The Namibian Constitution: Reconciling legality and legitimacy

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With the adoption of the Namibian Constitution 20 years ago, the illegitimate but apparently legal regime that had previously existed in the country became converted into a state legal order that enjoyed full legitimacy. After decades of strife, legality and legitimacy were reconciled.

This article first investigates the causes and extent of the breach between legality and legitimacy that existed in the pre-Independence era, and shows how this breach was overcome by the Namibian Constitution. The section that follows raises the question of whether, in the 20 years following its adoption, the Constitution has maintained and will in future continue to maintain its original force – not only to reconcile legality and legitimacy, but also to strengthen such reconciliation.

Legality and legitimacy

Legality

Often, *legality* and *legitimacy* are used as synonyms.[1] However, that they are synonymous is not quite true. Although intrinsically related to *legality*, *legitimacy* is a much broader concept; it certainly finds its roots in the notion of *legality*, but it embraces much more. Whereas *legality* denotes lawfulness and describes an act in accordance with the law, *legitimacy* implies a sentiment or conviction that such an act is not only in accordance with the law, but also in accordance with laws that are at the same time just, equitable and reasonable. In essence, the concept of *legitimacy* raises political and moral judgments. Stated differently, one could say that *legality* relates to the law as it is, and *legitimacy* to the conviction that the law as it is, is also good, acceptable and, above all, worthy to be adhered to.

Legality, if taken literally, would simply mean that an act that complies with the existing law is by definition legal and, therefore, lawful. Thus, an act – even if it finds its justification in an unjust or oppressive law – would still, in positivist thinking, bear the stamp of legality. To Hans Kelsen, the famous legal philosopher, law is a command that must be followed in order to create legal certainty.[2] If that legal command is unjust and unfair, it has to be changed by law reform or challenged in the political arena.

1 Max Weber, quoted by Carl Schmitt (1932:14): "*Legalität kann als Legitimität gelten*" ("legality can hold true as legitimacy"; translation M Wiechers).

2 The Kelsinian doctrine was elaborated by him in his numerous books and writings of which his *Theory of pure law* (1951) is probably the most definitive.

This extreme positivistic approach is often found in autocratic and oppressive regimes, including post-independence African states.[3]

In countries where sovereignty is vested in Parliament, such as in South Africa before 1994, by way of a simple majority Parliament can pass harsh and unjust laws that have to be applied by the courts. To counterbalance the harshness of unjust laws and their effects, the doctrine of the rule of law was enunciated. This doctrine postulates a higher law which precedes and governs parliamentary laws and other forms of state regulation. This higher law can be derived from principles of natural law – or, in the case of England, be found in such historical documents as the Magna Carta, the Petition of Right, Habeas Corpus Acts, the Declaration of Rights, the Bill of Rights and the Act of Settlement, as well as great judgments of the past. The rule of law, according to its protagonists, implies respect for human rights, the protection of personal freedoms, equality before the law, and the absence of arbitrary government. The problem with the rule of law doctrine was that it is imprecise and always subjected to the vicissitudes of parliamentary legislation. This led to the famous observation by W Ivor Jennings that –[4]

> [t]he truth is that the rule of law is apt to be rather an unruly horse … If analysis is attempted, it is found that the idea includes notions which are essentially imprecise, including post-independence African states.

Regardless of its imprecise content and precarious application, the rule of law doctrine nevertheless – and especially in South Africa – kept the quest for the protection of human rights alive and served as a potent weapon to criticise and oppose unjust laws and the abuse of governmental power.[5]

With the adoption of constitutions as fundamental laws, first in Namibia in 1990 and in South African in 1994, the propagation of the doctrine of the rule of law subsided and very few, if any, learned writings on that subject are to be found. The reason for this is obvious: the Namibian and South African Constitutions incorporated all those principles that were previously enunciated as rule of law principles, and elevated them beyond the tyranny of a parliamentary majority.[6] The rule of law became replaced by the notion of *legality*. *Legality*, in this sense, means that the Constitution has become the supreme law and all laws and governmental actions are now subjected to its principles and rules. It can

3 See Prempeh (2006:1239, 1280): "The primary function of the typical African constitution installed between 1960 and 1990 was to provide a Kelsenian positivistic cover for regimes of insecure and dubious legitimacy".

4 Jennings (1959:60).

5 In South Africa there was an abundance of books and articles on the rule of law. Two seminal works were by Mathews (1971) and Dugard (1978). For an overview of English and South African writings on the rule of law, see Wiechers (1981:135–156).

6 Dyzenhaus (2006:734, 739): "It might still seem that the rule of law has no independent role to play in legal discourse after a Constitution such as South Africa's is entrenched, since the rights and liberties guaranteed by the Constitution not only include all the substantive content of the rule of law, but also much more besides".

safely be said that the adoption of a higher law in the form of a written constitution was the final triumph of the rule of law.

