Constitutional jurisprudence in Namibia since Independence

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Introduction

> Administrative bodies and administrative officials who are capable of making decisions affecting the citizens should always bear in mind that, by the adoption of the Constitution of Namibia, we have been propelled from a culture of authority to a culture of justification.[1]

The above is a profound departure from the following:[2]

> Whether or not any legislative measure is calculated to promote or to harm these interests of the inhabitants, would be a matter of policy in the discretion of Parliament, into which our Courts would decline to enquire.

These two statements by judges 37 years apart not only reflect the evolution of the legal culture in Namibia since Independence, they also manifest the jurisprudential polarity between a natural law approach and legal positivism.[3] According to some South African academics, positivism, as a legal theory, is to blame for the terrible track record of the judiciary in respect of the protection of civil liberties in apartheid South Africa[4] (and, by extension, Namibia prior to Independence). This is chillingly demonstrated in *R v Sachs*, where the following was stated:[5]

> Courts of law do scrutinise such statutes with the greatest care but where the statute under consideration in clear terms confers on the Executive autocratic powers over individuals, courts of law have no option but to give effect to the will of the Legislature as expressed in the statute. Where, however, the statute is reasonably capable of more than one meaning a court of law will give it the meaning which least interferes with the liberty of the individual.

This reasoning profoundly affected how courts approached the protection of civil liberties in pre-constitutional South Africa and Namibia. The issue was primarily the limit of the statutory authority – not the manner of its exercise or its consequences.[6]

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1 Per Mainga J, in *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC) at 385 I–J.

2 Per Steyn CJ, in *S v Tuhadeleni & Others* 1969 (1) SA 153 (A) at 173 A–B.

3 For a lucid exposition on these theories, see Roederer & Moellendorf (2007).

4 See e.g. Dugard (1971).

5 1953 (1) SA 392, at 399 G–H per Centlivres CJ.

6 *Middelburg Municipality v Gertzen* [1914] AD 544 at 577.

The aim in this article is to explore how the adoption of the Namibian Constitution on Independence Day, 21 March 1990, has affected the jurisprudence in Namibia since apartheid. The period of 1985 to Independence will be alluded to as an historical prelude because it arguably sets the stage for the constitutional development that followed Independence.

1985 to Independence

On 17 June 1985, the first Bill of Fundamental Rights was introduced in Namibia. Ironically, it was done through a Proclamation issued by the State President of the Republic of South Africa.[7]

The Preamble to this Bill of Rights expressed the desire of the people of "SWA/Namibia" to be independent and free from outside domination. Ten fundamental rights[8] were catalogued, starting with the right to life and ending with the right to own property.

In *S v Heita and Others*,[9] Levy J (as he then was) held that the provisions of section 2 of the Terrorism Act[10] were in conflict with Article 4 of Annexure 1 to Proclamation R101 and subject to it. However, this case was effectively overruled two months later by the South African Appellate Division, which was the Court of Appeal for Namibia at the time.[11]

In fact, Chief Justice Rabie explicitly said that Levy J was wrong in the *Heita* matter. Rabie CJ made it clear that, as far as he was concerned, the Bill of Fundamental Rights did not affect legislation that preceded Proclamation R101 even though the legislation might be in conflict with a provision relating to a fundamental right.

In March 1988, in *Ex parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985*,[12] the Full Bench of the Namibian High Court adhered to the *Katofa* precedent and ruled that Proclamation R101 conferred a limited power on the court to test only legislation passed by the Legislative Assembly of Namibia, created by Proclamation R101, and other legislative authorities in Namibia that preceded or coexisted with it, such as the Administrator-General (AG). The court then proceeded to declare the Representative Authorities Proclamation AG 8 of 1980, a Proclamation by the AG that set up ethnically differentiated authorities in

7 The Bill of Fundamental Rights was introduced as Annexure 1 to the South West Africa Legislative and Executive Authority Establishment Proclamation R101 of 1985. This Proclamation was issued under powers granted in terms of section 38 of the South West Africa Constitution Act, 1968 (No. 39 of 1968) – legislation passed by the South African Parliament.

8 Articles 1 to 10, Annexure 1, Proclamation R101 of 1985.

9 1987 (1) SA 311 (SWA).

10 No. 83 of 1967.

11 *Kabinet van die Tussentydse Regering vir Suidwes-Afrika & 'n Ander v Katofa* 1987 (1) SA 695 (A) at 728–729, per Rabie CJ.

12 (RSA) 1988 (2) SA 832 (SWA).

Namibia, in conflict with the Bill of Rights. This matter never went on appeal to the Appellate Division of the Supreme Court of South Africa. If it had, it may well have been overturned.

