanding the foregoing, Article 81 of the Constitution allows Parliament to overturn or contradict rulings of the Supreme Court. The literal interpretation of this Article may raise the following conundrums:

1. Does Article 81 make Parliament a final (judicial) authority with the powers to review and/or contradict decisions rendered by the Supreme Court?
2. Assuming that the answer to the foregoing question is in the affirmative, does this mean that Article 81 reintroduces the Westminster system of parliamentary sovereignty through a back door, in contradiction with Article 1(6) of the Constitution?
3. If the legislature can willy-nilly contradict decisions of the highest court of the land, what would then be the place, relevance of the doctrine of a separation of powers, which is well-rooted in all modern politico-legal systems?
4. Can Article 81 be construed as a constitutional instrument put in place to counter the so-called countermajoritarian dilemma?

This paper attempts to address the above questions. It is the author's opinion that, whilst the legislature is, by virtue of Article 81, empowered to contradict the Supreme Court's decisions, this process has to be done lawfully and in line with other constitutional provisions. Thus, this paper endorses the following proposition: in order for Parliament to contradict the constitutional decisions of the Supreme Court or any other court, it (Parliament) has to amend the Constitution. Although this proposition is not expressly endorsed by any constitutional provision, it is justified by a purposive reading of the Constitution. This understanding is also supported by additional premises derived from the founding principles of the Constitution, as read with the provisions of its Chapter 19.

Analysing Article 81 of Namibian Constitution

The Namibian Parliament derives its authority and powers to contradict the Supreme Court's decisions from Article 81 of the Namibian Constitution. This Article stipulates the following:

> A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or it is *contradicted* by an Act of Parliament *lawfully* enacted. [Emphasis added]

The scope and content of Article 81 is limited to the binding nature of the Supreme Court's rulings – that much can be deduced from the ordinary meaning of the words used in the Article. What is not self-evident is this: how does Parliament lawfully contradict a decision of the Supreme Court? That is, what is the legal framework in which Parliament has to operate when contradicting Supreme Court decisions? The answer to this question cannot be deduced from the language of Article 81. Neither can the answer be inferred from the Article itself, because it only stipulates what Parliament can do: it does not indicate the process and procedure that should be followed by Parliament.

Article 81 is a codification of the stare decisis rule, a well-known rule of the common law, which deals with the relevance and legal force of judicial precedents. Although this rule is mostly associated with common law, which is judge-made law, it impacts on legislation as well.[5] This rule provides that decisions of a higher court are absolutely binding on all lower courts until and unless the higher court contradicts such a decision.[6] The Supreme Court is Namibia's apex court in all legal disputes, whether they involve the interpretation of legislation or common law. Article 79 sets out the court's jurisdiction ratione materiae, stipulating that the court has jurisdiction to hear, inter alia, "appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of [the] Constitution". Decisions of the Supreme Court have binding force until the conditions in Article 81 kick in.

At this point, I need to make a few preliminary remarks. The first of these is terminological. For the sake of brevity, disputes involving the interpretation, implementation and upholding of the Constitution will be referred to as *constitutional decisions*. Decisions other than those that involve the interpretation, implementation and upholding of the Constitution will be referred to as *non-constitutional decisions*. The latter category involves disputes resolved through exclusive application of common law rules. This distinction is crucial to this enterprise because it is the major premise on which most of the arguments are posed. The second point relates to the types of legislation. In this paper, I will refer to legislation that requires a simple majority in order to be passed as *ordinary legislation*. This is contrasted with legislation requiring special majority in order to be passed.

5 Du Bois (2007:76).
6 (ibid.:87).

The last remark is a clarification. This paper does not aim to argue that Parliament does not have the power to contradict constitutional rulings of the Supreme Court. Rather, the paper argues that both the rules of the Constitution and the normative order underlying it suggest that Parliament should amend the Constitution to achieve this outcome.

I will now provide examples of the difference between constitutional and non-constitutional disputes. Factual causation, be it in the law of delict or criminal law, is resolved by the application of the condictio sine qua non test.[7] This rule is derived from the common law, and delictual disputes turning on factual causation are resolved by the application of the abovementioned common law rule. Thus, the apportionment of delictual damages is resolved through the application of rules stipulated in the Apportionment of Damages Act.[8] In contrast with the aforementioned disputes, there are others that involve issues of constitutionality of legislation. If the court has to determine whether a legislative provision banning the practice of labour brokering/hiring is unconstitutional, the court has to look at the provisions of the Constitution impacted upon by the banning of such a practice. The court then has to look at whether the provisions of the legislation unjustifiably limit the rights in the Bill of Rights. If any such provision in the legislation does, the impugned provision is struck down. A dispute of this nature is a constitutional dispute par excellence, for it can only be resolved by the application of rules stipulated in the Constitution. While the distinction between *constitutional* and *non-constitutional* decisions can be loose, the point remains that a dispute that is to be adjudicated by the application of constitutional provisions is a constitutional dispute, no matter whatever else it may be. Attention will now be focused on this class of disputes.