Legitimacy

As explained above, *legitimacy* denotes an overall conviction that the existing laws which give concrete form to the principle of legality are worthy of adherence.

Because *legitimacy* relates to the perceptions and convictions of governments as well as peoples and individuals, it may well be treated as a sociological concept to be dealt with by using sociological, political science, economic and psychological methodologies.[7] But this does not mean that legitimacy is a terrain that falls outside the scope of legal thinking. Because legitimacy is so intimately related to legality, and because legality constitutes the parameters within which legitimacy functions, it is also necessary to analyse the concept of *legitimacy* from a juristic perspective.

However, such an analysis is not an easy task: there are many divergent views and approaches, all of them correctly touching on elements which foster legitimacy. To some, the main source of legitimacy is the quality of the state and the government's fulfilment of its moral obligations and responsibilities.[8] Others find the sources of legitimacy in the collective racial, historical and religious convictions of the population.[9] Yet others consider elections, namely the direct participation of voters in the affairs of government, as the dominant factor giving concrete form to the concept of *legitimacy*.[10]

Peter Badura, in his seminal work on the German Constitution, views *legitimacy* as the principled acceptance and justification of the state's political rule or dominance, coupled with the legality of public authority.[11] State rule or political dominance ("*staatlicher*" and "*politischer Herrschaft*") should be founded on the principles of the sovereignty of the people and on state values and aims ("*staatliche Werte*" and "*Ziele*"), as well as on the limitations and tasks of the state ("*Grenzen und Aufgaben des Staates*").[12] A constitution, in order to be legitimate, should not only assure legality, effectiveness and orderliness ("*Planmässigkeit*"); it should also connect political dominance with the

7 See Chantebout (1995:19).

8 Tötemeyer (2006:63).

9 See Hotterman (1989:177): "*De legitimerende theorie rust in een concept waarbij de bevolking niet opgevat word als een aantal individuen, maar gezien word als een collectiviteit die enkele bindende waarden verteenwoordigt, zoals ras, historische voorbeschikking of religieuse opvattingen*" ("The legitimising theory is based on a concept that the population should not be regarded as a number of individuals, but be seen as a collectivity that represents some binding values, such as race, historical preordinance or religious convictions").

10 See Katz (1996:44).

11 Badura (1986:9): "*Legitimität bedeutet die in Prinzipien begründete Anerkennung und Rechtfertigung politische Herrschaft und der Legalität öffentliche Gewalt*" ("Legitimacy means the principled recognition of political dominance and the legality of public authority").

12 (ibid.).

individual's social norms and aspirations.[13] In short, to this learned author, the realisation and task fulfilment of the constitutional state is the essence of democratic legitimacy.[14]

It can be concluded that legitimacy not only strengthens the application of the principle of legality, but is at the same time an essential prerequisite. Laws that are perceived to be illegitimate will lose their force of persuasion and may lead to resistance and even open revolt. The reasons for illegitimacy are manifold. Basically, however, they all imply bad governance which, in turn, can be related to a non-adherence to the constitution and a neglect of the needs and aspirations of the people, which in a democratic state would also include the rights and aspirations of ethnic and political minorities.

Legality and legitimacy in Namibia before 1990

On 17 December 1920, the Council of the League of Nations entrusted the administration of South West Africa as a C-mandated territory to South Africa. In *R v Christian*,[15] the South African Appeal Court held that sovereignty over the territory was vested in the mandatory. South African sovereignty over the territory led the South African Government and Parliament to assume full authority for the administration of South West Africa. As a start, Act 49 of 1919 gave the Governor-General and his representative, the Administrator for the territory, plenary powers of administration. Act 42 of 1925 introduced limited self-rule, but Act 39 of 1949 brought a change and expanded South African rule.[16] Act 38 of 1968, together with Act 25 of 1969, took the incorporation of the territory as a fifth South African province a step further and also made the South African Government's Bantustan policies applicable in South West Africa. Again, this incorporation has to be understood in the light of international developments. The rejection of the Liberian and Ethiopian claims by the International Court of Justice in 1966, as well as the United Nations General Assembly's revocation in the same year of the mandate held by South Africa over the territory of South West Africa, made the South African Government even more determined to govern South West Africa as an integral part of its Republic.

But, in 1977, when it became apparent that the independence of South West Africa was unavoidable, the South African Parliament passed Act 95 of 1977. which gave the State President full power to rule the territory by Proclamation. The most important of these were Proclamations R180 and R181 of 1977, which instituted the Office of Administrator-General and invested him with legislative and executive powers. In 1977, the State President issued a Proclamation to terminate direct representation of the

13 (ibid.:7).