In the matter of *Eins v Cabinet of the Transitional Government for the Territory of South West Africa*,[13] the Namibian court declared section 9 of the Residence of Certain Persons in South West Africa Regulation Act[14] (legislation promulgated by the SWA National Assembly) unconstitutional and invalid. However, on appeal, the South African Appellate Division overruled the Namibian court on the basis of Mr Eins's supposed lack of locus standi.[15]

The South African Appellate Division again attempted to emasculate the Bill of Rights in Namibia by ruling in *Cabinet for the Territory of South West Africa v Chikane & Another*[16] that the courts could not measure administrative action against the Bill of Rights. Despite this, the Namibian full bench persisted in applying the Bill of Fundamental Rights.[17]

A few more cases were reported during the period following the promulgation of Proclamation R101 until Independence.[18] It is clear from these cases that the Namibian judiciary at the time was far more prepared to protect the individual in pre-Independence Namibia than the Appellate Division in South Africa was.

Independence: The Namibian Constitution

Upon Independence and the adoption of the Namibian Constitution, the legal order changed fundamentally. The Constitution makes it clear it is the Supreme Law of Namibia.[19] It goes further and unequivocally provides that the fundamental rights and freedoms enshrined in it are to be respected and upheld by the Executive, Legislature and Judiciary, and are enforceable by the courts in Namibia.[20] The Supreme Court and the High Court are created by Article 78 of the Constitution. Both courts are imbued with the interpretation, implementation and upholding of the Constitution, as well as the fundamental rights and freedoms guaranteed by it.[21]

In *Federal Convention of Namibia v Speaker, National Assembly of Namibia, & Others*,[22] heard on 6 December 1990, the High Court of Namibia demonstrated from the outset that

13 An unreported matter, also 1988.
14 No. 33 of 1985.
15 *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) per Rabie ACJ.
16 1989 (1) SA 349 (A).
17 See *Namibian National Students' Organisation & Others v Speaker of the National Assembly for South West Africa & Others* 1990 (1) SA 617 (SWA).
18 An example is *S v Mbonge* 1988 (2) SA 391 (SWA).
19 Article 1(6).
20 Article 5.
21 Articles 79(2) and 80(2).
22 1994 (1) SA 177 (NM).

it was up to the challenge to implement the provisions of the Constitution by directing the Speaker of the National Assembly to exercise his function in terms of Article 48(1)(b) of the Constitution to remove a person as a Member of the National Assembly.

Articles 5 to 20 of the Constitution contain the guaranteed fundamental rights, while Article 21 sets out the fundamental freedoms that are protected under the Constitution. Article 25 provides that no legislation may abolish or abridge any right or freedom, nor may the Executive or any government agency do so unless authorised by the Constitution.

The Constitution also permits an extremely limited scope for the abridgement of rights or freedoms enshrined in it. For example, the right to life is inviolable.[23] The right to liberty can be interfered with only in accordance with procedures established by law. Arbitrary arrest and detention are no longer permitted.[24] Article 10 further provides that all persons are equal before the law, and protects every Namibian against discrimination. Article 23 permits legislation for the advancement of persons that were disadvantaged by apartheid, which is a limited authorisation for the abridgement of the right to equality.

Article 18 of the Constitution is a very important provision. It grants the inhabitants of Namibia the right to expect – and enforce through the courts – fair and reasonable administrative actions. The equivalent of this right existed before Independence through the common law review procedure. However, before Independence, the review procedure did not allow for a challenge of administrative decisions on the basis of unreasonableness. Article 18 added this ground.

Article 66(1) of the Constitution provides that customary and common law in force on the date of Independence remains valid to the extent to which it is not in conflict with the Constitution or any other statutory law. On the other hand, Article 140(1) provides as follows:

> Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.

This apparent conflict was resolved by the Supreme Court of Namibia in 2000. It ruled that the net effect of Articles 66(1) and 140(1) is that only statutes need to be declared unconstitutional.[25] Therefore, any common law or customary law principle which is in conflict with the Constitution is invalid as at the date of Independence, while an unconstitutional provision in a statute remains in force until declared unconstitutional by a competent court.[26]

The difficulties that existed prior to Independence in respect of what could be tested against the Bill of Rights and how administrative justice was to be enforced have been

23 Article 6.

24 Articles 7 and 11.

25 *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC) at 263 E–I.

26 *Frans v Paschke & Others* 2007 (2) NR 520 (HC) at paragraph [17].

addressed by the Namibian Constitution itself. The courts were left to interpret and apply the Constitution. The question is this, however: have the Namibian courts done justice to the Constitution over the past 20 years?

A comprehensive discussion of each and every constitutional matter that was decided since independence is beyond the scope of this work. Therefore, three general areas will be focused on: criminal justice, administrative justice and unconstitutional laws. The intention is to provide a broad perspective on how Namibia has departed from an era of fundamental injustice and oppressive legislation to one of equality and reasonableness respecting the rule of law and protecting fundamental human rights.

