

# The impact of the Constitution on state- and nation-building\*

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The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside.<sup>1</sup>

Following such a fundamental normative concept as suggested by the highest judge during the early years of Namibian Independence, as quoted above, the Constitution that was drafted and adopted as the final step towards national sovereignty 20 years ago was supposed to symbolise much more than a mechanical act. It transcended the pragmatic meaning of a mere formal prerequisite to meet the agreed components defined in the United Nations Security Council Resolution 435 of 1978. The transition to independence required agreement by all parties involved on such a Constitution guiding the Republic of Namibia from its Independence Day. But the adopted document was more than a formal obligation: it defined the ultimate normative framework as a foundation for Namibian society and its principal values. It is a document neither drafted for the day, nor for opportunistic purposes. It is a codex which demands respect, and against which those in political power have to be measured and judged. It provides a reference point for those taking the oath as political office-bearers and civil servants on duty in the public interest. It is not only a legal, but also a moral and ethical compass and anchor.

As such a normative framework, with all its limitations reflecting the interests of those involved in the controlled change towards independence, it was far from perfect. But it served to instil an identification with a common state and nation that took responsibility for self-governance within a defined and codified legal environment, reflecting the best possible compromise under the given circumstances. Namibia was widely applauded and respected for the installation of this constitutional democracy.

## Namibia's Constitution as a state- and nation-building tool

The introductory and concluding passages of the Preamble to the Constitution of the Republic of Namibia testify to this fundamental meaning and concept of *constitutional democracy* in the following clauses:

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\* This article is dedicated to the memory of Hans-Erik Staby (1935–2009).

1 Ismael Mahomed, then Chief Justice of Namibia and later Chief Justice of South Africa as quoted in Sachs (2009:7).

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status;

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;

Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid; ...

Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic.

Namibia's Constitution symbolically and materially represented the end of foreign rule and the beginning of self-government by the Namibian people under a common normative framework drafted by the elected representatives of all citizens entitled to vote. It set standards by means of "transition through constitutionalism"<sup>2</sup> and was adopted without any opposing vote by all 72 members of the Constituent Assembly as a result of negotiations. The 66 men and 6 women elected by the Namibian people represented 7 parties, and had been mandated through general elections under the supervision of the United Nations Transition Assistance Group (UNTAG) in November 1989.

The Preamble agreed upon, as the introductory statement indicates, represents much more than a mere expression of the prevailing spirit articulating respect and recognition of the democratic future ahead in a particularly historic moment. It also embodies the human rights culture guiding the international normative standards of the time as the valid criteria applicable to governing the Namibian nation by the authorities of its state agencies. As the Namibian High Court stated,<sup>3</sup> the Preamble was beyond this moment an important internal aid to the construction of the subsequent provisions and, hence, must be considered a substantive point of reference with exemplary value – a value which should not be compromised.<sup>4</sup>

Constitutions are –<sup>5</sup>

... primarily about political authority and power within a state; where it is located, and how it is conferred, distributed, exercised and limited among the separate organs of the state and in relation to its subjects.

As provided by Article 24(a) of the 1966 United Nations International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976, –<sup>6</sup>

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2 A term coined by Erasmus (2000).

3 *Kauesa v Minister of Home Affairs*, 1994, Case No. A125/94, unreported, pp 67, 106–107.

4 Cf. Naldi (1995:11).

5 Austin (2009:10).

6 For a recent introduction to the relevance of the ICCPR as a global normative framework, particularly for the human rights values enshrined in constitutions at a national level, see Tomuschat (2008).

[e]very citizen shall have the opportunity ... to take part in the conduct of public affairs either directly or through freely chosen representatives.

This principle, as Reginald Austin elaborates, —<sup>7</sup>

... forms the basic relationship between citizens and state. When it is set out in a national constitution, it results in a contract between a government and its people.

The status of most written constitutions is that they are “the highest law of the land”, overriding all ordinary legislation. Thus, the creation and reform of a national constitution is vital for lasting peace, good governance and stability of a state and should ideally be an honest expression of a national consensus. This underlines the importance of the requirement of Article 24 (a) of the Covenant that citizens participate “directly or indirectly” in public affairs, a critical part of which is the constitutional process.