14 (ibid.:9), where he quotes the dictum of the Constitutional Court, BVerfGE 62, 1/43: "*Nach dem Grundgesetz bedeutet verfassungsmässige Legalität zugleich demokratische Legitimation*" ("In terms of the Constitution, constitutional legality simultaneously means democratic legitimacy").

15 1924 AD 101.

16 The 1949 Act was a direct result of South Africa's view that the mandate had lapsed upon the demise of the League of Nations. This Act also introduced direct South West African representation in the South African Parliament.

territory in the South African Parliament.[17] This state of affairs, with the Administrator-General representing the South African State President and having plenary legislative and administrative powers, remained up to Namibia's independence in 1990.

From this cursory overview of South African rule in the former South West Africa,[18] it is abundantly clear that laws and law enforcement took prominence in the territory. Legality, in the strict positivistic sense of law as a command, reigned supreme.[19]

However, during that same time, the legitimacy of the South African laws and regulations eroded more and more. Many factors contributed to this breach between the legality of the system and its legitimacy. The most important reason for the decline in legitimacy was that South Africa and the white government in the territory, instead of promoting the interests and well-being of all the peoples in it, inflicted policies of racial subjugation upon blacks. This was perceived by the majority of the peoples of Namibia as a violation of the sacred trust of civilisation, and inevitably led to their questioning the legitimacy of South African laws and their application.

Another concomitant and contributing factor to the decline of legitimacy was the obstinacy of the South African Government to accept the continuation of the mandate and the supervisory authority of the United Nations. The refusal of South Africa to acknowledge the United Nations' role resulted in six cases before the International Court of Justice; in the General Assembly revoking the mandate in 1966; and in a resolution by the Security Council declaring South Africa to be in illegal occupation of Namibia.[20]

The stigma of unlawfulness, the worldwide condemnation of this illegal occupation, and the armed resistance on Namibia's northern borders finally destroyed all vestiges of legitimacy of South African rule over the territory – not only amongst members of the international community, but also amongst the majority of the people inside the country.

The Namibian Constitution – reconciling legality and legitimacy

It would be a gross oversimplification to say that the adoption of the Namibian Constitution reconciled legality and legitimacy in one fell swoop. The Constitution, as Prof. Gretchen

17 R 249 of 1977.

18 For a more comprehensive account of the years of South African rule, see Carpenter (1989/1990:22–27); Du Pisani (1986); O'Linn (2003:Ch.4). Namibian constitutional and political developments during the pre-Independence years raised considerable interest in South Africa because many of these developments were quite correctly seen as precursors of what is also to come in that country. See Wiechers (1981:444–502).

19 In some court cases, the legislative powers of the South African Parliament over the territory, after the UN had revoked the mandate, were unsuccessfully challenged. See e.g. *S v Thuhadeleni & Others* 1969 (1) SA 153 (AD) and O'Linn (2003:219).

20 In 1966, the General Assembly changed the name of South West Africa to *Namibia*. The South West Africa cases were to become the most protracted and voluminous litigation in international adjudication. See Dugard (2005:478) for a brief legal chronology; see also Dugard (1973).

Carpenter rightly pointed out,[21] "did not fall out of the sky: it is the product of many years of negotiation and political growth". It was precisely during the pre-Constitution years that a process of restoration of legitimacy occurred, parallel to the gradual decline of the legitimacy of South African rule over the territory, which eventually culminated in the legitimacy of the Constitution.

The following can be considered as benchmarks in the process of restoring legitimacy by stimulating democratic expectations and faith in a future, independent Namibia, as well as hopes for the country to become a fully accepted member of the international family of nations after the adoption of a constitution that accommodated the aspirations of all the people:

- The Turnhalle Constitution, 1977
- The elections, 1978
- The Multi-party Conference, 1994
- The Transitional Government of National Unity, 1985
- Proclamation 101, 1995, which introduced the Windhoek Declaration of Basic Principles and the Bill of Fundamental Rights[22]
- The Constitutional Council mandated by the National Assembly in 1985 to draw up a Constitution for an independent Namibia
- Free and fair elections under United Nations supervision, 1989, with a participation rate of almost 97% of the population,[23] and
- The drafting of the Namibian Constitution and its unanimous acceptance by the Constituent Assembly.[24]

Professor Carpenter's concluding remarks as regards the process of restoring legitimacy need to be endorsed here:[25]

> It can be said that the various conferences, elections and constitutions in Namibia helped to turn an exceptionally unsophisticated, politically backward population into one which is, today, politically 'streetwise' and aware. Many of the principles which have been incorporated in

21 Carpenter (1989/1990:63).

22 The application of this Bill of Fundamental Rights arose in a number of cases and no doubt reinforced faith in the independence of the courts and a Bill of Rights per se. For a discussion of these cases, see O'Linn (2003:245–280). Noteworthy were *S v Angula* 1986 2 SA 540 (SWA) and *Cabinet of the Transitional Government of the Territory of SWA v Eins* 1988 3 SA 369 (A).