It was mentioned earlier that Parliament is empowered to contradict Supreme Court decisions by lawfully enacting legislation to that effect. In the ensuing paragraphs, the thesis is put forward that, for Parliament to lawfully contradict constitutional decisions of the Supreme Court so that they lose their binding force, it is a necessary condition that they amend the Constitution.

The power vested in Parliament to contradict Supreme Court decisions is qualified by the requirement of lawfulness. What does the lawfulness requirement in Article 81 entail? The adverb *lawfully* is derived from the adjective *lawful*. According to the Oxford English Dictionary, *lawful* means "permitted or recognised by law". The correct question to ask, therefore, is this: when is a legislative contradiction of a constitutional decision by the Supreme Court recognised by law? The answer to this question cannot be *When it is lawfully passed*, for then the Article would be circular and that is not plausible. The answer to this question should, thus, be sought in the constitutional principles regulating the legislative process.

Chapters 7 and 8 of the Namibian Constitution contain, inter alia, the rules governing the legislative process in general. Chapter 19 contains special rules that are to be observed in the process of constitutional amendments. When Parliament overrules the Supreme

7 *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A), at 914–15.

8 No. 34 of 1956.

Court on a constitutional matter, it amounts to an ostensible constitutional amendment with the effect that the provisions of Chapter 19 will be engaged.[9] This is because, in terms of the constitution, constitutional interpretation is an exclusive province of the judiciary. Secondly, any contrary reading would make nonsense of one of the founding principles of the Constitution, namely the rule of law. What could possibly justify the qualification to the general rules by the provisions of Chapter 19? The answer lies in the constitutional supremacy clause in Article 1(6) of the Constitution. Because of its supreme status, the Constitution is treated differently from ordinary rules of law that are contained in legislation, the common law or any other sources recognised by the common law. For this reason, there are special rules stipulated for its amendment.

Chapter 19 stipulates the rules that should be observed for constitutional amendment. Article 131 entrenches the provisions of Chapter 3 of the Constitution. Article 132 deals with repeals and amendments to the Constitution. Articles 132(a) and (b) lay down the famous two-thirds majority rule, making this the threshold for any changes to the Constitution. This is in comparison with the simple majority required for the passing of ordinary legislation.[10] Although the significance of the provisions of Article 132 will depend on the political circumstances of the time, what is clear is that constitutional amendment is deliberately meant to be a cumbersome procedure.

It would be a conceptual error to view the provisions of the Constitution – including the ones presently under discussion – as mere rules. These rules should be understood against the values underlying the Constitution, requiring the court to embrace substantive reasoning when interpreting constitutional provisions. That is, the court should engage in rightness or wrongness evaluations when interpreting these provisions. This value-laden approach to constitutional interpretation has been confirmed in numerous Supreme Court judgments.

In *Ex Parte Attorney-General, Namibia: In re: Corporal Punishment*,[11] the majority judgment of Mahomed J described the Constitution as an "articulation of the nation's commitment to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law".[12] In *Mwandingi v Minister of Defence*,[13] the court expressly endorsed the purposive approach to constitutional interpretation in order to "avoid the austerity of tabulated legalism".[14] In the case *Ex Parte Attorney General, Namibia: In re: Constitutional Relationship between the Attorney-General and Prosecutor General*,[15] the court expressly distinguished the Constitution from a mere statute on the grounds that it articulates and embodies the consensual values of the state.[16]

9 Article 131.
10 See Articles 67 and 77 of the Constitution.
11 1991 (3) SA 76 (NmSC).
12 At 2–3.
13 1992 (2) SA 355 NmSC.
14 At 362.
15 1995 (8) BCLR 1070 (NmSC).
16 (ibid.:13).

In *Government of the Republic of Namibia v Cultura 2000*,[17] the court advocated a broad liberal and purposive approach to the interpretation of the Constitution.[18] While reliance on the corporal punishment case referred to earlier can be hazardous (because it involved interpretation of the Bill of Rights), the *Mwandingi*, *Relationship between AG and PG* and the *Cultura 2000* cases all involved provisions outside the Bill of Rights. Thus, these decisions are good authority that the whole Constitution should be read purposively.