Once adopted, a constitution is not cast in stone. But as a document codifying essential values and norms, it should be considered and respected as a paradigmatic guiding formula, which clearly should survive opportunist temptations. This is why legal frameworks normally protect a constitution from being changed merely because the government of the day would like to enact new rules of the game according to its preferences. Therefore, many countries, including Namibia, have empowered the elected parliamentary representatives to be able only to change constitutional clauses and principles based on a two-thirds majority of parliamentary votes – if the constitution can be changed at all.<sup>8</sup> This serves to ensure that such changes reflect the will of the overwhelming majority of the people. By assumption, it is also assumed that, in a democracy, this requires a wide coalition of representatives from a panorama of different political parties elected into Parliament.

## **The Constitution in a dominant-party environment**

As a result of National Assembly elections held in November 1994, and ever since the second legislative period beginning on 21 March 1995, this assumption of a pluralist parliamentary democracy based on coalition politics has been confronted with a political reality that turned Namibia into a “single-dominant-party system”.<sup>9</sup> The former anti-colonial liberation movement, the South West Africa People’s Organisation (SWAPO), now the ruling SWAPO Party of Namibia,<sup>10</sup> obtained an influence over the institutions of the state as a result of its political dominance. They turned Namibia into a de facto one-party state by obtaining a two-thirds majority of votes and, hence, the legal authorisation not only to govern alone, but also to change the Constitution single-handedly. In all

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7 Austin (2009:10).

8 Chapter 3, entitled “Fundamental Human Rights and Freedoms” and comprising Articles 5 to 25, is protected against change. As Article 25(1) stipulates, “... 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 freedom conferred by this Chapter”.

9 Cf. Keulder et al. (2000).

10 Hereafter *SWAPO Party*.

National Assembly elections since then,<sup>11</sup> the SWAPO Party consolidated its hegemonic status by almost identical proportions, amounting to around 75% of the votes cast. This gives new meaning to the slogan born during the anti-colonial struggle that “SWAPO is the nation and the nation is SWAPO”. But the question remains whether this equation, promoted as the antithesis to racist minority rule under apartheid and settler colonialism, is truly democratic, notwithstanding the overwhelming dominance SWAPO has obtained by means of general elections. After all, the slogan excludes a quarter of the electorate represented by other parties and all those who did not vote.

Therefore, the guiding principles for state- and nation-building might need to be based on more than the mere arithmetic of a formal legality – seen as an entitlement executed by a two-thirds majority of votes among the electorate. While this, technically and in compliance with legal provisions, enables a change of laws and most constitutional clauses without any further consensus-building, the execution of such power is not the same as legitimacy built on a wider consensus. By building the foundations of the independent Republic of Namibia upon a constitutional state to which provisions on the supremacy of the Constitution testify, democracy in Namibia is “not intended to be unqualified majority rule”.<sup>12</sup> To this end, the Namibian Constitution enshrined a concept that seeks to integrate and secure fundamental freedoms – also for those not represented in the echelons of political power – and keeps them protected from any abusive interference by those elected.

Under the given proportional relations, this protection is a difficult task, since the legislative is assumed to control the executive as well as maintain the independence of the judiciary, as the three pillars of democratic accountability, transparency and autonomy. But given that three quarters of the elected representatives of the people entitled to vote are of the same party, they are often not only Members of Parliament (and tasked to execute control over the executive), they also hold political office, either in ministerial rank or as deputy ministers. As members of the legislative body, parliamentarians are required to simultaneously control themselves as members of the executive. This is tantamount to a mission impossible and discredits parliamentary control over the executive.<sup>13</sup>

Such a tempting constellation brings to life the warning of the British Lord Acton that “power tends to corrupt; absolute power corrupts absolutely”.<sup>14</sup> Notwithstanding such potential threats to truly all-encompassing notions of state- and nation-building, Namibian lawmakers from SWAPO have largely resisted giving in to this temptation. Indeed, only once so far, in 1999, has a constitutional change been implemented – against the votes of

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11 November 1999, November 2004, and November 2009. The results of the latter were still the subject of a legal dispute in the Namibian High Court at the time of writing this chapter, after nine opposition parties objected.