23 See Katz (1996:44), who is of the opinion that elections are one of the most important factors in giving concrete form to the concept of legitimacy.

24 See Ihonvbere (2004:239, 252): "The process of constitution-making is critical to the strength, acceptability and legitimacy of the final product". See also Geingob (2003:22), who states that the acceptance – as suggested by Mr Dirk Mudge of the DTA – on 12 December 1989 of the South West Africa People's Organisation (SWAPO) draft as a working document which combined the most important elements of the other parties' proposals contributed much to the success of the constitutional deliberations. Also, it must be stressed that the appointment of three South African lawyers to do the drafting reinforced the idea of a home-grown constitution, not devised by foreign legal experts.

25 See Carpenter (1989/1990:63).

> the Constitution grew from … immature early efforts. It must be conceded that SWAPO,[26] the most powerful party in Namibia at present, did not participate in these early negotiations and came in only towards the end, but the success achieved by the Democratic Turnhalle Alliance, in particular, in breaking down racial barriers in politics, contributed greatly to the spirit of compromise which played such an important part in the widespread acceptance which the Constitution ultimately achieved.

Also, in the process of restoring legitimacy, the role of the international community by its adoption of Security Council Resolution 435 in 1978 should be emphasised. Resolution 435, fortified by the Constitutional Principles,[27] guided the whole process of Namibian independence and assured its support and final acceptance by the family of nations.

Finally, the Constitution had to reconcile the illegitimacy of the former South African rule with the legality of the new order. This was achieved in an anomalous manner. On the one hand, the Constitution accepted all the laws and enactments as well as governmental appointments and actions of the previous regime as having full legal force in as far as they were compatible with the Constitution;[28] on the other hand, it declared that –[29]

> [n]othing contained in this Constitution shall be construed as recognising in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia.

How does one explain this glaring anomaly of accepting the legal force of previous laws and governmental actions while, at the same time, declaring them to be invalid? The explanation is that the law as a rational instrument in the hands of the legislature can presume a factual state of affairs to have legal force and effect without accepting the validity of such state of affairs.[30] This presumption, introduced by the Constitution, is a clear manifestation of the latter's evolutionary and non-revolutionary character.

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26 See Naldi (1995:8): "However, by this time SWAPO had in great measure abandoned the Marxist rhetoric typical of many national liberation movements and adopted a pragmatic socialism, including endorsement of a mixed economy".

27 See Wiechers (1989/1990:1); see also O'Linn (2003:378).

28 Articles 140 and 141 of the Constitution.

29 Article 145(2).

30 Strictly speaking, Article 142(2) contains a contradiction in terms. The laws and actions of the South African Government should have been declared illegitimate and not invalid since the aforegoing Articles 140 and 141 expressly declare them to be legally valid. In constitutional theory, this presumption of legality can be explained as a manifestation of what German theorists would label as the "*normative Kraft des Faktischen*" ("the normative force of a factual state of affairs"). In the two Namibian cases that dealt with Article 145(2), namely *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (NmS) and *Government of the Republic of Namibia v Cultura 2000* 1994 (1) SA 407 (NmS), the theoretical basis of the legality/invalidity anomaly was not fully explored.

The Constitution and its future legitimacy

The Namibian Constitution bears all the hallmarks of a constitutional democracy, namely it provides for the recognition and enforcement of fundamental human rights and freedoms, the separation of powers, judicial independence, a multiparty system, and regular elections.[31] At the time of its adoption, the Constitution enjoyed the highest degree of legitimacy since it contained the promise of a future state conforming to all the tenets of constitutionalism.[32] But as former Chief Justice Ismail Mahomed warned, –[33]

> [t]he realisation of this promising future cannot, however, be guaranteed by the eloquence of the Constitution. … It needs *inter alia* the widespread dissemination of a pervading human rights culture to support the values and institutions of the Constitution; organs of civil society active in its defence; media emphatic to its objectives; a vigilant Bar ready to identify transgressions of the Constitution to ventilate more specific issues arising from its more generalised aspirations, and to bring the discipline of the law and the scholarship of the international community to bear on their solution; academic inputs to bring vision and perspective to the debate; and a judiciary sensitive to and knowledgeable on such issues.

In short, what Chief Justice Mohamed so vividly propagates is that the values and institutions of the Constitution should constantly and vigilantly be defended. Such continuing defence is certainly essential to safeguard not only the legality, but also the legitimacy of the Constitution.