Avoiding a 'High Court of Parliament'

Article 78(1) vests the judicial authority in the Judiciary. Article 78(2) provides that the courts are to be independent and that the Cabinet and the legislature should not interfere in judicial functions. It was also pointed out earlier that Article 79 indicates the court's jurisdiction ratione materiae. In the *Cultura 2000* case referred to earlier, the court mooted the potential ambiguities of Articles 78(1) and (2) when viewed in light of Article 81.[19] That is, the power of Parliament to reverse Supreme Court decisions turns Parliament – to borrow from O'Linn J – into "some High Court of Parliament".[20] The term *High Court of Parliament* has uncomfortable undertones for it envisages the judicial and legislative organs rolled into one. This makes nonsense of the separation of powers. The term also has uncomfortable undertones in our historical context.

In pursuit of the apartheid policy, the South African Parliament sought to disenfranchise any voter who was not classified as *white*. The franchise was defined by imperial legislation and two-thirds of both houses of Parliament were required to change the legislation. To disenfranchise black and so-called coloured voters, Parliament passed the Separate Representation of Voter's Act,[21] but with a simple majority. The Appellate Division (AD) declared this legislation invalid, however, in the case of *Harris v Minister of Interior*.[22] Parliament responded by passing the High Court of Parliament Act (HCPA).[23] This Act allowed Parliament to set aside any past or future decisions in which the AD had declared certain legislation invalid. The next step was not a surprise, as Parliament declared the *Harris* judgment invalid. The AD then declared the HCPA invalid on the grounds that this was Parliament disguising itself as a court in order to do, by simple majority, what it could not do by special majority. Parliament had the last say, however, when they inflated the Senate and packed the AD with National Party sympathisers. The amendment to the legislation was duly passed, and a challenge to invalidate it failed in the case of *Collins v Minister of Interior*.[24]

The South African Parliament could do this because, at the time, South Africa operated under the system of Westminster constitutionalism with parliamentary sovereignty. As

17 1993 NR 328.
18 340 B–D.
19 At 113.
20 See also the *Frank* case, p 113.
21 No. 46 of 1951.
22 *Harris v Minister of the Interior* 1952 (2) SA 428 (A).
23 No. 35 of 1952.
24 *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

mentioned earlier, one of the consequences of this was that Parliament could make and unmake any laws without any substantive constraints. This system gives Parliament monopoly over power and, as we all know, "absolute power corrupts absolutely".[25] It is within this context that the system of constitutional supremacy should be understood. In systems where the Constitution is supreme, all legal and political acts of government inconsistent with the Constitution are invalid. More importantly, these limitations should be justiciable – meaning that the courts should have the power to invalidate such action.

When the courts review legal or political acts by government, they are vindicating constitutionalism and the rule of law. They are ensuring that power is exercised within the confines of the Constitution. If Parliament could contradict the judiciary by passing an ordinary Act of Parliament, procedural limitations such as the special majority provisions would become meaningless, for then, Parliament could simply disguise itself as a 'High Court of Parliament' and do by simple majority what is required by special majority.

The Namibian Constitution recognises the rule of law ideal as well as its systemic aspects, namely the separation of powers and judicial review as procedural and structural limitations on power.[26] The courts, through the rule of law ideal, are able to review all governmental actions for both procedural and substantive validity. If Parliament is able to contradict all Supreme Court rulings through simple majority legislation, the court's judicial review powers would be meaningless – which, in turn, means that the rule of law would be reduced to a mere lofty ideal. This is more consistent with the Westminster constitutional model in which Parliament reigns supreme. However, it is inconsistent with the Namibian constitutional enterprise in which the Constitution reigns supreme.

The countermajoritarianism dilemma: Normative harmony or normative discord

There is tension between judicial review as an aspect of the rule of law and democratic theory. This tension cannot be ignored, because the Namibian Constitution recognises both democracy and the rule of law as founding principles.[27] This tension, which is common to all constitutional democracies, is described by constitutional scholars in the United States (US) as the *countermajoritarian dilemma*.[28] The main conundrum is that when the courts strike down statutes (through judicial review), they trump the will of the prevailing majority as expressed by Parliament. That is, the concept of judicial review counteracts the fundamental principle of democracy because it bestows upon unelected public officials (judges) the power to nullify the acts of elected public officials (the legislature).

25 Lord Acton, in a letter to Bishop Mandell Creighton, 1887.
26 Article 1(1).
27 Article 1(1).
28 Brest (1975:67).

Some authors have argued that the tension between judicial review and democracy is not inherent and is, therefore, reconcilable.[29] Because the Namibian Constitution endorses democracy and the rule of law, these arguments will be instructive to Namibian constitutional lawyers. The synthesis is to be found in the political condition of *constitutionalism*: a proclamation that a constitutional enterprise has certain essential features, so that even a majority government has no business amending or destroying them.[30] These features include individual rights and the mechanism by which they are protected. The function of preserving these essential features is entrusted to the judiciary, requiring judges to ensure that the exercise of executive powers is in terms of law. This proposition, in short, is what amounts to the concept of *judicial review*. Because judicial review is a necessary element in respect of enforcing individual rights as well as other limitations on governmental power, it follows that it is a necessary element of a constitutional enterprise. It is a necessary mechanism for preserving the principles that are fundamental to the constitutional enterprise against incursion by government.[31] For this reason, all governmental decisions ought to be subject to judicial review.