12 Erasmus (2000:86).

13 Cf. Melber (2005).

14 [http://en.wikipedia.org/wiki/John\\_Dalberg-Acton,\\_1st\\_Baron\\_Acton#cite\\_note-3](http://en.wikipedia.org/wiki/John_Dalberg-Acton,_1st_Baron_Acton#cite_note-3); last accessed 6 February 2010. Notably, this statement was made in the context of a society considered to be one of the historical midwives of political systems, with a degree of popular participation and institutionalised checks and balances commonly qualified as democracy.

all opposition parties – which provided the first Head of State an exceptional third term in office. This was a hotly debated issue with direct consequences in the arena of political contestation, as it contributed to the formation of the first political opposition party with roots of its founders in the upper ranks of the SWAPO Party. Since then, a decade later, the Constitution has remained untouched.

At the end of 2007, however, a new opposition party was founded by some former members of the SWAPO Party leadership that had broken away. This has provoked an increasingly antagonistic and hostile political climate. It has also contributed to the SWAPO Party's growing intolerance of deviating views, and has prompted new desires to make use of its dominance to change the rules and seek political compliance among all higher ranks of the public service representing the state authorities. Civil servants would then be directly responsible to a party and its political programme, and not to an oath taken to serve the wider interest of a society. This places the independence of a civil service under threat and reflects similar tendencies and desires as those who increasingly question and attack the autonomy of the judiciary.

## **Politics and the rule of law**

Political office-bearers in ministerial ranks have occasionally articulated frustration over court rulings they considered against their political-ideological orientation and conviction. If constitutional principles were referred to as an argument for certain legal decisions taken in the Namibian judicial system, these arguments were not always met with respect. At times, the rule of law was implicitly seen to be the law of the rulers. With the heated political climate and polarisation building up ahead of the National Assembly and Presidential elections in November 2009, voices articulating the tendency to change laws according to the desire of those in political power and control were on the increase.

In a joint press conference just ahead of the elections, the SWAPO Party Youth League (SPYL) President, Elijah Ngurare, and the Secretary-General of the National Union of Namibian Workers (NUNW), Evilastus Kaaronda, launched a vendetta against all those in senior positions in the civil service, the management of state-owned enterprises and the top echelons of the SWAPO Party, who were suspected of being 'unreliable elements' for not being staunch enough in their party loyalty. The SPYL and NUNW leaders suggested that a strict process of scrutinising candidates for their political reliability should be implemented to ensure that only 'trustworthy' party cadres filled such positions in the higher ranks of government, the civil service, and other state-controlled authorities. This narrow definition of politically acceptable servants to the people included diplomats representing the Republic of Namibia internationally, who, in the SPYL and NUNW leaders' view, were loyal only to the Head of State. During the course of their lengthy reasoning they made the following categorical statement:<sup>15</sup>

If laws prevent this from happening, we cannot be held back by laws we can change, as simple as that.

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15 Ngurare & Kaaronda (2009).

Such public statements are cause for serious concern. Not only do they imply that laws are merely changed to suit the government of the day, they also suggest that a legal framework is only as functional as its degree of compliance with the political ideology of a specific party. Revisiting the Preamble of the Namibian Constitution, however, –

... [civil] rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary[.]

In contrast, the conception that leading political office-bearers and other party loyalists are articulating evidences little – if any – respect for an overarching normative framework such as the Constitution if it does not meet a party's own political interests. This does not bode well for Namibia's democratic future, unless these temptations are uncompromisingly rejected by the highest representatives of Namibian society in defence of the country's fundamental democratic principles.