However, the Constitution is not a historical monument which has to be defended by drawing a cordon of protective measures around it. A constitution is a living institution. While its legitimacy must certainly be defended and fortified, at the same time it could be detrimentally influenced and undermined by a number of factors which, if not identified in time, could lead to its disaffection and eventual ruin.

Factors which might have negatively influenced the legitimacy of the Namibian Constitution during the past 20 years and may undermine its future legitimacy

African constitutionalism

A strong conviction previously held that the failure of many African constitutions was due to the fact that they introduced concepts of *democracy*, mainly from Western sources, which were foreign to traditional African constitutionalism. For instance, Henry

31 These features ensured that the Constitution conformed to the prescriptions of the Constitutional Principles.

32 Prempeh (2006:1239, 1280) observes that Africa abounds with constitutions without constitutionalism. This is certainly not true in the case of the Namibian Constitution.

33 In his foreword to Naldi (1995).

J Richardson III questioned the soundness of the Constitutional Principles that eventually supplied the basis of the Namibian Constitution, arguing that –[34]

> [c]learly, the text of the Phase I guidelines raises doubts that in their particulars, and even in some cases their outline, a newly independent African state would have freely adopted them. They are more a balancing of outside interests than an expression of the constitutive expectations of the people in the territory.

In the same vein, Yash Ghai is of the opinion that, in Africa, –[35]

> [t]he ideology of constitutionalism had only the most slender of appeals to the rulers and the ruled. Legitimacy comes from other sources, and some of these sources are antithetical to the rule of law.

Manfred O Hinz also expresses his doubts by stating that –[36]

> [w]hen Namibia gained independence in 1990, the approval of the Constitution on the part of the population did not go beyond an understanding of the constitution as purely a symbol for the liberation won through the struggle.

What constitutes African constitutionalism is not very clear. It is generally said that Western ideologies of constitutionalism are universal in the sense that the human rights of all persons are universally recognised on a basis of equality, whereas African constitutionalism is relativistic, and claims that these rights depend on the culture and context of the society.[37] Stated differently, it means that human rights emanate from a collective source and do not appertain to each and every person individually. It is said that individual rights not coupled to duties towards the collectiveness may lead to anarchy. To some, the protection of human rights and liberties is subservient to the interests of the state, and more particularly, in the management of natural resources. JB Ojwang puts it as follows:[38]

> A notion of constitutionalism, which assumes the immutable, accrued rights of the *self,* would not be well matched to the general African context. The African context is in the first place a context of *creation,* of *construction* of larger rights and liberties, through orderly and well-conceived management of national resources – rather than a *defence* of a fully developed, well-founded and universally understood set of rights and liberties. The creative process may moreover require certain compromises to be made within the body of emergent liberties. The possibility of uncompromising vindication of accrued rights and liberties, thus, would fall to a secondary position in the ordering of fundamental national priorities. [Emphasis in original]

34 Richardson (1984:76, 108). The concerns of this author were belied by the fact that the Constituent Assembly, at its first meeting on 21 November 1989, unanimously resolved to adopt the 1982 Constitutional Principles as a "framework to draw up a constitution for South West Africa/Namibia".

35 Ghai (1990:4).

36 Hinz (2006a:282).

37 See Mangu (2002:157).

38 Ojwang (1990:57, 70).

Furthermore, in terms of African constitutionalism, it is held that traditional chieftainship and popular participation within the tribal system should be recognised.[39]

In Africa, the adoption of notions of African constitutionalism has not always led to positive experiences. Often, it led to one-party rule, lifelong presidencies, abuse of power, outright military dictatorships, and the denial and suppression of individual human rights by an authority assumed on behalf of the collectiveness or by virtue of higher state interests.[40]

A yearning for a return to a form of African constitutionalism may not only erode the legitimacy of the Namibian Constitution, but also give to a ruling party the pretext for the installation of an autocratic government and the denial of human rights and freedoms. In this respect, the warning by Hage Geingob sounds true:[41]

> One thing is sure, if attempts are made by influential persons to undermine the constitution, backed by the ruling party having two-thirds majority in the National Assembly, the constitution can be wrecked.