To discharge this duty, judges have to deduce from the language of the Constitution a political morality upon which society is based.[32] This requires judges to, among other things, identify an interpretive theory that strikes a balance between the competing principles of democracy and the rule of law. It is against this backdrop that theories on constitutional interpretation should be understood.

There are also competing theories on constitutional interpretation. One is propounded by legal philosopher Ronald Dworkin, who argues that a government are obliged not to ignore the fundamental principles such as liberty, justice and equality in terms of which all individuals deserve to be treated with equal concern.[33] According to this theory, the enforcement of constitutional principles by independent judges is a necessary element of a legitimate democracy.[34] While one may disagree with Dworkin's set of principles, the point nevertheless remains: constitutional interpretations should give effect to some set of principles in order to be coherent. Thus, we should adapt Dworkin's argument to fit the Namibian constitutional model, and put it thus: those principles expressly set out in Article 1(1) of the Constitution are a minimum condition for our constitutional democracy.

It was indicated earlier that the purposive approach has been endorsed in various constitutional decisions. This approach is contrasted with literalism, a theory that views interpretation as a mechanistic enterprise and which the courts have particularly warned against.

29 (ibid.).
30 (ibid.).
31 (ibid.).
32 (ibid.).
33 Dworkin (1993:123).
34 (ibid.).

Conclusion

To better comprehend the content and essence of Article 81 of the Namibian Constitution, one must not read it in isolation. Rather, this Article can only be better understood if it is read in conjunction with other constitutional provisions which provide for, inter alia, constitutionalism, the rule of law, the separation of powers, and the supremacy of the Constitution in the Namibian politico-legal system. True, a better understanding of Article 81 is only possible if and when the intentions of the framers of the Constitution are considered. In addition, special attention must be focused on both teleological and purposive approaches of interpretation in respect of any constitutional provision.

The debate on Article 81 cannot be complete without a brief overview of the recent Supreme Court ruling in the case of *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*.[35]. In casu, the Supreme Court struck down section 128 of the Labour Act.[36] This section outlawed the practice of labour brokering – or *labour hire*, as it is colloquially referred to in Namibian labour circles. The court ruled that section 128 unjustifiably limited Article 21(1)(j) of the Constitution, i.e. the freedom to practise any profession, or carry on any occupation, trade or business. While the arguments made in this paper have no bearing on the substantive aspect of that judgment, this paper is nevertheless relevant for anyone seeking to understand the implications of that judgment for the legitimate course of action open to Parliament after the judgment. Members of the executive have openly expressed their dismay with the court's ruling, thus creating the possibility that Parliament may invoke Article 81 of the Constitution in order to contradict the judgment.

While it is true that Parliament may contradict Supreme Court rulings in terms of Article 81, Parliament will do well to note that the *Africa Personnel Services* judgment is a constitutional judgment par excellence. This is because that ruling turned on the scope and content of Article 21(1)(j) of the Constitution. Its effect was that if and when Parliament wishes to lawfully prohibit labour brokering, they will have to amend the Constitution so that the freedoms in Article 21(1)(j) will no longer cover the practice of labour brokering. That is, Parliament will have to extricate the practice of labour brokering from the content of Article 21(1)(j), thus placing such brokering beyond constitutional protection. However, even if Parliament does amend the Constitution, the matter will still not be closed. This is because the course is always open for the argument that the freedom in Article 21(1)(j) is part of the basic structure of the Constitution – so it is beyond the reach of Parliament all together. The validity of this argument will be left for another day. Alternatively, the option open to the policymakers in regard to this

35 Case No. SA 51/2008.

36 No. 11 of 2007.

conundrum would be to put in place stringent measures regulating labour brokering.[37] These restricting measures must, however, comply with Article 22 of the Constitution.[38]

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37 At the time of writing, the Namibian government embarked on and endorsed an amendment to the impugned legislation (Labour Act, 2007 [No. 11 of 2007]) as a regulatory solution to the exploitive aspects of the labour-hire system, thus abandoning the option that involved constitutional amendment. The latter would contradict the *Africa Personnel Services* ruling and ban labour brokering altogether. See *The Namibian*, 8 February 2010.

38 Article 22 provides for guidelines on the limitations and restrictions of fundamental rights and freedoms. Briefly, the Article makes it clear that any restriction or limitation on rights and freedoms as per Chapter 3 are to be of general application, and cannot negate the essential content of the right or freedom in question. More importantly, any such limitation cannot be aimed at a particular individual.