Criminal justice

Criminal justice is limited here to the changes relating to arrest and detention and the right to a fair trial.[27] Prior to Independence, people were regularly and arbitrarily arrested and detained for a variety of (sometimes unspecified) reasons. This was largely because of their beliefs and opposition to the apartheid regime. Some were tried and jailed. Others were incarcerated without trial for long periods. Many were tortured. Since Independence, such arbitrary action has specifically been prohibited. The Namibian Constitution makes it clear in Articles 11 and 12 that no arrest or detention may be arbitrary, and that every trial is required to be fair. Ultimately, it is left to the courts to determine whether or not an arrest or detention is arbitrary and a trial fair in the circumstances.

For the most part, Namibian courts have lived up to the challenge to ensure that the deprivation of liberty is undertaken in strict accordance with the provisions of the Constitution. For example, in *Djama v Government of the Republic of Namibia & Others*[28] per Muller AJ (as he then was), the High Court ordered the release of a suspected prohibited person because the Tribunal which was supposed to order his deportation in terms of Article 11(4) of the Constitution had not yet been established. The court relied on the prohibition against arbitrary arrest and detention in Article 11(1) of the Constitution. This is a clear example of judicial activism to protect the individual against arbitrary arrest and detention.

Furthermore, in *Amakali v Minister of Prisons and Correctional Services*,[29] the High Court ordered the release of Mr Amakali who was being kept in jail by the prison authorities after he had already served his prison sentence.

The High Court also ruled that a person cannot be charged for escaping from custody if s/he is held beyond the 48 hours authorised in Article 11(3) of the Constitution,[30] or if s/he was arrested without reasonable suspicion.[31]

27 Protected by Articles 7, 11 and 12 of the Constitution.

28 1992 NR 37 (HC); see also *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC).

29 2000 NR 221 (HC).

30 *S v Mbahapa* 1991 NR 274 (HC); see also *S v Araeb* 2006 (2) NR 569 (HC).

31 *S v Kazondandona* 2007 (2) NR 394 (HC).

However, on occasion, the Supreme Court has differed with the High Court as to whether an arrest and detention were unlawful.[32] Also on occasion, it appears that procedural defects were allowed to undermine a legitimate remedy,[33] which is unfortunate.

The Courts have astutely enforced the right to a fair trial. The change brought about by the Constitution in Namibia was cogently articulated in *S v Scholtz*:[34]

> What, however, has happened is that the law has undergone some metamorphosis or transformation and some of the principles of criminal procedure in the Criminal Procedure Act are now rights entrenched in a justiciable bill of rights. That is, in my view, the essence of their inclusion in art 12 of the Constitution. Any person whose rights have been infringed or threatened can now approach a competent court and ask for the enforcement of his right to a fair trial.

The Supreme Court has also confirmed an accused's right to legal representation and legal aid.[35]

In *S v Luboya & Another*,[36] the Supreme Court relied on a combined application of Articles 11 and 18 of the Constitution to quash charges against accused persons who had been refused legal aid.

The High Court also ruled evidence inadmissible in criminal trials for reasons varying from lack of adequate warning[37] to duress[38] and torture.[39] In *S v De Bruyn*,[40] in a somewhat obiter manner, the court indicated that a deliberate enticement of a person to commit a crime could lead to the exclusion of the evidence on the basis of unfairness. The cautionary rule in sexual offences was also abolished.[41] The presumption of guilt contained in sections 18(2) and (3) of the Sea Fisheries Act[42] were also struck down as

32 See *Getachew v Government of the Republic of Namibia* 2006 (2) NR 720 (HC) and *Government of the Republic of Namibia v Getachew* 2008 (1) NR 1 (SC). See also *De Jager v Government of the Republic of Namibia & Another* 2006 (1) NR 198 (HC).

33 *McNab & Others v Minister of Home Affairs NO & Others* 2007 (2) NR 531 (HC), where a claim for detention in squalid conditions was dismissed due to poor pleading. See also *Minister of Home Affairs v Bauleth* 2004 NR 68 (HC).

34 1998 NR 207 (SC) at 216 H–I.

35 *Government of the Republic of Namibia & Others v Mwilima & All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC). See also *S v Kasanga* 2006 (1) NR 348 (HC), where the court went further and held that an accused should be informed of his/her right to legal representation; but see *S v De Wee* 1999 NR 122 (HC) and *S v Forbes & Others* 2005 NR 384 (HC), where the court held that a violation of a constitutional right (failure to inform the accused of his/her rights) did not per se constitute an irregularity.

36 2007 (1) NR 96 (SC).

37 *S v Malumo & Others* (2) 2007 (1) NR 198 (HC).