A promised land and frustrated expectations

The Namibian Constitution is highly idealistic and generous. It promises a land of fulfilment and plenitude. Its Preamble[42] proclaims the equal and inalienable right of all members of the human family; the establishment of a democratic society where the government is responsible to the people; the unity and integrity of the nation; national reconciliation; and a determination to cherish and protect the gains of the long struggle against colonisation, racism and apartheid.[43] Chapter 3 contains an impressive catalogue of entrenched fundamental rights and freedoms, and special provision is made for their enforcement. To entrench their protection, Article 131 proscribes any amendment or repeal of the Constitution that diminishes or detracts from these rights and freedoms. In addition, Article 95 enshrines an equally impressive list of tasks which the state promises to undertake for the welfare of the people, such as the advancement of women, senior citizens and workers; the formation of independent trade unions; access to public facilities, health and other services; the promotion of justice on the basis of equal

39 See Koyana (1995:28); Hinz (2006a:24).

40 See Ghai (1990:4), who states that, in Africa, "[t]he ideology of constitutionalism had only the most slender of appeals to the rulers and the ruled. Legitimacy comes from other sources, and some of these sources are antithetical to the rule of law".

41 Geingob (2003:66).

42 In *Kauesa v Minister of Home Affairs* 1994 NR (HC) 135, the Court held that the Preamble was an integral part of the Constitution.

43 In the *Kauesa* case, Justice O'Linn views the Constitution as a compromise agreement, and at 143(E–G) goes on to state the following: "The letter and spirit of this compromise agreement was reconciliation. It envisaged corrective measures, but not revenge; not discrimination in reverse; not the mere changing of roles of perpetrator and victim. The parties to the settlement relied for its interpretation on the honour and integrity of the participants".

opportunity; and the maintenance of ecosystems. In addition, Article 98(1) promises an economic order with the objective of securing economic growth, prosperity and a life of dignity for all Namibians.

Admittedly, the principles of state policy contained in the Constitution are not legally enforceable by a court; however, they must serve as guidelines to the government, and the courts are entitled to have regard to those principles in interpreting any laws based on them.[44]

It speaks for itself that a government and ruling party that protects human rights and freedoms, uphold the principles of state policy, and generally adhere to the provisions of the Constitution will enhance the latter's legitimacy.[45]

Conversely, if a government fails to fulfil its constitutional commitments and, furthermore, its governance is tainted by corruption, nepotism, the wasting of public resources and discrimination, the promised land of the Constitution will not be realised and the high expectations raised by the Constitution will be betrayed. Of course, it is primarily the government that must be blamed for such a betrayal. Finally, however, those betrayed expectations will be projected on the Constitution, and its legitimacy will be questioned and contested. If that happens, the very existence of the Constitution is in jeopardy.

It falls outside the scope of this article to investigate the performance records of the Namibian Governments, past and present, and find out in how far the expectations raised by the Constitution are being fulfilled. Such an investigation would require an extensive study and assessment of Namibian politics, economics and state administration.

Suffice it here to point to a 2005 publication of surveys that were carried out to establish political sentiments amongst the population, especially the youth.[46] The findings of the associated report are discouraging. The growing marginalisation of women and young people was noted, as was widespread political apathy. Some 40% of the youth do not want to engage in political activities and were not interested in the vote.[47] More worrying was the finding that there was –[48]

> … a growing trend for people to be disenchanted with the form of democracy in Namibia, and voter apathy has been observed in a democracy that is only 15 years old.

In this climate of a declining preference for democracy, there is a disturbing conclusion, namely that single-party and even military rule become options.

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44 Article 101.

45 In this respect, the third presidential term decided on in 2000 must be noted as a clear transgression of Article 29(3).

46 LeBeau & Dima (2005).

47 (ibid.:70).

48 (ibid.:107, 108).

Surely, if the will on the part of the people to uphold a democracy[49] is in decline, the legitimacy of the Constitution is increasingly eroded.

The muted voice of the Constitution: Constitutional interpretation

The voice of the Constitution should be heard clearly and loudly, especially when the courts, in their judgments, interpret its provisions. This is why the courts, as the protectors and mouthpieces of the Constitution, should be totally independent, and why judges should perform their function without fear, favour or prejudice.

By stressing the importance of human rights and freedoms as well as socio-economic advancement, the authoritative interpretation of the Constitution by the courts enhances and strengthens its legitimacy. Such interpretation should, apart from clearly establishing the law, also assure the unity and integrity of the body of laws and should serve justice.[50] In the latter respect, much has been written lately about a 'transformative constitutionalism'. Marius Pieterse,[51] for example, poses the following question:

> What do we mean when we speak about "constitutional constitutionalism"? … What does this mean, and what does it require of our community of constitutional interpreters?

In this regard, Pieterse defends an –[52]

> … essentially social-democratic understanding of the concept as mandating the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a "culture of justification" for every exercise of public power.

To him, the Constitution contributes to transformation in primarily three ways. Firstly, it does not stand in the way of political projects aimed at social transformation; secondly, it mandates the state to prioritise and actively pursue transformation; and thirdly, it functions as a tool of transformation by requiring that its provisions are interpreted and applied in a manner that furthers their transformative purpose.[53] In short, *transformative constitutionalism* means an interpretation and application of the Constitution that will foster freedom, equality and social justice.