The responses to the latest landmark ruling of the Namibian Supreme Court, delivered on 14 December 2009 – almost 20 years to the day after the Constitutional Assembly convened, are of particular interest.<sup>16</sup> The appeal case by the largest labour hire company in Namibia had challenged the constitutionality of section 128 of the Labour Act,<sup>17</sup> which prohibited any form of labour hire. In its conclusion, the Supreme Court overruled an earlier affirmative High Court judgment by declaring that Article 21(1)(j) of the Constitution – which is part of the fundamental freedoms set out in Chapter 3 and provides that “all persons have the right to ... practise any profession, or carry on any occupation, trade or business” – entitled the labour hire company to its business, subject to adhering to the legal provisions. The Supreme Court put it as follows:<sup>18</sup>

... the prohibition of the economic activity defined by s. 128(1) in its current form is so substantially overbroad that it does not constitute a reasonable restriction on the exercise of the fundamental freedom to carry on any trade or business protected in Article 21(1)(j) of the Constitution and, on that basis alone, the section must be struck down as unconstitutional.

In an important subsequent qualification, it was stressed that this ruling did not imply the absence of any legal restrictions regulating the form of business. Instead, the Supreme Court, in stating –<sup>19</sup>

... that the freedom protected by Article 21(j) does not imply that persons may carry on their trades or businesses free from regulation, [did] not find it necessary for purposes of this appeal to determine by which measure regulative legislation in the area of private economic activity falls to be assessed. The prohibition of a particular trade or business does not regulate how it

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16 Appeal Judgment in the Supreme Court of Namibia, *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*, Speaker of the National Assembly, Chairperson of the National Council, President of the Republic of Namibia, Case No. SA 51/2008.

17 No. 11 of 2007.

18 *Africa Personnel Services (Pty) Ltd* at 90[91].

19 (ibid.:95[97].

may be carried on but precludes it from being carried on at all. Thus, the prohibition in this instance seeks to remove – not regulate – the business of an agency service provider from the protection of Article 21(1)(j).

In a press statement following the verdict, the Minister of Labour and Social Welfare made the following comment:<sup>20</sup>

The Supreme Court has spoken. As a nation built on the rule of law, the Namibian Government respects the final authority of the Supreme Court to interpret the Namibian Constitution. However, Government would be remiss if it did not exercise its constitutional right to voice its disagreement with the Court's judgment.

... I remind you that Article 81 of the Namibian Constitution provides as follows[:]  
“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 is contradicted by an Act of Parliament lawfully enacted.”

I therefore wish to assure the Namibian nation that our Ministry will not allow the Supreme Court's judgment to divert it from its duty to protect the most marginalised and vulnerable workers in our country. In light of the Supreme Court's judgment, the Government is more determined now than ever before to pursue the goals of dignity and justice for employees working in the labour hire system. I hereby pledge that our Ministry, after studying the Court's judgment in the fullest detail and implication, will prepare legislation that will put an end to the practice of labour hire as we know it today, in accordance with Constitutional requirements, and will create a strong administrative framework to enforce such legislation.

In contrast to this relatively measured response, the SWAPO-affiliated NUNW's reaction to the ruling was indicative of the current polarisation within Namibian society and the hegemonic aspirations of some political activists, who seem to place the party ideology above constitutional principles. Kaaronda, the NUNW Secretary-General, described the ruling as a “slap in the face”, a “calculated political move”, and as “counter-revolutionary”, “anti-people”, “insensitive” and “humiliating”. His statement concluded as follows:

It is clear that the time has come for the complacent and ignorant functionaries of the judiciary to be dismissed as they clearly have no clue of, nor do they respect[,] the suffering endured by our people enslaved by the labour hire system. [The NUNW] outwardly rejects this ruling in its entirety [and we call on our members] to equally reject this unpatriotic and reactionary ruling.

According to Kaaronda, the Supreme Court had forced the NUNW “to declare war against its ruling”. The NUNW stated that it would not tolerate such a system “just because it economically benefits some of the judges, whether directly or indirectly”.<sup>21</sup>

In a response, Senior Council Raymond Heathcote, President of the Society of Advocates of Namibia, urged the trade union leader to retract his statements, and asked the Prosecutor General to charge Kaaronda with contempt of court. He qualified Kaaronda's statements as “outright defamatory, contemptuous, and a threat to the independence

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20 Ngatjizeko (2009).