38 *S v Kukame* 2007 (2) NR 815 (HC).

39 *S v Minnies & Another* 1990 NR 177 (HC).

40 1999 NR 1 (HC).

41 *S v D & Another* 1992 (1) SACR 143 (Nm); *S v Katamba* 1999 NR 348 (SC).

42 No. 58 of 1973.

unconstitutional,[43] as was the minimum sentence provision[44] in section 38(2)(a) of the Arms and Ammunition Act.[45]

The High Court has also ruled that, in order for a juvenile to have a fair trial, it is peremptory for him/her to be assisted by a parent or guardian.[46]

The application of Article 12(1)(b) of the Constitution, which requires an accused to be released if the trial does not take place within a reasonable time, initially presented the Courts with some difficulty.[47] It appears to be settled now that a delay of approximately 14 months can be regarded as unreasonable, and that an accused could be entitled to be released from stringent bail conditions as well as prosecution, depending on the circumstances.[48]

Furthermore, the restriction of a prisoner's right to appeal imposed by section 309(4)(a) read with section 305 of the Criminal Procedure Act[49] was declared unconstitutional.[50]

In general,[51] criminal justice in Namibia has made great strides. However, it appears that the lower courts still present cause for concern. For example, sentences of imprisonment imposed by lower courts in excess of three months are subject to automatic review by High Court judges.[52] This system ensures that proceedings in lower courts are regularly reviewed by the High Court in order to ensure that justice is done. A study of some of the review judgments has shown that, in some instances,[53] magistrates are not conversant with the laws they are required to apply. Also, review and appeal records are not timeously finalised or forwarded to the High Court. This undermines the system of review and often results in a failure of justice.[54] Thus, it appears that endemic failure of justice

43 *S v Pineiro* 1991 NR 424 (HC).

44 *S v Likuwa* 1999 NR 151 (HC).

45 No. 7 of 1996.

46 *S v M* 2006 (1) NR 156 (HC).

47 *S v Strowitzki & Another* 1995 (1) BCLR 12 (Nm); *S v Heidenreich* 1995 NR 234 (HC); *Van As & Another v Prosecutor-General* 2000 NR 271 (HC); *Malama-Kean v Magistrate for the District of Oshakati NO & Another* 2001 NR 268 (HC).

48 *Malama-Kean v Magistrate for the District of Oshakati NO & Another* 2001 NR 268, *Malama-Kean v Magistrate for the District of Oshakati & Another* 2002 NR 413 (SC).

49 No. 51 of 1977.

50 *S v Ganeb* 2001 NR 294 (HC).

51 With the exception of the odd lapse; see *S v Titus* 1991 NR 318 (HC).

52 Section 302, Criminal Procedure Act

53 See *S v Moses Garoëb* 2004 (6) NCLP 57, where it was held that the magistrate asked inappropriate questions to establish whether an accused was guilty of "breaking" into a house; *S v Gurirab* 2004 (6) NCLP 60, where the magistrate was found to have convicted an accused for an offence not known in the law of Namibia and later sought to alter the record to make it appear as if the defect was not apparent; *S v Doeses* 2004 (4) NCLP 1, where the magistrate found the accused guilty of assault with intent to do grievous bodily harm after it was established that the accused intended to hit someone else, and the prosecution led no evidence to prove that there was still an intent to do grievous bodily harm on the unintended person.

54 See Office of the Ombudsman (2007:11–12).

still occurs in the lower courts.[55] This is largely attributable to a lack of funding and a shortage of skills. For criminal justice in Namibia to fully comply with the principles enunciated in the Constitution, considerable attention has to be paid to the inadequacies of the lower courts.

Administrative justice

Each individual, irrespective of where in the world s/he is, has to deal with public officials or administrative agents. In pre-Independence Namibia, administrative agents ranging from the Administrator-General to police officers, soldiers, commissioners and magistrates were part of the machinery designed to implement and maintain the apartheid system. Individuals had very limited legal remedies against these officials as a result.

Administrative justice encapsulates the means by which every individual in Namibia has legal redress in the event of any action, or omission, by an administrative agent that is perceived to be unjust or unreasonable.

Examples of the enforcement of administrative justice abound in post-Independence Namibia. This enforcement has largely been reliant on the application of Article 18 of the Constitution. The following has been held in this regard:[56]

> There can be no doubt that art 18 of the Constitution of Namibia pertaining to administrative justice requires not only reasonable and fair decisions, based on reasonable grounds, but inherent in that requirement fair procedures which are transparent.