In Namibian case law, two approaches to constitutional interpretation are found. Justice O'Linn[54] holds the view that "[t]he Constitution must be interpreted broadly, liberally

49 See La Torre (2007:30), who refers to Prof. Konrad Hesse's "*Wille zur Verfassung*", namely the will to uphold the constitution.

50 Zippelius (1989:745) mentions three elements of constitutional interpretation: the goal of setting rules ("*Regelungswerk*"), the keeping of the unity of the law ("*Rechtseinheit*"), and justice ("*Gerechtigkeit*").

51 Pieterse (2005:155).

52 (ibid.).

53 (ibid.:164).

54 In *Kauesa v Minister of Home Affairs* 1994 NR 102 (HC) at 118 (D–E).

and purposively". On the other hand, Chief Justice Dumbutshena[55] is of the opinion that "[c]onstitutional law in particular should be developed, cautiously, judiciously and pragmatically if it is to withstand the test of time".[56]

The Constitution is not an ordinary law of Parliament: it is a fundamental law on which all state institutions rest. It is also a policy document of overriding importance, since it clearly prescribes to government how it must protect human rights and freedoms, and how the principles of state policy should be carried out in practice. This asks for a complete departure of the previously casuistic approach that did not allow the courts to express themselves on governmental policies. Thus, a narrow, positivistic interpretation of the Constitution, without considering its goals and purposes, would be a bloodless exercise. By its decisions, the courts, in a spirit of transformative constitutionalism, must construct a comprehensive system of normative values. Showing themselves to be "sensitive and knowledgeable"[57] to the values and institutions of the Constitution, the judiciary becomes a major contributor to its legitimacy.

For these reasons, the approach advocated by Justice O'Linn has to be preferred.

Conclusion

The most important factors which may threaten the legitimacy of the Namibian Constitution are the misappropriation of an ideology of African constitutionalism, the accumulation of betrayed hopes and aspirations, and a jurisprudence that does not acknowledge the underlying goals and visions of the Constitution.

Legitimacy is a multifaceted concept and there are many other sociological, economic and political factors that may affect it adversely, such as a declining economy and increased poverty, a lack of transparency, and racial tensions. A very important factor is the behaviour of the main actors in the political arena, namely the political parties. If ruling political parties and their leaders do not pledge their constant support to the Constitution and a multiparty democracy and are bent on retaining their power, the people will eventually lose their belief in a constitution that is supposed to be above the power games of politicians. As Charles M Forbad warns, –[58]

> [w]ith so many political parties in Southern Africa sitting with comfortable majorities in parliament, all they will certainly try to do is to prepare to win again rather than open space for effective competition.

At the time of its adoption and immediately afterwards, the Namibian Constitution enjoyed a high measure of legitimacy and there was general optimism about its success.

55 In *Kauesa v Minister of Home Affairs*, *Namibian Law Reports 1995*, 175 at 184(A–B).

56 See also the Chief Justice's remark that "[t]he lesser [sic] the judicial branch of government intrudes into the domain of Parliament[,] the better for the functioning of democracy" (ibid.:197).

57 See Chief Justice Mahomed in the foreword to Naldi (1995).

58 Forbad (2007:45).

Craig Gross observed in 1992 that –[59]

> [t]here are few signs indicating that Namibian democracy and constitutionalism will unravel in the near future.

However, 15 years after Independence, Debie LeBeau and Edith Dima came to the worrying conclusion that –[60]

> Namibia is still a country with serious political and ethnic divisions, as well as [a] general lack of understanding and acceptance of democracy.

Legitimacy of the Constitution is not a given state of affairs. Legitimacy must constantly be reinforced and assured by being constantly alert to those undermining and destructive elements which could eventually erode it. The Namibian Constitution, after 20 years, has retained much of its legitimacy as a modern and progressive democratic constitution, unanimously adopted by the freely elected representatives of the people. It should be fervently hoped that, in future, its legitimacy will not become eroded and finally destroyed.

References

Badura, Peter. 1986. *Staatsrecht*. Munich: Beck Juristischer Verlag.

Bergamin, RJB & Thom Hotterman (Eds). 1989. *Algemene Begrippen Staatsrecht* (Second Edition). Zwolle: WEJ Tjeenk Willink.

Carpenter, Gretchen. 1989/1990. "The Namibian Constitution – *ex Africa aliquid novi* after all?". *South African Yearbook of International Law*, 15:22–27.

Chantebout, Bernard. 1995. *Droit Constitutionel et Science Politique* (Twelfth Edition). Paris: Colin.

Dugard, John. 2006. *International law – A South African perspective* (Third Edition). Cape Town: Juta & Co.