21 Shejvali (2009a).

of the judiciary”.<sup>22</sup> In a separate statement, the Legal Assistance Centre (LAC) agreed with the Society of Advocates. LAC Director Norman Tjombe welcomed the Supreme Court’s differentiation between the protection of a fundamental constitutional right and the need for strict legal restrictions prohibiting the abuse of enshrined freedoms. He added that, while judges were not above reproach, a balance had to be struck between —<sup>23</sup>

... healthy comments on judgments and outright contemptuous statements against the courts. To call for the dismissal of judges simply because one disagrees with their verdict is a serious threat against the independence of the judiciary without which a constitutional democracy cannot function.

Notwithstanding such voices of concern, the trade union leader remained stubbornly convinced of his position and, at another press conference in response to the criticism of his statement, he declared that only “over his dead body” would he apologise for his stance.<sup>24</sup> Instead, he announced that the NUNW would request the Head of State to transform the judiciary. He asked why, after having obtained independence for their country, the people of Namibia should accept what the courts had to say. He refused to be silenced through intimidation and asked why the judiciary had not changed to reflect the values of those he referred to as “our people”.<sup>25</sup>

Against the backdrop of such these views, the words of caution articulated at a human rights workshop only three years after Independence by the then Under-Secretary for Legal Affairs at the Ministry for Foreign Affairs come to mind. As he then observed, —<sup>26</sup>

[i]t is ironic that[,] although we have a widely admired Constitution, the organizations which are supposed to provide the officials who will protect this constitution, namely our political parties, are the most undemocratic institutions in the country.

His concerns were echoed and confirmed by the sceptical but profound reflections that a scholar of law in temporary service at the University of Namibia had to offer after more than a decade into Namibia’s independence, in his comparison with experiences in Zimbabwe. The scholar drew the following conclusion:<sup>27</sup>

... betterment and enhancement of constitutionalism after independence is partly inhibited by relationships and practices that were carried over from the process of liberation itself. As a result, some fundamentals of constitutionalism appear to be irreconcilable with some lessons learnt and practices observed during the liberation struggle. Some lessons learnt in the liberation process may, themselves, not be favourable to the furtherance of diversity, political pluralism and respect for, and sustenance of, a human rights culture.

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22 Heita (2009).

23 Shejvali (2009b).

24 De Bruyn (2009).

25 (ibid.).

26 Pickering (1995:107).

27 Bukurura (2003:44).



But the ultimate question that remains is this: Does the Constitution serve and impact upon state- and nation-building that has democracy and the protection of civil liberties for all as its goal, and does it serve as a beacon for the “one Namibia, one nation” that stands for “unity in diversity”?<sup>28</sup> As generally observed, the trends in African states seem to suggest that the executive continues to dominate society.<sup>29</sup>

Though democracy might have become the only game in town in many countries, the rules of the game are often not that democratic yet.

Thus, we should jealously guard the achievements obtained at Independence against any individual or collective assaults by those who mistakenly believe that the political legitimacy obtained by a majority among the electorate entitles them to change the rules of the game – the same rules that provided them with access to this political legitimacy in the first place.

## Conclusion

It seems appropriate to recall what the Supreme Court stated in its controversial but pioneering ruling in the protection of the fundamental freedoms envisaged in Chapter 3 of the Namibian Constitution. In its landmark judgment, the Supreme Court assessed the purpose of freedom as defined in Article 21(1)(j) –<sup>30</sup>

... not only by referring to its history and background but also by looking forward at its objectives. The Constitution, after all, is not a memorial of a bygone era but an ever-present compass, its constituent parts carefully composed of our People’s collective experiences, values, desires, commitments, principles, hopes and aspirations, by which we seek to navigate a course for the future of our Nation in a changing and challenging world.

Despite all the limitations Namibia’s Constitution might have, it is the only relevant framework to which all sections of society can refer and should respect. It is the fundament for consolidating legitimate sovereignty in a democratic state that serves all people, and thereby continues to build the nation.

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28 Both slogans were part of the established SWAPO rhetoric during the ‘struggle days’ and continued to be employed by the ruling party after Independence.

29 Austin (2009:11).

30 *Africa Personnel Services (Pty) Ltd* at 46[42].

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