This includes the right to be given a hearing before any decision is taken that affects a person's rights.[57] The courts also now enquire into the fairness of any administrative decision,[58] which was not possible under the common law as it was applied prior to Independence. This resulted in redress being achieved by people negatively affected by administrative decisions in matters ranging from expropriation[59] and importation of

55 *S v Paulus* 2007 (1) NR 116 (HC); *S v Karenga* 2007 (1) NR 135 (HC); *S v Rooi* 2007 (1) NR 282 (HC); *S v Witbooi & Others* 2007 (2) NR 604 (HC).

56 *Aonin Fishing (Pty) Ltd & Another v Minister of Fisheries and Marine Resources* 1998 NR 147 (HC) at 150 G.

57 *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC); *Viljoen & Another v Inspector-General of the Namibian Police* 2004 NR 225 (HC); *Kessl v Ministry of Lands and Resettlement & Others and Two Similar Cases* 2008 (1) NR 167 (HC).

58 *Mostert v The Minister of Justice* 2003 NR 11 (SC); *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC); *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC).

59 *Kessl v Ministry of Lands Resettlement & Others and Two Similar cases* 2008 (1) NR 167 (HC).

game[60] to denying a teacher promotion[61] and the government revoking an agreement with a microlender.[62]

The Supreme Court went as far as ordering the Minister of Health and Social Services to issue an authorisation to a medical doctor to use the facilities at the Windhoek State Hospital after it found the Minister's initial refusal breached Article 18 of the Constitution.[63] The court was of the opinion that to refer the matter back to the Minister would perpetuate the prejudice to the doctor. However, in the *Waterberg* matter,[64] the Supreme Court decided – with a majority of two to one – to refer the matter back to the Minister rather than impose their decision.

The list of instances where administrative justice was enforced by the courts in Namibia is impressive.[65] Nonetheless, there may have also been lapses. In *Kerry McNamara Architects Inc & Others v Minister of Works, Transport and Communication & Others*,[66] the court held that a derivate right was not enough to give a person locus standi to challenge the award of a tender in reliance on Article 18 of the Constitution. In reaching its conclusion, the court applied the 'direct and substantial interest' test which was developed in the pre-constitutional era in the context of civil litigation, without investigating the possibility of a more 'lenient' approach to locus standi in view of the provisions of the Constitution.

Also in *Chairperson of the Immigration Selection Board v Frank & Another*,[67] the Supreme Court interpreted the definition of *family* in Article 14 of the Constitution restrictively

60 *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v The Minister of Environment and Tourism*, unreported decision of the Supreme Court of Namibia, Case No. SA 13/2004 delivered on 23 November 2005.

61 *Eilo & Another v The Permanent Secretary of Education & Others*, unreported decision of the High Court of Namibia, Case No. LC28/2006, delivered on 13 November 2007.

62 *Open Learning Group Namibia Finance CC v Permanent Secretary, Ministry of Finance & Others* 2006 (1) NR 275 (HC). An appeal has been lodged to the Supreme Court, and a decision is still pending.

63 *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC).

64 *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v The Minister of Environment and Tourism*, unreported decision of the Supreme Court of Namibia, Case No. SA 13/2004 delivered on 23 November 2005.

65 For further examples, see *Viljoen & Another v Inspector-General of the Namibian Police* 2004 NR 225 (HC) (police officer transferred to another region upon two days' notice without prior consultation); *Sheehama v Inspector-General, Namibian Police* 2006 (1) NR 106 (HC) (suspension of police officer without a hearing); *Mostert v The Minister of Justice* 2003 NR 11 (SC) (Magistrate entitled to reasons for transfer); *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC) (person unlawfully declared persona non grata in terms of section 49(1) of the Immigration Control Act, 1993 [No. 7 of 1993]); *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC) (refusal of permanent residence permit without a hearing referred back to Immigration Board; this judgment is also open to criticism; see later herein.

66 2000 NR 1 (HC).

67 2001 NR 107 (SC).

in order to exclude a same-sex relationship. It ruled that same-sex relationships were not recognised in Namibia. In doing so, the Supreme Court overruled the High Court, which found that the Constitution recognised the same-sex relationship as a universal partnership.[68] This judgment is an example of a conservative and positivist approach. In reaching this conclusion, the Supreme Court judges may have given precedence to their own values through their formulation of what the prevailing values of the Namibian people were at the time in relation to same-sex relationships, because there was ultimately no evidence before the court of any societal value in this context.