Dugard, John. 1973. *The South West Africa/Namibia dispute*. Berkeley/Los Angeles: University of California Press.

Dugard, John. 1978. *Human rights and the South African legal order*. Princeton, NJ: Princeton University Press.

Du Pisani, André. 1986. *SWA/Namibia – The politics of continuity and change*. Johannesburg: Jonathan Ball.

Dyzenhaus, David. 2006. "The pasts and future of the rule of law in South Africa". *South African Law Journal*, 124(4):734, 739.

Forbad, Charles M. 2007. "Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from southern Africa". *American Journal of Comparative Law*, LV(1):45

Geingob, Hage. 2003. *The drafting of Namibia's Constitution*. Windhoek: Trustco.

Ghai, Yash. 1990. *The rule of law in Africa – Reflections on the limitations of constitutionalism*. Bergen: Chr. Michelsen Institute.

59 Gross (1992:269, 292).

60 LeBeau & Dima (2005:112).

Gross, Craig. 1992. "Constitutional development in South Africa and the role of the Namibian constitutional model". *Hastings International and Comparative Law Review*, 2:269, 292.

Hinz, MO. 2006a. "The project of 'tradition': Constitutionalism in Africa". In Hinz, MO & FT Gatter (Eds). *Global responsibility – Local agenda. The legitimacy of modern self-determination and African traditional authority*. Münster: Lit Verlag.

Hinz, MO. 2006b. "The rule of law and the new African constitutionalism: Which law and which state? Theory and experience". In Hinz, MO & F Thomas Gatter (Eds). *Global responsibility – Local agenda. The legitimacy of modern self-determination and African traditional authority*. Münster: Lit Verlag.

Ihonvbere, Julius O. 2004. "Reconstructing the state: Constitutionalism as public policy in Africa". In Kalu, KA (Ed.). *Agenda setting and public policy in Africa.* Leiden: African Studies Centre.

Jennings, W Ivor. 1959. *The law and the constitution* (Fifth Edition). London: University of London Press.

Katz, Alfred. 1996. *Staatsrecht* (Thirteenth Edition). Heidelberg: CF Muller Verlag GmbH.

Koyana, DS. 1995. "The interaction between the indigenous constitutional system and received Western constitutional principles". In De Kock, PD & JMT Labuschagne (Eds). *JC Bekker Festschrift*. Pretoria: Vista University Press.

La Torre, Massimo. 2007. *Constitutionalism and legal reasoning – A new paradigm for the concept of law*. Dordrecht: Springer.

LeBeau, Debie & Edith Dima. 2005. "Multiparty democracy and elections in Namibia". EISA *Research Report No. 13*. Johannesburg: Electoral Institute of Southern Africa.

Mangu, AMB. 2002. "The road to constitutionalism and democracy in post-colonial Africa". Unpublished thesis, University of South Africa, Pretoria.

Mathews, AS. 1972. *Law, order and liberty in South Africa*. Berkeley/Los Angeles: University of California Press.

Ojwang, JB. 1990. "Constitutionalism in classical terms and in African nationhood". *Lesotho Law Journal*, 6:57, 70.

Naldi, Gino J. 1995. *Constitutional rights in Namibia.* Kenwyn: Juta.

O'Linn, Bryan. 2003. *Namibia: The sacred trust of civilization – Ideal and reality*. Windhoek: Gamsberg Macmillan.

Pieterse, Marius. 2005. "What do we mean when we talk about transformative constitutionalism?". *SA Publiekreg/Public Law*, 20(1):155.

Prempeh, H Kwasi. 2006. "Marbury in Africa: Judicial review and the challenge of constitutionalism in Africa". *Tulane Law Review*, 80(4):1239, 1280.

Richardson III, Henry J. 1984. "Constitutive questions in the negotiations of Namibian independence". *American Journal of International Law*, 78:76, 108.

Schmitt, Carl. 1932. *Legalität und Legitimität*. Berlin: Duncker & Humblot.

Tötemeyer, G. 2006. "The legitimacy of modern self-government – The Namibian case". In Hinz, Manfred O & F Thomas Gatter (Eds). *Global responsibility – Local agenda*. Berlin: LIT Verlag.

Wiechers, Marinus. 1981. *Staatsreg* (Third Edition). Pretoria: VerLoren van Themaat Centre for Public Law Studies, University of South Africa.

Wiechers, Marinus. 1989/1990. "Namibia: The 1982 Constitutional Principles and their legal significance". *South African Yearbook of International Law*, 15:1.

Zippelius, Reinhold. 1989. "Auslegung als Legitimationsproblem". Canaris, C-W & U Diederichsen (Eds). *Festschrift für Karl Larenz zum 80. Geburtstag*. Munich: CH Beck.