In *S v Mushwena & Others*,[69] Hoff J ruled that he lacked jurisdiction to try accused persons for high treason who were brought to Namibia from Botswana and Zambia without following the prescribed extradition procedure. The Supreme Court overturned this decision with a slim majority of three out of five judges.[70] Strydom ACJ (as he then was) and O'Linn AJA (as he then was) dismissed the appeal in respect of most of the accused, while the majority of the court allowed the appeal. This is another failure of both criminal justice and administrative justice in Namibia. It was clear from the facts that the majority of the accused had been brought back from Botswana and Zambia through the unlawful conduct of officials on both sides of the respective borders. The message sent by the Supreme Court does not bode well.[71]

It would also appear that the scope of what constitutes an *administrative action* is gradually being narrowed. Recently, the Supreme Court per Strydom AJA said the following:[72]

> The issue in the present appeal is whether the termination of the agreement by the first appellant was administrative action which would have entitled the respondent to claim application of Article 18 of the Constitution which requires fair and reasonable action by administrative bodies and administrative officials. Once it is found, as I have, that the termination of the agreement did not constitute administrative action, Article 18 does not apply.

In reaching this conclusion, the Supreme Court went to great trouble to distinguish the nature of the agreement in this matter from the agreement in *Open Learning Group Namibia Finance CC v Permanent Secretary, Ministry of Finance & Others*,[73] where

68 *Frank & Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

69 2004 NR 35 (HC).

70 *S v Mushwena & Others* 2004 NR 276 (SC).

71 On the subject of the Caprivi treason trial, it is noted that, on 1 August 1999, approximately 130 persons were arrested on charges of treason. Over 270 charges were recorded in this case. To date, ten years later, the trial still continues, and some accused have in the meantime passed away. The fact that so many charges were laid against such a substantial number of accused may play a role in what has become the longest trial in Namibian history. At the same time the fact remains that there is a clear and embarrassing infringement of Article 12(1)(b) of the Constitution in the Caprivi matter.

72 *The Permanent Secretary of the Ministry of Finance & Others v Dr Cornelius Martinus Johannes Ward*, Supreme Court, unreported Case No. SA 16/2008, delivered on 17 March 2009 at paragraph [71].

73 2006 (1) NR 275 (HC).

the High Court accepted that the cancellation of the agreement in question was an administrative action. This may very well be the beginning of a gradual erosion of the right to enforce administrative justice. The effect of this is that whoever contracts with government may or may not expect fair treatment and a right to be heard before such contract is cancelled, depending on the nature of the agreement as perceived by the court.

Apart from the criticism levelled above, the overall condition of administrative justice in Namibia is laudable. The courts have generally been prepared to come to the assistance of the aggrieved individual. This is light years from the positivist approach to administrative actions that Namibia experienced prior to Independence.

Unconstitutional laws

The Namibian Constitution has profoundly affected common law and customary law, as well as legislation that adversely affects the individual's rights and freedoms. In the case of common law and customary law, as pointed out earlier, Article 66 of the Constitution has the effect that any principle that adversely affects any constitutional right or freedom is invalid as at the date of Independence, However, it may sometimes still be necessary for a court to declare a common or customary law unconstitutional in order to resolve uncertainties. For example, the common law rule prohibiting children born out of wedlock from inheriting from their father under intestate succession was declared unconstitutional.[74]

As mentioned earlier, legislation endures until declared unconstitutional by a court. An important judgment in this context is *Ex parte Attorney-General: In re Corporal Punishment by Organs of State*.[75] This matter was referred to the court by the Attorney-General in terms of Article 87(c) read with Article 79(2) of the Constitution, and concerned institutional corporal punishment. Several legislative provisions were in the firing line, and Article 8 of the Constitution was the barometer against which they were to be measured.[76]

In one of the most lucid judgments emanating from the Supreme Court, Mahomed AJA set the parameters thus: [77]

> Article 8 of the Constitution must therefore be read not in isolation but within the context of a fundamental humanistic constitutional philosophy introduced in the preamble … and woven into the manifold structures of the Constitution.

The court concluded that any corporal punishment, whether inflicted through the criminal penal system or in schools, constituted degrading and inhuman punishment within the

74 *Frans v Paschke & Others* 2007 (2) NR 520 (HC).

75 1991 NR 178 (SC).

76 (ibid.:179 G–188). Article 8 of the Constitution protects human dignity and proscribes cruel, inhuman or degrading treatment.

77 (ibid.:179 G); this consideration is sometimes forgotten.

meaning of Article 8(2)(b) of the Namibian Constitution. As a result, several legislative provisions were struck down in one fell swoop.

This was taken further in what came to be known as the *Cultura 2000* matter. This matter demonstrates the flexibility available to a court in applying the Constitution. Just before Independence, the Representative Authority for Whites (RAW) established under Proclamation AG 8 donated R4 million to Cultura 2000, an organisation set up to preserve the 'white culture'. RAW made a further soft loan of R4 million to Cultura 2000, which the Administrator-General converted into a donation one month before Independence.

After Independence, the Namibian government promulgated the State Repudiation (Cultura 2000) Act[78] under Article 140(3) of the Constitution. The purpose of this legislation was to recover the R8 million. Cultura 2000 challenged this legislation in the High Court. The latter ruled that the legislation was ultra vires and invalid.[79] In reaching this conclusion, the court took a strictly positivist view and considered it irrelevant that Cultura 2000 originated as a racist organisation that would be an unlawful body in post-Independence Namibia. The court reasoned that, because the act of making the donation had been completed before Independence, the Government could only expropriate with just compensation. In the court's opinion, this did not make sense. It also found that Article 140(3) of the Constitution did not authorise the government to recover anything. Therefore, the court concluded that the State Repudiation (Cultura 2000) Act was ultra vires and invalid in its entirety.

The Namibian government appealed the ruling,[80] which was subsequently partly overturned. Mahomed CJ (as he then was) succinctly disposed of the High Court's reasoning as follows:[81]

> A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the "austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government. An interpretation of art 140(3) which limits its potential operation only to acts by the previous Administration which were "uncompleted" would not give to the clear words of the article a construction which is "most beneficial to the widest possible amplitude" …
>
> There is nothing in the ordinary meaning of the word "repudiation" which justifies giving to that expression the limited construction which found favour in the Court a quo. To "repudiate" means simply "to disown; to refuse to acknowledge; to refuse to recognise the authority of".

78 No. 32 of 1991.

79 *Cultura 2000 & Another v Government of the Republic of Namibia & Others* 1993 (2) SA 12 (Nm).

80 The appeal judgment is reported as *Government of the Republic of Namibia & Another v Cultura 2000 & Another* 1993 NR 328 (SC).

81 (ibid.:340 B–H).

> This is exactly what s 2(1) of the Act seeks to do. It simply gives power to Parliament to disown or turn its back upon acts perpetrated by the previous Administration before the independence of Namibia, whether such acts were at the time of their perpetration lawful or unlawful.

A limited positivist application of the Constitution was turned into a generous purposive approach – the way it should be.

Unfortunately, through the years, the natural law values have not always been triumphant. An example is the case of Mr Mwellie, an ex-employee of the Ministry of Works, Transport and Communication (the defendant), who was dismissed.[82] He alleged the dismissal was unlawful and approached the High Court for reinstatement.

The defendant raised the point that section 30(1) of the Public Service Act[83] limited the time in which a person could bring an action to 12 months and, since more than 12 months had elapsed, Mr Mwellie had no claim. Mr Mwellie retorted that this limitation had to be unconstitutional because the normal prescription period was three years. The court rejected Mr Mwellie's response and agreed with the defendant.

In reaching this conclusion, the court relied on the *Chikane* judgment,[84] amongst others, as authority. The *Chikane* case was decided before any Constitution was in place. The court embarked on an elaborate analysis of the applicable principles and concluded that "the special plea of prescription taken by the defendant must be upheld".[85] The court then proceeded to dismiss the plaintiff's claim with costs. The consequence for Mr Mwellie, who was in all likelihood unfairly dismissed, was that he had had no redress, and was responsible for his own legal costs as well as the defendant's.

In retrospect, it is now clear that this judgment was wrong, in so far as there is no provision in the Public Service Act for the possibility of a waiver by the Minister in respect of the 12-month time frame.[86]

However, for the most part, the Namibian courts have done an admirable job since Independence, and the list of legislative provisions that have been struck down is inspiring.[87]

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

83 No. 2 of 1980.

84 *Cabinet for the Territory of South West Africa v Chikane & Another* 1989 (1) SA 349 (A).

85 At 1142 H–1143 A.

86 See *Minister of Home Affairs v Majiedt & Others* 2007 (2) NR 475 (SC) and the cases discussed there.

87 *Kauesa v Minister of Home Affairs & Others* 1996 (4) SA 965 (NmS) (Regulation 58(32) deemed to have been made under Police Act, 1990 (No. 19 of 1990)); *S v Smith* 1996 (2) SACR 675 (Nm) (section 11(1) of Racial Discrimination Act, 1991 (No. 26 of 1991)); *Mostert v The* [Continued overleaf]

In the recent judgment of *Africa Personnel Service (Pty) Ltd v Government of the Republic of Namibia & Others*,[88] in a landmark judgment the Supreme Court struck down section 128 of the 2007 Labour Act.[89] Section 128 was intended to criminalise outright so-called labour hire services in Namibia. The court applied Article 21(1)(j) of the Constitution, which forms part of the protected freedoms, and reads as follows:

> All persons shall have the right to practise any profession, or carry on any occupation, trade or business.

This judgment outlines very important principles and guidelines relating to legislation imposing prohibitions in Namibia. It is a poignant reminder that the statement in *R v Sachs* by Centlivres CJ, to which reference was made at the outset, is a relic of the distant past. Maybe the time has arrived to say: Namibia has developed a constitutional legal order.

In the realm of common law and customary law, important strides have also been taken. Thus, Namibians can have no doubt that, for the most part, everyone is equal before the law,[90] and a wife and husband married in community of property are also equal.[91] Discrimination on the basis of race without the permissible legislation was declared unlawful.[92]

Minister of Justice 2003 NR 11 (SC) (section 9 (as amended) and section 10 of the Magistrates' Courts Act, 1944 (No. 32 of 1944)); *S v Vries* 1998 NR 244 (HC) (section 14(1)(b) of the Stock Theft Act, 1990 (No. 12 of 1990)); *Freiremar SA v The Prosecutor-General of Namibia & Another* 1996 NR 18 (HC) (proviso to section 17(1) of the Sea Fisheries Act, 1973 (No. 58 of 1973)); *S v Van den Berg* 1995 NR 23 (HC) (the presumption contained in sub-paragraph (b) of section 35A of the Diamond Industry Protection Proclamation of 1967); *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs & Another*; *Nasilowski & Others v Minister of Justice & Others* 1998 NR 96 (HC) (section 2(1) of the Indecent and Obscene Photographic Matter Act, 1967 (No. 37 of 1967) unconstitutional); *Hendricks & Others v Attorney General, Namibia, & Others* 2002 NR 353 (HC) (presumptions in sections 12(1) and (2) of the Combating of Immoral Practices Act, 1980 (No. 21 of 1980) unconstitutional because they derogate from the right to be presumed innocent); *Detmold & Another v Minister of Health and Social Services & Others* 2004 NR 1 (section 71(2)(f) of the Children's Act, 1960 (No. 33 of 1960) prohibiting non-Namibians from adopting Namibian children unconstitutional).

88 As yet unreported, Case No. SA 51/2008, delivered on 14 December 2009.

89 No. 11 of 2007.

90 With the exception of sexual orientation, in the sense that a same-sex relationship is not considered *family*: *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).

91 *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC). See also The Married Persons Equality Act, 1996 (No. 1 of 1996), but see *Stipp & Another v Shade Centre & Others* 2007 (2) NR 627 (SC), where the effect of the Act was neutralised on procedural grounds. See also *S v Katamba* 1999 NR 348 (SC) and *S v Bohitile* 2007 (1) NR 137 (HC) in relation to the equality of the genders.

92 *Grobbelaar & Another v Council of the Municipality of Walvis Bay & Others* 2007 (1) NR 259 (HC).

The High Court has gone further and adopted crucial social stances, especially relating to children and violence against women, while attempting to strike a fine balance between individual rights and addressing social ills. For example, in *S v Gaweseb*,[93] Damaseb JP adopted the following dictum with approval in relation to children:[94]

> Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life[-]sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those dependent on the law. It is a function of the State not only to provide a good legal framework but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by s 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.

In *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs and Another; Nasilowski and Others v Minister of Justice and Others*,[95] in the process of declaring a section in legislation unconstitutional, the court said the following per Maritz J (as he then was):[96]

> The indignity and outrage suffered by women as a class of persons when senseless sexually explicit scenes of rape and other forms of sexual violence are depicted as normal in pornographic material and the social and moral dangers of exploiting children in such material for the sexual gratification of certain adults, are but two of the reasons why it is imperative for any responsible Legislature to promulgate adequate measures to address those evils in the interest of decency and morality.

Conclusion

While a more detailed and extensive analysis would have done the endeavours of the Namibian courts more justice, the purpose here was to create a general overview of the Namibian judicial landscape since Independence.

Namibia has come a long way since the days of supremacy of Parliament in an apartheid system. However, it appears that the road ahead, although no longer replete with administrative injustices that cannot be redressed, is nonetheless fraught with challenges involving the actual administration of justice. This is manifested by some incompetence in the lower courts, difficulties of access to the courts, unavailability of judges, and extreme delays in delivering judgments.[97] In a recent speech in Namibia, retired South

93 2007 (2) NR 600 (HC).
94 (ibid.:paragraphs [11] and [12]).
95 1998 NR 96 (HC).
96 At page 102 F–G. See also *S v Bohitile* 2007 (1) NR 137 (HC).
97 Some judgments have been outstanding for over four years.

African Judge Johann Kriegler addressed the failure to deliver judgments in time as follows:[98]

> A failure by a judge to deliver judgements timeously is not a matter for disciplinary action to be taken over, but for the judge involved it should be a matter of self-respect. … It is as much an abuse as beating your wife.

As a 20-year-old, Namibia has done well with its constitutional jurisprudence and the realm of abuse and remedies has changed. As with every growing democracy, there are pitfalls which require urgent attention. If problems concerning the administration of justice are not addressed, the advances gained through jurisprudence may amount to nothing.

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98 *The Namibian*, 27 November 2009, p 5.